

# BREAKING BAD LAW: METH LAB INVESTIGATIONS HIGHLIGHT ALASKA'S CURRENT APPROACH TO PRIVACY

Victoria Sheets\*

## ABSTRACT

*The right to privacy explicitly provided by the Alaska Constitution has long been broadly interpreted – even protecting Alaskan citizens' right to personal home use and possession of marijuana. Though this right to privacy has been interpreted many times over the last few decades, Alaska currently lacks a coherent approach to application of its privacy laws. As the prevalence of methamphetamine production increases in homes across Alaska, the Alaskan courts' approach to privacy must be reevaluated in light of its delicate interaction with search and seizure policies surrounding methamphetamine labs.*

## INTRODUCTION

*Since the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that the right is broader in scope than that of the Federal Constitution.<sup>1</sup>*

This Note proposes that Alaskan courts should adopt a coherent, purposeful approach to balancing Alaskans' codified right to privacy with the state's interest in protecting its people. The key case examined

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\* J.D., Duke University School of Law, expected 2016; M.A., Philosophy, Duke University, expected 2016. B.A., Philosophy, University of Florida, 2013. The author would like to thank Professor Darrell A. H. Miller for his guidance and comments during the drafting of this Note. The views expressed, along with any omissions or errors, remain the author's own.

1. Anchorage Police Dep't Emps. Ass'n v. Municipality of Anchorage, 24 P.3d 547, 550 (Alaska 2001).

here is *Martin v. State*.<sup>2</sup> While exemplifying many aspects of Alaska's current approach to a citizen's right to privacy, the case also provides a framework within which competing approaches can be analyzed. This Note is divided into four sections. Section I outlines the right to privacy as provided in Alaska's constitution and as interpreted by Alaskan case law. Section II examines the extent of the state's significant interest in public health and safety, particularly the interests at stake in *Martin*. Section III analyzes the reasoning and current approaches to privacy law in Alaska, as well as how the existence of multiple approaches has manifested in *Martin*. Finally, Section IV highlights how other states have balanced the competing interests between privacy and promoting public safety. From these considerations, this Note will explain why Alaska's current approach to balancing privacy and public safety interest (as exemplified in *Martin*) is incoherent and suggest a few ways in which Alaska's courts could improve their approach going forward.

Unreasonable search and seizure laws cut to the core of the intricate balance between a citizen's right to privacy and the government's duty to protect its people. In March 2013, the Court of Appeals of Alaska decided the latest in a series of cases on searches conducted in private residences without a warrant or invitation. *Martin v. State* involved a search by State Trooper Mike Ingram that resulted in the arrest of Gene Martin and four others in their place of residence.<sup>3</sup> Martin was tried and subsequently convicted of second-degree misconduct involving a controlled substance (specifically, the drugstore materials needed to make methamphetamine).<sup>4</sup> A security guard at a Wasilla shopping center tipped off Trooper Ingram that Martin and four others "were interested" in items often used to manufacture methamphetamine.<sup>5</sup> Trooper Ingram followed the men from the shopping center to the address in question—an apartment complex with five separate residences connected by a walkway.<sup>6</sup> To avoid detection by the men, Trooper Ingram passed the residence before seeing which of the five residences the men entered upon stopping at the apartment complex.<sup>7</sup> After calling for back-up and waiting for about two hours in hopes that some of the suspects would come out of whichever residence they had previously entered, Trooper Ingram proceeded to walk onto a deck surrounding the residences and "looked through the window of the first

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2. 297 P.3d 896 (Alaska Ct. App. 2013), *cert. denied*, 135 S. Ct. 280 (2014).

3. *Id.* at 898.

4. *Id.*

5. *Id.* at 897.

6. *Id.*

7. *Id.*

unit he came to.”<sup>8</sup> Specifically, the officer was looking “through a crack in the closed blinds” that was “an opening created by a broken piece of blind.”<sup>9</sup> It was then that Trooper Ingram saw items commonly used to make methamphetamine within the home, and subsequently obtained a search warrant based on what he saw through the blinds.<sup>10</sup>

The finding that Trooper Ingram was standing on a walkway that was “impliedly open to the public” at the time of the search,<sup>11</sup> a technicality, stopped the Alaskan court from declaring a much-needed comprehensive approach to search and seizure jurisprudence in Alaska. In *Martin*, the Alaska Court of Appeals analyzed Trooper Ingram’s search in two parts: (1) the approach of the trooper towards the window and (2) the trooper’s looking through a broken piece in the closed blinds.<sup>12</sup> The court made a determination on the first part of the analysis, and therefore did not reach the issue of whether the officer was reasonable in looking through a crack in the closed blinds.<sup>13</sup> By declaring the walkway to be impliedly open to the public and stopping at the first step of analysis, the court declined the opportunity to choose one of the many approaches currently employed by the court, further demonstrating the need to create a comprehensive approach to balancing a right to privacy with the state’s interest in public safety.

According to Alaska law, without either a search warrant or an invitation, law enforcement may only approach a residence if they are “standing upon a part of [the] property that has been expressly or impliedly opened to the public use.”<sup>14</sup> Relying on this rule in *Martin*, the appellate court affirmed the superior court’s finding that the deck was impliedly open to the public when Trooper Ingram approached the window to look inside.<sup>15</sup> The reasons given by the superior court for their finding had included the facts that Trooper Ingram “was not engaged in some random fishing expedition,” and that he “reasonably suspected” the group of men he had followed to be engaged in illegal activity.<sup>16</sup> Still, these reasons parallel the reasonable expectation of privacy test that would have been employed in step two of the analysis. Thus, under *Martin*, an Alaskan citizen – who may otherwise have had a

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8. *Id.*

9. *Id.*

10. *Id.* at 897-98.

11. *Id.* at 898.

12. *Id.*

13. *See id.* at 899-900 (explaining that because the court held that Trooper Ingram’s vantage point was found to be “impliedly open to the public[,]” the court could find that the officer’s looking through the blinds was lawful).

14. *Pistro v. State*, 590 P.2d 884, 886 (Alaska 1979).

15. *Martin*, 297 P.3d at 899.

