Seizing Opportunity, Searching for Theory: Article I, Section 7

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I. INTRODUCTION

No provision of the Washington Constitution has received a more vigorous workout than article I, section 7, which ostensibly relates to searches and seizures. The qualification of ostensibility arises because the section, unlike its federal constitutional counterpart, makes no explicit reference to either searches or seizures. Rather, it reads as follows: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."[1]

By contrast, the fourth amendment to the United States Constitution, thought by some a model of terseness, seems as windy as an Independence Day oration:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[2]

These two passages have exactly five words in common: *no, be, in, or, of.* Yet, wondrously, courts have interpreted the provisions as identical in nearly all important respects, and the areas of divergence have had little to do with textual differences.

Washington case law dealing with searches and seizures has now reached a developmental stage from which it can proceed either haphazardly or along any of several well-defined lines. The purpose of this Article is not to provide a compendium of

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1. WASH. CONST. art. I, § 7.

2. U.S. CONST. amend. IV.

Washington search-and-seizure cases.[3] Rather, the Article analyzes the more recent (and some of the earlier) cases in which the Washington Supreme Court has interpreted article I, section 7, and suggests several alternative theoretical bases for the further development of Washington constitutional search-and-seizure jurisprudence.

II. HISTORY

The adoption, or what is known of it, and the history of the interpretation of article I, section 7,[4] have been detailed elsewhere.[5] In brief, the provision was adopted by the Washington State Constitutional Convention in 1889, after the convention had rejected a proposal to adopt language identical to the fourth amendment to the United States Constitution.[6] "Unfortunately, history provides little guidance to the intention of the framers when they chose the specific language of Const. art. I, § 7."[7] The Washington Supreme Court cited section 7 extensively in the years following the federal Supreme Court's enunciation of the exclusionary rule in *Weeks v. United States*.[8] The provision eventually lost significance, however, because it was interpreted so broadly as to allow most police searches on the theory that they were incident to lawful arrests.[9] Following *Mapp v. Ohio*,[10] section 7 fell into desuetude as federal court decisions interpreting the fourth amendment rapidly took center stage. The federal courts developed search-and-seizure doctrine so quickly and interpreted citizens' rights so expansively that Washington's fourth amendment counterpart was generally forgotten.[11] Only

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3. Such a compendium has been prepared and presented in mimeographed form to the Washington judiciary by Justice Robert F. Utter of the Washington Supreme Court. This 132-page untitled work, containing all cases through July 1982, deserves general publication. It has been an invaluable research tool in the preparation of this Article, and the author is deeply indebted to Justice Utter for his willingness to permit its use for this purpose.

4. WASH. CONST. art. I, § 7.

5. State v. Ringer, 100 Wash. 2d 686, 690-99, 674 P.2d 1240, 1243-47 (1983).

6. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, at 497 (B. Rosenow ed. 1962).

7. State v. Ringer, 100 Wash. 2d 686, 690, 674 P.2d 1240, 1243 (1983).

8. 232 U.S. 383 (1914). The exclusionary rule generally excludes evidence obtained in violation of the fourth amendment.

9. State v. Ringer, 100 Wash. 2d 686, 693-97, 674 P.2d 1240, 1244-47 (1983).

10. 367 U.S. 643, 655-57 (1961) (exclusionary rule held to be an essential part of the fourth amendment).

11. *See* State v. Ringer, 100 Wash. 2d 686, 690, 674 P.2d 1240, 1246 (1983).

after the United States Supreme Court's expansion of these rights stopped, and its contraction of the same rights began,[12] did Washington resurrect its own constitutional provisions.[13]

Since rediscovering section 7, the Washington Supreme Court has worked a rather massive change in search-and-seizure law through only seven decisions,[14] each of which expressly rejects one or more United States Supreme Court cases. These seven opinions are worth considering in some detail, as they present the entire corpus of Washington decisions explicitly resting on section 7 and rejecting fourth amendment constructs.

The case that marks the Washington Supreme Court's first gingerly post-*Mapp* step in the direction of its own search-and-seizure jurisprudence is *State v. Hehman*,[15] a reaction to the United States Supreme Court decisions in *United States v. Robinson*[16] and *Gustafson v. Florida*.[17] All three decisions involved traffic arrests[18] followed by full searches of the persons of the arrestees. The United States Supreme Court upheld both of the searches that it considered, taking the view that a full-scale body search is an inherently reasonable incident of a full-custody arrest.[19] Because the issue was not raised, the Court assumed the validity of a full-custody arrest for a minor traffic offense.[20]

In *Hehman*, the Washington court did not dispute the United States Supreme Court's conclusions concerning the reasonableness of searches incident to arrests, but held that a full-custody arrest for a minor traffic offense, when the offender is

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12. *See* United States v. Leon, 104 S. Ct. 3405 (1984); Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984).

13. *See* cases cited *infra* note 14.

14. State v. Myrick, 102 Wash. 2d 506, 688 P.2d 151 (1984); State v. Jackson, 102 Wash. 2d 432, 688 P.2d 136 (1984); State v. Chrisman, 100 Wash. 2d 814, 676 P.2d 419 (1984); State v. Ringer, 100 Wash. 2d 686, 674 P.2d 1240 (1983); State v. White, 97 Wash. 2d 92, 640 P.2d 1061 (1982); State v. Simpson, 95 Wash. 2d 170, 622 P.2d 1199 (1980); State v. Hehman, 90 Wash. 2d 45, 578 P.2d 527 (1978).

15. 90 Wash. 2d 45, 578 P.2d 527 (1978).

16. 414 U.S. 218 (1973).

17. 414 U.S. 260 (1973).

18. In *Hehman*, the defendant was stopped for a defective taillight and arrested when found to have an expired driver's license. 90 Wash. 2d at 46, 578 P.2d at 527. In *Robinson*, the defendant was arrested on probable cause that he was operating a vehicle after revocation of his license and with a permit obtained by misrepresentation. 414 U.S. at 220. In *Gustafson*, the defendant was arrested for driving without having his vehicle operator's license in his possession. 414 U.S. at 262.

19. *Gustafson*, 414 U.S. at 264-65; *Robinson*, 414 U.S. at 235.

20. *Gustafson*, 414 U.S. at 262; *Robinson*, 414 U.S. at 220-21.

willing to sign a promise to appear, is unreasonable under the Washington Constitution.[21] The court determined that it did not need to discuss the validity of the search because the underlying arrest was invalid.[22]

The Washington court became noticeably bolder in *State v. Simpson*,[23] rejecting flatly and firmly, but not with great persuasive force, *United States v. Salvucci*,[24] which had overruled the "automatic-standing" rule for federal courts.[25] The rejection, which restored automatic standing in Washington, was accompanied by the court's ringing declaration of the right of Washington courts to interpret the state constitution as more protective of individual rights than the United States Supreme Court interprets the federal charter.[26] Although the liberty of so interpreting the Washington Constitution was clearly established,[27] the reasons for the general interpretation were left for another day, and the reasons for the interpretation in the particular case were tenuous at best.[28]

Simpson was followed by *State v. White*,[29] in which the Washington Supreme Court rejected *Michigan v. DeFillippo*.[30] Both *White* and *DeFillippo* dealt with the admissibility of the fruits of otherwise lawful searches made incident to arrests for

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21. 90 Wash. 2d at 47, 578 P.2d at 528.

22. The discussion of *Hehman*, *Robinson*, and *Gustafson* in State v. Chrisman, 100 Wash. 2d 814, 819, 676 P.2d 419, 422-23 (1984), implies that the thrust of the rejected federal decisions was the approval of the underlying traffic arrests. This, as already indicated, is not entirely accurate.

23. 95 Wash. 2d 170, 181, 622 P.2d 1199, 1206 (1980).

24. 448 U.S. 83 (1980).

25. These two cases are treated in great detail in Adams & Nock, *Search, Seizure, and Washington's Section Seven: Standing from* Salvucci *to* Simpson, 6 U. PUGET SOUND L. REV. 1 (1982).

Under the "automatic standing" rule, a defendant is given standing to object to admission of the fruits of a search or seizure if he is charged with a crime having as an essential element the possession of the thing seized at the time of the seizure. *See* Brown v. United States, 411 U.S. 223, 227 (1973).

26. *Simpson*, 95 Wash. 2d at 177, 622 P.2d at 1204.

27. *Id.* at 177, 622 P.2d at 1204 and authorities cited therein.

28. The court relied on two cases, State v. Brackman, 178 Mont. 105, 582 P.2d 1216 (1978), and State v. Glass, 583 P.2d 872 (Alaska 1978), which interpreted state privacy provisions that were similar to the Washington State privacy provisions. The state supreme courts stated that the presence of express guarantees of privacy in the state constitutions, when compared with the absence of such a guarantee in the federal Constitution, provides clear authority for finding greater protection in search-and-seizure cases under state law than under the fourth amendment. *Simpson*, 95 Wash. 2d at 178, 622 P.2d at 1205.

29. 97 Wash. 2d 92, 640 P.2d 1061 (1982).

30. 443 U.S. 31 (1979).

violating vagrancy statutes that were unconstitutionally vague. In each case, the statute was presumptively valid at the time of the arrest. The United States Supreme Court thought exclusion of the evidence pointless because police should not be encouraged to make their own assessments of the validity of statutes.[31] In addition, the Court reasoned that the police would hardly be deterred from making arrests by the remote possibility that a court would hold the statutes invalid.[32] The Washington court, however, excluded the evidence, in part in the interest of deterring the legislature from enacting similar statutes,[33] and in part by questioning the propriety of deterrence considerations generally as a basis for application of the exclusionary rule.[34]

By far the most important of the first five cases is *State v. Ringer*.[35] *Ringer* involved two prosecutions consolidated on appeal: Ringer's and Corcoran's. Both prosecutions involved lawful arrests of drivers who were arrested after leaving their vehicles.[36] In each case, the vehicle was searched and seizable matter was discovered. In Ringer's case, but not in Corcoran's, probable cause to search the vehicle presumably existed (in the form of a strong odor of marijuana emanating therefrom).[37] The Washington Supreme Court disapproved both searches.[38]

Both searches involved in *Ringer* were constitutional under decisions of the United States Supreme Court. The Court had held in *New York v. Belton*[39] that police may search the entire passenger compartment of a vehicle incident to a lawful arrest of the driver. Moreover, the Court had held in *United States v. Ross*[40] that probable cause to believe a properly stopped vehicle contained seizable matter justified a warrantless search of the vehicle and all containers within the vehicle.

The federal decisions in *Belton* and *Ross* are manifestly

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31. *Id.* at 38.

32. *Id.* at 37-38.

33. 97 Wash. 2d at 103-04, 107-08, 640 P.2d at 1067, 1069-70.

34. *See* Adams & Nock, *supra* note 25, at 27-29.

35. 100 Wash. 2d 686, 674 P.2d 1240 (1983).

36. *Id.* at 688-89, 674 P.2d at 1241-42.

37. *Id.* at 688-89, 703, 674 P.2d at 1242, 1249.

38. *Id.* at 700-03, 674 P.2d at 1248-50. The court found that no exigent circumstances existed for searching defendants' vehicles, especially in light of the fact that the defendants were out of their vehicles and handcuffed at the time the searches took place. The court also found that it was not impracticable for the officers to obtain warrants prior to searching the vehicles.

39. 453 U.S. 454 (1981).

