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The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy

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THE ORIGIN AND DEVELOPMENT OF WASHINGTON'S INDEPENDENT EXCLUSIONARY RULE: CONSTITUTIONAL RIGHT AND CONSTITUTIONALLY COMPELLED REMEDY

For the past sixty-four years, Washington courts have excluded evidence obtained in violation of a defendant's right to privacy guaranteed in article 1, section 7 of the Washington Declaration of Rights.[1] In 1982, the Washington Supreme Court distinguished the state exclusionary rule[2] from its federal counterpart, holding that the Declaration's broader privacy protection and the years of independent state jurisprudence required the state exclusionary rule to apply whenever the defendant's right to privacy was violated.[3] However, due to major changes in the court's membership, a new majority seems to be forming behind a privacy protection that more closely reflects federal search and seizure jurisprudence with the inevitable result: the court has been asked to conform the state exclusionary rule to its federal counterpart.[4]

Underlying any court's analysis of the exclusionary rule are certain basic theoretical elements that determine whether a court takes a unitary or a bifurcated approach to exclusion.[5] To determine what theoretical elements

1. The Washington State Constitution is divided into 27 articles, the first of which contains the Declaration of Rights. WASH. CONST. art. 1, §§ 1–34. Based on article 1, §§ 7 and 9 of the Declaration of Rights, the Washington Supreme Court, in 1922, first recognized the exclusion doctrine in State v. Gibbons, 118 Wash. 171, 203 P. 390 (1922). *See infra* notes 79–93 and accompanying text.

2. The term "exclusionary rule" is employed in a variety of evidentiary contexts where a court suppresses evidence acquired in violation of a defendant's constitutional rights. However, for the purposes of this Comment, the term exclusionary rule refers exclusively to exclusion of evidence obtained in a search and seizure violative of either the federal or the state constitution. In the federal context, the term refers to the exclusion of evidence seized in violation of the fourth amendment, first required in Weeks v. United States, 232 U.S. 383 (1914), and applied against the states in Mapp v. Ohio, 367 U.S. 643 (1961). In the context of the Washington Declaration of Rights, the term refers exclusively to evidence seized in violation of article 1, § 7, first required in State v. Gibbons, 118 Wash. 171, 203 P. 390 (1922), and most recently discussed in State v. Bonds, 97 Wn. 2d 1, 683 P.2d 1024 (1982). The term also has been applied to the exclusion of evidence obtained in violation of the fifth amendment to the United States Constitution. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 467 (1966); State v. Lavaris, 99 Wn. 2d 851, 856, 664 P.2d 1234, 1237 (1983). *But see* New York v. Quarles, 104 S. Ct. 2626, 2633 (1984) (adopting a public safety exception to *Miranda* warnings requirement). The term also applies to the exclusion of evidence obtained in violation of the sixth amendment right to counsel. *See, e.g.*, Brewer v. Williams, 430 U.S. 387, 394–95, 406 (1977); Massiah v. United States, 377 U.S. 201 (1964); State v. Fitzsimmons, 93 Wn. 2d 436, 610 P.2d 893, *vacated*, 449 U.S. 977, *aff'd on remand*, 94 Wn. 2d 858, 620 P.2d 999 (1980). *But see* Nix v. Williams, 104 S. Ct. 2501, 2510 (1984) (adopting the "inevitable discovery" exception to the exclusionary rule).

3. State v. White, 97 Wn. 2d 92, 108–12, 640 P.2d 1061, 1070–72 (1982). *See infra* notes 178–84 and accompanying text.

4. *See infra* notes 198–201 and accompanying text.

5. *See infra* notes 22–28 and accompanying text.

underlie the Washington rule, the court must familiarize itself with the state rule's long history of independent application, which has never been fully explored. The court must also recognize the historical relationship between the state exclusionary rule and certain provisions of the Declaration of Rights.[6] Analysis of the Washington exclusionary rule's development reveals that, at minimum, exclusion is constitutionally compelled as the most effective remedy available to vindicate the defendant's right to privacy.[7] Moreover, failing to exclude violates the framers' intention to incorporate the exclusionary rule in the state privilege against compelled self-incrimination contained in article 1, section 9.[8] Finally, a failure to exclude eviscerates the defendant's article 1, section 7 rights in violation of the state due process guarantee contained in article 1, section 3.[9]

I. THE EXCLUSIONARY RULE CONTROVERSY: DETERMINING THE CONSTITUTIONAL CONNECTION

Traditionally, courts conceive of the exclusionary rule as either a constitutional right or one of several possible judicially created remedies.[10] A third view perceives exclusion as the remedy best able to make the applicable state or federal constitutional protection against unlawful search and seizure effective and, therefore, constitutionally compelled.[11] Exclusion's connection to the constitutional guarantee might have been unambiguously set out within the constitutional text. Unfortunately, neither the federal Constitution nor the Washington state constitution contains such unambiguous wording.

The textual differences between the federal and state constitutional guarantees against unlawful search and seizure are readily apparent. Article 1, section 7 provides:

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.[12]

6. *See infra* notes 211–374 and accompanying text.

7. *See infra* notes 124–46, 281–97 and accompanying text.

8. *See infra* notes 298–339 and accompanying text.

9. *See infra* notes 340–74 and accompanying text.

10. *See generally* Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983); Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983).

11. *See* Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U.L.Q. 621, 640–49; Stewart, *supra* note 10, at 1383–89.

12. WASH. CONST., art. 1, § 7. At the state constitutional convention of 1889, the framers of the Washington Declaration of Rights expressly rejected a proposed state provision identical to the fourth amendment of the United States Constitution. Instead, the framers adopted the present wording of article 1, § 7. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 51, 497 (B. Rosenow ed. 1962) [hereinafter cited as 1889 JOURNAL]; *see also* State v. Ringer, 100 Wn. 2d 686,

The fourth amendment provides:

> 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.[13]

Regardless of the significance one attaches to the textual differences, the two provisions do have one element in common—neither text specifies what consequences should attach when their substantive requirements are violated. Furthermore, no contemporaneous record indicates whether the framers of either provision considered the need for an express enforcement mechanism.[14] Nevertheless, the effectiveness of both guarantees depends upon a remedy attaching when a violation occurs.[15]

Since neither constitutional provision specifies an enforcement mechanism, a court must, at some point, determine how the constitutional guarantee will be made effective.[16] Two theoretical elements underlie this

690–91, 674 P.2d 1240, 1243 (1983). From 1978 through 1985, the Washington Supreme Court relied on this intentional difference in language to hold, in a variety of contexts, that article 1, § 7 embodied a broader protection than the fourth amendment. *See infra* note 160. However, critics of this broader protection approach argue that, by rejecting the fourth amendment text, the framers may have intended to provide less, rather than more, protection. *Ringer* Committee, RECOMMENDATION AND REPORT at Appendix A1 (1984) [hereinafter cited as RINGER REPORT] (copy on file with the *Washington Law Review*). *See infra* note 160. This argument is based on the fact that neither records of the Constitutional Convention nor contemporaneous newspaper accounts explain the framers' decision to reject the fourth amendment text. *See generally* 1889 JOURNAL, *supra*, at vi-vii (although a daily journal was kept, arguments presented in debate went unrecorded). *See also* State v. Ringer, 100 Wn. 2d 686, 690, 674 P.2d 1240, 1243 (1983). The *Ringer* Committee argued that since the federal Constitution did not restrict state and local officials at the time of the drafting of article 1, § 7, the state was free to choose lesser protection than that provided by the fourth amendment. United States Supreme Court jurisprudence at the time, however, indicates that the framers intended to provide broader protection. Note that this Comment addresses whether the framers intended to adopt wording that reflected the scope of fourth amendment guarantees as of 1889, not as of late twentieth century Burger Court interpretations. *See infra* notes 308–12, 316–18 and accompanying text.

13. U.S. CONST. amend. IV.

14. For the history surrounding the framing of article 1, § 7, see generally 1889 JOURNAL, *supra* note 12. For a brief discussion of the origins of the fourth amendment, see Stewart, *supra* note 10, at 1371. For a detailed account of the origins of the fourth amendment, see J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT ch. 1 (1966); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937).

15. Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11, 24 (1925); Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 373–75 (1981).

16. Atkinson, *supra* note 15, at 24; Mertens & Wasserstrom, *supra* note 15, at 373–75. The most frequently raised criticism of the exclusionary rule as a mandate of the search and seizure guarantee is that neither constitutional provision explicitly requires suppression. Therefore, a court could decline to nullify or invalidate the unconstitutional conduct and refuse to invoke the exclusionary rule. *See, e.g.*, Wolf v. Colorado, 338 U.S. 25, 28 (1949); Finley, *Who Is on Trial—The Police? The Courts? Or the Criminally Accused?*, 57 J. CRIM. L. CRIMINOLOGY & POL. SCI. 379, 384 (1966); Kaplan, *The Limits of*

determination: (1) the enforcement mechanism's relationship to the guarantee against unlawful search and seizure, as well as its relationship to any other constitutional provisions that may require a specific mechanism[17] and (2) the purposes thought served by enforcing the constitutional guarantees.[18] A court's perception of the source and purposes of the mechanism depends, in turn, upon whether a court allows the tension created by two competing responsibilities to influence its decision. On the one hand, courts have an obligation to preserve the defendant's individual rights guaranteed by the state constitution.[19] On the other hand, courts must be

the Exclusionary Rule, 26 STAN. L. REV. 1027, 1030 (1974). However, assuming the validity of this criticism, it then follows that no need for judicial review would arise under any constitutional provision, unless the constitutional text explicitly granted the judiciary the power to invalidate or nullify government actions which ran counter to the constitutional command. Schrock & Welsh, *Up from* Calandra: *The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 351 n.251 (1974). *See also* Kamisar, *supra* note 10, at 581–86; *infra* notes 247–50 and accompanying text. Consequently, unless article 1, § 7, unlike any other constitutional provision, does not contemplate judicial review of governmental conduct, then the "not explicit criticism" is, in reality, an attack on the institution of judicial review. Schrock & Welsh, *supra*, at 351 n.251.

17. *See* Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635, 650 (1978). The viability of any exception is greatly influenced by the remedy's theoretical basis. For example, "[i]f exclusion is considered a constitutional right, the Court would have a constitutional duty to uphold it and could not dispense with it simply because of good faith." *Id; see also* Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1119 (1978). Consequently, either a court will find that the constitutional provision itself mandates, by implication, the choice of a particular mechanism, or a court will find it is free to choose, using its supervisory power, whatever mechanism it deems most appropriate. This source determination is, in turn, dependent upon whether a court applies a narrow or broad interpretation of the constitutional provision. *See infra* notes 38–42, 166–77 and accompanying text.

18. A court's perception of the remedy's purposes determines the scope, and ultimately the fate, of the enforcement mechanism chosen. 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1, at 18 (1978). How a court perceives the rule's purposes seems to follow from its determination of the source. If the court sees the remedy as implied by the constitutional provision itself, the purpose for invoking the rule is to protect the defendant's rights and to maintain judicial fidelity to the constitution. If the court sees the choice of remedy as arising under its own power, limited only by the need to make the constitutional guarantee effective, then the court's perception of the beneficiary of the constitutional protection determines the purposes served by the enforcement mechanism. Since the Burger Court believes the choice of remedy falls within its supervisory power and believes that the fourth amendment affords protection only to the innocent victims of illegal searches, vindicating the defendant's rights need not be considered as an exclusionary rule objective. *See* Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1268–69 (1983). However, if a court believes that the constitutional protection against unlawful search and seizure extends to all, regardless of what evidence the illegal search discovers, then vindication of the defendant's rights becomes the paramount concern. *See, e.g., id.* at 1268–69.

19. *See, e.g.*, People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905, 907 (1955) (opinion of Traynor, J.). Justice Traynor observed that a court must vindicate both the rights of the defendant before it, however guilty he may appear, and the constitutional rights of all people to be secure in their homes and private affairs. *See also* State v. McCollum, 17 Wn. 2d 85, 95–96, 136 P.2d 165, 169–70 (1943) (Millard, J., dissenting). *See generally* Kamisar, *supra* note 10. *See infra* note 259 and accompanying text.

careful not to diminish society's ability to provide efficient and effective law enforcement.[20]

The choice of the exclusionary rule highlights this tension; suppression of highly probative evidence focuses attention on the cost society bears to vindicate the rights of a defendant who probably committed the crime charged.[21] Yet, even after a court selects the exclusionary rule as the enforcement mechanism, whether exclusion *automatically* applies depends upon the nature of the rule's constitutional connection and upon whether or not the court allows the tension between its conflicting responsibilities to influence its decision.

Courts generally adopt one of two approaches to the exclusionary rule's application. Courts adopt a unitary approach if they view exclusion as

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20. Former Washington Supreme Court Justice Robert C. Finley has written that the exclusionary rule embraces "two antitheticals. . . . On the one side there is the individual and his rights equated with concepts of liberty and freedom. On the other, there is society, group interests and rights, equated with the concepts of ordered liberty and freedom through government under law." Finley, *supra* note 16, at 384. Former Supreme Court Justice Jackson warned that:

> The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the Constitutional Bill of Rights into a suicide pact.