16. *Id.*

reasonable expectation of privacy – may never have had that expectation if the officer who infringes that expectation is deemed, in an ad hoc determination by an Alaska court, to have reasonably suspected the citizen of being engaged in illegal activity. Indeed, the situation in which an officer suspects illegal activity may be the only time a reasonable expectation of privacy would be at issue in the first place. But because Trooper Ingram was standing on an impliedly public walkway, the officer’s observation of chemicals through a crack in the drawn window blinds was allowed to serve as the primary evidence in a showing of probable cause used to subsequently obtain a search warrant for the residence.<sup>17</sup>

The bifurcated analysis and novel result in *Martin* exemplify the need for a comprehensive approach to the right to privacy throughout the Alaskan court system. Situations like the one presented in *Martin* will continue to arise. Accordingly, Alaska needs to adopt an approach to reasonable searches that incorporates both the right to privacy guaranteed by its state constitution and the growing need to protect its people from the dangers of drug manufacturing.

## I. THE RIGHT TO PRIVACY

*The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.*<sup>18</sup>

Affectionately referring to the rest of the United States as the ‘lower forty-eight,’ Alaska has embraced its unique heritage since gaining statehood.<sup>19</sup> One of the many unique qualities of the Alaska government comes in the form of the express right to privacy guaranteed by the state’s constitution. Only ten states, including Alaska, expressly provide for a right to privacy in their state constitution.<sup>20</sup> Since *Ravin v. State*<sup>21</sup> in

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17. *Id.* at 897.

18. ALASKA CONST. art. 12, § 22.

19. Gaining statehood on January 3, 1959, Alaska is the most recent state to be admitted to the United States apart from Hawaii (which gained statehood in August of the same year). Alaska Statehood Act of 1959, Pub.L. 85-508, 72 Stat. 339, 339; Hawaii Statehood Admission Act of 1959, Pub.L. 86-3. *See also* Consent to Act of Admission, ALASKA CONST. art. 12, § 13.

20. Other states that reiterate the Fourth Amendment, as well as expand upon the general right to privacy, include Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington. *Privacy Protections in State Constitutions*, NAT’L CONF. OF STATE LEGISLATURES (Dec. 12, 2014), <http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-protections-in-state-constitutions.aspx>.

21. 537 P.2d 494, 504 (Alaska 1975). In *Ravin v. State*, the Alaska Supreme Court held that the general right to privacy in article I, section 22 allowed for personal possession and use of marijuana in the home. *Id.*

1975, Alaska courts have created a robust jurisprudence surrounding the right to privacy. These official expansions of the general right to privacy echo the strong social mores of the Alaskan people—a long-existing consensus that Alaskans want to be left alone in their independent lifestyles by the government's influence.<sup>22</sup> As recognized by the Alaska Supreme Court, "[o]ur territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states."<sup>23</sup>

"[T]he Fourth Amendment cannot be translated into a general right to privacy."<sup>24</sup> Instead, the issue of whether or not each citizen has a right to privacy has been "left largely to the law of the individual [s]tates."<sup>25</sup> Alaska has addressed this issue directly by setting out a right to privacy in its state constitution. Section 22 of the Alaska Constitution expressly recognizes a "right of the people to privacy" that "shall not be infringed."<sup>26</sup> Signaling the importance of this right, the Alaska Supreme Court has since determined that the right to privacy is self-executing.<sup>27</sup> The Alaska Constitution also provides that "all persons have a natural right to life, liberty, [and] the pursuit of happiness."<sup>28</sup> In 1972, the same year that Alaska's Declaration of Rights was signed into law, the Alaska Supreme Court held that the word "liberty" in article I, section 1 provided "total personal immunity from governmental control: the right 'to be let alone.'"<sup>29</sup> Even in the context of searches and seizures, the Fourth Amendment and its interpretations do not limit the scope of this right to privacy in the state of Alaska.<sup>30</sup> Indeed, the Alaska Constitution's privacy provisions have continually been interpreted to encompass a broader right to privacy than the Fourth Amendment to the United States Constitution. The Alaska Constitution's right to privacy was first interpreted as broader than the Fourth Amendment in 1975 by *Ravin*, and its expansive guarantee has been reiterated as

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22. *Id.*

23. *Id.*

24. *Katz v. United States*, 389 U.S. 347, 350 (1967).

25. *Id.* at 351.

26. ALASKA CONST. art. I, § 22.

27. *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 37–38 (Alaska 2001).

28. ALASKA CONST. art. I, § 1.

29. *Breese v. Smith*, 501 P.2d 159, 168 (Alaska 1972).

30. *See State v. Glass*, 583 P.2d 872, 874–75 (Alaska 1978) (holding that the Fourth Amendment and any federal decisions "should not be regarded as determinative of the scope of Alaska's right to privacy amendment, since no such express right is contained in the United States Constitution").

recently as 2000.<sup>31</sup>

Not only does the right to privacy extend beyond the protection from unreasonable searches and seizures under the Fourth Amendment, but the express guarantee of privacy in article I, section 22 of the Alaska Constitution has also been interpreted to be a “fundamental individual right” by the Alaska Supreme Court.<sup>32</sup> Originating as Senate Joint Resolution No. 68, the right to privacy clause of the Alaska Constitution was amended in the Senate and moved on to the House in June of 1972.<sup>33</sup> Legislative revisions have provided powerful insight into the interpretation of the legislative intent.<sup>34</sup> For instance, the commentary of the legislators has been found to support an extension of the right to privacy beyond just informational privacy.<sup>35</sup> The right to privacy provisions have even supported the right of the mentally ill to refuse antipsychotic medication in non-emergency situations.<sup>36</sup> One of the primary functions of the right to privacy guaranteed in the Alaska Constitution, however, is specifically the protection against *government* intrusion.<sup>37</sup> The provisions cover searches by state actors, like police officers and detectives.<sup>38</sup> Another source of a right to privacy in the Alaska Constitution comes in the form of article I, section 14, which provides that “[t]he right of the people to be secure in their persons,

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31. See *State v. Am. Civil Liberties Union of Alaska*, 204 P.3d 364, 379 (Alaska 2009) (striking down a one ounce limit on the possession of marijuana in the home under the privacy ruling in *Ravin v. State*); *Anchorage Police Dep’t Emps. Ass’n v. Municipality of Anchorage*, 24 P.3d 547, 550 (Alaska 2001) (reiterating the heightened privacy interests in Alaska as compared to the federal floor).