40. 456 U.S. 798 (1982).

unsound. *Belton* represented an unjustifiable departure from *Chimel v. California*,[41] which had limited the scope of searches incident to arrest to the area within the arrestee's immediate control. The Court's rationale in *Chimel* was that police need to search incident to arrest only to discover weapons or concealable evidence, the latter capable of destruction, the former capable of threatening the arresting officer or others.[42] Nevertheless, the *Belton* Court allowed a search of the entire passenger compartment because the area of the arrestee's immediate control is difficult to determine when the arrest takes place in an automobile and because a "bright line" test was necessary so that police would know the precise limits upon the areas that they might properly search.[43] It is plain, however, that an arrestee who has been removed from the car and who typically is handcuffed and placed in a patrol car[44] cannot reach any part of the interior of the vehicle in which he was arrested.

Similarly, the Court's decision in *Ross* was the ultimate perversion of the "automobile exception" doctrine.[45] In *Carroll v. United States*,[46] probable cause alone justified a search of a motor vehicle because the vehicle's mobility enabled it to be moved out of the jurisdiction before a warrant could be obtained.[47] *Ross* was merely the latest in a series of cases that had ignored this justification by applying the automobile exception when the automobile was under police control and thus clearly not capable of being moved out of the jurisdiction.[48]

Faced in *Ringer* with two decisions of neither binding force nor persuasive value, the Washington Supreme Court unsurprisingly rejected them. Moreover, it did so gracefully, without exposition of their deficiencies. The court focused instead, and for the first time, on the development of a theoretical basis for interpretation of article I, section 7. The *Ringer* court discussed at length the meager history of section 7 and the many early Washington cases interpreting it, concluding that the section

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41. 395 U.S. 752 (1969).

42. *Id.* at 763.

43. 453 U.S. at 459-60.

44. In *Ringer*, both Corcoran and Ringer had been handcuffed and placed in the patrol cars prior to the unauthorized searches of their vehicles. 100 Wash. 2d at 688-89, 674 P.2d at 1242.

45. *See* Carroll v. United States, 267 U.S. 132, 153-56 (1925).

46. 267 U.S. 132 (1925).

47. *Id.* at 153.

48. 456 U.S. at 825.

"poses an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions."[49]

This dictum, overstated and unsupported, could prove troublesome. The court discussed numerous common-law decisions governing the right of search incident to arrest and the early Washington cases unjustifiably expanding that right, overruling the earlier decisions.[50] The court concluded that section 7 sets up a warrant preference rule.[51] It then recognized two (and, by inference, only two) exceptions to the rule: (1) police may search the arrestee and, apparently, the area within the arrestee's actual control incident to a lawful arrest, but may search objects only for weapons and evidence of the crime for which the arrest was made; and (2) police may make warrantless searches on probable cause under exigent circumstances.[52]

Applying its new rules to the cases at hand, the Washington court found that the automobile searches could not be justified as incident to the arrests, since both arrestees were outside the cars (and, in fact, handcuffed in police patrol cars) when the arrests occurred.[53] The court further refused to recognize a right to search Ringer's vehicle, despite clear probable cause for so doing. According to the court, such a search required a demonstration of the existence of exigent circumstances justifying failure to seek a search warrant.[54] Furthermore, the availability of telephonic warrants must be considered in determining the existence of "exigent circumstances."[55] Since no showing of exigency was made, and no explanation for failure to seek a telephonic warrant was advanced by the prosecution (upon which the court placed the burden of proof), no exigency could be found.[56] With respect to the search of Corcoran's vehicle, no probable cause existed,[57] and the court had no need to discuss the matter further. Both searches were invalidated.[58]

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49. 100 Wash. 2d at 690, 674 P.2d at 1243.

50. *Id.*

51. *Id.* at 700, 674 P.2d at 1248. A warrant preference rule provides that searches, seizures, or other privacy invasions require warrants unless a good reason exists for not obtaining them.

52. *Id.* at 699-701, 674 P.2d at 1248-49.

53. *Id.* at 700, 674 P.2d at 1248.

54. *Id.* at 701, 674 P.2d at 1249.

55. *Id.* at 702, 674 P.2d at 1249.

56. *Id.* at 703, 674 P.2d at 1249.

57. *Id.*

58. *Id.*

There are two practical effects of the *Ringer* decision. The first is that it makes searches of vehicles on probable cause more inconvenient for the police, by requiring warrants or the demonstration of unspecified exigencies justifying their absence.[59] The second is that it precludes altogether vehicle searches without probable cause, many of which would be permissible under federal constitutional interpretations.[60]

Barely a month after *Ringer*, the Washington court decided *State v. Chrisman*.[61] In *Chrisman*, the court rejected an earlier decision of the United States Supreme Court in the very same case.[62] The case involved a campus police officer's arrest of a minor student for possession of alcohol. The officer accompanied the student to the student's dormitory room so that the student could retrieve his identification. While standing at the open door to the room, the officer saw a pipe and seeds on a desk, entered, found them to be of the type used for smoking marijuana, and conducted a further search.[63] The Washington Supreme Court invalidated the search;[64] the United States Supreme Court reversed,[65] and the Washington Supreme Court then invalidated it again, this time solely on the basis of section 7.[66]

The United States Supreme Court held that the officer was entitled to enter the room in order to keep an eye on the arrestee, a natural corollary of the right of an arresting officer to search the area within the arrestee's immediate control.[67] The Washington court, however, concluded that there was no general rule or "bright line" test to determine the permissible limits of an officer's conduct in such a situation; these limits were to be determined by the exigencies arising from the facts of the particular case.[68] The court approved the officer's decision to accompany the student to his dormitory room since there was no other reasonable way to make sure he would not simply disappear.[69] It

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59. *Id.* at 701, 674 P.2d at 1248 (citing State v. Smith, 88 Wash. 2d 127, 135, 559 P.2d 970, 974 (1977)).

60. *Id.* at 689, 674 P.2d at 1242.

61. 100 Wash. 2d 814, 676 P.2d 419 (1984).

62. Washington v. Chrisman, 455 U.S. 1 (1982).

63. 100 Wash. 2d at 816, 676 P.2d at 421.

64. State v. Chrisman, 94 Wash. 2d 711, 714, 619 P.2d 971, 974 (1980).

65. Washington v. Chrisman, 455 U.S. 1, 10 (1982).

66. 100 Wash. 2d at 818, 822, 676 P.2d at 422, 424.

67. Washington v. Chrisman, 455 U.S. 1, 6 (1982).

68. 100 Wash. 2d at 820, 676 P.2d at 423.

69. *Id.* at 821, 676 P.2d at 424.

held, however, that the officer had neither subjective belief nor reasonable ground to fear that the student, once inside his room, would escape, destroy evidence, or use a weapon.[70] There was thus no actual necessity for the warrantless entry of the room, and the court invalidated the search.[71]

These five cases fall far short of establishing a comprehensive body of law. *Hehman* did little more than balance a need for police intrusion against the effect of such an intrusion. *Simpson* and *White* dealt not primarily with substantive search-and-seizure law, but with the question of when to apply the exclusionary rule to the fruits of certain police conduct. *Ringer* and *Chrisman*, however, established some broad and important rules.

The *Ringer-Chrisman* doctrine, in brief, seems to be that warrantless searches or seizures must be justified, not according to general rules, but by a clear demonstration of their necessity under the facts of each case.[72] Such a doctrine is at once clear, logical, disquieting, and a little frightening. The doctrine is clear and logical in its simplicity, which gives maximum effect to the preference for official intrusion by judicial warrant. It is disquieting because, by apparently repealing the set of rules that guides and therefore controls police activity,[73] it inevitably will blur the lines of permissible police conduct and thus likely will diminish the level of control that the law in fact exerts over that conduct. The doctrine is frightening, and perhaps more than a little naive, in its presupposition that police can protect themselves against injury and death by conducting weapons searches only when some objective factor gives them reason to suspect danger.[74]

There is some room for the Washington court to back away from the more stark implications of its *Ringer* and *Chrisman*

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70. *Id.*

71. *Id.* at 821-22, 676 P.2d at 424.

72. *Chrisman*, 100 Wash. 2d at 820, 676 P.2d at 423; *Ringer*, 100 Wash. 2d at 701, 674 P.2d at 1248.

73. These rules are the traditional exceptions to the warrant requirement.

74. In approving the practice of requiring persons lawfully detained for traffic violations to exit their cars routinely, rather than only when the officer has "reason to suspect foul play from the particular driver at the time of the stop," the United States Supreme Court took due note of the potential, however remote, for violence in all such police-suspect encounters. Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977). *See also* Terry v. Ohio, 392 U.S. 1, 23 (1968) (discussing efficacy of allowing police to neutralize danger in all police-suspect contacts by reasonable means, rather than forcing an officer to trust his ability to spot danger in a particular encounter according to objective criteria).

opinions. The *Ringer* court quoted extensively from a decision that seemed to base even the right to search the person of an arrestee incident to a lawful arrest upon the exigencies of each situation.[75] The Washington court could consign that citation to the realm of dictum and reaffirm a general right to search any arrested person for weapons, in view of the drastic consequences of undetected possession. The *Ringer* court quoted from no fewer than five decisions stating that police may search only for evidence incident to the crime for which the arrest took place.[76] The Washington court should acknowledge that this limitation is basically unsound because police officers ought to be free to remove concealable or destructible evidence of any crime from an arrestee and to prevent the evidence from being pointlessly lost or disposed of in a way that would cast suspicion upon others.[77] The Washington Supreme Court should not consider itself precluded from considering the point by the extravagant and unnecessary language of these cases.

Nonetheless, the Washington court has taken its baby steps towards a warrant preference rule allowing warrantless privacy violations only upon the demonstrated exigencies of each individual situation. This course seems at first blush to parallel the traditional fourth amendment jurisprudential scheme that permits warrantless intrusions when they fall into certain categories that have traditionally been fraught with exigencies.[78] But the courses are not in fact parallel and therefore promise ever-greater divergence. The Washington rule asks whether exigency is present in a particular case. The federal rule asks whether the case is of a kind associated with exigency. The two approaches will necessarily produce some disparate results.

Two quite recent decisions complete the catalogue: *State v.*

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75. 100 Wash. 2d at 692, 674 P.2d at 1244 (quoting Leigh v. Cole, 6 Cox Crim. L. Cas. 329, 332 (Oxford Cir. 1853)).

76. 100 Wash. 2d at 692-97, 674 P.2d at 1244-46. The cases are Angello v. United States, 269 U.S. 20, 30 (1925); Weeks v. United States, 232 U.S. 383, 392 (1914); State v. Michaels, 60 Wash. 2d 638, 642-43, 374 P.2d 989, 991 (1962); State *ex rel.* Murphy v. Brown, 83 Wash. 100, 105-06, 145 P. 69, 71 (1914); Dillon v. O'Brien, 20 L.R. Ir. 300, 317 (Ex. D. 1887).

77. For example, if the arresting officers are unable to pat down an arrestee who is carrying concealed narcotics, the arrestee may, once having been placed in the patrol car, stuff the material behind the seat of the vehicle, thereby casting suspicion upon later occupants of the vehicle.

78. The exceptions to the warrant requirement have been characterized as "specific situations, typically involving exigent circumstances, in which obtaining a warrant would prove unfeasible or unnecessary." C. WHITEBREAD, CRIMINAL PROCEDURE 108 (1980).

Jackson[79] and *State v. Myrick*.[80] In each case the Washington Supreme Court went out of its way to express disagreement with decisions of its federal counterpart. The court did so, however, with considerably more thoughtfulness than it had theretofore displayed in section 7 analysis.