Terminillo v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

Those who emphasize society's need for protection have adopted the "Crime Control Model," which is "based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process." H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 158 (1968). For a discussion of the crime control model versus individual rights, see *id.* at 149–73. *See also* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 951–53 (1965). Perhaps the most quoted criticism of the exclusionary rule was authored by Justice Cardozo who stated that the rule results in the anomalous situation where "the criminal goes free because the constable blundered." People v. Defore, 242 N.Y. 13, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 637 (1926). While the Cardozo formulation seems to underlie the Burger Court's exclusionary rule jurisprudence, many commentators argue that it is the fourth amendment, not the exclusionary rule that causes the loss of the evidence. *See* Kamisar, *The exclusionary rule in historical perspective: the struggle to make the Fourth Amendment more than just an "empty blessing,"* 62 JUDICATURE 337, 343–44 (1979) ("exclusionary rule prevents convictions in no greater degree than would effective prior direction to police to search only by legal means") (quoting Note, *Judicial Control of Illegal Search and Seizure*, 58 YALE L.J. 161, 162 (1948)); Loewy, *The Warren Court as Defender of State and Federal Criminal Laws: A Reply to Those Who Believe That the Court Is Oblivious to the Needs of Law Enforcement*, 37 GEO. WASH. L. REV. 1218, 1236 (1969) ("the criminal does not go free because the constable had blundered, but because he would have gone free if the constable had not blundered"). For a full range of criticisms of the exclusionary rule, see Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 672–736 (1970).

21. The strong resistance to the exclusionary rule arises because, by invoking it, a court seeks to "unring the bell," to reconstruct the past as though the highly probative evidence never existed. Kamisar, *supra* note 10, at 569 (quoting Maness v. Meyers, 419 U.S. 449, 460 (1975)). This unringing of the bell is seen as "flaunt[ing] before us the costs we must pay for fourth amendment guarantees." Kaplan, *supra* note 16, at 1037. *See also* J. KAPLAN, CRIMINAL JUSTICE: INTRODUCTORY CASES AND MATERIAL 28 (1st ed. 1973); 1 W. LAFAVE, *supra* note 18, § 1.2, at 23 (arguing that the cost objection was rejected when the fourth amendment was adopted).

either an inviolate constitutional right of the accused or a constitutionally compelled remedy aimed at protecting the accused's personal right to privacy.[22] Under a unitary approach, once a court decides that a substantive violation has occurred, it automatically excludes the wrongfully obtained evidence.[23] Courts adopting this approach do not attempt to balance the competing responsibilities, reasoning instead that the framers of the constitutional provision have already balanced the competing interests.[24] Conversely, courts adopt a bifurcated approach if they perceive exclusion as a product of their supervisory power, intended as a check on unlawful police conduct, and unconnected to the accused's personal constitutional rights.[25] Under a bifurcated approach, a court divides its review of police conduct into separate questions. First, the court must determine whether a substantive violation of the constitutional provision occurred. If the answer is yes, the court then decides whether to suppress the unlawfully obtained evidence. Suppression depends upon the results of a cost-benefit analysis: the benefits derived from excluding the evidence must outweigh societal costs resulting from the loss of evidence highly probative of the defendant's guilt.[26] During the first sixty years of federal exclusionary rule jurisprudence, federal courts strictly adhered to the unitary approach.[27] Since

22. Mertens & Wasserstrom, *supra* note 15, at 373. *See generally* Geller, *supra* note 11; Stewart, *supra* note 10.

23. Mertens & Wasserstrom, *supra* note 15, at 373–75.

24. The federal exclusionary rule operated as a unitary remedy from its inception until 1949 when the Supreme Court decided Wolf v. Colorado, 338 U.S. 25, 28–32 (1949). Mertens & Wasserstrom, *supra* note 15, at 379. Early in the development of Washington's exclusionary rule jurisprudence the court adopted a unitary approach, holding that when article 1, § 7 is violated, by necessity, the exclusionary remedy must attach. State v. Dersiy (*Dersiy I*), 121 Wash. 458, 209 P. 837, 838 (1922). Over 25 years later, Justice Simpson observed that the drafters of the constitution had considered the danger of criminals escaping punishment and had still designed the constitution to place obstacles in the way of police excesses, which they seemed to think were a greater danger to a free people. State v. Miles, 29 Wn. 2d 921, 932–33, 190 P.2d 740, 746–47 (1948); *see also* Kamisar, *supra* note 10, at 647.

25. *See, e.g.*, United States v. Leon, 104 S. Ct. 3405, 3412 (1984).

26. Mertens & Wasserstrom, *supra* note 15, at 373–74. *See infra* notes 171–76 and accompanying text. The judicial process itself often requires a court to select the value representing the deeper and larger interest from an array of conflicting principles, precedent, or logic. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 40–43 (1921); Atkinson, *supra* note 15, at 26. Justice Powell believes that "the jurisprudence of the fourth amendment demands consideration of the public's interest in effective law enforcement as well as each person's constitutionally secured right to be free from unreasonable searches and seizures." United States v. Mendenhall, 446 U.S. 544, 565 (1980) (Powell, J., concurring). However, because the guarantee against unlawful search and seizure remains a fundamental constitutional right, a court does not have the power to choose not to enforce it. *See* Stewart, *supra* note 10, at 1404; *see also* Atkinson, *supra* note 15, at 26 (fourth amendment violations must be discouraged by every feasible means).

27. *See* Wolf v. Colorado, 338 U.S. 25 (1949). Although Justice Frankfurter's opinion in *Wolf* drove a wedge between exclusion and the constitutional right, the Supreme Court stoutly adhered to the exclusionary rule in federal cases. Kamisar, *supra* note 10, at 616 n.296; Mertens & Wasserstrom, *supra* note 15, at 380. Nevertheless the *Wolf* opinion "planted the seeds of destruction for the [federal] exclusionary rule—in federal as well as state cases." Kamisar, *supra* note 10, at 616.

1974, however, the Burger Court has employed the bifurcated approach, selectively applying the exclusionary remedy according to the results of this cost-benefit analysis.[28] Whether Washington follows the Burger Court's lead depends, in part, upon whether the federal approach to exclusion is consistent with the source and purposes of the Washington exclusionary rule.

II. ORIGINS AND DEVELOPMENT OF THE WASHINGTON EXCLUSIONARY RULE

During its history, the Washington exclusionary rule has gone through three distinct historical periods. The Washington Supreme Court adopted the rule in 1922.[29] This initial period of developing an independent state exclusionary rule jurisprudence continued until 1961,[30] when the United States Supreme Court first required state courts to apply the federal exclusionary rule in state prosecutions.[31] As a result, Washington's independent rule entered its dormant period; the Washington court stopped applying the independent state exclusionary rule, and began relying solely on cases decided under the fourth amendment. The Washington rule lay dormant for more than twenty years,[32] until 1982, when the rule passed out of dormancy into a new era of independent application. In response to the Burger Court's narrower approach to the scope and enforcement of fourth amendment guarantees,[33] the Washington Supreme Court rejected the federal approach to exclusion in one of a series of controversial decisions[34] that interpreted article 1, section 7 as providing a broader privacy protection than the fourth amendment.[35]

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28. United States v. Calandra, 414 U.S. 338 (1974). In *Calandra,* the Court deconstitutionalized the federal exclusionary rule and held that no constitutional violation occurred when a witness was compelled to answer grand jury questions based on information acquired in an unlawful search. *Id.* at 351–52. Schrock & Welsh, *supra* note 17, at 1119; *see also* Kamisar, *supra* note 10, at 640; Mertens & Wasserstrom, *supra* note 15, at 384–88. *See generally* Schrock & Welsh, *supra* note 16. The selective application approach is based upon the Court's perception of exclusion as a judicially-created remedy aimed at vindicating fourth amendment rights generally by deterring future unlawful police conduct. *See infra* notes 161–77 and accompanying text.

29. State v. Gibbons, 118 Wash. 171, 203 P. 390 (1922).

30. *See infra* note 147 and accompanying text.

31. Mapp v. Ohio, 367 U.S. 643, 656 (1961). *See infra* notes 148–50 and accompanying text.

32. The Washington court did not reassert the exclusionary rule as an independent state requirement until its 1982 decision in State v. White, 97 Wn. 2d 92, 640 P.2d 1061 (1982); *see* Nock, *Seizing Opportunity, Searching for Theory: Article I, Section 7,* 8 U. PUGET SOUND L. REV. 331, 332–33 (1984). *See also infra* notes 151–60 and accompanying text.

33. *See infra* notes 156–59 and accompanying text.

34. State v. White, 97 Wn. 2d 92, 640 P.2d 1061 (1982).

35. *See infra* note 160 and accompanying text.

A. *Prologue*

Under the common law, a strict nonexclusionary rule required a court to admit all competent and probative evidence regardless of its source.[36] This doctrine of nonexclusion developed from the common law courts' paramount concern with truth-seeking and punishing the guilty.[37] Common law courts employed a literal interpretation of the applicable constitutional text and concluded that admitting unlawfully obtained evidence did not violate constitutional prohibitions against unreasonable search and seizure.[38] Although they did not condone the illegal search, common law courts ignored the unlawful nature of the search until the defendant brought an action directly against the offending officer.[39]

The common law rule of nonexclusion remained unchallenged until 1886, when the United States Supreme Court reached its landmark decision in *Boyd v. United States*.[40] The *Boyd* Court viewed illegal search and seizure from the perspective of a nineteenth century conception of trespass against property and against an individual's rights. Based on the need to

36. The earliest statement of the common law rule came in Commonwealth v. Dana, 43 Mass. 329 (2 Met. 1841), *cited in* 4 J. WIGMORE, EVIDENCE § 2183 (2d ed. 1923). Originally courts justified the nonexclusionary rule by reasoning that the officer or party responsible for issuing a warrant bears the responsibility for the illegal search, not the state. *Id.* Courts would not take notice of the manner in which evidence was obtained—whether lawfully or unlawfully. *Id.*

37. The common law prevented courts from framing a collateral issue to decide the legality of a search because to do so would merely confuse, interrupt, or delay the determination of the defendant's guilt or innocence. Stevison v. Earnest, 80 Ill. 513, 518 (1875); *see also* 4 J. WIGMORE, EVIDENCE § 2183 (1st ed. 1905); Atkinson, *supra* note 15, at 26; R. LEMPERT & S. SALZBERG, A MODERN APPROACH TO EVIDENCE 148 n.2 (2d ed. 1982) (in the law of evidence, the "truthfinding" model dominates).

38. Under this literalist view, the constitutional violation is seen as ending with the illegal search, which is already complete before trial begins. The constitutional provision literally only prohibits the illegal search, it says nothing about the use of illegally obtained evidence. Consequently, a court's decision to admit such evidence is not limited by the constitutional provision. Since the constitutional violation was complete before trial, admission of the evidence would not subvert the defendant's rights. Atkinson, *supra* note 15, at 13; Note, *Evidence Obtained by Illegal Search and Seizure*, 14 COLUM. L. REV. 338, 338–39 (1914).

Some courts went even further, construing the amendment so narrowly as to deny that a violation occurred at all. Williams v. State, 100 Ga. 511, 28 S.E. 624 (1897). Under this view, police officers who conduct an illegal search exceed their authority. *Id.*, 28 S.E. at 627. Through a legal fiction, courts no longer viewed the offending officer as a representative of the state but rather as a private person. *Id.* Consequently, search and seizure guarantees against governmental conduct were inapplicable. *Id.*

39. 4 J. WIGMORE, *supra* note 36, § 2183, at 626. Professor Wigmore believed that the fourth amendment implied a remedy: not suppression of the unlawfully obtained evidence, but rather a direct action against the offending officer in trespass or for constitutional criminal contempt. *Id.* § 2184, at 639. For criticism of Wigmore's defense of the common law rule, see Chafee, *The Progress of the Law, 1919–1922, Searches and Seizures*, 35 HARV. L. REV. 673, 694 (1922); Kamisar, *supra* note 10, at 589 n.160; Schrock & Welsh, *supra* note 16, at 330–34.

40. 116 U.S. 616 (1886). *See* 4 J. WIGMORE, *supra* note 36, § 2183. Justice Brandeis hailed *Boyd* as a "case that will be remembered as long as civil liberty lives in the United States." Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

protect rights from governmental trespass, the *Boyd* Court interpreted the fourth and fifth amendments as providing a broad guarantee of personal privacy.[41] To effectively protect those privacy rights, Justice Bradley's opinion enunciated a principle of constitutional interpretation (the *Boyd* principle) that required courts to liberally construe constitutional provisions that protected individual rights.[42] Applying this principle of liberal construction to the fourth and fifth amendments, the *Boyd* Court found that the guarantee against unreasonable search and seizure converged with the privilege against compelled self-incrimination. The Court held that admitting into evidence private papers unconstitutionally seized from the defendant, in effect, compelled the defendant to be a witness against himself in violation of the fifth amendment's privilege against self-incrimination (hereinafter designated the *Boyd* convergence theory).[43]

The *Boyd* decision generated widespread criticism.[44] State supreme courts almost universally rejected the *Boyd* principle and its concomitant convergence theory.[45] Moreover, in *Adams v. New York*,[46] the Supreme

41. *Boyd*, 116 U.S. at 627. *See infra* notes 319–20 and accompanying text.

42. *Boyd*, 116 U.S. at 635. According to Justice Bradley, such constitutional provisions required a liberal construction because

> [a] close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis* [resist the first encroachment].

Id. (emphasis in original). The *"Boyd* principle" served as the basis for the civil liberty decisions reached by the Warren Court in the 1950's and 60's. Burger Court retrenchment in the area of individual rights represents an abandonment of the long adhered-to principle. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 494–95 (1977).