32. *Planned Parenthood of Alaska*, 35 P.3d 30, 36-38.

33. ALASKA S. JOURNAL, 7th Leg., 1st Sess. 1150, 1173 (June 6-7, 1972); ALASKA H. JOURNAL, 7th Leg., 1st Sess. 1478-79 (June 5, 1972).

34. See *Planned Parenthood*, 35 P.3d at 36-38 (looking to the legislative history of article I, section 22 in support of the self-executing nature of the right to privacy in the Alaska Constitution).

35. *Valley Hosp. Ass’n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 n.10 (Alaska 1997).

36. See *Myers v. Alaska Psychiatric Inst.*, 138 P.3d 238, 254 (Alaska 2006) (relying on the “Alaska Constitution’s guarantees of liberty and privacy” to hold that “in future non-emergency cases a court may not permit a treatment facility to administer psychotropic drugs” without consent or proof by “clear and convincing evidence that the proposed treatment is in the patient’s best interests”).

37. See *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1129 (Alaska 1989) (declining to extend the right to privacy to private actions).

38. See *State v. Glass*, 583 P.2d 872, 881-82 (Alaska 1978) (affirming the correct application of article I, section 22 in suppression of testimony acquired through electronic monitoring because “Alaska’s Constitution mandates that its people be free from invasions of privacy by means of surreptitious monitoring of conversations”).

houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated.”<sup>39</sup> The Alaska Supreme Court has further provided that “[t]he primary purpose of these constitutional provisions is the protection of personal privacy and dignity against unwarranted intrusions by the State.”<sup>40</sup>

The right to privacy guaranteed in the Alaska Constitution has been uniquely applied in the context of drug possession. In 1975, Alaska became the first state to enact a statute declaring that a ban on the possession and personal use of marijuana was unconstitutional based on the statute’s impermissible infringement on the citizens’ right to privacy.<sup>41</sup> The court held that the right to privacy guaranteed under article I, section 22 of the Alaska Constitution “encompass[es] the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home.”<sup>42</sup>

The right to privacy in Alaska, as in the federal jurisdiction, has been especially recognized in the home. The express right to privacy in article I, section 22 of the Alaska Constitution was added with the deliberate purpose of codifying the concentration of privacy in the home of each Alaska resident.<sup>43</sup> The fact that Trooper Ingram’s search uncovered conduct within the home makes the failure to apply the right to privacy in *Martin* especially troubling. The Alaska Supreme Court “has consistently recognized that the home is constitutionally protected from unreasonable searches and seizures, reasoning that the home itself retains a protected status under the Fourth Amendment and Alaska’s constitution distinct from that of the occupant’s person.”<sup>44</sup> However, part of the court’s reasoning in *Ravin* turned on the fact that the state could not show “any harm to the user or others from the private, personal use of marijuana.”<sup>45</sup> Where the production or use of methamphetamines is the conduct in question, the government will

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39. See *Woods & Rohde, Inc. v. State, Dep’t of Labor*, 565 P.2d 138, 148 (Alaska 1977) (quoting *Weltz v. State*, 431 P.2d 502, 506 (Alaska 1967)) (referring to article I, section 14’s guarantees against unreasonable search and seizures by the state).

40. *Weltz*, 431 P.2d at 506 (internal quotations omitted).

41. See Bruce Brashear, *Marijuana Prohibition and the Constitutional Right of Privacy: An Examination of Ravin v. State*, 11 TULSA L. J. 563, 565 (1975) (explaining that before the Alaska Supreme Court decided *Ravin*, “no court had declared a statute outlawing the possession and use of marijuana unconstitutional” based on a right to privacy).

42. *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975).

43. See *id.* at 503–04 (“The privacy amendment to the Alaska Constitution was intended to give recognition and protection to the home.”).

44. *Id.* at 503.

45. *Id.* at 501.

presumably have an easier time establishing harm to the user and others.<sup>46</sup> The court in *Ravin* was careful to add that “[n]o one has an absolute right to do things in the privacy of his own home which will affect himself or others adversely.”<sup>47</sup> However, the government “cannot simply decide what is in a person’s best interest and compel it.”<sup>48</sup> The right to privacy is definitely present to some extent in the home, but whether or not the public interest served in *Martin* should outweigh that privacy interest is an issue that needs to be addressed directly.

In sum, the express right to privacy guaranteed by the Alaska Constitution in article I, sections 14 and 22 has been interpreted to “serv[e] its core purpose as a ‘restraining force against the abuse of governmental power.’”<sup>49</sup> This express right to privacy has infamously pioneered a right to the possession and personal use of recreational drugs in the home.<sup>50</sup> If the state’s search of the suspects’ home in *Martin* can be defended as an exception to this robust right to privacy, the state will have to provide compelling evidence that it “can meet its substantial burden” in showing that its actions were in furtherance of a legitimate state interest.<sup>51</sup>

## II. THE STATE’S INTEREST

The state has long been empowered to enforce regulations in the interest of public safety.<sup>52</sup> In direct opposition to the strong right to privacy established in Section I, the state of Alaska also faces a growing threat to public safety from methamphetamine consumption and production. The state’s interest in curtailing this conduct, which often takes place in the privacy of individual residences, is an equally important factor in Alaska’s establishment of an appropriate approach to the protection from unreasonable searches and seizures by the state. It is unclear whether heavy emphasis on the Alaska Constitution’s right to privacy should prevail over narcotic use now, as it did over marijuana use in 1975.<sup>53</sup>

First of all, this is a recent problem. Therefore, Alaska Supreme

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46. See *infra* Section II.

47. 537 P.2d at 504.

48. *Id.* at 509.

49. *State v. Planned Parenthood*, 35 P.3d 30, 38 n.50 (Alaska 2001) (quoting *United States Jaycees v. Richardet*, 666 P.2d 1008, 1013 (Alaska 1967)).

50. *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975).

51. *Id.*

52. See *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2681 (2011) (holding that the state’s legitimate interest in promoting public health “falls within the traditional scope of a State’s police power”).