The *Jackson* decision set forth the requirements for establishing probable cause on the basis of an informant's tip. A search warrant had been issued by a federal magistrate on the basis of detailed information furnished by an identified informant of demonstrated reliability. Although the affidavit supporting the warrant did not show the basis of the informant's knowledge, it did set forth the results of police investigations that corroborated some aspects of the informant's statements. The corroborative data concerned conduct not in itself wrongful. The warrant was subsequently executed by federal officers.[81]

In *Illinois v. Gates*,[82] the United States Supreme Court held that the sufficiency of an affidavit to establish probable cause is to be determined by the "totality of the circumstances."[83] In doing so, the Supreme Court overruled two of its own decisions,[84] *Aguilar v. Texas*[85] and *Spinelli v. United States*.[86] The so-called *Aguilar-Spinelli* two-prong test required that an affidavit resting solely on an informant's tip show two things: (1) facts establishing the informant's characteristic reliability; and (2) facts showing that the informant spoke from personal knowledge or its functional equivalent.[87] The *Gates* Court took note of the obvious importance of both the informant's reliability and the basis of his knowledge, but recognized that it is occasionally possible to dispense with one or the other and come to a rational conclusion that probable cause was present, particularly if adequate corroboration of the tip existed. The Court then proceeded to apply its "totality of the circumstances" test to find probable cause on the basis of an anonymous letter corroborated by police investigation.[88] The investigation corroborated only

79. 102 Wash. 2d 432, 688 P.2d 136 (1984).
80. 102 Wash. 2d 506, 688 P.2d 151 (1984).
81. 102 Wash. 2d at 436-38, 688 P.2d at 137-38.
82. 103 S. Ct. 2317 (1983).
83. *Id.* at 2332.
84. *Id.*
85. 378 U.S. 108 (1964).
86. 393 U.S. 410 (1969).
87. *Jackson*, 102 Wash. 2d at 436-38, 688 P.2d at 138-39.
88. *Gates*, 103 S. Ct. at 2335-36.

innocent actions mentioned in the letter.[89]

In *Jackson*, the Washington Supreme Court refused to adopt the "totality of the circumstances" test to establish probable cause under section 7, adhering instead to the *Aguilar-Spinelli* approach.[90] The *Jackson* court went out of its way to reject *Gates*, as evidenced by the fact that it upheld the validity of the search and thus had no need to consider that decision.[91] In so doing, the Washington Supreme Court delivered itself of an outrageous, unsupported, and probably unsupportable (but perhaps also unintended) dictum: "[R]ecently we held that the substantial difference in wording between the Fourth Amendment and Const. art. I, § 7 mandates that the freedom from unreasonable searches and seizures to [sic] be interpreted more expansively under the state constitution than under the federal constitution."[92] The authorities cited in support of this proposition do no more than state that the difference in wording between the two constitutional provisions "allows" a more expansive interpretation of the Washington document.[93] It is scarcely conceivable that the wording difference could "mandate" such an interpretation, requiring the consistent and reflexive rejection of all fourth amendment interpretations in an effort to find more "expansive" ones in section 7. One assumes, therefore, that this dictum is not to be taken seriously.

Even if it did so with unseemly eagerness, the Washington court firmly rejected *Gates*. The rejection came, however, with a lengthy and thoughtful discussion of the relative merits of *Gates* and *Aguilar-Spinelli*.[94] The soundness of its ultimate conclusion will be discussed below.[95] The court's willingness to grapple at length with the underlying merits of the competing theories is, however, a hopeful sign that the court is recognizing the importance of the theoretical development of a section 7

89. *Id.* at 2335.

90. *Jackson*, 102 Wash. 2d at 438, 688 P.2d at 141.

91. *Id.* at 446, 688 P.2d at 144 (Dimmick, J., concurring).

92. *Id.* at 439, 688 P.2d at 141.

93. The authorities cited are State v. Chrisman, 100 Wash. 2d 814, 676 P.2d 419 (1984); State v. Ringer, 100 Wash. 2d 686, 674 P.2d 1240 (1983); State v. White, 97 Wash. 2d 92, 640 P.2d 1061 (1982); State v. Simpson, 95 Wash. 2d 170, 622 P.2d 1199 (1980); State v. Hehman, 90 Wash. 2d 45, 578 P.2d 527 (1978). All of these cases state that the Washington Supreme Court is *permitted* to interpret § 7 more expansively than the United States Supreme Court interprets the fourth amendment. None state or imply, however, that it is *required* to do so.

94. *Jackson*, 102 Wash. 2d at 435-43, 688 P.2d at 138-44.

95. *See infra* text accompanying notes 96-99.

jurisprudence.

The *Jackson* opinion makes at least a plausible case for the superiority of *Aguilar-Spinelli* over *Gates* as an interpretation of the fourth amendment. What is frustratingly missing from the opinion, however, is any effort to show that the *Aguilar-Spinelli* approach embodies the proper interpretation of the Washington Constitution. Neither the wording nor the history of that document is invoked to support the proposition that section 7, which does not even mention the words "probable cause," enshrines a pair of United States Supreme Court decisions from the 1960s.

To make matters worse, the *Jackson* court upheld the search warrant in that case by relying on corroboration of innocent activity to bolster the credibility of the informant's tip. This is the approach taken in *Gates*, the illogic of which is tellingly pointed out in Justice Utter's dissent in *Jackson*.[96] The majority opinion, taken as a whole, leaves the distinct impression that the Washington court is willing to grasp any opportunity to express disagreement with the United States Supreme Court.[97]

The impression is but slightly ameliorated by *State v. Myrick*,[98] the most recent, and in many ways the most nearly satisfactory, section 7 opinion. In that case, police had obtained a search warrant for the defendant's land after observing marijuana growing thereon from an airplane flying over the land at an altitude of 1500 feet without using visual enhancement devices. The court upheld the warrant, concluding that the overflight did not violate the defendant's rights under section 7.[99] In

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96. *Jackson*, 102 Wash. 2d at 447-49, 688 P.2d at 144-46 (Utter, J., dissenting).

97. It is interesting that the court took no notice of the fact that the warrant had been issued by a federal magistrate, executed by federal officers, and was presumably valid under the fourth amendment. It is not self-evident that the fruits of such a search should be suppressed in Washington courts under the Washington Constitution. In light of State v. Williams, 94 Wash. 2d 531, 617 P.2d 1012 (1980) (suppressing on nonconstitutional grounds voice recordings lawfully made by federal officers), one can assume that the Washington court could have unearthed a ground for suppression. It is certainly arguable that a refusal to suppress would result in state officials attempting to persuade federal officials to obtain evidence by the use of methods violating the state, but not the federal Constitution, with a consequent erosion of state constitutional rights. *Cf.* Elkins v. United States, 364 U.S. 206 (1960) (articles obtained as a result of an unreasonable search and seizure by state officers, without involvement of federal officers, not admissible against defendant in a federal criminal trial). Nonetheless, some analysis of the issue would have been of value to the bar.

98. 102 Wash. 2d 506, 688 P.2d 151 (1984).

99. *Id.* at 514, 688 P.2d at 156.

doing so, the court rejected (or distinguished) still another United States Supreme Court decision, but it based the rejection on a thoughtful distinction between the wording of section 7 and that of the fourth amendment.[100]

The distinction is not difficult to draw. The issue in the case was whether the overflight, which was not authorized by a warrant or by any exception to the warrant requirement, violated a constitutional right of the defendant. For fourth amendment purposes, the answer depends upon whether an overflight amounts to a "search." The answer to that depends, in turn, upon whether the overflight intrudes upon a "reasonable" or "legitimate" expectation of privacy.[101] Privacy is not expressly mentioned in the text of the fourth amendment, but the United States Supreme Court has held that the amendment protects privacy interests.[102] In order to effect that protection, the Court developed the notion that a violation of a legitimate expectation of privacy is a "search" for purposes of the fourth amendment.[103] The Washington Constitution, by contrast, expressly protects "private affairs." There is no need to resort to an artificial interpretation of "search" to confer this protection. The *Myrick* court could thus properly make the following statement: "In contrast [to the fourth amendment] due to the explicit language of Const. art. I, § 7, under the Washington Constitution the relevant inquiry for determining when a search has occurred is whether the state unreasonably intruded into the defendant's 'private affairs.' "[104] In explication of this standard, the court added:

> Const. art. I, § 7 analysis encompasses those legitimate privacy expectations protected by the Fourth Amendment, but is not confined to the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many

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100. *Id.* at 513, 688 P.2d at 155.

101. The "reasonable expectation of privacy" test originated in Katz v. United States, 389 U.S. 347 (1967). The quoted phrase is not actually used in that case, but appears to be a paraphrase of the following language in the concurring opinion of Mr. Justice Harlan: "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as 'reasonable.' " *Id.* at 361. The test was modified to one of "legitimate expectation of privacy" in Rakas v. Illinois, 439 U.S. 128, 142 (1978).

102. *See* Katz v. United States, 389 U.S. 347, 350-51 (1967).

103. *Id.* at 353.

104. *Myrick*, 102 Wash. 2d at 510-11, 688 P.2d at 153-54.

> aspects of their lives. . . . Rather, it focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.[105]

The court also distinguished[106] *Oliver v. United States*,[107] which held that "open fields" (encompassing all lands beyond the "curtilage" of an adjacent dwelling) are not entitled to fourth amendment protection.[108] The conclusion in *Oliver* that people have no "legitimate expectation of privacy" in open fields was based in part on the proposition that open fields were neither "houses" nor "effects," and thus not within the scope of the fourth amendment.[109] Again contrasting Washington law, *Myrick* stated that section 7 "precludes a 'protected places' analysis and mandates protection of the person in his private affairs."[110]

The difference in wording between the two constitutional provisions provides ample justification for construing them differently in situations such as those presented in *Myrick*. The Washington Supreme Court's carefully articulated reliance on the difference is a welcome sign of the court's willingness to relate analysis of section 7 to its textual provisions. The rule fashioned by the court, however, is not particularly helpful. The rule refers to, but does not identify, "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant."[111] Without further explication, the rule is a tautology. Moreover, the court appears to utilize the reasonable expectation of privacy test in determining the validity of the *Myrick* overflight.[112] Finally, the court's conclusion that an overflight at an altitude of 1500 feet, without visual enhancement, did not unreasonably intrude upon the defendant's "private affairs" is a subjective conclusion buttressed solely by reference to cases applying the concept of reasonable expectation of privacy to overflights.[113]

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105. *Id.* at 511, 688 P.2d at 154.
106. *Id.* at 513, 688 P.2d at 155.
107. 104 S. Ct. 1735 (1984).
108. *Id.* at 1740.
109. *Id.*
110. *Myrick*, 102 Wash. 2d at 513, 688 P.2d at 155.
111. *Id.* at 511, 688 P.2d at 154.
112. *Id.* at 511-14, 688 P.2d at 154-56.
113. *Id.* at 511-12, 688 P.2d at 154.

The decision gives little guidance to law enforcement officers beyond telling them that if they overfly suspected marijuana farms at an altitude no lower than 1500 feet and can identify the marijuana without using binoculars or other vision-enhancing devices, they are reasonably safe. The rule articulated in *Myrick* is ostensibly quite different from that developed by the United States Supreme Court. Any difference in application, however, is at this writing speculative. The suspicion that the Washington Supreme Court's search-and-seizure jurisprudence begins with the presumptive rejection of fourth amendment doctrine of its current federal counterpart is not wholly dispelled.

III. Competing Theories

The seven modern cases interpreting article I, section 7 have laid the groundwork for articulation of a comprehensive theory on which further development of the section should be based. This Article presents three competing theories and suggests that the Washington Supreme Court consciously and expeditiously choose one from among these three theories or any others that may be proffered by commentators or developed by the court itself. Settling on a single theory, while not a practical necessity, would add clarity, predictability, and consistency to the development of the law. The three theories proposed here, given names upon which improvement can surely be made, are: the "literal" theory; the "orthodox" theory; and the "exigency" theory.