43. *Boyd*, 116 U.S. at 633–35. *Boyd* concerned a civil charge for evasion of custom duties by fraudulent invoicing. The trial court, acting pursuant to federal statute, ordered the defendant to produce a paper invoice or have the prosecution's allegations taken as confessed. The defendant complied under protest and appealed to the Supreme Court. *Id.* at 620. Although the Court could have decided the issue before it under the fifth amendment alone, *id.* at 639 (Miller, J., concurring), it also relied on the fourth amendment to hold the federal statute unconstitutional and the court order an unreasonable search and seizure. *Id.* at 622. Using its liberal construction principle, the *Boyd* Court viewed the fourth and fifth amendments as protective of an individual's privacy, *id.* at 635, and found the two amendments to be intimately related. *Id.* at 630, 633. This convergence of the two amendments resulted in exclusion. This Comment refers to the *Boyd* exclusion analysis as the "convergence theory." For further discussion of the *Boyd* convergence theory, see *infra* notes 64, 308–36 and accompanying text.

44. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 366 (1920); *see, e.g.*, 4 J. WIGMORE, *supra* note 36, at §§ 3125–27; Taft, *The Tobacco Trust Decisions*, 6 COLUM. L. REV. 375, 384, 386 (1906); Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479, 480 (1922); Note, *Admission of Evidence Obtained Under An Illegal Search Warrant*, 4 COLUM. L. REV. 60, 61 (1904). For a contemporary response to Wigmore's criticism of *Boyd*, see Chafee, *supra* note 39, at 694.

45. For a list of courts rejecting *Boyd*, see 4 J. WIGMORE, *supra* note 36, § 2264. Prior to 1914, at least two state courts adopted the *Boyd* rule and rejected the common law's close and literal interpreta-

Court virtually repudiated *Boyd* by declaring that the "weight of authority as well as reason" supported the common law rule.[47] When the Washington Supreme Court's first opportunity to address the exclusion issue came in the 1905 case of *State v. Royce*,[48] the court also found *Boyd* unpersuasive.[49] Without addressing the issue of whether the defendant's article 1, section 7 rights were violated,[50] a unanimous Washington Supreme Court held that, in any event, admitting evidence seized from the accused without authority of law did not compel the defendant to testify against himself.[51] The court rejected the *Boyd* convergence theory in favor of the common law rule.[52]

Seventeen years elapsed before the Washington court reconsidered the exclusionary rule issue.[53] During the intervening years, two substantial

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tion. State v. Slamon, 73 Vt. 212, 50 A. 1097, 1099 (1901) (convergence theory invoked to suppress letter seized during search pursuant to warrant authorizing search for stolen goods); State v. Sheridan, 121 Iowa 164, 96 N.W. 730, 731 (1903) (allowing a defendant to be convicted on illegally seized evidence would "emasculate the constitutional guaranty, and deprive it of all beneficial force or effect in preventing unreasonable searches and seizures"). For a contemporary criticism of *Sheridan*, see Note, *supra* note 44, at 60. For a complete listing of the date at which each state adopted or rejected the federal exclusionary rule, see Wolf v. Colorado, 338 U.S. 25, 33–39 (1949). Rather than outright rejection of *Boyd*, state courts often distinguished it as applying only when a court affirmatively ordered a defendant to produce private papers. *See, e.g.*, Gindrat v. People, 138 Ill. 103, 27 N.E. 1085, 1087 (1891).

46. 192 U.S. 585 (1904).

47. *Id.* at 594. Following the trend in common law courts, the *Adams* Court limited *Boyd's* application to situations where a court specifically ordered the defendant to affirmatively produce evidence. *Id.* at 598. *See* 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 3.1, at 132 (1985).

48. 38 Wash. 111, 80 P. 268 (1905). *Royce* concerned an appeal from a burglary conviction. Police officers, acting on mere suspicion, seized and searched the defendant, discovering a pawn ticket to a typewriter, not reported stolen until several days later. *Id.* at 113, 80 P. at 269. The defendant appealed his conviction and, inter alia, invoked the *Boyd* convergence theory. *Id.* at 116, 80 P. at 270.

49. *Id.* at 116–17, 80 P. at 270–71.

50. *Id.* at 116, 80 P. at 270. *Royce* is a prime example of how the absence of an exclusionary rule affects the substantive content of article 1, § 7. In *Royce*, the court found no need to address whether the police conduct had, in fact, violated the defendant's privacy. Instead, the court assumed, arguendo, that a violation had occurred and went on to hold that the constitution did not require the exclusion of unconstitutionally acquired evidence. *Id.* at 116, 80 P. at 271. Without the possibility of exclusion, the defendant's article 1, § 7 rights offered no protection against the government's conduct. Proponents of the exclusionary rule cite this failure to address the substantive violation of the constitutional provision as a basic reason to maintain the rule's existence. Without an exclusion requirement, a court will not address the constitutional protections and consequently they will have little effect. *See* 1 W. LAFAVE, *supra* note 18, § 1.2, at 28; Geller, *supra* note 11, at 654–56.

51. *Royce*, 38 Wash. at 118, 80 P. at 271.

52. *Id.* at 117–18, 80 P. at 270–71. The *Royce* court failed to identify which constitution, state or federal, guided its decision. The court found the *Boyd* decision inapplicable because no court exercised any "compulsion whatever to procure evidence from the defendants." *Id.* at 117, 80 P. at 270 (quoting Gindrat v. People, 138 Ill. 103, 111, 27 N.E. 1085, 1087 (1891)). In reaching its decision in *Royce*, the court relied on State v. Pomeroy, 130 Mo. 489, 32 S.W. 1002 (1895), a case decided under a Missouri constitutional provision containing a "testimony" based self-incrimination guarantee purposefully rejected by the framers of WASH. CONST. article 1, § 9. *Royce*, 38 Wash. at 117–18, 80 P. at 271. For a discussion of the history of article 1, § 9, see *infra* notes 316–25 and accompanying text.

53. State v. Gibbons, 118 Wash. 171, 203 P. 390 (1922). Prior to *Gibbons* the Washington court had two other opportunities to address the exclusion issue but failed to reach the question in both instances.

changes took place. First, the passage of prohibition, both state and federal, caused an unprecedented increase in the frequency of interactions between individuals and law enforcement officers. This magnified the importance of constitutional protections against unlawful search and seizure.[54] Second, significant developments occurred in Supreme Court exclusionary rule jurisprudence that resurrected the federal suppression doctrine, but left unclear its exact connection to various provisions of the federal Constitution.

In 1914, in *Weeks v. United States*,[55] the Supreme Court resurrected the exclusionary rule, transforming the common law rule into a requirement that defendants move before trial for the return of their property and suppression of the evidence.[56] The *Weeks* Court reasserted the *Boyd* principle and concluded that fourth amendment guarantees would be meaningless unless courts prohibited the government from using unlawfully seized evidence.[57] However, rather than invoking the *Boyd* convergence theory, the *Weeks* Court focused solely on the fourth amendment,[58] holding that the constitutional provision required the government to return property illegally seized from the defendant.[59] Six years later, in *Silverthorne Lumber Co. v. United States*,[60] the Court again relied solely on the fourth

State *ex rel.* Murphy v. Brown, 83 Wash. 100, 145 P. 69 (1914) (lower court inappropriately invoked exclusionary doctrine, no illegal search occurred); State v. Hennessy, 114 Wash. 351, 195 P. 211 (1921) (court rejected defendant's contention that evidence was unlawfully seized, noting that, in any event, motion to suppress came too late).

54. Wigmore, *supra* note 44, at 479. *See also Search and Seizure in Old Days*, 8 A.B.A. J. 712 (1922) (comparing public attitudes towards "rum running" in 1922 to "molasses running" in the 1770's).

55. 232 U.S. 383 (1914). *Weeks* concerned a federal trial for illegal gambling in which the defendant challenged the admission into evidence of papers and lottery tickets seized unlawfully from his home, first by local police and later by federal agents. *Id.* at 386–87.

56. *Id.* at 396–97. Justice Day, who also authored the *Adams* opinion, distinguished *Adams* on the grounds that the motion to suppress in *Weeks* came before trial, while the motion in *Adams* came after trial began. *Id.*

57. *Id.* at 393–94. For the *Weeks* Court, the fourth amendment protection reached those accused of crimes, as well as the innocent. *Id.* at 392.

58. *Id.* at 389. Based on the actual language employed in the *Weeks* opinion, the fifth amendment played no explicit role in the decision. However, former Supreme Court Justice Potter Stewart maintains that the *Weeks* Court implicitly based its holding on the fifth amendment. Stewart, *supra* note 10, at 1375.

59. *Weeks*, 232 U.S. at 398. Although the court held that the fourth amendment did not reach evidence illegally obtained by local police, such evidence obtained by federal officers could not be used in a federal trial. *Id.* Commentators differ on the exact import of the *Weeks* holding. *See* Kamisar, *supra* note 10, at 594–95 (arguing that while the *Weeks* decision was ambiguous, later Supreme Court decisions made it clear that the defendant had a personal fourth amendment constitutional right to exclusion); Schrock & Welsh, *supra* note 16, at 295–302 (contending that *Weeks* held that use of illegally seized evidence constituted second violation of fourth amendment); Stewart, *supra* note 10, at 1374–75 (arguing that *Weeks* established exclusion not as a constitutional right, but rather as a constitutional remedy necessary to give meaning to the fourth amendment).

60. 251 U.S. 385 (1920).

amendment and held that the guarantee against unlawful search and seizure prohibited the government from making any derivative use of evidence obtained in an unlawful search and seizure.[61]

However, federal exclusionary rule jurisprudence was ambiguous concerning whether the fourth amendment mandated exclusion independently from the fifth amendment.[62] In *Gouled v. United States*,[63] the Court, relying on *Boyd*, returned to the fifth amendment rationale and the convergence theory.[64] The *Gouled* Court also emphasized the *Boyd* trespassory and property rights theory of privacy by placing private books and papers inside a super privacy zone[65] and by articulating the property rights-

61. *Id.* at 391–92. In *Silverthorne*, the defendant's business records had been illegally seized and presented to the grand jury. *Id.* at 390. After complying with a district court order requiring the return of the originals to the defendant and the impoundment of the copies, the grand jury then issued a subpoena duces tecum requiring the defendant to produce the originals. The defendant refused to comply and appealed to the Supreme Court. *Id.* at 391. The Court held that the fourth amendment prevented the government from making use of knowledge derived from illegally obtained evidence. *Id.* at 391. It stated that a failure to exclude all evidence tainted by the government's original illegal act would reduce the fourth amendment to a mere "form of words." *Id.* at 392. Moreover, in writing for the Court, Justice Holmes also observed that "[t]he essence of a provision [the fourth amendment] forbidding the acquisition of evidence [by unlawful search and seizure] is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.* at 392. However, the Burger Court has since held that, in the grand jury context, the exclusionary rule does not prohibit an individual from being asked questions based on evidence obtained in an illegal search and seizure. United States v. Calandra, 414 U.S. 338, 354–55 (1974).

Justice Holmes' conception of the fourth amendment exclusionary rule served as the basis for Justice Fullerton's description of the Washington rule six years later in State v. Buckley, 145 Wash. 87, 258 P. 1030 (1927). *See infra* notes 113–22 and accompanying text. *Silverthorne* gave birth to what later became known as the "fruit of the poisonous tree" doctrine, which requires the exclusion of all evidence tainted by the prior constitutional violation. *See* Nardone v. United States, 308 U.S. 338 (1939); Wong Sun v. United States, 371 U.S. 471 (1963), and the "independent source" doctrine, which prevents the operation of the exclusionary rule where the government learned of the evidence from a source independent of the constitutional violation. *See* Nix v. Williams, 104 S. Ct. 2501, 2508 (1984) (relying on the *Silverthorne* reasoning to adopt the "inevitable discovery" exception to the exclusionary rule).

62. *See, e.g.*, Atkinson, *supra* note 15, at 26 (describing exclusion in fourth amendment context not as a personal right, but rather as necessary to discourage violations of its guarantee); Stewart, *supra* note 10, at 1375 (arguing that originally exclusion as a constitutional right found its source in the fifth amendment, but when viewed as a constitutionally compelled remedy, the rule depended upon the fourth amendment).

63. 255 U.S. 298 (1921).

64. *Id.* at 306. The *Gouled* Court explained the convergence theory by reasoning that whether the government unlawfully compelled the defendant to produce incriminating evidence or obtained the evidence by an unlawful search and seizure, the result for the defendant remained the same. In either case, the defendant became the unwilling source of the evidence. To the *Boyd* and *Gouled* Courts, the essence of the privilege against self-incrimination was that the accused could not be unlawfully made into the unwilling conduit of incriminating evidence. *Id.* at 306, 311.

65. In *Gouled*, the government had seized the defendant's private business papers in two separate searches. The first, conducted surreptitiously by a government agent without a warrant, was a clear violation of the fourth amendment. *Id.* at 306. Relying on *Boyd*, the *Gouled* Court placed private books and papers in a super privacy zone susceptible neither to search with a warrant nor to compulsory production by subpoena unless the government could show with particularity which papers were

based "mere evidence" rule.[66]

In *Gouled's* companion case, *Amos v. United States*,[67] the Court clouded the exclusionary rule picture still further. First, in an ambiguously worded paragraph, the *Amos* Court cited both the *Weeks/Silverthorne* and the *Boyd/Gouled* line of cases without clarifying whether each established an independent exclusion requirement.[68] Second, the *Amos* Court extended exclusion beyond private books and papers to other types of physical or real evidence.[69] However, both the Court and government lawyers continued to analyze exclusion in terms of the defendant's right to the return of the evidence, even where the unlawfully seized evidence was contraband whiskey.[70] Consequently, in 1922, when the Washington Supreme Court reconsidered exclusion in *State v. Gibbons*,[71] it was unclear whether the

involved in criminal activity. *Id.* at 305–13. Because the second search, conducted pursuant to a valid search warrant, intruded upon this super privacy zone, the *Gouled* Court held that it also violated the fourth amendment. *Id.* at 311. Whether the *Gouled/Boyd* super privacy zone continues to offer any protection for private papers is a matter of controversy among present Supreme Court members. *See* United States v. Doe, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring); *id.* at 618–19 (Marshall, J., concurring in part and dissenting in part). The *Gouled* Court held that the use of the papers illegally obtained in both searches violated the fifth amendment privilege against self-incrimination. *Gouled*, 255 U.S. at 306, 311. However, the Supreme Court has explicitly noted that the *Boyd/Gouled* convergence theory has "failed the test of time." United States v. Leon, 104 S. Ct. 3405, 3412 (1984). *See infra* note 308.