53. *Ravin*, 537 P.2d at 504.

Court precedent on personal drug possession and use within the home is developing. The prevalence of narcotic manufacturing as well as abuse has increased dramatically in recent years nationwide.<sup>54</sup> Specifically, thirty-six methamphetamine labs have been seized in Alaska in the last five years alone.<sup>55</sup> In addition to the potential for bodily harm, manufacturing operations damage property, often beyond repair.<sup>56</sup> Drug use is also a concern for public safety as it may facilitate further crimes by citizens who are under the influence. According to the Alaska Department of Public Safety, between thirty-seven and forty-seven percent of all cases initiated by Alaska State Troopers involved either drugs or alcohol.<sup>57</sup> Alaska currently deploys seven investigative task forces specifically to deal with the state's drug problem.<sup>58</sup>

The fact that the state's compelling interest in identifying and curtailing drug abuse and manufacture was driving the analysis of the *Martin* case bears on how the right to privacy might be limited in that context. In the context of drug abuse prevention, the right to be free from unreasonable search and seizures has been interpreted narrowly by the Supreme Court of the United States. For instance, in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, the Supreme Court held that random drug testing of students that

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54. See 2013 National Drug Threat Assessment Summary, U.S., DEP'T OF JUSTICE, DRUG ENFORCEMENT ADMIN. 10 (Nov. 2013) <http://www.dea.gov/resource-center/DIR-017-13%20NDTA%20Summary%20final.pdf> (stating that as methamphetamine prices have decreased nationwide 70 percent from 2007 to 2012, the purity of the drug has also increased almost 130 percent). This project was taken over by the Department of Justice in 2012. *Id.* at iii. The 2013 National Drug Threat Assessment factors were provided by 1,307 state and local law enforcement agencies through the 2013 National Drug Threat Survey. *Id.* at iv.

55. Alaska State Troopers, 2013 Annual Drug Report, ALASKA BUREAU OF INVESTIGATION STATEWIDE DRUG ENF'T UNIT 21 <http://www.dps.state.ak.us/AST/ABI/docs/SDEUreports/2013%20Annual%20Drug%20Report.pdf> (last visited Sept. 21, 2015).

56. ALASKA DEP'T OF ENVIRON. CONSERVATION, *Illegal Drug Manufacturing Sites*, [http://dec.alaska.gov/spar/perp/methlab/methlab\\_listing.htm](http://dec.alaska.gov/spar/perp/methlab/methlab_listing.htm) (last visited Nov. 7, 2014) (listing illegal drug manufacturing site records kept by Department of Environmental Conservation as required by 46.03.550(b) of the Alaska Statutes).

57. Div. Statewide Drug Enf't Unit, DEP'T OF PUB. SAFETY, <http://dps.alaska.gov/AST/ABI/SDEU.aspx> (last visited Nov. 7, 2014).

58. Alaska State Troopers, 2013 Annual Drug Report, ALASKA BUREAU OF INVESTIGATION STATEWIDE DRUG ENF'T UNIT 4 <http://www.dps.state.ak.us/AST/ABI/docs/SDEUreports/2013%20Annual%20Drug%20Report.pdf> (last visited Sept. 21, 2015). The seven task forces are the Alaska Interdiction Task Force/Anchorage Enforcement Group (DEA sponsored), Fairbanks Area-wide Narcotics Team, Mat-Su Narcotics Enforcement Team, South Central Area-wide Narcotics Team, Southeast Alaska Cities Against Drugs Task Force, Western Alaska Alcohol and Narcotics Team, Special Crimes Investigation Unit.

participated in extracurricular activities, even without suspicion, did not violate the students' Fourth Amendment rights.<sup>59</sup> Despite the express right to privacy found in the Alaska Constitution, the Court's holding in *Earls* echoed the stance already taken in the year prior by the Alaska Supreme Court.<sup>60</sup> As noted in Section I, the state of Alaska has a unique history in its treatment of drug use and the right to privacy.<sup>61</sup> Arguably, Alaska's more liberal view of personal drug use is due in part to the Alaska Supreme Court's view on what constitutes a state's interest in preventing harm to its citizens. After analyzing several approaches, the court in *Ravin* affirmed a "general proposition that the authority of the state to exert control over the individual extends only to activities of the individual which affect others or the public at large."<sup>62</sup> Although the right to privacy and freedom to choose one's own lifestyle is not absolute, the court only allows the right to be curtailed where "it begins to infringe on the rights and welfare of others."<sup>63</sup>

Because of the tenets embraced by the Alaska Supreme Court, the main analysis of public safety and its balance with a citizen's right to privacy focuses on the harm done to others in the society. In allowing the right to privacy to cover personal use of marijuana in the home, the Alaska Supreme Court emphasized marijuana's effects of "passivity and inactivity" on the mind and body.<sup>64</sup> This allowed the court to discount the public harm that might be caused by getting high and driving—a phenomenon seen as the most common way marijuana use could harm others.<sup>65</sup> In contrast to marijuana's mellowing effects, methamphetamines often produce physical effects like "increased wakefulness, increased physical activity . . . increased respiration, [and] rapid heart rate" while at the same time producing "reduced motor skills" and "anxiety, confusion, insomnia, and mood disturbances" as well as "violent behavior."<sup>66</sup> Therefore, the evidence cited in *Ravin*, making the harm caused by marijuana seem less likely to affect people

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59. See 536 U.S. 822, 830 (2002) ("A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.").

60. See *Alaska Police Dep't Emps. Ass'n v. Municipality of Anchorage*, 24 P.3d 547, 557 (Alaska 2001) (approving suspicionless drug testing for some police officers and firefighters).

61. See *supra* Section I.

62. *Ravin v. State*, 537 P.2d 494, 509 (Alaska 1975).

63. *Id.*

64. *Id.* at 510-11.

65. *Id.* at 511.

66. *DrugFacts: Methamphetamine*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., NAT'L INST. ON DRUG ABUSE, 1-2 (Jan. 2014), [https://d14rmgtrwzf5a.cloudfront.net/sites/default/files/drugfacts\\_meth.pdf](https://d14rmgtrwzf5a.cloudfront.net/sites/default/files/drugfacts_meth.pdf).

other than the user himself, is unavailing in the context of methamphetamines.