A. The "Literal" Theory

The "literal" theory is so called because it purports to apply as written the actual language of section 7: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."[114] The radically different nature of this language from the fourth amendment has been blithely used as a ground for departing from United States Supreme Court interpretations of the fourth amendment, but the words of section 7 itself have been virtually ignored.[115] Yet close examination of those nearly unique words[116] demonstrates that they are capable

114. Wash. Const. art. I, § 7.

115. *See, e.g.*, State v. Chrisman, 100 Wash. 2d 814, 818, 676 P.2d 419, 422 (1984).

116. The only state constitutional provision identical to Wash. Const. art. I, § 7, appears to be Ariz. Const. art. II, § 8. This information is derived from a series of mem-

of sustaining an interpretive theory of great merit.[117]

Simply put, the literal theory asserts that article I, section 7 justifies all of, and only, those home invasions or privacy disturbances authorized by statute, common law, or, perhaps, rules and express policies adopted by politically responsible institutions. Put differently, official intrusion into protected interests could be justified only by the express authorization of the deliberative processes of government or by the sparse and tested principles of the common law. Express authorization, unless invalid under some other principle, would be judicially honored.

After seventy years of judicial creation of search-and-seizure law from constitutional principles, the idea of entrusting privacy protection to the political process sounds both radical and naive. Yet the idea is both ancient and of proven worth. It is instructive to read the quotation selected by the Washington Supreme Court in *Ringer* as epitomizing both the common law and article I, section 7:

> [E]very official interference with individual liberty and security is unlawful *unless justified by some existing and specific statutory or common law rule*; any search of private property will similarly be a trespass and illegal unless some recognized lawful authority for it can be produced; in general, coercion should only be brought to bear on individuals and their property at the instance of regular judicial officers acting in accordance with established and known rules of law, and not by executive officers acting at their discretion; and finally it is the law, whether common law or statute, and not a plea of public interest or an allegation of state necessity that will justify acts normally illegal.[118]

This quotation admirably states a bold, old principle: that the enemy of liberty is the executive official doing his job according to his own best idea of how to proceed, and that liberty is safeguarded by a demand for adherence to precise and predetermined legal principles. The principles that lie at the core of our protection from wrongful privacy invasions did not spring forth from the brow of an Olympian jurist agonizingly meditating

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oranda concerning WASH. CONST. art. I, § 7, prepared in 1983 for Justice James M. Dolliver of the Washington Supreme Court by Craig Schuman, a student at the University of Puget Sound School of Law, and used with the kind permission of Justice Dolliver.

117. *See infra* text accompanying notes 118-30.

118. 100 Wash. 2d at 691, 674 P.2d at 1243 (quoting P. POLYVIOU, SEARCH & SEIZURE 9 (1982)) (emphasis added).

upon constitutional mysteries. Rather, they accreted over the years as judges and legislative bodies attempted to resolve, upon principled bases, the eternal tensions between individual and governmental rights. In other words, both we and those from whom we derive our juridical heritage are and have always been well served by a system that protects privacy by demanding a specific grant of legislative or common-law authority to abridge privacy rights.

One of the more lamentable consequences of "judicial activism" is the tendency toward judicial and public perception of the courts as the sole guardians of liberty, the lonely sentinels who watchfully hover over our precious freedoms lest they be snatched away, like an infant by an eagle, by a rapacious legislature. If the history of Washington is an example, however, the legislature has been diligent in its defense of privacy and loath to authorize its violation, whereas the judiciary has been traditionally reluctant to interfere with perceived executive prerogative. The modern Washington statutes regulating electronic eavesdropping and unauthorized voice recording[119] go far beyond the preexisting demands of state or federal case law. The "knock-and-wait" laws,[120] sometimes perceived as a restriction on police rights to enter houses, are actually the sole source of authorization to enter and are grudgingly conditioned upon the fulfillment of certain prerequisites to entry. The exceptions to the knock-and-wait rule have been judicial creations.[121] By contrast, the record of an earlier Washington Supreme Court, set forth candidly and in detail in *Ringer*,[122] is that of a sorry, steady expansion of the search power of the police, on a case-by-case basis, far beyond any principled justification.[123]

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119. WASH. REV. CODE § 9.73.030 (1983) makes unlawful the recording of any communication over telephone or radio between two or more individuals, or of any private conversation, without first obtaining the consent of the individuals involved. The statute provides exceptions for news-gathering employees who have prior consent, or who make the recording device obvious, and for calls of an emergency nature, such as the reporting of a fire, crime, or other disaster.

120. WASH. REV. CODE § 10.31.040 (1983) provides: "To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other inclosure, if, after notice of his office and purpose, he be refused admittance."

121. *See* Dalia v. United States, 441 U.S. 238 (1979); Ker v. California, 374 U.S. 23 (1963); State v. Coyle, 95 Wash. 2d 1, 621 P.2d 1256 (1980); State v. Young, 76 Wash. 2d 212, 455 P.2d 595 (1969).

122. 100 Wash. 2d at 692-96, 674 P.2d at 1244-46.

123. The court in *Ringer* explained that the expansion of search power was accom-

The Washington experience thus bolsters the proposition that the legislature may be even more stringent than the courts in limiting police powers. Nor would reason point to a different result. If the Washington Supreme Court were to announce that henceforth it would permit only those privacy invasions affirmatively authorized by statute, law enforcement personnel would make a concerted effort to obtain authorization for the kinds of conduct they deem necessary. A response by the civil-liberties lobby would be certain, and a public debate would begin. The importance and newsworthiness of the debate would spur public interest and participation. The issue would be: what invasions of home and privacy should be permitted, and on what conditions? There is not the slightest reason to think that citizens would cavalierly surrender their privacy rights in the face of any but the most compelling demands for official intrusion. Could it be seriously contended that the public or its legislative representatives would authorize comprehensive warrantless automobile searches on probable cause or "incident to arrest" when no more than police convenience could be offered to support them? In the context of a legislative debate, the citizenry could scarcely lose sight of the fact that its own liberties would be in issue.

By contrast, the decision facing a court in determining the validity of a search or seizure already accomplished is inextricably bound up with the issue of whether to apply the exclusionary rule and "free the guilty." Courts have an understandable reluctance to do so, particularly without support from any other branch of government. The citizen who hears of such a decision may have great difficulty in identifying with the "criminal" who has been let off "on a technicality" and is likely to lose sight of the protection of privacy issue in his outrage at a perceived injustice. An attempt to control police conduct through legislative authorization would thus quite probably produce both tighter control and greater public support for it than result from the present judicial development of case law.

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plished through cases that were "all without historical justification and are inconsistent with traditional protections against the ability of law enforcement officers to make warrantless searches and seizures." *Id.* at 699, 674 P.2d at 1247. The expansion of the search power was accomplished through a steady disregard of WASH. CONST. art. I, § 7, by focusing on the fourth amendment to the United States Constitution. The courts' expansions of the exceptions eventually led to a situation in which the exceptions threatened to swallow the rule that a warrant is required for a legal search. 100 Wash. 2d at 698, 674 P.2d at 1247.

In fact, the most difficult question in applying the "literal" theory might lie in deciding what effect, if any, to give to judicially created authorizations of police conduct. The term "authority of law" in section 7 would doubtless include any authority conferred by established principles of English common law.[124] But should the principle of common-law authorization be applied to permit courts to create new kinds of authorized police conduct in the course of case adjudication? Fourth amendment jurisprudence, not to mention that of section 7, has developed as almost exclusively judge-made law. Judicial development offers the great advantage of flexibility in dealing with situations unforeseen (though probably not unforeseeable) by a legislature. The early history of the Washington Supreme Court[125] and the recent record of the United States Supreme Court,[126] however, demonstrate an unsettling judicial propensity to allow erosion of civil liberties through the decision of difficult cases.

A strong argument can be made that if law enforcement lacks the foresight to request detailed and express legislative authorization for its conduct or lacks the ability to obtain authorization through persuasion, it ought not to demand judicial ratification for its completed and prospective acts. Why should the courts be allowed to give what the legislature has withheld?

A somewhat more difficult question is whether the term "authority of law" could be broadened enough to encompass rules, regulations, or formal policies promulgated by executive agencies such as police forces. The merit of using police rulemaking to control police discretion (supplementing, rather than supplanting, other fourth amendment requirements) has been urged by Professor Anthony G. Amsterdam.[127] To the extent that police rulemaking is susceptible of development with widespread public participation, it offers some of the possibilities of the legislative approach in limiting police conduct. It also admits of much more detailed regulation than any other approach. Self-regulation in the interest of the regulated, however, has not had great success as a device for limiting govern-

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124. *See* authorities cited *supra* note 118 and accompanying text.

125. *See* cases discussed in State v. Ringer, 100 Wash. 2d 686, 692-96, 674 P.2d 1240, 1244-46 (1983).

126. *See supra* notes 14-48 and accompanying text.

127. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 346, 416-17 (1974).

mental conduct. The potential for abuse exists because the political accountability of a police force is much less than that of a legislature. To allow police rulemaking, in default of legislation, to serve as the only control on police conduct would be a questionable policy, no matter how good the faith or how high the professionalism of the police. Police rulemaking is certainly not mandated by any reading of section 7, and it is not endorsed here.

Despite the attractiveness of the "literal" theory,[128] in terms of both its fidelity to the text of section 7 and its considerable prospective policy merit, and despite its complete consistency with the general analysis set forth in *Ringer*, the Washington Supreme Court is scarcely committed to the adoption of this theory. The court's general statement in *Ringer* that section 7 "poses an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions"[129] is difficult to reconcile with a theory that would allow an informed electorate and its legislative representatives to authorize whatever arrests, searches, and seizures they wish. The Washington court's unfortunate dictum in another case, to the effect that legislatures should be deterred by application of the exclusionary rule from enacting unconstitutional statutes,[130] hardly reveals strong judicial confidence in the willingness and ability of the most democratic branch of government to protect the civil liberties of the demos.

The reluctance of the judiciary to trust the legislature is to be expected. A willing transfer of significant power from one branch of government to another is rare. The judicial activism by which courts arrogate power to themselves is still the norm, and new ideas (even old new ideas) are seldom quickly accepted. Federalism allows Washington to be a laboratory and to experiment with a system that puts maximum restrictions on official power to conduct searches and seizures and make arrests, with maximum public support for such restriction. Tempting as such experimentation may be, any device that diminishes the courts' role as protectors of freedom is unlikely to meet with enthusiastic judicial response. Therefore, it is necessary to examine other

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128. The author is deeply indebted to Justice Hans Linde of the Oregon Supreme Court for his articulation and development of this theory in private conversation. This does not necessarily imply that Justice Linde endorses the theory.

129. 100 Wash. 2d at 690, 674 P.2d at 1243.

130. State v. White, 97 Wash. 2d 92, 105-08, 640 P.2d 1061, 1068-70 (1982).

theories.

B. The "Orthodox" Theory

The theory that best explains what the Washington Supreme Court has done (though not what it has said) in interpreting article I, section 7 is that the constitutional provision embodies the orthodox view of the fourth amendment. The orthodox view is that the United States Supreme Court's fourth amendment jurisprudence is fundamentally sound, except to the extent that its logical principles have been savaged by a number of patently irrational decisions, particularly on the part of the "Burger Court."[131] It would be crude, a trifle cynical, and perhaps an overstatement as well, to state that this view adopts uncritically all United States Supreme Court decisions restricting police activity and accepts those authorizing police activity only to the extent that they are rationally persuasive.[132] Since the Washington court must accept the minimal protections afforded by the fourth amendment, the court has few occasions to question its federal counterpart's restrictions on official conduct. Presumably that fact, rather than a persistent bias, explains the paucity of such questioning in the Washington Reports.