66. The *Gouled* Court articulated the "mere evidence" rule by relying on language from *Boyd*. The "mere evidence" rule prevented the government from searching for articles of a purely evidentiary nature. The government could only search for evidence to which it had a superior right to possession, such as contraband, stolen articles, and the tools used to commit a crime. *Gouled*, 255 U.S. at 308–09. However, the Supreme Court abandoned the "mere evidence" rule in Warden v. Hayden, 387 U.S. 294, 310 (1967).

67. 255 U.S. 313 (1921). In *Amos*, federal revenue officers had unlawfully seized whiskey on which the defendant had failed to pay the tax required by law. *Id.* at 315. Although the facts establishing the illegality of the search were contained in the revenue officer's testimony, the trial court denied the defendant's motion to suppress, having earlier denied a petition for the return of the whiskey. *Id.*

68. *Id.* at 315–16.

69. *Id.* at 316. Supreme Court exclusionary rule decisions prior to *Amos* dealt exclusively with private books and papers. *See* Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Weeks v. United States, 232 U.S. 383 (1914); Boyd v. United States, 116 U.S. 616 (1886). Consequently, one could argue that prior to *Amos*, the convergence theory applied only to books and papers because such evidence embodies a defendant's testimony and admitting the evidence at trial would compel defendants to bear witness against themselves. However, the *Amos* Court attached no significance to the nontestimonial nature of whiskey as evidence. 255 U.S. at 316–17. For a possible explanation of the reason the Court treated all illegally seized evidence identically, see *infra* note 320 and accompanying text.

70. *Amos*, 255 U.S. at 315–16. On several occasions, the Supreme Court had considered property liable to duties and concealed to avoid payment, like the whiskey in *Amos*, as the type of evidence the government had a superior right to possess. Gouled v. United States, 255 U.S. 298, 308 (1921); Boyd v. United States, 116 U.S. 616, 623 (1886). Despite the contraband nature of the evidence, the Court continued to view exclusion as related to the right to the return of unlawfully seized property. *Amos*, 255 U.S. at 316–17. The government answered the defendant's appeal by arguing that the petition for return of the evidence came too late, not that the whiskey could not be returned. *Id.* at 316.

71. 118 Wash. 171, 203 P. 390 (1922).

federal exclusionary rule extended to contraband evidence.[72] Furthermore, it was uncertain that the fourth and fifth amendments independently required exclusion.[73] As late as 1925, the federal exclusionary doctrine rested on a constellation of related but not very clearly articulated principles.[74]

Despite the development of a federal exclusionary requirement, most state courts refused to follow the Supreme Court's lead, continuing instead to adhere to the pre-*Boyd* common law rule.[75] Thus, the *Gibbons* court could have followed the great weight of state authority,[76] and its own precedent in *State v. Royce,* by rejecting the exclusion doctrine.[77] However, the Washington Supreme Court found the United States Supreme Court's reasoning persuasive and Washington became the fifth state to adopt an independent exclusionary rule patterned on the federal doctrine.[78]

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72. The United States Supreme Court did not explicitly extend exclusion to contraband evidence until 1925. Agnello v. United States, 269 U.S. 20 (1925). The *Agnello* Court attached no significance to the distinction between papers and contraband cocaine seized in an illegal search. After stating that when the evidence is contraband the defendant need not move for its return, the *Agnello* Court invoked the convergence theory and held the evidence inadmissible. *Id.* at 34. *See* Stewart, *supra* note 10, at 1377. For a discussion of the property rights aspects of early federal exclusionary rule decisions, see White, *Forgotten Points in the "Exclusionary Rule" Debate,* 81 MICH. L. REV. 1273, 1279 (1983). Unlike its federal counterpart, the Washington exclusionary rule, from its very inception, extended to nontestimonial, contraband evidence. State v. Gibbons, 118 Wash. 171, 203 P. 390 (1922). *See infra* notes 316–33 and accompanying text.

73. Atkinson, *supra* note 15, at 17, 26 (arguing that exclusion as a right is mandated by the fifth amendment but exclusion under the fourth amendment is only an enforcement mechanism). This ambiguity continued in Agnello v. United States, 269 U.S. 20 (1925). The Court's opinion raised some doubt as to whether the fourth amendment independently required exclusion: "It is well settled that, when properly invoked, the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment." *Id.* at 33–34.

74. Wasserstrom & Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?,* 22 AM. CRIM. L. REV. 85, 86 (1984). However, two later Supreme Court decisions expressly recognized an independent fourth amendment exclusionary mandate. Dodge v. United States, 272 U.S. 530, 532 (1926) (fourth amendment "would be infringed yet further if the evidence were allowed to be used"); Olmstead v. United States, 277 U.S. 438, 462 (1928) ("the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment"). *See* Kamisar, *supra* note 10, at 596–98; Mertens & Wasserstrom, *supra* note 15, at 366 n.6.

75. *See* 4 J. WIGMORE, *supra* note 36, §§ 2183–84.

76. Chafee, *supra* note 39, at 694 (great weight of state authority rejected *Boyd).*

77. The *Royce* court quoted one of the most cited common law, nonexclusionary rule decisions, Gindrat v. People, 138 Ill. 103, 27 N.E. 1085 (1891): "Courts, in the administration of the criminal law, are not accustomed to be over-sensitive in regard to the sources from which evidence comes, and will avail themselves of all evidence that is competent and pertinent and not subversive of some constitutional or legal right." State v. Royce, 38 Wash. 111, 117, 80 P. 268, 270–71 (1905).

78. The other four states were Vermont (State v. Slamon, 73 Vt. 212, 50 A. 1097, 1099 (1901)); Iowa (State v. Sheridan, 121 Iowa 164, 96 N.W. 730 (1903)); Michigan (People v. Marxhausen, 204 Mich. 559, 171 N.W. 557 (1919)); and Kentucky (Youman v. Commonwealth, 189 Ky. 152, 224 S.W. 860 (1920)). Four other states adopted the federal rule soon after the *Gibbons* decision: Tennessee

B. Stage 1: Origins, Development, and Independent Application

1. Origins and Early Development: The Article 1, Section 9 Mandate

Originally, the Washington Supreme Court relied on the convergence of the article 1, section 9 privilege against self-incrimination and the article 1, section 7 privacy protection to adopt the exclusionary rule in *State v. Gibbons*.[79] In *Gibbons*, a local sheriff, acting solely on a hunch and without waiting for a telephone warrant he had requested, seized defendant in his automobile and forced him to drive to the police station. After arriving at the station, the sheriff searched the vehicle pursuant to a warrant and discovered twelve quarts of whiskey, which led to a conviction for unlawful possession.[80] On appeal, defendant argued that the trial court violated his constitutional rights by denying his pretrial motion for the return of the illegally seized whiskey and his motion to suppress made after trial had begun.[81]

Since at that time neither the fourth nor the fifth amendment limited state authorities,[82] the court based its decision solely on the Washington Declaration of Rights.[83] To reach its decision, the *Gibbons* court employed a two-

(Hughes v. State, 145 Tenn. 544, 238 S.W. 588 (1922)); Mississippi (Tucker v. State, 128 Miss. 211, 90 So. 845 (1922)); Florida (Atz v. Andrews, 84 Fla. 43, 94 So. 329 (1922)); and West Virginia (State v. Andrews, 91 W. Va. 720, 114 S.E. 257 (1922)).

79. 118 Wash. 171, 184, 203 P. 390, 395 (1922).

80. *Id.* at 180–81, 203 P. at 394.

81. *Id.* at 183, 203 P. at 394–95.

82. At the time of the *Gibbons* decision, the United States Supreme Court had specifically held that the fourteenth amendment's due process clause did not require state authorities to abide by the procedural safeguards contained in the fifth amendment privilege against self-incrimination, Twining v. New Jersey, 211 U.S. 78, 99 (1908), or the fourth amendment's protection against unreasonable search and seizure, Weeks v. United States, 232 U.S. 383, 398 (1914). Consequently, the Washington court was free to accept or reject the reasoning underlying the federal exclusionary rule.

83. Because Supreme Court decisions were not binding on state courts, the *Gibbons* court, in order to rely on federal precedent, compared article 1, §§ 7 and 9 with their federal counterparts, the fourth and fifth amendments, concluding that the guarantees were in substance the same. *Gibbons*, 118 Wash. at 184, 203 P. at 395. Having done so, the *Gibbons* court concluded that it could use federal exclusionary rule jurisprudence as "a proper aid" in the court's decisionmaking process. *Id.* Later in its opinion, the *Gibbons* court relied on the reasoning used by the Michigan Supreme Court, but only after observing that the two state constitutions were also in substance the same. *Id.* at 187, 203. P. at 396. The *Gibbons* court's treatment of federal precedent as merely a proper aid was consistent with the Washington court's view in general concerning the authoritativeness of Supreme Court precedent. For example, even where the wording in state and federal provisions was virtually identical, as in the due process clause of article 1, § 3 and the fourteenth amendment, the Washington court did not feel bound by federal precedent. The court only assigned substantial weight to Supreme Court interpretations, and required the Supreme Court's reasoning to be persuasive before following federal precedent. *See, e.g.*, State v. Buchanan, 29 Wash. 602, 608, 70 P. 52, 54 (1902); Herr v. Schwager, 145 Wash. 101, 105, 258 P. 1039, 1040 (1927). In contrast to the Washington court's independent attitude, several state courts felt bound to conform interpretations of their state constitutions with that of the Supreme Court. *See, e.g.*, State v. Andrews, 91 W. Va. 720, 114 S.E. 257, 260 (1922); Gore v. State, 24 Okla. Crim. 394, 218 P. 545, 547–58 (1923).

step approach.[84] First, the court addressed the substantive question, holding that the sheriff's original warrantless seizure of the defendant, as well as the search under the warrant, violated article 1, section 7.[85] Second, the court considered whether the trial court's decision to admit the contraband whiskey constituted an additional, distinct violation of the defendant's constitutional rights.[86]

In analyzing the exclusion issue, the *Gibbons* court found the reasoning underlying federal and Michigan state precedent sufficiently persuasive to use as an aid in its inquiry.[87] Without mentioning *Royce,* the *Gibbons* court held that evidence seized in violation of defendants' privacy, guaranteed by article 1, section 7, could not be admitted against them.[88] The court's analysis did not include recognition of an independent article 1, section 7 exclusionary mandate. Nor did the court refer to the *Weeks/Silverthorne* fourth amendment-based analytic.[89] Instead, the *Gibbons* court concluded that the *Boyd* convergence theory was embodied in the state constitution.

84. This two-step analysis is not the bifurcated approach, as this Comment uses the term. As used in this Comment, bifurcated analysis refers to the two-step approach courts use to decide whether to apply the exclusionary rule, not the two-step approach necessary to deciding whether to adopt an exclusionary rule. Since Washington had no preexisting exclusionary rule, the court had to decide the substantive question first. Only after determining that a violation occurred could the court turn to the separate question of whether to adopt the exclusionary rule.

85. *Gibbons,* 118 Wash. at 182–84, 203 P. at 394–95. The court found that the initial seizure of the defendant, his automobile, and its contents occurred without a search warrant. *Id.* The search warrant waiting at the police station could not cure the original illegality. *Id.* The subsequent seizure of the whiskey was also unlawful in that it came incident to the unlawful arrest of the defendant. *Id.*

86. The court noted that the defendant had moved for the return of the whiskey in order "to prevent the introduction of the whiskey in evidence against him." *Id.* at 183, 203 P. at 394. The court did not address the question of returning contraband, since the return of the evidence was not the important point. Rather, the court concentrated on the admission of the whiskey into evidence. *Id.* at 188–89, 203 P. at 396. Thus, the court's focus was not on the defendant's right to the return of his property, but rather on the defendant's right to have the property excluded from evidence. Later the same year, the court took care to make it clear that a court could not order the return of contraband to the accused, and therefore, a defendant need only move to suppress, rather than for the return of the evidence. State *ex rel.* Yakima v. Superior Court, 120 Wash. 280, 282, 206 P. 925, 925 (1922).

87. *Gibbons,* 118 Wash. at 184–85, 187, 203 P. at 395–96. *See infra* note 83.

88. *Gibbons,* 118 Wash. at 188–89, 203 P. at 396.

89. The court discussed the federal rule in terms of the fourth and fifth amendments. *Id.* at 189–90, 203 P. at 395–96. Although the court quotes the fourth amendment for comparative purposes, the opinion failed to mention the *Weeks/Silverthorne* fourth amendment branch of exclusion. This failure to focus on the search and seizure provision as the source of the federal exclusionary requirement reinforces the notion that United States Supreme Court exclusionary rule jurisprudence was ambiguous on the point. *See supra* notes 55–74 and accompanying text. Yet, later Washington cases cite *Gibbons,* along with other early Washington cases, as having adopted the *Weeks* rule. *E.g.,* State v. Greco, 52 Wn. 2d 265, 266, 324 P.2d 1086, 1087 (1958); State v. Smith, 50 Wn. 2d 408, 409, 312 P.2d 652, 653 (1957); State v. Cyr, 40 Wn. 2d 840, 842, 246 P.2d 480, 482–83 (1952). However, in a decision reached prior to the cases cited above, but subsequent to *Gibbons,* the Washington court implicitly invoked the rationale underlying *Silverthorne.* State v. Buckley, 145 Wash. 87, 258 P. 1030 (1927). *See infra* note 122 and accompanying text.