Another aspect of drug use absent with marijuana in *Ravin*, but present with methamphetamines in *Martin*, is the commercial use of methamphetamine precursors. The Alaska Supreme Court made it very clear that the right to privacy only encompassed the possession and use "in a purely personal, non-commercial context in the home."<sup>67</sup> The court makes a comparison between its treatment of marijuana use and the Supreme Court's treatment of obscenity in the home.<sup>68</sup> The "distinction between commercial distribution of obscene matter and the private enjoyment of it at home" was incorporated into the right to privacy analysis of the use of illicit substances in the home.<sup>69</sup> The fact that the suspects in *Martin* were suspected of buying the materials necessary for the manufacture of methamphetamines, presumably commercial rather than merely personal use of the drugs, cuts against the right to privacy from Trooper Ingram's search in the *Martin* case.

Despite the dangers and societal costs of methamphetamine use, the state's interest in public safety must still be balanced with the express right to privacy in Alaska. After all, the court did not make its ruling in *Ravin* in absence of serious doubts about the safety of marijuana. The Alaska Supreme Court emphasized that the ruling did "not mean to condone the use of marijuana."<sup>70</sup> Instead, the court found that the right to privacy in Alaska's Constitution outweighed the opinion of the experts involved that were "unanimously opposed to the use of any psychoactive drugs."<sup>71</sup> This makes it less clear that the danger of methamphetamine to users is enough to outweigh the privacy concerns raised by the search in *Martin*. However, even in 1975, the court noted the increased danger of other drugs that "result in numbers of people becoming public charges" or "widespread use of [a] drug [that] could significantly debilitate the fabric of our society" as possibly necessitating state interference in the future.<sup>72</sup>

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67. *Ravin*, 537 P.2d at 504.

68. *See id.* at 499 (discussing the Supreme Court's development and refinement of case law on First and Fourteenth Amendment protections applicable to obscene materials).

69. *Id.*

70. *Id.* at 511.

71. *Id.*

72. *Id.* at 509-10 (comparing marijuana use with "far more dangerous effects of alcohol, barbiturates, and amphetamines").

### III. CURRENT APPROACHES

The *Martin* case embodies the collision of two strong legal footholds. On one hand, the state has a strong, clear interest in protecting its citizens and societal fabric from methamphetamine use and manufacture. On the other hand, each citizen has a right to privacy expressly provided for in the Alaska Constitution—a right that is most acute in the home.

Despite the right to privacy's classification as a fundamental right, the Alaska Supreme Court has recognized some limitations on the right due to public policy considerations. In *Ravin*, the court cautioned that even within the home, "the right of privacy in the sense of immunity from prosecution is absolute *only when the private activity will not endanger or harm the general public.*"<sup>73</sup> However, as the majority held in *Ravin*, the right to privacy does "encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home."<sup>74</sup> In Alaska, the government can only prosecute these types of activities in the home if "the state can meet its substantial burden" by showing that the prevention or regulation of the activity in question achieves "a legitimate state interest."<sup>75</sup> In *Martin*, the court failed to establish the legitimate state interest that supports waiver of the privacy considerations traditionally given to activities (even drug related activities) within the home. Though, as stated in Section II of this Note, the state may have a substantially more legitimate state interest in regulating the home manufacture of methamphetamine than personal marijuana use,<sup>76</sup> the *Martin* decision makes no argument on these grounds. Instead, the court relies solely on the implied openness to the public of the walkway upon which Trooper Ingram stood.

By deciding *Martin* on the basis of whether the walkway upon which Trooper Ingram stood was open to the public, the court robbed itself of an opportunity to face the balancing issue head on. This theoretical punt of addressing two competing interests in *Martin*, privacy and public safety, is the latest example of the current scattered approach to privacy law in Alaska.

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73. *Id.* at 500 (emphasis added).

74. *Id.* at 504.

75. *Id.*

76. This assumes that the state interest would be in the societal effects of methamphetamine production and use, rather than a purely paternalistic motive.

### A. Current Theoretical Approaches to the Right to Privacy in Alaska

Since the court's interpretation of the express right to privacy in *Ravin*, several different approaches to the right to privacy have emerged, cluttering Alaska's privacy jurisprudence.<sup>77</sup> Three separate approaches have been identified in Alaska's privacy law, each applied in different fact-specific scenarios. The first two approaches, the "compelling state interest" test and the "sliding scale" approach, both require a justification based on how closely tailored the state action is to the state interest. The third approach, distinct from the first two tailoring approaches, is the reasonable expectation test. The Alaska Supreme Court has employed all three of these approaches at various times. However, Alaska's privacy jurisprudence would benefit from a more consistent and comprehensive approach.

The "compelling state interest" test was first put forth in *Gray v. State*.<sup>78</sup> This test requires a state to justify any infringement upon a fundamental right as necessary in furtherance of a compelling state interest.<sup>79</sup> *Gray* also found the right to privacy to encompass the right to ingest "food, beverages or other substances."<sup>80</sup> A version of this test was used in *Ravin*—albeit without mention of a fundamental right to smoke marijuana—to find that the state's interest was not compelling enough, allowing for the personal use of marijuana under the privacy clause.<sup>81</sup>

Secondly, the Alaska Supreme Court adopted a "sliding scale" approach<sup>82</sup> to assess the right to privacy in *State v. Erickson*.<sup>83</sup> In an approach almost indistinguishable from the compelling state interest test, the sliding scale approach entails balancing the fundamental right to privacy infringed upon and the closeness of the relationship of the government action to the legitimate state interest served.<sup>84</sup> The Alaska Supreme Court explicitly declined to use the same compelling state interest terminology and test that was used in *Ravin*, but continued to

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77. See John F. Grossbauer, *Alaska's Right to Privacy Ten Years After Ravin v. State: Developing a Jurisprudence of Privacy*, 2 ALASKA L. REV. 159, 160 (1985) ("The court's failure to develop an independent analytical approach to the privacy issue has resulted in inconsistent treatment of the right in the variety of contexts in which the amendment has been invoked.").

78. 525 P.2d 524 (Alaska 1974).

79. *Id.* at 527.