The orthodox view, in its simplest form, requires that searches or seizures (including arrests) should be made on the basis of warrants issued by neutral and detached magistrates, on probable cause, and that the warrants must particularly describe the objects of the search or seizure.[133] A warrant may be dispensed with only if one or more of a limited number of exceptions to the warrant requirement are present. These exceptions are for situations that normally require necessity, though actual

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131. *See* United States v. Ross, 456 U.S. 798 (1982); New York v. Belton, 453 U.S. 454 (1981); United States v. Robinson, 414 U.S. 218 (1973).

132. The court stated in *Chrisman*: "We are not, however, limited to review under the Fourth Amendment. The federal constitution only provides minimum protection of individual rights. Accordingly, it is well established that decisions from the federal courts 'do not limit the right of state courts to accord . . . greater rights.' " 100 Wash. 2d at 817, 676 P.2d at 422.

133. *See, e.g.*, U.S. CONST. amend. IV: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *See also* WASH. SUP. CT. CRIM. R. 2.3: "If the court finds that probable cause for the issuance of a warrant exists, it shall issue a warrant . . . identifying the property or person and naming or describing the person, place or thing to be searched."

necessity need not be present in a particular case.[134]

Several United States Supreme Court decisions have departed from the orthodox doctrine, usually by enlarging warrant-requirement exceptions to include large classes of cases in which no necessity for dispensing with a warrant exists.[135] The Washington Supreme Court's rejections of these decisions, as well as other less exceptionable decisions,[136] are fully explainable by the orthodox theory. The orthodox theory does not represent poor policy. Its principles are rational, workable, and tested. Its difficulties lie in its application to state constitutional search-and-seizure clause provisions generally, and to section 7 in particular.

Any state court that interprets its own constitution by following generally the decisions of the United States Supreme Court should give at least some consideration as to why it is doing so. Textual similarity, or even identity, of the federal and state provisions is not sufficient reason for giving federal decisions even a presumption of soundness. The existence of a fully developed federal jurisprudence makes it convenient to employ such a presumption and saves a good deal of analysis. If the state and federal provisions both have the same meaning, however, the federal court does not enjoy a superior ability to determine that meaning. State courts ought always to give nonbinding decisions of the United States Supreme Court only such effect as their persuasiveness justifies. The state courts should be obliged to develop their own jurisprudence within only the limits of their own energy. Hence, an interpretive theory that unquestioningly accepts all United States Supreme Court jurisprudence, save that which is both distasteful and dispensable, is fundamentally flawed.

In Washington, however, the problem is greatly compounded by the disparity in language between the two provisions.[137] It is difficult to maintain that a constitutional convention that explicitly rejected a provision identical in wording to

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134. *See generally* C. WHITEBREAD, *supra* note 78, at 102-08. Professor Whitebread sets forth a detailed discussion of two competing theories held by various members of the United States Supreme Court. The orthodox view, the theory set forth in the text accompanying this footnote, is the theory that Professor Whitebread identifies as prevailing at the time he wrote his book in 1980.

135. Most notable are United States v. Ross, 456 U.S. 798 (1982); New York v. Belton, 453 U.S. 454 (1981); United States v. Robinson, 414 U.S. 218 (1973).

136. *See* cases cited *supra* note 14.

137. *See supra* notes 1-2 and accompanying text.

the fourth amendment, in favor of one bearing no resemblance to it, intended that the language would embody the same substance as the fourth amendment. The Washington drafters could hardly have been in rebellion against United States Supreme Court jurisprudence, which, at the time the Washington Constitution was adopted, consisted of one significant decision.[138] The drafters must therefore have intended that the provision be construed in a manner fundamentally different from the rejected fourth amendment twin. An interpretation of section 7 as a document enshrining the real fourth amendment, without the regrettable heresies of the most recent decade,[139] is beyond the powers of this author to justify.

C. The "Exigency" Theory

Doubtless aware of the limitations of the orthodox view, the Washington Supreme Court has made strides toward the articulation of the "exigency" theory, which seems to explain both *State v. Ringer*[140] and *State v. Chrisman*,[141] the "heavenly twins" or the "gruesome twosome," depending on one's point of view, of Washington search-and-seizure law. The theory seems to be that every warrantless search, seizure, or arrest is justifiable only if the search is necessary and the exigencies of a particular situation preclude resort to a warrant.[142] The qualifier "seems" is used because it is not at all clear that the court intended such a broad rule.

The uncertainty arises because the *Ringer* decision appeared to accept the propriety of a search incident to a lawful arrest.[143] The *Ringer* court quoted liberally, however, from decisions that allow such a search only for weapons or evidence of the crime for which the arrest was made, and only when there is some reason to think that weapons or evidence will be found.[144] Naturally, in those circumstances, resort to a warrant is out of the question. Exigent circumstances are present, but the presence of necessity appears to depend on whether the police have some reason to think that the particular arrestee has a weapon

138. Boyd v. United States, 116 U.S. 616 (1886).
139. These heresies are exemplified by the decisions cited *supra* note 135.
140. 100 Wash. 2d 686, 674 P.2d 1240 (1983).
141. 100 Wash. 2d 814, 676 P.2d 419 (1984).
142. *Ringer*, 100 Wash. 2d at 701, 674 P.2d at 1248.
143. *Id.* at 699, 674 P.2d at 1248.
144. *Id.* at 692-94, 674 P.2d at 1244-45.

or concealable evidence.

In *Chrisman*, the court held that an officer was entitled to escort an arrestee into the arrestee's room only if there was some reason to think that the arrestee would escape or seize a weapon, and only if the officer was in fact concerned that the arrestee would do so.[145] Absent these circumstances, entry into the room was unnecessary.[146] Under traditional rules, a right to search or accompany the arrestee would arise in every case of arrest, simply because arrests generally carry the potential for seizure of weapons, destruction of evidence, or escape, even if the facts of the particular case did not give rise to suspicion that the particular arrestee would do any of those things.[147]

The exigency theory has been criticized[148] because of the potentially grave danger faced by police if they must take the risk that an arrestee whom they place in the rear of a patrol car is armed unless they can point to some specific indication that he may be armed. The gravity of the risk to an arresting officer when the arrestee's possession of a deadly weapon goes undetected, despite its remoteness, speaks strongly in favor of allowing a routine weapons search whenever a full-custody arrest is made. An additional, though less compelling, argument would support a routine search for destructible evidence in the same situation. Otherwise, an arrestee could easily stuff a packet of drugs behind the rear seat of a patrol car, casting suspicion upon any recent rider in the car when the drugs are discovered.

The Washington Supreme Court could make clear, without doing violence to the language or concepts of *Ringer* and *Chrisman*, that a routine search for weapons (and perhaps for contraband or destructible evidence as well) is a permissible incident of a full-custody arrest. The court would thus leave only the full-custody arrest exception to a general rule that demonstrable necessity and exigency in each particular case are requisites of any warrantless intrusion.

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145. 100 Wash. 2d at 821, 676 P.2d at 424.

146. *Id.* at 819-20, 676 P.2d at 423-24.

147. The traditional theory was first developed in Chimel v. California, 395 U.S. 752, 763 (1969). Simply stated, if an arresting officer is allowed to search an arrestee and the area of the arrestee's immediate control, then the officer should also be allowed to search any area with which the arrestee has come into contact. Under this theory, there is always a risk that the arrestee may escape, destroy evidence, or grab a weapon that would be dangerous to the arresting officer. The United States Supreme Court followed this theory in Washington v. Chrisman, 455 U.S. 1, 7 (1982).

148. *See supra* text accompanying notes 74-77.

As the exigency theory is thus modified, what are its merits and demerits? The exigency theory's strength lies in its clarity and simplicity. One weakness, among others, is that the theory depends heavily upon the ability of the individual law enforcement officer to make sound judgments in difficult, pressured situations, haunted always by the spectre of being unable to convince a court later of the objective soundness of his judgment. Police officers are more comfortable following detailed rules. A defined rule, moreover, may also better control police activity and limit police discretion than a rule that places primary emphasis on sound judgments in individual cases.[149]

The exigency theory's second weakness is that, while it would undoubtedly encourage the use of warrants, it would inevitably diminish their quality. Its primary effect would be to increase the use of telephonic warrants. While there is no reason why such warrants cannot meet the constitutional demands of probable cause and particular description, they are less likely to do so than traditional warrants. Ordinary warrant procedure can involve in the application process the services of prosecutors or other legal advisors trained to ensure that a warrant and its supporting affidavit meet constitutional requisites.[150] In contrast, a telephonic warrant is normally based on a two-way conversation between a magistrate and the officer seeking the warrant.[151] Neither the warrant nor its supporting testimony can be reduced to writing in advance with the advice of law-trained drafters. In fact, the practical difficulties of involving any third person in the quick issuance of a telephonic warrant would be almost insuperable. Without such involvement, warrants are substantially less likely either to meet constitutional standards or to provide meaningful protection.

IV. Consequences of Theoretical Choices

It is doubtful that further material development of a section 7 jurisprudence can take place without a firm choice of a theoretical approach to its provisions. The time is ripe for the Washington Supreme Court to make such a choice, either from among

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149. *See* Amsterdam, *supra* note 127, at 416.

150. State v. Ringer, 100 Wash. 2d 686, 701, 674 P.2d 1240, 1249 (1983); Wash. Sup. Ct. Crim. R. 2.3(c).

151. *See, e.g., Ringer*, 100 Wash. 2d at 696, 674 P.2d at 1246 (citing State v. Michaels, 60 Wash. 2d 638, 374 P.2d 989 (1962)).

the foregoing alternatives, or from any other adequate theories that may commend themselves to the court. Any choice among competing theories should be made with as much insight as possible into the logical consequences of each choice. The following discussion will outline some of the predictable consequences of choosing any of the three theories identified in this Article.

The chief differences among the competing theories lie in the circumstances in which warrants are not required. The consequences of theoretical choices are thus likely to be greatest in the applicability of the exceptions to the search warrant requirement.

The most important exception eliminates the warrant requirement for search incident to a lawful arrest.[152] This exception raises questions in two major areas: (1) lawfulness of the arrest; and (2) propriety of the incident search. The question of lawfulness of the arrest is an independent one under at least the fourth amendment, as it constitutes a "seizure" of the "person" within the meaning of the amendment.[153] Since an arrest warrant is required by the fourth amendment, absent exigent circumstances, as a condition of entering the arrestee's home to make an arrest,[154] the difficult question concerns the lawfulness of a warrantless arrest in a public place when obtaining a warrant would be feasible. The United States Supreme Court has held, based on common-law tradition, that such an arrest is lawful.[155]

Under the literal theory, the lawfulness of such an arrest would depend partly upon whether it had been authorized by statute. Express legislative authorization would be sufficient. Because of the clear common-law authority for such an arrest, however, legislative authorization would appear not to be strictly necessary. Nonetheless, the Washington Supreme Court could legitimately declare the question fit for public debate, announce that it would no longer rely upon the common-law rule, and await a legislative response.

Under the orthodox theory, the well-established character of the common-law rule would justify inclusion of the public warrantless arrest on the list of traditional, and therefore per-

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152. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

153. *Id.*

154. Payton v. New York, 445 U.S. 573, 576 (1980).

155. United States v. Watson, 423 U.S. 411, 418 (1976) (the crucial question is whether there is probable cause).

missible, police practices. An argument could be made, however, that the common-law credentials of the rule have been overstated by the United States Supreme Court, which veered from orthodoxy in adopting it. Proper resolution would require a detailed examination of the common-law rule and the modern instances of its application.