The court observed that without exclusion, article 1, section 7 and article 1, section 9 could not effectively guarantee an individual's privacy.[90] Relying on earlier Washington case law,[91] as well as *Boyd,* the *Gibbons* court held that the admission of evidence taken from the defendant without authority of law compelled the defendant to give evidence against himself in violation of article 1, section 9.[92]

Gibbons was decided by Department Two of the Washington Supreme Court, rather than the court sitting en banc.[93] In *State v. Catalino,*[94] decided immediately after *Gibbons,* Department Two continued to develop the state exclusionary rule, holding that a defendant had the right to cross-examine a prosecution witness as to the validity of a search warrant.[95] Thus, the *Catalino* court implicitly recognized that under certain circumstances the defendant had a right to move to suppress after trial began.[96] However, shortly after *Catalino,* Department One took a much narrower approach to exclusion in two companion cases. Contrary to the procedural approach adopted by Department Two in *Catalino,* in both *State v. Dersiy (Dersiy I)*[97] and *State v. Smathers,*[98] Department One articulated, and strictly applied, a rule that exclusion would not apply unless the defendant

90. Although the court did not address the nature of the connection between article 1, § 7 and exclusion, it did note that both the United States and Michigan Supreme Courts had observed that both the privilege against self-incrimination and the guarantee against unlawful search and seizure could not be effective without exclusion. *Gibbons,* 118 Wash. at 184, 187, 203 P. at 395, 396.

91. In addition to implicitly adopting the reasoning underlying the Supreme Court's convergence theory, Chief Justice Parker justified the exclusionary mandate contained in article 1, § 9 by relying on State v. Jackson, 83 Wash. 514, 145 P. 470 (1915). *Gibbons,* 118 Wash. at 188, 203 P. at 396. In *Jackson,* the court had held that article 1, § 9 prohibited the prosecution from making a demand, in front of the jury, that the defendant produce incriminating documents claimed to be in his possession. *Jackson,* 83 Wash. at 516–19, 145 P. at 471–72. In *Gibbons,* Justice Parker stated that since article 1, § 9 prohibited the prosecution from making a demand for production, it must also prohibit the prosecution from introducing illegally seized evidence. However, Justice Parker's opinion failed to explain exactly how the admission of such evidence violates the privilege against self-incrimination. *Gibbons,* 118 Wash. at 188, 203 P. at 396. *See infra* notes 300–07 and accompanying text.

92. *Gibbons,* 118 Wash. at 188–89, 203 P. at 396.

93. *Id.* at 171, 203 P. at 391. In 1909 the structure of the Washington Supreme Court changed from an en banc court to a departmental system with the membership of the court increasing from seven to nine. Each department was composed of four members appointed by the Chief Justice who usually sat as the fifth member of each panel. The membership of the departments changed from time to time. However, an en banc court could be convened either by the Chief Justice or at the request of four of the nine justices. 1909 Wash. Laws ch. 24, § 3 at 34 (codified at WASH. REV. CODE § 2.04.120 (1961)). In 1971, the court returned to an en banc format. 1971 Wash. Laws ch. 81, § 183 (effective March 23, 1971).

94. 118 Wash. 611, 204 P. 179 (1922).

95. *Id.* at 611–12, 204 P. at 179.

96. *Id.* at 612–13, 204. P. at 179–80.

97. 121 Wash. 455, 209 P. 837 (1922).

98. 121 Wash. 472, 209 P. 839 (1922).

moved to suppress before trial.[99] Moreover, Department One decisions brought into question exclusion's constitutional connection; neither decision contained any reference to the *Gibbons* convergence theory. In *Dersiy I*, however, Department One clearly agreed with one aspect of the *Gibbons* holding: Washington had adopted a unitary approach that required the exclusionary remedy to automatically attach whenever law enforcement officers violated the defendant's right to privacy.[100] Some months later, perhaps in an attempt to avoid the appearance of a divided court, an en banc court affirmed the approach adopted in *Dersiy I*.[101] Although the en banc court did not clarify whether exclusion was constitutionally mandated, the court did take care to affirm the *Catalino* procedural approach, establishing specific guidelines for the timing of a motion to exclude unlawfully obtained evidence once trial had begun.[102]

Thus, by the end of 1922, although exclusion's precise constitutional connection was unclear, the Washington Supreme Court had adopted a unitary approach, with exclusion automatically applying because of its inextricable connection to the violation of the defendant's right to privacy. However, the cost of the exclusionary remedy to society may have troubled the court. In twenty-two out of twenty-four article 1, section 7 cases between 1922, when *Gibbons* was decided, and 1927, when the commitment to exclusion was reevaluated in *State v. Buckley*,[103] the Washington Supreme Court decided the issue in favor of the prosecution.[104] When

99. In *Dersiy I*, Department One held that regardless of how obvious the constitutional violation, when the defendent knew or had reason to suspect that evidence had been seized without a warrant, a failure to investigate and move to suppress before trial resulted in a denial of any suppression motion made after trial began. 121 Wash. at 458, 209 P. at 838. In *Smathers*, the court characterized *Royce's* adoption of the common law rule as establishing a "timely application" requirement for all suppression orders. 121 Wash. at 474, 209 P. at 840.

100. "[S]ince there is a *right*, there *must by necessity be a remedy*, and the remedy is to be found in the making of a timely application to the court for an order [suppressing the evidence]." *Dersiy I*, 121 Wash. at 458, 209 P. at 838 (quoting from 10 R.C.L. 933 and agreeing with Taylor v. Benham, 46 U.S. (5 How.) 233 (1847)) (emphasis added).

101. State v. Dersiy *(Dersiy II)*, 121 Wash. 461, 215 P. 34 (1922) (rehearing en banc).

102. A defendent could move to suppress after trial began only if one of the following could be established: (1) direct or proper cross-examination of state witnesses made it appear that the articles offered in evidence were unlawfully seized; or (2) the defendant demonstrated that he could not learn of the unlawful seizure before trial. *Id.* at 462–63, 215 P. at 34–35.

103. 145 Wash. 87, 258 P. 1030 (1927).

104. State v. Llewellyn, 119 Wash. 306, 309–10, 205 P. 394, 395–96 (1922) (no article 1, § 7 violation where officers enter door uninvited when door opens to admit member of the public); State v. Miller, 121 Wash. 153, 154, 209 P. 9, 10 (1922) (motion to suppress properly denied where contraband evidence in plain view of officers); *Dersiy I*, 121 Wash. 455, 459, 209 P. 837, 839 (1922) (defendant failed to make timely motion to suppress); State v. Smathers, 121 Wash. 472, 474–75, 209 P. 839, 840 (1922) (defendant failed to make timely motion to suppress); State v. Hughlett, 124 Wash. 366, 370, 214 P. 841, 843 (1923) (limiting *Gibbons'* substantive search and seizure holding so that no article 1, § 7 violation occurs where police search defendant and automobile without a warrant but incident to an arrest); State v. Duncan, 124 Wash. 372, 376, 214 P. 838, 840 (1923) (no search warrant necessary since

viewed in light of the court's unitary approach,[105] some of these decisions seem to reflect a desire to avoid invoking the exclusionary remedy. Given its commitment to the unitary principle, the court could avoid excluding evidence only by limiting the number of defendants that could take advantage of its benefits or by holding that police conduct did not violate article 1, section 7.

For example, to limit the scope of the rule, the court adopted a "standing" requirement in *State v. Ditmar:*[106] a defendant could invoke the exclusion doctrine only if his personal privacy rights had been violated.[107]

liquor seized as evidence was in "plain view" of police officers); State v. Wynn, 125 Wash. 398, 403, 216 P. 872, 874 (1923) (warrant to arrest not required where arresting officer has reasonable grounds to believe that defendant committed the offense charged); State v. Basil, 126 Wash. 155, 157–58, 217 P. 720, 721 (1923) (civil trespass by police officers not a violation of article 1, § 7 where police look through glass door and *see* defendant with liquor); State v. Secrest, 131 Wash. 217, 218, 229 P. 744, 744 (1924) (where officers do not commit a trespass and liquor is in plain view, no search warrant required); State v. Conrad, 132 Wash. 153, 153, 231 P. 942, 942 (1925) (where evidence seized was in officer's presence, no warrant required); State v. Ditmar, 132 Wash. 501, 508, 232 P. 321, 324 (1925) (no right to suppression where defendant's personal privacy rights not violated); State v. Costello, 133 Wash. 170, 172, 233 P. 307, 308 (1925) (search pursuant to warrant not abandoned where police leave premises and return later as part of ruse to fool defendants); State v. Zounick, 133 Wash. 638, 638, 234 P. 659, 659 (1925) (where evidence conflicts as to legality of search, court refuses to disturb trial judge's denial of motion to suppress); State v. Andrich, 135 Wash. 609, 612, 238 P. 638, 639 (1925) (search warrant not invalidated because of incorrect address where police knew which residence defendant lived in without reference to the address); State v. Deitz, 136 Wash. 228, 230–31, 239 P. 386, 387 (1925) (court allows warrantless search of defendant and automobile when made incident to a lawful arrest for any misdemeanor including minor traffic violations); Olympia v. Culp, 136 Wash. 374, 240 P. 360 (1925) (no article 1, § 7 violation where police officers searching pursuant to warrant detain and search all persons on the premises); State v. Kittle, 137 Wash. 173, 177, 241 P. 962, 963 (1926) (source of sheriff's information upon which probable cause based is irrelevant to legality of warrantless search occurring before defendant arrested); State v. Britton, 137 Wash. 360, 364, 242 P. 377, 378, *aff'd,* 137 Wash. 367, 247 P. 9 (1926) (en banc) (no article 1, § 7 violation occurs when city police arrest and search defendant after request by county officials "to look him over" even though city police had no idea whether probable cause existed and county officers based "probable cause" on fact that defendant left town with two suitcases on afternoon of burglary); State *ex rel.* Hagen v. Superior Court, 139 Wash. 454, 461–62, 247 P. 942, 945 (1926) (*Boyd* doctrine not applicable in license revocation proceeding); State v. Rhode, 140 Wash. 47, 49, 248 P. 67, 67 (1926) (no article 1, § 7 violation where police invade defendant's home without warrant because home used for unlawful production of liquor and therefore not protected by law); State v. Dutcher, 141 Wash. 627, 629, 251 P. 879, 879 (1927) (where police observe defendant in possession of illegal liquor from vantage point outside of home, no violation of privacy when police enter home uninvited and arrest defendant without benefit of a search warrant); State v. Evans, 145 Wash. 4, 13, 258 P. 845, 849 (1927) (defendant consented to search of his hotel room after police arrested him on street corner, but even without consent search valid as incident to arrest).

The two decisions favorable to the defendant were: State v. Catalino, 118 Wash. 611, 611–12, 204 P. 179, 179 (1922) (court held defendant had right to cross-examine prosecution witness as to legality of search); State v. Etheridge, 135 Wash. 500, 504–05, 238 P. 19, 20 (1925) (en banc) (defendant arrested illegally when he was seized by federal agents on federal property, forced to enter state jurisdiction, and search by state officers discovered liquor).

105. *See supra* notes 22–24, 100 and accompanying text.

106. 132 Wash. 501, 232 P. 321 (1925).

107. In *Ditmar,* police officers, acting pursuant to information acquired by stopping a car carrying two young men, obtained a search warrant and discovered an unlawful "moonshine" operation in the

Although a standing rule was consistent with the court's conception of exclusion as a means to redress the invasion of the defendant's privacy,[108] it also served to limit the number of defendants who could avail themselves of the rule's benefits.[109]

In several cases the court "manipulated" search and seizure requirements to avoid finding that the defendant's privacy had been violated. For example, soon after *Gibbons,* the court, in a series of decisions, began to expand the scope of the search-incident-to-arrest exception to the warrant requirement beyond any historical justification or precedent.[110] In addition, in both *Ditmar* and *State v. Costello,*[111] the court approved police officer use of one warrant to make repeated searches when the original search proved fruitless.[112]

Given the court's apparent ambivalence toward the exclusionary rule, it is not surprising that the 1927 case of *State v. Buckley*[113] concerned a government appeal of a lower court decision to exclude evidence.[114] But in

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defendant's farmhouse. *Id.* at 504, 232 P. at 322–23. Although the evidence obtained by the original seizure of the young men and their automobile may have been unlawful, the court held that the defendants could not invoke the exclusionary rule because the evidence was not obtained through any violation of the defendants' personal right to privacy: the defendants could not avail themselves of the wrong committed against the victims of the original search. *Id.* at 507–08, 232 P. at 324. Without citing *Gibbons,* Justice Fullerton's opinion confirmed that evidence unlawfully seized from the defendant is suppressed because its use compelled the defendant to become a witness against himself. *Id.* at 507, 232 P. at 324 (citing Gouled v. United States, 255 U.S. 298 (1921)). For an explanation and discussion of the standing rule, see W. LAFAVE & J. ISRAEL, *supra* note 47, at § 9.2. *See also infra* note 129 and accompanying text.

108. *See infra* notes 126–29 and accompanying text.

109. *See infra* note 127 and accompanying text.