80. *Id.* at 528.

81. *Ravin v. State*, 537 P.2d 494, 511 (Alaska 1975).

82. Grossbauer, *supra* note 77.

83. 574 P.2d 1 (Alaska 1978).

84. See *id.* at 22 ("We find that there is a sufficiently close and substantial relationship between the means chosen to regulate cocaine and the legislative purpose of preventing harm to health and welfare so as to justify the prohibition of use of cocaine.").

analyze the possible privacy infringement under a tailoring approach using different terminology.<sup>85</sup> Despite the similarities of the compelling state interest test and the sliding scale approach,<sup>86</sup> the sliding scale approach in *Erickson* allowed the government interest in public safety to outweigh the privacy interest in using cocaine in the home—in stark contrast to the outcome of the compelling state interest test analysis in *Ravin*.<sup>87</sup>

Yet another approach to the Alaskan right to privacy, distinct in terminology and analysis from these first two tests, has been adopted as a reflection of the federal measures against unreasonable search and seizure—whether the individual had a reasonable expectation of privacy at the time and place of the search.<sup>88</sup> Another point of the privacy analysis in *Martin*, as well as in many search and seizure cases, is whether there was a reasonable expectation of privacy at the time and place of the search.<sup>89</sup> In his concurrence in *Katz v. United States*,<sup>90</sup> Justice Harlan set forth the two-prong test for finding that there was a reasonable expectation of privacy.<sup>91</sup> First, the person must have an actual *subjective* expectation of privacy; secondly, the expectation must be recognized as reasonable by society.<sup>92</sup> After laying out the test, Justice Harlan specifically applied the two-prong approach to the home, finding that the home is typically a place where privacy is reasonably expected.<sup>93</sup> The state of Alaska has explicitly and continuously adopted Justice Harlan’s articulation of this two-prong approach in assessing whether a reasonable expectation of privacy exists.<sup>94</sup>

Alaska’s continual use of all three of these approaches has led to

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85. *See id.* at 11–12.

86. Both tests are different versions of a tailoring test with different terminology denoting a similar analysis. The compelling state interest test requires necessity to meet a compelling state interest, while the sliding scale approach requires a closeness of the relationship to a legitimate state interest. This is another indication of the lack of structure in approaches to a right to privacy.

87. *Erickson*, 574 P.2d at 18.

88. *See State v. Glass*, 583 P.2d 872, 875 (Alaska 1978) (adopting the reasonable expectation of privacy test).

89. *Martin v. State*, 297 P.3d 896, 899 (Alaska 2013).

90. 389 U.S. 347 (1967).

91. *Id.* at 361.

92. *Id.*

93. *See Katz*, 389 U.S. at 361 (“Thus a man’s home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the ‘plain view’ of outsiders are not ‘protected’ because no intention to keep them to himself has been exhibited.”) (internal quotations omitted).

94. *Smith v. State*, 510 P.2d 793, 797 (Alaska 1973). *See, e.g., Anderson v. State*, 555 P.2d 251, 260–61 (Alaska 1976); *Nathanson v. State*, 554 P.2d 456, 458 (Alaska 1976); *Woods & Rohde, Inc. v. State*, 565 P.2d 138, 149 (Alaska 1977).

scattered jurisprudence and seemingly case-by-case determination of whether or not the right to privacy protects an individual's conduct. For instance, in *Luedtke v. Nabors Alaska Drilling, Inc.*,<sup>95</sup> the Alaska Supreme Court found that although *Ravin* still allowed the personal use of marijuana to be covered by the right to privacy, employees "could not maintain an action for invasion of privacy with regard to . . . urinalysis" conducted by their employer that was designed to detect personal use of marijuana.<sup>96</sup> The rationale for allowing the infringement on the employees' right to privacy in *Luedtke* was in large part that the personal use of marijuana could endanger others because "work on an oil rig can be very dangerous."<sup>97</sup> Yet, in *Sampson v. State*,<sup>98</sup> the Alaska Supreme Court held that the right to privacy did not allow for physician-assisted suicide of the terminally ill—despite the lack of evidence that the act involves any genuine harm to others.<sup>99</sup>

One explanation for the current approach is that, while the decisions may seem chaotic, there is actually an underlying pattern. The phenomenon of "equilibrium-adjustment" has been proposed to explain similar case-by-case analysis in Fourth Amendment jurisprudence.<sup>100</sup> The basic principle of equilibrium-adjustment is characterized as maintaining the status quo such that "[w]hen new tools and new practices threaten to expand or contract police power in a significant way, courts adjust the level of Fourth Amendment protection to try to restore the prior equilibrium."<sup>101</sup> However, several Fourth Amendment laws have remained relatively stable since their inception.<sup>102</sup> This includes the rule that in order "[t]o search a home, the police ordinarily must have a warrant."<sup>103</sup> This theory can be triggered when there are "new crimes and new ways in which crimes are committed and investigated."<sup>104</sup> In *Martin*, the home manufacture of methamphetamines was a fairly new criminal act and social phenomenon. Methamphetamine was not invented until 1919 in Japan,

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95. 768 P.2d 1123 (Alaska 1989).

96. *Id.* at 1138.

97. *See id.* at 1136 ("It is extremely important that the driller be drug free in the performance of his tasks in order to insure the immediate safety of the other personnel on the particular drill rig.").

98. 31 P.3d 88 (Alaska 2001).

99. *Id.* at 98.

100. *See* Orin Kerr, *An Equilibrium-Adjustment Theory of The Fourth Amendment*, 125 HARV. L. REV. 476 (2011) (explaining equilibrium-adjustment theory in defense of a seemingly scattered Fourth Amendment jurisprudence).

101. *Id.* at 480.

102. *Id.* at 484–85.

103. *Id.* at 484.

104. *Id.* at 489.

and was not outlawed until 1970 by the Controlled Substances Act.<sup>105</sup> The current method of cooking methamphetamines at home did not appear until the 1990s, and the precursors that are sold in drugstores were not regulated until 1996.<sup>106</sup> Under the equilibrium-adjustment theory, this new crime might cause the search and seizure analysis to adjust to account for the change. However, even if there is some element of subconscious order through the equilibrium-adjustment theory, driven in *Martin* by the relatively new crime of methamphetamine production, Alaska still needs to express the approach in a coherent manner so that it can be applied with clarity and regularity going forward.