Finally, under the exigency theory, the warrantless arrest would presumably fail. The very feasibility of obtaining a warrant and the lack of exigency or necessity for failure to do so dictate the result.

The question of whether a search is properly incident to an arrest has already been alluded to. The United States Supreme Court in *Chimel v. California*[156] set forth a reasonable, defensible position when it limited the scope of searches incident to arrest to the area within the arrestee's immediate control. The Court justified searches incident to arrests because police need to confiscate weapons and destructible evidence. None of the three theories identified in this Article would necessarily justify expansion beyond the *Chimel* doctrine of the scope of searches incident to arrest.

For instance, in *New York v. Belton*,[157] the Court sanctioned the search of the entire passenger compartment of an automobile incident to the arrest of the driver. This decision is beyond rational justification and could not meet the tests of either the orthodox or the exigency theory. A small warning flag goes up, however, when the literal theory is considered. Only the narrowest kind of search incident to arrest would be justified absent express legislative authorization. This is an area, however, in which the legislature might be tempted to confer such authorization. Expansive searches incident to arrest do not merely suit police convenience, they also permit searches that otherwise often could not take place at all. For example, if police arrest a driver without probable cause to search the vehicle, neither the "automobile exception" nor the issuance of a search warrant could justify a search of the vehicle. Both require probable cause.[158] The resultant inability to search means that much reliable physical evidence will be undiscoverable. Expansion of the scope of search incident to arrest to *Belton* limits or beyond

156. 395 U.S. 752 (1969). *See supra* note 147.

157. 453 U.S. 454 (1981).

158. Carroll v. United States, 267 U.S. 132, 147 (1925); U.S. CONST. amend. IV.

would doubtless be effective in bringing evidence to light and thus has a certain appeal to law-enforcement-minded legislators. Presumably, the citizenry would not sit still for such a legislative assault on civil liberties, but a public unable to identify with arrestees might feel it has no stake in the matter and bow before the always-persuasive crime-fighting blandishments of law enforcement. The risk that something like this could occur should be borne in mind when evaluating the literal theory on policy grounds.

All three theories would permit a weapons-and-evidence search of the person of an arrestee under some circumstances. The exigency theory, in its harshest form, would demand some indication of danger for a weapons search and would confine the evidence search to evidence of the crime for which arrest is made.[159] The merits and demerits of the exigency approach in this regard have already been discussed.[160] The orthodox and literal theories would seem, on the basis of common-law tradition, to routinely allow weapons and evidence searches. To the extent that *United States v. Robinson*[161] allows these searches to exceed the limits of what might be necessary to protect the officer and prevent destruction of evidence, the Washington courts should not follow the *Robinson* decision.

The "automobile exception" would be effectively wiped out under any theory, as it has been in *State v. Ringer*,[162] subject to an unlikely legislative resurrection under the "literal" theory. The exception has a narrow justification under those circumstances when there is probable cause (that is, the basis for issuance of a search warrant) to search a vehicle and a real danger that the vehicle will be moved out of the jurisdiction before a warrant can be obtained.[163] The exception has been flagrantly abused by its employment in cases when the vehicle was under police control and thus going nowhere.[164] With the availability of telephonic warrants, there will be few cases in which the traditional justification applies. If the courts recognize a right to detain a vehicle for a reasonable time pending issuance of a war-

159. *See supra* text accompanying notes 140-44.

160. *See supra* text accompanying notes 148-49.

161. 414 U.S. 218 (1973).

162. 100 Wash. 2d 686, 700, 674 P.2d 1240, 1248 (1983).

163. Carroll v. United States, 267 U.S. 132, 153 (1925).

164. *See* United States v. Ross, 456 U.S. 798 (1982); Chambers v. Maroney, 399 U.S. 42 (1970).

rant on probable cause to search it, all justification for employment of the exception will evaporate.

The emerging "inventory search" exception would likewise have at most limited application under any theory. Under this exception, police are permitted to examine the contents of containers lawfully in police custody in order to compile "inventories" of those contents.[165] The "inventory" is justified on the theory that it protects the police or the bailee from false allegations of theft of the contents or negligence in handling.[166] The United States Supreme Court has upheld inventory searches in two cases,[167] on the ground that the police interests served were legitimate. The Court took the view that the availability of less intrusive means of serving those same interests was immaterial.[168] This approach is not entirely consistent with Washington case law, which seems to require that inventory searches be strictly limited in scope to that which is necessary to serve legitimate objectives.[169] Nor would the approach of the United States Supreme Court be consistent with any of the theories advanced herein.

There is, given the availability of less intrusive means, neither necessity nor exigency to satisfy the exigency theory, nor is there a common-law or traditional basis for the exception that would satisfy the orthodox theory to justify inventory searches. The political process is unlikely to produce an affirmative authorization to allow police routinely to inventory-search impounded cars because the citizenry would doubtless find the intrusions personally obnoxious. On the other hand, the public might be less opposed to a blanket authorization to inventory-search an arrestee's personal effects before putting him behind bars, and application of the literal theory might thus encourage a legislative grant of such authority.

The exception that has been characterized as involving "'hot pursuit,' evanescent evidence, and other 'emergency' searches"[170] would probably undergo no functional change under any theory. The exception definitionally involves exigent circum-

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165. *See* South Dakota v. Opperman, 428 U.S. 364 (1976).

166. *Id.*

167. Illinois v. Lafayette, 103 S. Ct. 2605, 2609-10 (1983); South Dakota v. Opperman, 428 U.S. 364, 369 (1976).

168. *See* Illinois v. Lafayette, 103 S. Ct. 2605, 2609-10 (1983).

169. *See* State v. Houser, 95 Wash. 2d 143, 155, 622 P.2d 1218, 1226 (1980).

170. C. WHITEBREAD, *supra* note 78, at 108.

stances and thus would meet the broad exigency test of *Ringer*.[171] There has been no significant abuse of the exception by the United States Supreme Court[172] and application of the exception would be consistent with the orthodox theory. On the other hand, it appears to lack common-law credentials and thus may require legislation for its existence as "authority of law" under the literal theory. The scope of such legislation would be an entirely proper one for prior legislative determination.

Consent searches present serious theoretical and many practical difficulties. They are highly commonplace activities whose theoretical justification has proved highly elusive.[173] The two consent-search problems most frequently encountered are: (1) the validity of defendant's own consent;[174] and (2) the validity of third-party consent.[175]

The United States Supreme Court's rule on the validity of the defendant's own consent is clear, though theoretically indefensible. Under *Schneckloth v. Bustamonte*,[176] the only criterion is voluntariness, to be determined on a case-by-case basis. The defendant need not be advised by the officer requesting consent, or even be aware, that he has a right not to consent.[177] This result, while not necessarily unsound, was reached in a most unsatisfactory manner. The Supreme Court accepted the notion that a consent to search was a waiver of the fourth amendment right to be free from unreasonable searches and seizures.[178] Disregarding the traditional definition of waiver as "the intentional relinquishment of a known right,"[179] the Court found a valid waiver of a right Bustamonte did not know he had by reducing that right to second-class status on the basis that it protects interests unrelated to the reliability of the guilt-determining process.[180]

The same result could have been reached much more easily and sensibly by simply recognizing a consent search as inherently reasonable. If it is entirely reasonable for a police officer to

171. 100 Wash. 2d 686, 701, 674 P.2d 1240, 1248 (1983).
172. *See* C. WHITEBREAD, *supra* note 78, ch. 8.
173. *Id.* at 197.
174. *Id.* at 206.
175. *Id.*
176. 412 U.S. 218 (1973).
177. *Id.* at 231-35.
178. *Id.* at 235-36.
179. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
180. *Schneckloth*, 412 U.S. at 237.

honor a householder's urgent request to enter a home and look for a burglar, it could hardly be inherently unreasonable for that officer to make a courteous request to conduct a detailed search and to act on the householder's actual or apparent assent. Differences between those two situations are matters of degree. (It may also be noted that the making of a request to search implies the right to refuse it.) Voluntariness is indeed important, for a police officer can reasonably believe he enjoys consent only if he believes that consent to be voluntary.

Third-party consent searches[181] present both similar and different problems. If the cases have a common denominator, it is that one may surrender his own privacy or property interests, even if in so doing he surrenders those of another.[182] The question could also be pursued as to whether the officer's reasonable belief in the authority of the third party to consent would suffice. If a consent search is a reasonable search, nothing more ought to be required than the officer's reasonable belief that he has consent.

Two competing theories justify consent searches. The first theory provides that a consent search is an actual waiver of fourth amendment rights by one competent or authorized to waive them. The second theory provides that a search based upon a reasonable belief that consent is present is a reasonable search.[183]

The orthodox theory could accept either of these competing theories, both of which are consistent with traditional fourth amendment adjudication. The literal theory would probably

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181. When two or more persons have equal rights in controlling or using premises or property, any of the parties may consent to a search of the property, subject to the same restrictions as normal consent searches. If evidence is found in such a search it may be used against any of the controlling persons. In this instance, the consent of the third party "constitutes a valid waiver of . . . [a] defendant's right to refuse search." C. WHITEBREAD, *supra* note 78, at 206.

182. *See* United States v. Matlock, 415 U.S. 164 (1974); State v. Bellows, 72 Wash. 2d 264, 432 P.2d 654 (1967). In *Matlock*, the defendant's roommate consented to having police officers search a room the two shared. 415 U.S. at 166. In *Bellows*, two defendants were arrested on larceny charges. The facts showed that the two had been acting in concert. Following their arrest, one of the defendants consented to a police search of their motel room. In the room, the officers discovered evidence that helped lead to the defendants' convictions. 72 Wash. 2d at 267-68, 432 P.2d at 656.

183. The waiver theory is the traditional one and apparently espoused in Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The reasonable belief theory was suggested in United States v. Matlock, 415 U.S. 164 (1974). *See* 2 W. LAFAVE, SEARCH AND SEIZURE § 8.3(g) (1978). The reasonable belief theory has been strongly criticized. *See* Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 64 (1974).

accept the second. The proper analysis of the language of section 7 would not be that a consent search is one made with "authority of law," which would seem to demand at least actual, rather than apparent, consent, and which would be a cumbersome way to refer to any kind of consent. Rather, the courts should hold that a consent search does not involve either a "disturbance" in private affairs or an "invasion" of a home.[184] Both of those words carry strong connotations of nonconsent and could not properly describe a consensual entry or search. Even apparent consent, if the appearance is reasonable, could hardly be called an invasion or disturbance.

The exigency theory does not appear to contemplate consent searches at all. If there is truly no room for them within its ambit, the theory's limitations are painfully evident. It is unthinkable that the Washington Supreme Court would abandon consent searches, which—apart from the danger of coercion, express or implied, and the ease of fabricating a claim of consent—are unexceptionable and so common as to be virtually unavoidable. Yet it is difficult to claim either necessity or exigency for a consent search.

"Stops and frisks" represent an important exception to the warrant requirement. As originally conceived, in *Terry v. Ohio*,[185] the exception contemplates a pat-down search for weapons, without warrant, probable cause, or grounds for arrest, of a person with whom an officer is in contact, when the officer has specific, articulable facts giving rise to a reasonable suspicion that the person with whom he is dealing is armed and dangerous. The practical justification for some such exception is apparent; its theoretical justification consists of a generalized claim of reasonableness.

The orthodox theory would probably accept most of the United States Supreme Court's stop-and-frisk cases, since they seem sound, both conceptually and in the light of experience. The exigency theory might do the same, since the emphasis of stop-and-frisk cases is on "specific and articulable facts," which must be identified in every case in order to justify a frisk. This approach is consistent with the exigency theory's demand that necessity and exigency be shown in each case.[186]

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184. *See supra* notes 178, 181 and accompanying text.
185. 392 U.S. 1 (1968).
186. *See supra* note 141 and accompanying text.