110. State v. Hughlett, 124 Wash. 366, 370, 214 P. 841, 843 (1923) (limited the *Gibbons* court's broad pronouncement concerning the protection accorded by article 1, § 7 to citizens in their automobiles); State v. Dietz, 136 Wash. 228, 230, 239 P. 386, 387 (1925) (allowed search by police of an automobile trunk where the defendant was arrested for a minor traffic violation); State v. Evans, 145 Wash. 4, 12–13, 258 P. 345, 349 (1927) (in dicta, court unnecessarily expressed its willingness to allow the search of defendant's hotel room as a search incident to arrest even though the arrest took place outside on a public street). For a criticism of *Evans* and the trend towards a broad search incident doctrine, see Note, *Search Without a Warrant of a Home as Incident to an Arrest Made Away From the Home of the Person Arrested,* 3 WASH. L. REV. 59 (1928).

The court's willingness to continue enlarging the search incident doctrine continued until 1983, when the Washington court reversed this trend, overruling case law dating back to *Hughlett* as being "without historic foundation" and inconsistent with the traditional scope of the search incident to arrest doctrine. State v. Ringer, 100 Wn. 2d. 686, 699, 674 P.2d 1240, 1247 (1983).

111. 133 Wash. 170, 233 P. 307 (1925).

112. *Ditmar,* 132 Wash. 501, 513, 232 P. 321, 326 (1925); *Costello,* 133 Wash. 170, 171–72, 233 P. 307, 307–08. For a contemporary criticism of *Ditmar,* see Note, *Invalidity of Several Searches Under Same Warrant,* 3 WASH. L. REV. 61 (1928). In *Costello,* the court held that police, after a fruitless search, could return to the site of the search using the same warrant. *Costello,* 133 Wash. at 171–72, 233 P.2d at 307–08.

113. 145 Wash. 87, 258 P. 1030 (1927).

114. *Buckley* presented an opportunity for the government to appeal an order for a new trial granted by a trial judge after he recognized his own error in admitting evidence seized in a search of the

Buckley, Justice Fullerton,[115] writing for a unanimous court, rejected the state's argument that no article 1, section 7 violation occurred when police officers forcibly entered defendants' hotel room with no reason to suspect the presence of stolen goods.[116] On the substantive issue, the *Buckley* court held that police officers violated Washington statutes,[117] and therefore article 1, section 7.[118] More importantly, the court rejected the state's invitation to return to the common law rule of nonexclusion,[119] reaffirming, instead, Washington's commitment to the exclusionary rule and its underlying unitary principle.[120]

While *Gibbons* provides the historical origins of the Washington exclusionary rule, Washington courts invariably invoke Justice Fullerton's explanation of the reason courts must suppress illegally seized evidence:

> [I]t is beneath the dignity of the state, and contrary to public policy, for the state to use for its own profit evidence that has been obtained in violation of law.[121]

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defendant's hotel room by police officers acting without a warrant or probable cause. 145 Wash. at 87–89, 258 P. at 1031–32.

115. Justice Fullerton, the only justice whose term of office dated back to *Royce,* authored many of the key decisions that favored the government's position in search and seizure cases. *See, e.g.,* State v. Evans, 145 Wash. 4, 258 P. 845 (1927); State v. Ditmar, 132 Wash. 501, 232 P. 321 (1925); State v. Basil, 126 Wash. 155, 217 P. 720 (1923); State v. Llewellyn, 119 Wash. 306, 205 P. 394 (1922).

116. *Buckley,* 145 Wash. at 90, 258 P. at 1031.

117. The police conduct violated REM. REV. STAT. § 2240(1), (2) (1921), which made it a gross misdemeanor for police to search residences without a search warrant. *Id.* at 90, 258 P. at 1032. *See infra* notes 241–43 and accompanying text.

118. *Buckley,* 145 Wash. at 90, 258 P. at 1031. Although the court did not specifically refer to art. 1, § 7, the violation of the constitutional provision was apparent due to the unlawful nature of the search under Washington laws.

119. *Id.* at 89, 258 P. at 1031.

120. *Id.* at 89–90, 258 P. at 1031. Justice Fullerton, however, did not rely on the reasoning underlying the *Gibbons* holding. *Id.* at 89–90, 258 P. at 1031. Instead, he explained the need for an exclusionary rule by referring to United States Supreme Court precedent. *Id.* at 89, 258 P. at 1031. Fullerton's reference to federal, rather than state precedent, probaby resulted from his view that the United States Supreme Court was the authoritative court. State v. Ditmar, 132 Wash. 501, 507–08, 232 P. 321, 324 (1925).

121. *Buckley,* 145 Wash. at 89, 258 P. at 1031. Justice Fullerton articulated this principle after citing the following United States Supreme Court decisions: Boyd v. United States, 116 U.S. 616 (1886); Weeks v. United States, 232 U.S. 383 (1914); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1921); Gouled v. United States, 255 U.S. 298 (1921); Amos v. United States, 255 U.S. 313 (1920); and Agnello v. United States, 269 U.S. 20 (1925). *Buckley* was the last time the Washington court considered whether, or on what basis, exclusion was required under the Washington Declaration of Rights until State v. White, 97 Wn. 2d 92, 640 P.2d 1061 (1982). *See infra* notes 178–84 and accompanying text. After *Buckley,* Washington courts simply cited the principle set forth in *Buckley* to explain the theoretical basis underlying exclusion. *See, e.g.,* State v. Knudson, 154 Wash. 87, 88, 280 P. 922, 923 (1929), *cert. denied,* 281 U.S. 745 (1930); State v. Vennir, 159 Wash. 58, 63, 291 P. 1098, 1099–1100 (1930); Tacoma v. Houston, 27 Wn. 2d 215, 223, 177 P. 2d 886, 890–91 (1947); State v. Smith, 50 Wn. 2d 408, 409, 312 P.2d 652, 653 (1957). For a criticism of the *Buckley* decision, see State v. Rousseau, 40 Wn. 2d 92, 99–101, 241 P. 2d 447, 451–53 (1952) (Finley, J., concurring).

Buckley does not explicitly contradict the *Gibbons* court's reasoning, yet on its face, the principle formulated by Justice Fullerton (the *Buckley* principle) does not refer to any state or federal constitutional provision as the source of the exclusionary rule.[122] Consequently, the *Gibbons* convergence theory, the original justification for the state exclusionary rule, receded into the jurisprudential background. Subsequent decisions by the court did not clarify the nature of the exclusionary rule's connection with either article 1, section 7 or article 1, section 9.[123]

2. *Independent Application: Exclusion as a Remedy Constitutionally Compelled by Article 1, Section 7*

After *Buckley,* the Washington Supreme Court continued to view the state exclusionary rule as connected, in some unspecified way, to the state constitution, and as independent of the federal constitution. The state rule continued to be applied as a traditional remedy[124] aimed at redressing the

122. The concept of suppressing evidence on the theory that the government may not profit from its own wrongdoing derives from Justice Holmes' opinion in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). Zap v. United States, 328 U.S. 624, 630 (1946). This concept of a "no use" policy is part of the very essence of the protection against unreasonable searches and seizures itself. Wasserstrom & Mertens, *supra* note 74, at 138. The use of the illegally seized evidence is a wrong in itself. *Id.* at 139 n.371. Thus the exclusionary rule, as defined by *Buckley,* was designed both to provide a meaningful remedy for the "trespassory violation" of the defendant's right to privacy, and to deprive the wrongdoing government of an ongoing benefit from its wrongful conduct. White, *supra* note 72, at 1279. Commentators interested in the nature of the federal rule's connection to the fourth amendment have focused on the failure of federal courts to articulate the rule's basis as the "no profit" concept contained in *Buckley.* For example, one critic of the federal exclusionary rule has argued that the failure of federal courts to fully adhere to the "no government benefit" concept means that the federal rule is not directly connected to the fourth amendment. Kaplan, *supra* note 16, at 1030. This view would suggest that exclusion must be directly connected to article 1, § 7, because Washington courts have strictly adhered to the "no government benefit" concept since *Buckley.* However, another commentator argues that when a court, as in *Buckley,* bases a decision on public policy choices, it cannot be considered a constitutional mandate. *See* Wilkey, *The exclusionary rule: why suppress valid evidence?,* 62 JUDICATURE 214, 232 (1978).

123. Some later decisions refer to exclusion as a court-created rule. *E.g.,* State v. Knudsen, 154 Wash. 87, 88, 280 P. 922, 923 (1929), *cert. denied,* 281 U.S. 745 (1930); State *ex rel.* Fong v. Superior Court, 29 Wn. 2d 601, 606–07, 188 P.2d 125 (1948), *cert. denied,* 337 U.S. 946 (1949). Others note the fundamental connection between exclusion and article 1, §§ 7 and 9 without specifiying the nature of the connection and without referring to exclusion as mandated by the constitutional provisions. *E.g.,* State v. Gunkel, 188 Wash. 528, 534, 63 P.2d 376, 379 (1936); Tacoma v. Houston, 27 Wn. 2d 215, 220–22, 177 P.2d 886, 889–90 (1947); State v. Miles, 29 Wn. 2d 921, 926, 190 P. 2d 740, 743 (1948).

124. A traditional "past-oriented" remedy seeks to help make or keep defendant-victims whole by helping them recover from or ward off specific governmental invasions. *See* Schrock & Welsh, *supra* note 16, at 315. When exclusion is viewed as a traditional remedy it is "dereliction of office" for the court to decline to invoke it. *Id.* at 316. Early in the development of the Washington exclusionary rule, the Washington court stated that a trial court had a "duty" to exclude once it became clear that evidence was seized in violation of the defendant's article 1, § 7 right to privacy. State v. Dersiy (*Dersiy II*), 121 Wash. 461, 461–63, 215 P. 34, 35 (1923) (en banc). Moreover, the *Buckley* principle's prohibition against the government profiting from its violation of the defendant's rights embodies this past-oriented

invasion of the defendant's privacy and vindicating the defendant's rights guaranteed in article 1, section 7.[125] Although the *Buckley* principle implied that the state should not profit from *any* illegally seized evidence,[126] the Washington court in *State v. Vennir,*[127] and later in *State v. Michaels,*[128] reaffirmed the connection between the state exclusionary rule and the vindication of the defendant's rights by continuing the standing requirement.[129]

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remedy approach. Courts have recognized that the purpose of such a prohibition is to restore the status quo ante by preserving the defendant's rights to the same extent as if the officers had stayed within the law. *See, e.g.,* State v. Davis, 295 Or. 227, 666 P.2d 802, 807 (1983). Conversely, although the United States Supreme Court describes exclusion as a remedy, its remedial effect is directed against future violations, not the violation of the defendant's rights. *See infra* note 170 and accompanying text.

125. In State v. Gunkel, 188 Wash. 528, 534, 63 P.2d 376, 380 (1936), the court expressly recognized that exclusion protected and preserved the defendant's article 1, § 7 constitutional rights. Five years later, the court again recognized that it had a duty to safeguard the defendant's civil liberties and reversed a trial court's denial of defendant's motion to suppress, noting that procedural requirements of timeliness should not prevail over protection of the defendant's constitutional right to privacy. State v. Miles, 29 Wn. 2d 921, 927, 190 P.2d 740, 743–44 (1948). *See also* State v. Raum, 172 Wash. 680, 683, 21 P.2d 291, 292 (1933) (after a search of defendant and his automobile proved fruitless, police seized defendant's keys and opened up his front door to search for liquor, court excluded evidence because defendant was entitled to have his article 1, § 7 rights protected).

126. *See* Mertens & Wasserstrom, *supra* note 15, at 383 (a standing requirement is inconsistent with view that exclusion prevents government from profiting from its illegal conduct).

127. 159 Wash. 58, 291 P. 1098 (1930). In *Vennir,* police officers, acting without warrant or probable cause, arrested the defendant, searched him and an automobile nearby, and discovered contraband liquor. Citing the *Buckley* principle, the court held that the search of the defendant's person violated his article 1, § 7 rights and that exclusion automatically attached. *Id.* at 61, 291 P. at 1100. However, unlike some federal courts, the Washington court held that the evidence seized in the car search was admissible because the defendant claimed he had no connection to the car; consequently, his article 1, § 7 rights had not been violated. *Id.* at 61, 291 P. at 1100.

128. 60 Wn. 2d 638, 374 P.2d 989 (1962).

129. In *Michaels,* the court adopted the automatic standing rule articulated by the United States Supreme Court in Jones v. United States, 362 U.S. 257 (1960). Under automatic standing, the court grants standing to invoke the exclusionary remedy whenever the defendant is charged with an offense that includes, as one of its essential elements, possession of the thing unlawfully seized. *Michaels,* 60 Wn. 2d at 646, 374 P.2d at 993–94. Under the pretext of an arrest for a minor traffic accident, police had gained access to the defendant's car, turning up illegal gambling equipment. *Id.* at 645, 374 P.2d at 992–93. The defendant disclaimed ownership of both the car and the gambling equipment. Nevertheless, the court distinguished *Vennir* and accorded the defendant standing because he was legitimately on the searched premises (the car) and the fruits of the search were to be used against him. *Id.* at 646, 374 P.2d at 993. The automatic standing rule has a twofold basis. First, defendants would otherwise have to incriminate themselves at the suppression hearing to establish that they possessed the goods. *Id.* at 646, 374 P.2d at 993. Second, without automatic standing, the government must simultaneously take contradictory positions that the defendant possessed the goods discovered in the illegal search, but did not suffer a deprivation of fourth amendment rights. *Id.* at 646, 374 P.2d at 993.