### **B. Consequences of the Current, Non-cohesive Approach in *Martin***

Under the court's reasoning in *Martin*, an officer could walk up to any house and peek through a narrow crack between curtains that have been deliberately drawn, just to see if they observe anything incriminating. The court claims that the officer "was not engaged in some random fishing expedition" because he had been tipped off that the men had purchased precursors used in the production of methamphetamine.<sup>107</sup> But the record shows that Trooper Ingram actually walked up on the deck, up to the house, and looked in the window *without knowing if the suspects had gone into that residence at all*.<sup>108</sup> The officer stated that he lost sight of the suspects after driving past the entrance of the complex to maintain his undercover status. In doing so, "he did not see which of the five units the suspects entered."<sup>109</sup> Then he called for backup, and waited outside "hoping that one or more of the four suspects would emerge" from one of the five residences in the complex.<sup>110</sup> At that point, the officers did not know which residence housed the suspects. This is apparent because of Trooper Ingram's testimony that he walked up and "looked through the window of the first unit he came to."<sup>111</sup> Luckily for the state (and quite unluckily for the suspects) that first unit happened to be housing precursors to the controlled substances. However, the link in the inference chain the officers were working with had been broken before they peered into the

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105. *A Brief History of Methamphetamine*, VT. DEP'T OF HEALTH (2015), [http://healthvermont.gov/adap/meth/brief\\_history.aspx](http://healthvermont.gov/adap/meth/brief_history.aspx).

106. *Id.*

107. *Martin v. State*, 297 P.3d 896, 900 (Alaska Ct. App. 2013).

108. *Id.* at 897.

109. *Id.*

110. *Id.*

111. *Id.*

window. If the first unit had housed a different set of four men who were lining up cocaine to snort, could Trooper Ingram have entered based on what he saw through a crack in their window blinds? Though he was looking for a particular set of suspects, and even if we stipulate the debatable point that the walkway was impliedly public space, the *Martin* approach still allows an officer to look through a hole in *anyone's* blinds, so long as they live near a followed suspect.

Furthermore, instead of providing probable cause and obtaining a search warrant to search the residence, Trooper Ingram's search itself, through the window, provided the probable cause that then allowed the officers to obtain a warrant and seize the evidence. Not only is this circular logic alarming, it also flies in the face of Alaska law. The Alaska Supreme Court has deliberately continued to use the two-prong *Aguilar-Spinelli* test for probable cause.<sup>112</sup> In 1983, the federal law became a two-prong test that allowed probable cause to be a fluid concept, with one prong being able to make up for a lack of reliability in the other, so as not to impede police work in the field by giving de novo review to magistrate judges.<sup>113</sup> However, the Alaska Supreme Court chose to keep the more stringent *Aguilar-Spinelli* test because of the heightened right to privacy established under Article I, Section 14 of the Alaska Constitution.<sup>114</sup> This bears on the analysis of the *Martin* decision in that the express right to privacy has been purposefully interpreted to heighten the burden on police investigations. There is far less weight given in Alaska to an argument that the practical impediments to obtaining evidence against suspects should allow the right to privacy to be infringed upon.

Because the Alaska Supreme Court employs these tests intermittently and in different fact-specific scenarios, the practical effect is a type of ex post, case-by-case analysis of an individual's right to privacy when it is competing with an action in furtherance of a state interest. Therefore, there is little predictability as to what is considered protected by a right to privacy and what is not. The facts of *Martin* demonstrate the necessity of a coherent approach to the right to privacy in Alaska.

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112. See *State v. Jones*, 706 P.2d 317, 322 (Alaska 1985) (maintaining a more stringent approach for probable cause found by a magistrate after the Supreme Court of the United States adopted a totality of the circumstances approach to establishing probable cause).

113. See *Illinois v. Gates*, 462 U.S. 213, 232-36 (1983) (adopting a less stringent test for determining probable cause for search warrants and citing, among other things, consideration for hindrance of police investigations).

114. *Jones*, 706 P.2d at 321-22.

#### IV. POTENTIAL APPROACHES

Though the Alaska Supreme Court somewhat dodged the question of whether the search invaded the reasonable expectation of privacy in *Martin*, Alaska needs to adopt a more comprehensive approach to balancing the privacy interests of individuals with the government's interest in public safety. This Section lists several different approaches employed by others states through both their common law decisions and legislative enactments. It is important to remember that, in addition to decisions by the Alaska Supreme Court, the "legislative body is well situated . . . to balance privacy and public safety in a comprehensive way."<sup>115</sup> Whether through the legislature or the court system, Alaska must choose an approach to the balance between privacy and protection that honors both the Alaska Constitution's express guarantees of privacy as well as the growing dangers to public safety.

##### A. Developing an Independent Right to Privacy Jurisprudence

Not all states that have separate codification of a right to privacy or a right to be free from unreasonable searches and seizures in their state constitutions have taken on the challenge of developing their own body of privacy law. Some states have instead decided to use a "lockstep" approach—keeping the privacy rights guaranteed by their state constitution in deliberate congruence with the case law of the Supreme Court of the United States surrounding the Fourth Amendment.<sup>116</sup> Other states' high courts have embraced their chance to interpret the state's constitutional provisions independent of any Supreme Court precedent on similar issues—and they often feel the need to express their reasons for doing so. The Supreme Court of Iowa did just this in their decision *State v. Ochoa*.<sup>117</sup> In fact, over half of the state supreme courts have recognized heightened protections of their citizens' rights of freedom from unreasonable searches and seizures under their own state constitutions rather than under the Fourth Amendment.<sup>118</sup> As discussed

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115. *United States v. Jones*, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring).

116. *See People v. Caballes*, 851 N.E.2d 26, 46 (Ill. 2006) (holding that "the search and seizure clause [in the state constitution] "as construed under our limited lockstep approach, strikes the proper balance between protecting the people from unreasonable intrusion by the state and providing the people with effective law enforcement").