However, nothing in the exigency theory would legitimize the initial police-citizen contact that must be made before the right of frisk can arise. There is seldom a true need for such a contact since the officer could simply avoid the citizen. Yet the contact itself could easily be viewed as not involving a search or seizure at all. So viewed, the contact would not require legitimation, and the exigency provided by the "specific and articulable facts" would justify the frisk. But if the contact rose to the level of a "detention,"[187] it would require a justification not clearly provided under the exigency theory.

Under the literal theory, an entirely different approach to stop-and-frisk would be taken. The question would be one of legislative authorization, without which no stop-and-frisk would be permitted at all. The legislature would define the limits of permissible stop-and-frisk. The New York Legislature took such an approach, enacting a detailed stop-and-frisk statute.

In *Sibron v. New York*,[188] a companion case of *Terry*,[189] the Supreme Court refused to consider the constitutionality of the statute, focusing instead on whether the police conduct in that case met the constitutional criteria set forth in *Terry*.[190] With that precedent, the Washington Legislature could not write a fully effective stop-and-frisk statute that failed to meet the minimal constitutional criteria of *Terry*. The legislature would, however, have no difficulty in writing a statute imposing more severe restrictions on official conduct than demanded by that decision and its progeny. Such legislation, written with broad community participation, might well be restrictive, sensible, and unlikely to exacerbate police-community relations.

The foregoing, of course, attempts to do no more than scratch the surface in suggesting ways in which the more important exceptions to the warrant requirement might be applied in Washington, according to the search-and-seizure theory chosen. The analysis is not intended as a text or model, but primarily to

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187. *Cf.* United States v. Place, 103 S. Ct. 2637 (1983). In *Place*, the Court held that temporarily detaining one's person and luggage for exposure to a trained narcotics detection dog did not violate the fourth amendment when there was a basis for reasonable suspicion that the luggage contained narcotics. Respondent Place was detained at Miami International Airport after his behavior aroused the suspicion of law enforcement officers. *Id.* at 2640.

188. 392 U.S. 40 (1968).

189. 392 U.S. 1 (1968).

190. *Sibron*, 392 U.S. at 59-62. See *supra* note 185 and accompanying text for a discussion of *Terry*.

inform the choice among theories by suggesting some consequences of each choice.[191]

V. Adjudicative Principles Not Depending on Choice Among Competing Theories

The competing constitutional theories heretofore considered are irrelevant to a number of choices that the Washington Supreme Court will have to face in determining whether to follow United States Supreme Court decisions. Other principles are useful in making these choices.

A particularly interesting issue concerns the application of the concept of "reasonable" or "legitimate" expectation of privacy. This concept, originally articulated in *Katz v. United States*[192] as a device to expand the fourth amendment beyond the person and property protection mentioned in its text, has been used frequently and has been highly workable. Its principal utility lies in determining when certain official conduct, not clearly a "search" or "seizure," nonetheless qualifies as the functional equivalent of one or the other for fourth amendment purposes.[193] Thus, a violation of a legitimate expectation of privacy[194] is treated as a search or seizure. Conversely, a finding of no legitimate expectation of privacy, at least in the absence of what is clearly a "search" or "seizure," results in withdrawal of fourth amendment protections.

The Washington courts have used the expectation of privacy theory.[195] Indeed, it is a highly appropriate theory for

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191. Discussion of the administrative inspection cases, such as United States v. Biswell, 406 U.S. 311 (1972), Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), See v. Seattle, 387 U.S. 541 (1967), and Camara v. Municipal Court, 387 U.S. 523 (1967), has been omitted, principally because the cases do not appear to have influenced Washington law, nor do they appear likely to do so.

192. 389 U.S. 347 (1967).

193. *Id.* at 353. The concept is especially useful when one's privacy right is equated with one's property right under the fourth amendment.

194. The term was rechristened in this form by Justice Rehnquist in Rakas v. Illinois, 439 U.S. 128, 143 (1978). The difference in meaning between "reasonable" and "legitimate" expectation of privacy was explained in this way:

> A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.' . . . Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.

Id. at 143 n.12.

195. *See* State v. Seagull, 95 Wash. 2d 898, 632 P.2d 44 (1981); State v. Simpson, 95

Washington, in light of the express protection of privacy in section 7—a protection not found in the language of the fourth amendment. There is no reason why it should not continue to be extensively employed. The difficulty is that the doctrine has been flagrantly misused by the United States Supreme Court in such outrageous holdings as those that deny that a passenger has a legitimate expectation of privacy in the glove compartment of a car,[196] or that a property owner can legitimately expect privacy in his fenced fields beyond the "curtilage" of his dwelling house.[197]

The difficulty lies, however, not with the expectation of privacy theory but with its application. The unsupported bare assertions of presence or absence of legitimate expectation of privacy that pepper the opinions of the United States Supreme Court are simply wrong. The Washington courts should feel entirely free to ignore these decisions and reach their own conclusions as to when a legitimate expectation of privacy exists. They can do so by applying the standards set forth by the highest federal court[198]—standards that, despite their misapplication, are fundamentally sound.

The approach actually adopted by the Washington Supreme Court, however, is slightly but significantly different. In *State v. Myrick*,[199] the court focused on the express language of section 7 protecting privacy.[200] Instead of adopting the "reasonable expectation of privacy" language of fourth amendment analysis, it identified the relevant test as "whether the state unreasonably intruded into the defendant's 'private affairs.' "[201] The court

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Wash. 2d 170, 622 P.2d 1199 (1980). In *Seagull*, an officer on a routine search involving another matter viewed what he believed to be a marijuana plant on defendant's property. The court held that the officer was lawfully on defendant's property. From this information a search warrant was issued, leading to the confiscation of evidence upon which defendant's conviction was based. The court held that, as the officer was lawfully on the property and the material was in plain view, the defendant's privacy rights were not violated, as she could have had no expectation of privacy under the facts. 95 Wash. 2d at 901, 632 P.2d at 46. In *Simpson*, officers arrested the defendant on a warrant charging first-degree forgery. The officers also noted that the vehicle Simpson drove "did not match" him, so they impounded the vehicle and checked its identification number, finding that the vehicle had been stolen. The court ruled this impounding an intrusion into Simpson's legitimate expectation of privacy. 95 Wash. 2d at 187, 622 P.2d at 1210.

196. Rakas v. Illinois, 439 U.S. 128 (1978).

197. Oliver v. United States, 104 S. Ct. 1735 (1984).

198. *See supra* note 194.

199. 102 Wash. 2d 506, 688 P.2d 151 (1984).

200. *See supra* notes 98-113 and accompanying text.

201. 102 Wash. 2d at 510-11, 688 P.2d at 153-54.

then proceeded to apply this test exactly as if it were properly applying the "reasonable expectation of privacy" criterion. If the language of section 7 does indeed call for a different privacy test from that used (and frequently abused) by the United States Supreme Court, such a test should be adopted. There seems little point, other than to twit the highest federal court, in discarding a quite workable test fashioned by that tribunal in favor of one having no real difference.[202]

Another problem that can be intelligently addressed without choosing among competing general theories of section 7 jurisprudence is that of assessing the sufficiency of evidence to show "probable cause" for the issuance of a search warrant or the making of a warrantless arrest. This assumes, of course, that a probable cause requirement will be read into section 7, which makes no reference to probable cause. The assumption is based on the proposition that requirements of probable cause and particular description are virtual logical corollaries of the idea of a warrant as a judicial authorization precluding the exercise of executive discretion. There would seem to be no point in dispensing with either probable cause or particular description, and no voice has been heard suggesting that either be jettisoned.

Given a requirement of probable cause, two approaches have developed for determining its existence in a particular case. The first is to establish specific criteria for its existence. The second is to examine in its entirety the evidence claimed to establish probable cause and make a subjective, case-by-case determination of its sufficiency. The first approach was taken by the United States Supreme Court in the 1960s, when it adopted the *Aguilar-Spinelli*[203] rule. Under this rule, the sufficiency of a

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202. The Washington court hinted at a difference between its approach and that of the fourth amendment when it stated that "§ 7 analysis encompasses those legitimate privacy expectations protected by the Fourth Amendment, but is not confined to the subjective privacy expectations of modern citizens who, due to well-publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives." *Id.* at 511, 688 P.2d at 154. If this suggests that the fourth amendment has been interpreted in such a way as to render an expectation of privacy "unreasonable" or "illegitimate" by virtue of surveillance technology advances permitting privacy invasions, it appears incorrect. No authority is cited for such a proposition. Indeed, the very premise of Katz v. United States, 389 U.S. 347 (1967), fountainhead of the concept of reasonable expectation of privacy, is that technological advances making possible privacy invasions do not diminish either the reasonableness or the likelihood of actuality of privacy expectations.

203. The rule is derived from, and named after, Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969).

hearsay declaration, by itself, to show probable cause depended on the establishment of two independent factors: the declarant's personal reliability and the basis of the declarant's knowledge. No matter how logically strong a showing may be made of the credibility of the hearsay declaration, failure to establish either of these factors was fatal. The second approach was taken by the same court in 1983 when it overruled *Aguilar* and *Spinelli* in *Illinois v. Gates*.[204] That case held that the sufficiency of the evidence was to be determined in light of the "totality of the circumstances."[205] Failure to establish one of the independent factors of declarant's personal credibility and the basis of declarant's knowledge was not necessarily fatal. These two approaches have been discussed in greater detail earlier in this Article.[206]

The Supreme Court made a strong argument in *Gates* for the proposition that probable cause can logically be established in at least some cases without slavish adherence to the demands of *Aguilar-Spinelli*. On that premise, the Court concluded that the *Aguilar-Spinelli* requirement of rigid obedience to its "two-prong" test was unsound and ought to be discarded.[207] Having reached this reasonable conclusion, however, the United States Supreme Court proceeded to find probable cause on the basis of an anonymous letter, corroborated by the results of an official investigation only as to matters that bore no indicia of criminality.[208] The letter stated that a couple named Gates was dealing in controlled substances and described the methods and routes that they used to transport the substances to their home.[209] Independent police investigation showed that the Gates couple followed in general those methods and routes, but failed to disclose any evidence of criminal activity.[210] The Supreme Court nonetheless concluded that the official corroboration sufficiently bolstered the credibility of the anonymous letter to justify a conclusion that the allegations in the letter were accurate.[211] The logic of this position is scarcely compelling.

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204. 103 S. Ct. 2317 (1983).
205. *Id.* at 2332.
206. *See supra* text accompanying notes 82-89.
207. *Gates*, 103 S. Ct. at 2332.
208. *Id.* at 2334-36.
209. *Id.* at 2335.
210. *Id.*
211. *Id.* at 2335-36.

Gates seems to be a case of a reasonable rule grossly misapplied. If so, the problem is not with the rule but with its application. In deciding whether to apply the "totality of the circumstances" rule enunciated in *Gates*, as in determining whether to apply the "reasonable expectation of privacy" rule, the Washington Supreme Court might well have considered whether the rule has intrinsic merit. If the court found such merit, it might have adopted the rule, while eschewing any misapplications by the federal courts. Instead, as we have seen in our earlier discussion of *State v. Jackson*, the Washington Supreme Court focused exclusively on the relative merits of *Aguilar-Spinelli* and *Gates*, assumed a necessity to choose between the two, and adopted the former.[212] The court failed to consider the possibility that *Gates* might represent a sound principle, cruelly abused by its discoverer, but quite valuable if applied rationally.