The Burger Court has abandoned the "legitimately on the premises" concept of standing in favor of requiring the defendant to have a reasonable and legitimate expectation of privacy in the area searched. *See* Rawlings v. Kentucky, 448 U.S. 98 (1980) (defendant had no reasonable expectation of privacy for drugs hidden in a friend's purse); Rakas v. Illinois, 439 U.S. 128 (1978) (passengers in a car do not have standing simply because of their lawful presence). In essence, the Burger Court has developed this expectation of privacy test by focusing not on the government's conduct, but rather on the nature of the evidence uncovered. *See* Comment, *Defining Fourth Amendment Searches: A Critique of the Supreme*

Consequently, the state could profit from evidence illegally seized from anyone except the defendant.

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*Court's Post-*Katz *Jurisprudence*, 61 WASH. L. REV. 191, 196 (1985). Washington has followed the Burger Court's formulation, requiring defendants to establish a reasonable expectation of privacy that society is willing to recognize. *See* State v. White, 97 Wn. 2d 92, 110 n.9, 640 P.2d 1061, 1071 n.9 (1982).

Although the Burger Court has made substantial changes in federal standing rules, the Washington court has not always followed. Washington refused to follow the Burger Court when it abandoned automatic standing. The Burger Court accomplished this alteration in the standing requirements in two steps. First, the Court claimed to have eliminated one point that had necessitated the automatic standing rule by holding that a defendant's testimony in support of a motion to suppress may not be admitted at his trial to establish his guilt. Simmons v. United States, 390 U.S. 377, 392–94 (1968). Second, the Burger Court overruled *Jones'* automatic standing rule on the grounds that *Simmons* provided the defendant broader protection and that, after *Rakas*, the government could, without contradiction, maintain both that the defendant possessed the goods, and did not suffer a deprivation of fourth amendment rights if the defendant failed to establish the requisite expectation of privacy in the area searched. United States v. Salvucci, 448 U.S. 83, 91–93 (1980). For a discussion and criticism of federal standing rules, see W. LAFAVE & J. ISRAEL, *supra* note 47, at §§ 9.1–9.2 (1984). Washington rejected the Burger Court's reasoning and result and maintained automatic standing for possessory crimes, in part, because of the state rule allowing use of suppression hearing testimony for impeachment purposes at trial. State v. Simpson, 95 Wn. 2d 170, 622 P.2d 1199 (1980). *See infra* note 160. However, the opportunity to overrule *Simpson* and end the automatic standing rule is now before the court. State v. Stroud, No. 51501-8 (Wash. Sup. Ct. heard on May 15, 1985); *see infra* note 199.

Adoption of, and continued adherence to, a "standing" requirement indicates that the Washington exclusionary rule seeks to remedy a wrong done to the defendant and that the remedy is directly connected to the defendant's article 1, § 7 guaranteed right to privacy. *See* People v. Martin, 45 Cal. 2d 755, 760, 290 P.2d 855, 857 (1955) (Traynor, J.); Allen, *The* Wolf *Case: Search and Seizure, Federalism and Civil Liberties*, 45 ILL. L. REV. 1, 22 (1950); Comment, *Judicial Control of Illegal Searches and Seizures*, 58 YALE L.J. 144, 156 (1948). *See generally* Burkoff, *The Court That Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151 (1979). Moreoever, the Washington court's strict adherence to the "standing" requirement, even one based on a reasonable expectation of privacy, demonstrates that the state exclusionary rule was created and continues to be applied from the perspective of protecting those accused of crimes, rather than soley protecting innocent victims of illegal searches. Loewy, *supra* note 18, at 1268. *But see* Mertens & Wasserstrom, *supra* note 15, at 383 n.85 (concept of standing is inconsistent with exclusionary rule's prohibition against the government profiting from its unlawful conduct).

However, strict adherence to and application of a standing requirement couched in terms of privacy expectations also works as an incentive for government officers to violate the constitutional rights of one person knowing that while they may not use the evidence obtained against the victim of the search, they can use it against the defendant who was the real object of their attention. *See, e.g.*, United States v. Payner, 447 U.S. 727, 730 (1980) (supervisory power may not be used to exclude evidence even though government actually encouraged its agents to violate fourth amendment rights of one person in order to obtain evidence against the defendant). Many commentators have pointed out the inconsistency that exists between the deterrence rationale and the standing rule's concomitant incentive for police wrongdoing. For a discussion of the standing requirement in the federal context see Burkoff, *supra*, at 162–67; Kamisar, *supra* note 10, at 634–38; Mertens & Wasserstrom, *supra* note 15, at 383; Oaks, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342, 358 (1967). In Washington, however, the rule's paramount purpose is to protect the defendant's right to privacy, rather than deterring future violations. Consequently, while the standing requirement's incentive aspects are regrettable, they are not inconsistent with the paramount rationale underlying the state exclusionary rule.

During the late 1940's several attempts were made to convince the Washington court to alter the automatic nature of the exclusionary rule. In *Tacoma v. Houston,*[130] police officers acting on an informant's tip made a warrantless entry into what appeared to be a normal residence, but discovered, instead, an operating house of prostitution.[131] Justice Mallory argued that a house of prostitution was not a bona fide residence and therefore the state statute requiring a warrant did not apply.[132] Consequently, Justice Mallory felt that the evidence should have been admissible, in effect suggesting that the defendant waives or loses the protection of his privacy rights according to the nature of the evidence discovered.[133] A majority of the court, however, held the evidence as inadmissible, refusing to allow the nature of the illegally seized evidence to determine whether the premises "deserved" protection.[134] One year later, in *State v. Miles,*[135] police officers had stopped and searched defendants without probable cause; the court excluded all evidence seized in the unlawful search even though the evidence linked the defendants to an unreported robbery.[136] The *Miles* court, like the *Houston* court before it, refused to allow the unlawfully seized evidence to legitimize the government's violation of the constitution, regardless of the probative and incriminating nature of the evidence.[137]

130. 27 Wn. 2d 215, 177 P.2d 886 (1947) (en banc).

131. *Id.* at 217–18, 177 P.2d at 887–88.

132. *Id.* at 228–29, 177 P.2d at 893 (Mallory J., dissenting).

133. This is known as the "waiver" or "forfeiture" theory. By engaging in illegal activity, even in the privacy of the home, defendants waive or forfeit their constitutional right to privacy. Therefore, defendants cannot complain about illegal searches and seizures that uncover contraband and other proof that a crime has been committed. *See* Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on* People v. Cahan, 43 CALIF. L. REV. 565, 581 (1955). For a response to Barrett's thesis see Schrock & Welsh, *supra* note 16 at 280.

134. Tacoma v. Houston, 27 Wn. 2d 215, 227, 177 P. 2d 886, 886 (1947) (en banc). The majority expressly stated that

> [i]f the evidence . . . were admissible, we would have no difficulty in holding that the character of the premises . . . was that of a house of prostitution rather than that of a "home," and, as such . . . , the premises would lose the protection of the constitutional provision. The trouble here is, however, that the evidence to establish the unlawful character of the place was . . . inadmissible.

Id.

135. 29 Wn. 2d 921, 190 P.2d 740 (1948).

136. *Id.* at 924–25, 933–34, 190 P.2d at 742, 747.

137. Justice Simpson, writing for the court, stated that the court "had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." *Id.* at 931, 190 P. 2d at 745 (quoting United States v. Di Re, 332 U.S. 581 (1948)).

While Justice Fullerton appeared to be leading the court on the exclusion issue during the 1920's and early 1930's, by the late 1940's Justice Simpson had become the conscience of the court with his emphasis on individual rights. In his *Miles* opinion, Justice Simpson reaffirmed the court's commitment to individual rights by recognizing the essential role played by article 1, § 7 in protecting

Pressure to alter the automatic nature of the state exclusionary rule gained momentum after 1949, when the United States Supreme Court decided *Wolf v. Colorado*.[138] Although the *Wolf* Court held the fourth amendment's substantive guarantees enforceable against the states through the due process clause of the fourteenth amendment,[139] it declined to incorporate the exclusionary rule.[140] Consequently, *Wolf* left the states free to reject the exclusionary rule in favor of another remedy capable of vindicating the rights of individuals victimized by illegal searches.[141]

Since Washington already had an exclusionary requirement, independently based on the state Declaration of Rights, *Wolf* had no substantive effect on the state exclusionary doctrine.[142] However, *Wolf* did encourage

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individual liberty. The court had a duty to safeguard civil liberties and consequently held in *Miles* that a technical reading of the timely motion requirement could not prevail over the defendant's constitutional right to privacy. 29 Wn. 2d at 927, 190 P. 2d at 744. The *Miles* court took its responsibility to protect the defendant's constitutional rights very seriously:

> The rights of individuals as guaranteed by our constitution, are not to be lightly considered. The framers of our constitutions . . . realized that laws affecting the liberty of men must be safeguarded, since the wisdom of the ages has taught that unrestrained official conduct in respect to depriving men of their liberties would soon amount to a total loss of those liberties. *Where procedure relating to arrest and search is provided, it must be strictly followed.*

Id. at 926, 190 P. 2d at 743 (emphasis added). *See also* City of Bremerton v. Smith, 31 Wn. 2d 788, 798–803, 199 P.2d 95, 100–02 (1948) (Simpson, J., dissenting).

138. 338 U.S. 25 (1949).

139. *Id.* at 27. The *Wolf* Court followed the selective incorporation approach set out by Justice Cardozo in Palko v. Connecticut, 302 U.S. 319, 325 (1937). The Court held that the guarantees of an individual's privacy contained in the fourth amendment were implicit in "the concept of ordered liberty;" therefore, the due process clause of the fourteenth amendment required the states to conform to the fourth amendment's substantive requirements. *Wolf*, 338 U.S. at 27–28.

140. *Id.* at 33.

141. *Id.* at 31. The *Wolf* Court reasoned that since exclusion only protects those discovered with incriminating evidence, it comported with due process for states to provide, instead of exclusion, the remedies of private action and the internal discipline of the police. *Id.*

Wolf contained the seeds that eventually grew into the Burger Court's selective approach to exclusion. By introducing the deterrence of future violations as the purpose of the remedy, the *Wolf* Court's decision represented a dramatic departure from the original understanding of the federal exclusionary rule as a constitutional mandate. Kamisar, *supra* note 10, at 606; Mertens & Wasserstrom, *supra* note 15, at 366. *See also* 1 W. LaFave, *supra* note 18, § 1.1, at 10–12. *Wolf* significantly changed the way the federal exclusionary rule is viewed by implicitly assuming, without any authority, and, without attempting to reconcile the language in federal jurisprudence to the contrary, that the federal exclusionary rule was based exclusively on a deterrence rationale, and that other methods, if constantly enforced, would be equally effective. Kamisar, *supra* note 10, at 606. Effectiveness of an alternative remedy depends upon whom the court is attempting to benefit. Since the Washington remedy is aimed at protecting the defendant's rights, none of the suggested alternatives is as effective as the exclusionary rule. *See infra* notes 281–97 and accompanying text.

Justice Black's concurrence identified the exlusionary rule as a "judicially created rule of evidence" developed out of the Court's supervisory power, rather than a constitutional mandate. 338 U.S. at 39–40 (Black, J., concurring). This view of exclusion came to be the centerpiece of the Burger Court's exclusionary doctrine. *See infra* notes 161–77 and accompanying text.

142. *See, e.g.*, State v. Young, 39 Wn. 2d 910, 917, 239 P.2d 858, 862 (1952); State v. Rousseau,

exclusionary rule opponents, such as Justice Robert Finley, to propose that the Washington court abandon exclusion in favor of alternative remedies.[143] Unwilling to violate what it perceived as its duty and obligation to protect the defendant from unlawful police conduct, the court consistently rejected Justice Finley's entreaties.[144] At one point the court stated unequivocably that it refused "to recede one iota" from the principles set down in *Miles*.[145] Thus, although the exact nature of exclusion's connection to the state constitution remained unarticulated, the Washington Supreme Court treated the exclusionary rule as a remedy constitutionally compelled by article 1, section 7.[146]

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40 Wn. 2d 92, 97–101, 241 P.2d 447, 450–53 (1952) (Finley, J., concurring); State v. Cyr, 40 Wn. 2d 840, 842, 246 P.2d 480, 483 (1952). Just prior to *Wolf*, Department Two of the Washington court identified the state exclusionary doctrine as a rule of decision created by courts, rather than a constitutional mandate. State *ex rel.* Fong v. Superior Court, 29 Wn. 2d 601, 607, 188 P.2d 125, 128 (1948), *cert. denied*, 337 U.S. 956 (1949). In the years following *Wolf*, the court viewed the Washington rule as reflecting *Weeks* and asserted that exclusion would remain the law under article 1, § 7 until the court decided to change it. State v. Cyr, 40 Wn. 2d 840, 842–43, 246 P.2d 480, 483 (1952); State v. Smith, 50 Wn. 2d 408, 408, 312 P.2d 652, 654 (1957); State v. Greco, 52 Wn. 2d 265, 266, 324 P.2d 1086, 1087 (1958).

143. State v. Rousseau, 40 Wn. 2d 92, 99, 241 P.2d 447, 452 (1952) (Finley, J., concurring). Justice Finley was Washington's most outspoken critic of exclusion during the 1950's, '60's, and early '70's. In his *Rousseau* concurrence, Justice Finley criticized the court's strict adherence to the exclusionary rule, noting that only the guilty, rather than the innocent, benefit from the rule. *Id.* at 99–100, 241 P.2d at 452. Since exclusion did little to deter future violations, Justice Finley proposed abandoning exclusion in favor of sufficient deterrent remedies already existing, such as civil actions and criminal penalties against offending officers provided for in REM. REV. STAT. § 2240-1, § 2240-2 (1952). *Id.* at 99–100, 241 P.2d at 452. To Justice Finley, only the innocent deserved a remedy. Justice Finley appears to have subscribed to the forfeiture theory of privacy under which the guilty, in effect, forfeit their privacy rights by committing a crime. *Id.* at 99–100, 241 P.2d at 452. *See supra* note 133. For Justice Finley, the exclusionary rule was "a somewhat emotional, shot-gun application of a rule of evidence which misses the bull's-eye, the specific aim or purpose of the rule—that is, the protection of the innocent, law abiding citizen—about as often as it hits it." *Id.* at 100, 241 P.2d at 452; *see also* Finley, *supra* note 16.