117. *See* 792 N.W.2d 260, 265 (Iowa 2010) ("Although many state constitutions have search and seizure language that is virtually identical to the Fourth Amendment, the movement toward independent state constitutional adjudication has had dramatic impact on the law of search and seizure.").

118. *See* Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS.

in Section III, the Alaska Supreme Court has affirmatively taken on the task of developing an independent approach to analyzing the protection of rights afforded its citizens under the Alaska Constitution, although it has yet to nail down a comprehensive approach.<sup>119</sup>

### B. Limiting the Scope of Places Protected

Some states have struck the balance between the government's interest in public safety and the individual right to privacy by limiting the scope of places where a reasonable expectation of privacy can exist. The Supreme Court of Illinois has interpreted the state constitutional right to privacy to protect a physical "zone of privacy."<sup>120</sup> The lower standard of reasonableness of the state's intrusion is counterbalanced by the physical zone inside which the individual's right is protected. This approach not only uses physical places to limit the scope of where a reasonable expectation of privacy exists, but also can be limited by which tools are used to convey private information. The Supreme Court of Montana adopted a version of this approach in *State v. Allen*.<sup>121</sup> Other states have specifically rejected the physical limitations approach to the right to privacy analysis. For instance, in *Hamberger v. Eastman*,<sup>122</sup> the Supreme Court of New Hampshire stated that the actions forbidden due to a right to privacy are "not limited to a physical invasion of his home or his room or his quarters," but also extend to wiretapping and eavesdropping depending on the content of the conversation.<sup>123</sup>

The Alaska Supreme Court has not used the physical limitations approach as an effective tool to balance privacy and public safety interests. Still, the court has identified some physical limitations of a reasonable expectation of privacy. For instance, the Alaska Supreme Court has held that there was no reasonable expectation of privacy where a suspect was voluntarily inside a police station, despite the fact that the note in question was partially hidden on the suspect's person when seized.<sup>124</sup>

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L. J. 417, 418-64 (2007) (stating the test that each state uses).

119. See *supra*, Section III.

120. See *Caballes*, 221 Ill.2d 282, 329-30 (Ill. 2006) (applying the Illinois approach that "the state's intrusion into the individual's bodily zone of privacy must be reasonable").

121. See 241 P.3d 1045, 1061 (Mont. 2010) (holding that conversations held over an individual's cell phone will be recognized as areas in which a reasonable expectation of privacy exists, even when that conversation is recorded "at the behest of law enforcement").

122. 206 A.2d 239 (N.H. 1964).

123. *Id.* at 241-42.

124. *Weltz v. State*, 431 P.2d 502, 505-06 (Alaska 1967).

### C. Adjusting the Burden of Proof Needed to Conduct a Search

Several states have balanced privacy concerns with the state's interest in public safety by adjusting the amount of suspicion needed for officers to conduct a search. Denoting a standard for the showing the government must make before conducting a search is one way that the state can balance individual privacy interests against public safety considerations. For instance, in *Jardines v. State*,<sup>125</sup> the Florida Supreme Court held that the higher burden of probable cause, not merely reasonable suspicion, was required to allow a search at a private residence.<sup>126</sup> This effectively allowed the state to search within a private area as long as a heightened burden of proof was met—creating a balance of privacy interests and public safety interests.

The state of Alaska has not taken advantage of this mode of protection for the right to privacy either. In 2009, the Alaska Supreme Court held that a search based on an officer's *reasonable suspicion*, with no probable cause, did not violate the individual's right to privacy, nor did it constitute an unreasonable search and seizure under the Alaska Constitution.<sup>127</sup> The court in *Martin* supported Trooper Ingram's actions of looking inside the residence, through closed blinds, based on the fact that he "*reasonably suspected* that the group of people he had followed to the residence had just brought drug manufacturing supplies into one of the units."<sup>128</sup> The use of the evidence Trooper Ingram saw only by taking the action of looking through the window, based on reasonable suspicion, was key to establishing the probable cause that then allowed the officers on the scene to obtain a warrant.<sup>129</sup> Setting the bar as low as reasonable suspicion for evidentiary support of Trooper Ingram's initial search does little to balance privacy interests with the needs of a police investigation in Alaska.

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125. 73 So. 3d 34 (Fla. 2011)

126. *See id.* at 37 (holding that "probable cause, not reasonable suspicion, is the proper evidentiary showing of wrongdoing that the government must make under the Fourth Amendment prior to conducting a dog 'sniff test' at a private residence").

127. *See Beltz v. State*, 221 P.3d 328, 337 (Alaska 2009) (holding that an officer's reasonable suspicion that the defendant was manufacturing methamphetamine outweighed the defendant's privacy interests in his street side garbage).

128. *Martin v. State*, 297 P.3d 896, 900 (Alaska Ct. App. 2013).

129. *See id.* at 897 ("This search warrant, in turn, was based in large measure on the testimony of a state trooper who walked up to the residence, looked through a narrow opening in the window blinds, and observed a number of supplies that are commonly used for making methamphetamine.").

## CONCLUSION

Alaska must find a way to balance the competing privacy interests of its individual citizens and the public safety interests of the state. Unlike the current, unpredictable approach, the Alaska courts need to deal with this delicate balance without *both* restricting the scope of a reasonable expectation of privacy *and* requiring only a showing of reasonable suspicion for an officer to effectively search a private residence from an impliedly public walkway. Instead, the Alaska Supreme Court should choose one limitation or the other to allow for searches and seizures in the interest of public safety, and without infringing upon the explicit fundamental rights to privacy guaranteed in the Alaska Constitution.

The current scheme allowing for decisions like *Martin v. State*—where an officer's effective search inside an individual's residence was allowed to serve as evidence for probable cause to obtain a search warrant and arrest the occupants of the residence—is not striking an adequate balance of the competing interests at stake. The Alaska Supreme Court went so far in *Martin* as to “concede that many reasonable people might find it distasteful to have police officers approach residential windows and peer through gaps in the curtains or blinds.”<sup>130</sup> The adoption of a more comprehensive approach, one that hopefully yields results that reasonable people will *not* find as distasteful as that in *Martin*, will allow for stability in future decisions in Alaska privacy law jurisprudence as well as predictability in which actions will be protected under the right to privacy and why they may be protected.

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130. *Id.* at 899.