VI. Application of the Exclusionary Rule

The Washington judiciary, in construing section 7, will inescapably confront several issues regarding whether a given violation of the section calls for application of the exclusionary rule. A strong argument exists, of course, for the outright abolition of the rule. This Article, however, does not address that argument, principally because the author has nothing new to contribute to the debate. In view of Washington's long-standing commitment to the exclusionary rule[213] and the total absence of judicial criticism, it is assumed that the rule will continue in force. Nonetheless, the United States Supreme Court has chosen on several occasions not to apply the rule, despite clear fourth amendment violations. The question is whether Washington will follow suit in any or all of the categories in which application of the rule is withheld.

The key to answering this question is found in identifying the purpose or purposes behind the exclusionary rule and acting in furtherance thereof. Several purposes have been recognized. The first and most prominent is deterrence of official misconduct. In all practical respects, the United States Supreme Court currently recognizes only the deterrence purpose.[214] Deterrence

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212. *See supra* notes 90-93 and accompanying text.

213. The rule was adopted in State v. Gibbons, 118 Wash. 171, 203 P. 390 (1922).

214. *See* United States v. Leon, 104 S. Ct. 3405 (1984); Rakas v. Illinois, 439 U.S. 128, 137 (1978); Stone v. Powell, 428 U.S. 465, 479 (1976); Terry v. Ohio, 392 U.S. 1, 12

of official misconduct is also recognized in Washington[215] and elsewhere.[216] A second identified purpose, mentioned but never really approved by the United States Supreme Court, is the preservation of judicial integrity.[217] Under this theory, the courts become parties to official misconduct when they admit evidence obtained through such misconduct.[218]

More recently, additional theories have begun to emerge. Chief Justice Williams of the Washington Supreme Court began the process of articulating a theory that would recognize the exclusionary rule as a moral imperative not requiring utilitarian justification.[219] More recently, Justice Brennan began the development of a theory that is similar, but which adds the notion that the admission of illegally seized evidence is a new and independent fourth amendment violation in addition to the original unconstitutional search or seizure.[220]

These various theories deserve consideration in a depth far beyond the limited scope of this Article. Selection among them will ultimately be influenced by value judgments, and this author has no qualifications for attempting to impose his personal values on others. A generalized disposition for or against application of the exclusionary rule will inevitably be a factor in the selection process. Nonetheless, the following general statements about the merits of these theories would seem to be in order.

The deterrence theory has great merit because it provides an answer to the criticism that the exclusionary rule typically works substantial injustice whenever it is applied by excluding relevant, probative evidence, at great cost to the reliability of the guilt-determining process.[221] The answer (like the answer to an argument questioning the value of any evidentiary privilege) is that the rule works a compensating good by deterring official

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(1968).

215. *See, e.g.*, State v. Simpson, 95 Wash. 2d 170, 180-81, 622 P.2d 1199, 1206 (1980).

216. *See, e.g.*, People v. Martin, 45 Cal. 2d 755, 760, 290 P.2d 855, 857 (1955).

217. *See* United States v. Payner, 447 U.S. 727, 735-36 n.8 (1980); Stone v. Powell, 428 U.S. 465, 485 (1976); Terry v. Ohio, 392 U.S. 1, 12-13 (1968).

218. *See* People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 912 (1955).

219. *See* Adams & Nock, *supra* note 25, at 24-30 (discussing State v. White, 97 Wash. 2d 92, 109-10, 640 P.2d 1061, 1070-71 (1982)).

220. United States v. Leon, 104 S. Ct. 3430, 3433 (1984) (Brennan, J., dissenting).

221. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411-27 (1971) (Burger, C.J., dissenting).

misconduct.

The great defect in the deterrence theory is that it permits the argument that, in any particular category of cases, application of the exclusionary rule is not required because effective deterrence generally can be provided by application of the rule.[222] The idea seems to be that one string at a time can be removed from the bow of the violin without perceptible difference in tonal quality. One would imagine, however, that at some point the metaphor falls flat. In all events, application of only the deterrence theory seems inevitably to restrict application of the exclusionary rule itself.

By contrast, the theories of judicial integrity and "moral imperative," and what might be called the "Brennan doctrine,"[223] all militate in favor of application of the exclusionary rule in nearly every situation. The theories share a sense that application of the rule whenever there has been a constitutional violation is an act vindicating abstract justice, requiring no pragmatic justification. This high moral note represents the theories' strength; their weakness lies principally in the fact that they provide no satisfactory answer to the pragmatist who points to the high cost of the exclusionary rule and tenders a demand for a counterbalancing utilitarian justification.[224] Furthermore, to the extent that these theories depend upon vindication of outraged morality, they lose force in situations in which a particular constitutional violation is, if not "technical," at least devoid of moral culpability. In these situations, the morality of exclusion of valuable evidence itself becomes an issue.

One of the most conspicuous areas of refusal to apply the exclusionary rule is that involving the imposition of a requirement of "standing," or a demonstration that the search-and-seizure rights of the party seeking exclusion were violated.[225] In

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222. The rule has been held inapplicable on this ground when police relied in good faith on an apparently valid warrant, United States v. Leon, 104 S. Ct. 3405 (1984); in collateral-attack proceedings, Stone v. Powell, 428 U.S. 465 (1976); in grand jury proceedings, United States v. Calandra, 414 U.S. 338 (1974); and in civil tax proceedings, United States v. Janis, 428 U.S. 433 (1976).

223. *See* United States v. Leon, 104 S. Ct. 3430, 3433 (1984) (Brennan, J., dissenting).

224. A cynic has been defined as one who "knows the price of everything, and the value of nothing." O. WILDE, LADY WINDERMERE'S FAN Act I. The exclusionary-rule cynic is given no education by the "morality" theories in the value of the rule whose cost he accurately assesses.

225. *See* Alderman v. United States, 394 U.S. 165, 173 (1969).

current United States Supreme Court parlance, the term "standing" is abjured in favor of a requirement that a party seeking exclusion of evidence on fourth amendment grounds demonstrate a violation of his own legitimate expectation of privacy.[226] Here, however, the general principles that a "deterrence" rationale militates against application of the exclusionary rule and that a "morality" rationale militates in favor of the exclusionary rule break down. As demonstrated elsewhere,[227] proper application of the deterrence rationale would result in the imposition of little or no standing requirement, a truism that the United States Supreme Court has almost studiedly ignored.[228] At the same time, Chief Justice Williams' "moral imperative" rationale would logically produce a broad standing requirement that would refuse to allow a party the windfall of exclusion of evidence obtained entirely in violation of the rights of another.[229] Nonetheless, the Washington Supreme Court, without consideration of the relationship between standing and the purposes of the exclusionary rule, has adopted an "automatic standing rule" that can allow just such a windfall.[230]

It may be further noted that the "judicial integrity" rationale suggests abolition of any standing requirement, since it focuses upon the responsibility of courts to avoid soiling themselves with tainted evidence, regardless of whose rights were violated in the tainting. With respect to the "Brennan doctrine," the proper analysis is somewhat murky, as is the doctrine itself. Its central notion that admission of illegally obtained evidence works a new fourth amendment violation independent of the original search and seizure seems to militate in favor of a standing requirement. It would be incoherent to hold that a party against whom illegally obtained evidence was offered would have his constitutional rights violated anew by its admission when his rights were not violated by the original obtaining of the evidence.

The point is that a rational decision on whether to apply the exclusionary rule in a case of constitutional violation can be made only in light of the purposes of the exclusionary rule.

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226. *See* Rakas v. Illinois, 439 U.S. 128, 134 (1978). *See also* United States v. Salvucci, 448 U.S. 83 (1980) (rejecting the "automatic standing" rule).

227. *See* Adams & Nock, *supra* note 25.

228. *See* Rakas v. Illinois, 439 U.S. 128, 134 n.3 (1978).

229. *See* Adams & Nock, *supra* note 25, at 29-30.

230. *See* State v. Simpson, 95 Wash. 2d 170, 179-82, 622 P.2d 1199, 1206-07 (1980).

Acceptance or rejection of any individual purpose should proceed in the light of the logical consequences of the choice of principles.

A proper decision requires not only identification of the correct exclusionary rule purposes, but also their correct application. Failure of either can cause a court to go wildly wrong. The most recent and conspicuous example is found in the "good-faith exception" cases of *United States v. Leon*[231] and *Massachusetts v. Sheppard*.[232] These cases hold, broadly, that the exclusionary rule will not be applied when the police have acted in good faith on an objectively reasonable belief in the validity of a search warrant, despite the warrant's invalidity and, hence, the unconstitutionality of the search.[233] The rationale is simple, and simply flawed. The argument is that the purpose of the exclusionary rule is to deter police misconduct, that there is none when police reasonably believe in the validity of the search warrant they are executing, and that deterrence of police misconduct could not be expected to result from exclusion of the evidence.[234]

The "good faith" approach is exactly wrong, however, proceeding as it does from a misapplication of the deterrence rationale.[235] The Court's key mistake was in identifying the objective of the exclusionary rule as "deterrence of police misconduct." Although police misconduct is a common feature of fourth amendment violations, it is not an inevitable one. In light of *Leon* and *Sheppard*, the deterrence rationale ought to be recast as the prevention of fourth amendment violations. If prevention of fourth amendment violations is the purpose of the exclusionary rule, excluding the evidence in *Leon* and *Sheppard* would have admirably served this purpose. If fourth amendment violations will result in exclusion of evidence, the police reasonably can be expected to take whatever steps are necessary to avoid such exclusion, including ensuring the actual validity of

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231. 104 S. Ct. 3405 (1984).

232. 104 S. Ct. 3424 (1984).

233. In *Leon*, the warrant was issued without probable cause. 104 S. Ct. at 3411. In *Sheppard*, the warrant lacked particular description of the objects of the search. 104 S. Ct. at 3428. Both probable cause and particular description are, of course, demanded by the express language of the fourth amendment.

234. The misconduct involved is judicial and not thought subject to deterrence through application of the exclusionary rule.

235. The decision will be the subject of intense criticism on a number of other grounds. No comment on its validity in other respects is intended here.

the warrants they obtain and execute. The police can and should be encouraged to rely on the resources of prosecutors, departmental legal advisors, and anyone else with the expertise and interest to ensure the validity of warrants and their supporting affidavits. If these efforts are chronically unavailing, it may be that fourth amendment doctrines have become too complicated to be workable and need to be re-examined. If, as in *Leon* and *Sheppard*, prosecutorial involvement is insufficient to guarantee validity of the warrants, that means only what is already known: any system of deterrence falls far short of complete success.

In all events, if deterrence is the chosen instrument to prevent fourth amendment violations, it should be ruthlessly applied as the only device that encourages law enforcement to meet the absolute standards of the fourth amendment. When, as it must, the Washington judiciary faces the issue of whether to recognize a good-faith exception to the exclusionary rule, it ought to approach the matter with a good deal more care and breadth of vision than has been displayed by the United States Supreme Court.

VII. Conclusion

In the disarray of fourth amendment jurisprudence, state courts have a splendid opportunity for the creation of rational bodies of law governing searches, seizures, and related governmental intrusions on privacy. The Washington Supreme Court has seized the opportunity and is well on its way to carrying it out. But exploitation of the opportunity requires early enunciation of the applicable theories that must shape the creation of any rational body of law.

This Article identifies competing theories of search-and-seizure adjudication, particularly in light of Washington's relevant constitutional provision, and points out some of the consequences of the adoption of each. Although some of these theories are more persuasive than others, the author's principal objective is not to recommend one over another, but to provide a sort of road map, pointing out the destinations that, absent back-tracking or cutting cross country, lie at the end of the route chosen at each of several forks in the road.