144. Shortly after *Rousseau*, the court reaffirmed its adherence to the *Buckley* principle in State v. Cyr, 40 Wn. 2d 840, 842, 246 P.2d 480, 483 (1952). Even Justice Finley recognized that the court had refused to adopt the approach suggested in his *Rousseau* concurrence. State v. Smith, 50 Wn. 2d 408, 409, 312 P.2d 652, 654 (1957).

145. State v. Young, 39 Wn. 2d 910, 917, 239 P.2d 858, 862 (1952). The court distinguished the facts in *Young* from those in *Miles*, noting that the police had probable cause to stop defendant's truck. *Id.* at 917, 239 P. at 862. The court emphasized that it had a responsibility to exclude evidence and "protect citizens from unwarranted, arbitrary, illegal arrests." *Id.* at 917, 239 P.2d at 862. However, the court also recognized its responsibility to protect other citizens from those who violate the law. *Id.* at 917, 239 P.2d at 862. The court stated that the probable cause requirement struck the balance between its two responsibilities. *Id.* at 918, 239 P.2d at 863.

146. *See infra* notes 211–33, 281–97 and accompanying text.

C. *Stage 2: The Dormant Period*

The Washington Supreme Court continued to automatically apply its independent state exclusionary rule until the early 1960's.[147] In 1961, in overruling *Wolf* in *Mapp v. Ohio*,[148] the United States Supreme Court held that "all evidence obtained by searches and seizures in violation of the [federal] Constitution is, by that same authority, inadmissible in a state court."[149] Consequently, state courts became obliged to apply the federal exclusionary rule.[150]

Shortly after *Mapp*, the Washington exclusionary rule passed from its first period of independent application into a dormant phase.[151] The Washington court began to disregard its history of independent article 1, section

147. *See supra* notes 30–33, and accompanying text. One of the last references to the Washington exclusionary rule came in a 1961 case that concerned the admissibility of the defendant's confession. State v. Self, 59 Wn. 2d 62, 366 P.2d 193 (1961), *cert. denied*, 347 U.S. 929 (1962). Although it held the confession to be voluntary and admissible, the *Self* court stated that Washington courts had developed a rule of exclusion holding inadmissible evidence illegally obtained by the officers and involuntarily given up by the possessor. *Id.* at 72, 366 P.2d at 199 (citing State v. Young, 39 Wn. 2d. 910, 239 P.2d 858 (1952), and State v. Knudsen, 154 Wash. 87, 280 P. 922 (1929), *cert. denied*, 281 U.S. 745 (1930)).

148. 367 U.S. 643, 655 (1961).

149. *Id.* at 655. The Court mustered a majority for overruling *Wolf*, but Justice Black, the fifth vote, concurred not on the basis of the fourth amendment standing alone but rather by invoking the *Boyd* convergence theory. *Id.* at 662 (Black, J., concurring).

Despite the plurality opinion's seemingly clear holding that the exclusionary rule was a constitutional requirement, the source and purpose of the requirement are not clearly delineated. Stewart, *supra* note 10, at 1380. Justice Clark's opinion contained a mixture of reasoning and rationales which only added to the doctrinal uncertainty concerning exclusion's constitutional connection. Schrock & Welsh, *supra* note 16, at 319; *see also* Mertens & Wasserstrom, *supra* note 15, at 381–82. Other commentators view the *Mapp* opinion as clearly identifying exclusion as part of the fourth amendment and therefore, part of the fourteenth. Allen, *Federalism and the Fourth Amendment: A Requiem for* Wolf, 1961 SUP. CT. REV. 1, 26. For a detailed discussion of *Mapp* and its ambiguities, see Kamisar, *supra* note 10, at 627. Ambiguous language prevented *Mapp* from firmly reestablishing the exclusionary rule as a personal constitutional right. Recent Supreme Court decisions dismiss *Mapp* as merely implying that the exclusionary rule is a necessary part of the fourth amendment. United States v. Leon, 104 S. Ct. 3405, 3423 (1984).

150. The Washington court expressed this view in McNear v. Rhay, 65 Wn. 2d 530, 536, 398 P.2d 732, 737 (1965). Justice Finley used his concurring opinion to renew his attack on the exclusionary rule, arguing that it was a "contagion of sentimentality" which had no deterrent effect and should not be perpetuated. *Id.* at 542–43, 398 P.2d at 740. (Finley, J., concurring) (citing 8 J. WIGMORE, EVIDENCE, § 2184 (3d. ed. 1940)).

151. Despite the *Mapp* holding, the Washington court seemed to independently apply the state exclusionary rule in two post-*Mapp* decisions. *See* State v. Michaels, 60 Wn. 2d 638, 374 P.2d 989 (1962); Tacoma v. Horton, 62 Wn. 2d 211, 220, 382 P.2d 245, 250 (1963). Eventually, the court began referring exclusively to the *Weeks/Mapp* exclusionary rule as opposed to the *Gibbons/Buckley* independently based rule. *See, e.g.*, State v. Riggins, 64 Wn. 2d 881, 884–86, 395 P.2d 85, 89 (1964); McNear v. Rhay, 65 Wn. 2d 530, 536–38, 398 P.2d 732, 737 (1965); State v. O'Bremski, 70 Wn. 2d 425, 428, 423 P.2d 530, 532 (1967).

7 decisions,[152] describing the exclusionary rule exclusively in terms of federal precedent.[153] As long as the United States Supreme Court continued to require state courts to automatically apply the federal exclusionary remedy whenever they found a fourth amendment violation, the Washington court had little reason to independently apply the Washington exclusionary rule.[154] An automatically applied federal rule paralleled the remedy developed in Washington jurisprudence.[155]

However, in reaction to the Burger Court's[156] retrenchment in the area of federally guaranteed civil liberties,[157] the Washington court returned to

152. State v. Ringer, 100 Wn. 2d 686, 697, 674 P.2d 1240, 1246 (1983) (and cases cited therein).

153. Languge used in State v. O'Bremski provides a typical description of the exclusionary rule after *Mapp:*

> The exclusionary rule is neither a statutory enactment nor an express provision of the fourth amendment to the United States Constitution. It is rather a command, judicially implied, intended to impose restraints upon law enforcement officers and to discourage abuse of authority, when constitutional immunity from unreasonable search is involved. . . . In each case the rights of the accused must be balanced against the rights of the public.

70 Wn. 2d at 429, 423 P.2d at 533 (citations omitted). This balancing concept became even more explicit in Washington court opinions after Calandra v. United States, 414 U.S. 338 (1974), discussed *infra* notes 161–77 and accompanying text. *See, e.g.,* State v. McFarland, 84 Wn. 2d 391, 393, 526 P.2d 361, 362 (1974) (the most important social good or purpose of the exclusionary rule is to discourage and deter police conduct violative of the fourth amendment; where no police deterrent effect will be served by exclusion, application of the exclusionary rule is unnecessary), *cert. denied,* 420 U.S. 1005 (1975). *See also* State v. Baker, 78 Wn. 2d 327, 331–32, 474 P.2d 254, 258 (1970) (in dicta, court characterized exclusion as an inherently inadequate way to restrain or regulate police or prosecutorial conduct).

In *McFarland,* Justices Stafford, Rosellini and Utter dissented. 84 Wn. 2d at 397–407, 526 P.2d at 364 (Stafford, J., dissenting) (pointing out that despite majority's disenchantment with federal exclusionary rule, state courts must apply it). Four years later, the *McFarland* dissenters formed the basis of the majority coalescing behind the "broader privacy protection" accorded by article 1, § 7. *See infra* note 160. In any event, Justice Finley's exclusionary rule discussion in both *McFarland* and *Baker* was in terms of the federal rule, not the historically independent *Gibbons/Buckley* formulation.

154. Nock, *supra* note 32, at 332; Utter, *Freedom And Diversity in a Federal System: Perspective on State Constitutions and the Washington Declaration of Rights,* 7 U. PUGET SOUND L. REV. 491, 499 (1984). United States Supreme Court Justice William Brennan observed that "it was only natural that when during the 1960's our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what protections, if any, were secured by state constitutions." Brennan, *supra* note 42, at 495. Moreover, the Washington Supreme Court acknowledged that it had neglected the state constitution during the 1960's and early 1970's by focusing instead on the protections provided by the fourth amendment. State v. Ringer, 100 Wn. 2d 686, 697, 674 P.2d 1240, 1247 (1983).

155. *See supra* notes 79–146 and *infra* notes 281–97 and accompanying text.

156. The term "Burger Court" is used to identify the period beginning with the appointment of Warren Burger as Chief Justice of the Supreme Court on June 23, 1969.

157. Brennan, *supra* note 42, at 495; Nock, *supra* note 32, at 332–33. *See generally* Wasserstrom, *The Incredible Shrinking Fourth Amendment,* 21 AM. CRIM. L. REV. 257 (1984).

independently interpreting the state constitution.[158] Thus, as the Burger Court narrowed the scope and content of fourth amendment guarantees,[159] the Washington court increasingly turned to article 1, section 7 to protect a defendant's right to privacy, which naturally resulted in a new period of independent application for the state exclusionary rule.[160]

158. Burger Court retrenchment in the area of civil liberties caused the Washington Supreme Court, like the appellate courts of a majority of the states, to turn to the state constitution to determine whether it provided broader protection than that afforded by the United States Constitution. Utter, *supra* note 154, at 499. However, disagreement by the Washington Supreme Court with United States Supreme Court reasoning and results did not begin with the advent of the Burger Court. *See, e.g.*, Visser v. Nooksack Valley School Dist. No. 506, 33 Wn. 2d 699, 711, 207 P.2d 198, 205 (1949). In *Visser*, the Washington court relied on article 1, § 11 and article 9, § 4 of the Washington Constitution to disagree with the separation of church and state analysis used by the United States Supreme Court in Everson v. Board of Educ., 330 U.S. 1 (1947). The *Visser* court stated that where the state constitution and the decisions thereunder run contrary to Supreme Court decisions, the Washington court must respectfully disagree. *Id.* at 711, 207 P.2d at 205.

In this latest period of independent interpretation, the Washington Supreme Court has held that the Declaration of Rights accords broader protection in a variety of contexts. *See, e.g.*, State v. Bartholomew, 101 Wn. 2d 631, 683 P.2d 1079 (1984) (despite nearly identical language, interpretation of state due process clause is not controlled by Supreme Court interpretations of the fourteenth amendment; portions of Washington's capital punishment statute violated the state due process guarantee though Burger Court would find no violation under the fourteenth amendment); Pasco v. Mace, 98 Wn. 2d 87, 653 P.2d 618 (1982) (unlike the sixth amendment, article 1, §§ 21 and 22 guarantee the right to a jury trial in all criminal prosecutions regardless of the potential punishment); Alderwood Assoc. v. Washington Envtl. Council, 96 Wn. 2d 230, 635 P.2d 108 (1981) (article 1, § 5 protects right to solicit initiative signatures in a private shopping center, contray to United States Supreme Court interpretation of first amendment); State v. Fain, 94 Wn. 2d 387, 617 P.2d 720 (1980) (article 1, § 22, unlike the eighth amendment, prohibits as cruel punishment certain recidivist statutes authorizing life imprisonment); Seattle School Dist. No. 1 v. State, 90 Wn. 2d 476, 585 P.2d 71 (1978) (education is a fundamental right under the state constitution though not under Burger Court interpretations of the federal Constitution).

159. As the composition of the Court changed, it became clear that an unmistakeable substantive tilt away from the rights of the accused and towards a crime-control, police orientation had occurred. Wasserstrom, *supra* note 157, at 260. In the decade following *Mapp*, "the Warren Court did not even review, much less reverse, a single state court decision upholding the fourth amendment claim of the accused." *Id.* By contrast, during the 1982 term, for example, the Burger Court agreed to review ten fourth amendment cases; in each case the prosecutor, not the defendant, had sought review. In seven of the nine cases ultimately decided, the Court reversed the court below and held that the police conduct was lawful. *Id.* The Burger Court's hostility toward the exclusionary rule has been apparent for many years, with the move towards narrowing the scope of the rule beginning when Chief Justice Burger severely criticized the rule in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) (Burger, C.J., dissenting). Wasserstrom, *supra* note 157, at 259; *see also* Brennan, *supra* note 42, at 495; Nock, *supra* note 32, at 333. For a response to Professor Wasserstrom's article, see Harris, *The Return to Common Sense: A Response to "The Incredible Shrinking Fourth Amendment,"* 11 AM. CRIM. L. REV. 25 (1984).

160. The dormant stage ended with State v. White, 97 Wn. 2d 92, 108, 640 P.2d 1061 (1982). *See infra* notes 178–84 and accompanying text. *White* was one of a series of decisions reached by the Washington Supreme Court between 1978 and late 1984 that "worked a rather massive change in search-and-seizure laws through only seven decisions, each of which expressly rejects one or more United States Supreme Court cases." Nock, *supra* note 32, at 333. The seven decisions in this series are:

(1) State v. Hehman, 90 Wn. 2d 45, 47, 578 P.2d 527, 529 (1978) (after disagreeing with United States v. Robinson, 414 U.S. 218 (1973) and Gustafson v. Florida, 414 U.S. 260 (1973), the court

held that in Washington, custodial arrests for minor traffic violations are unjustified, unwarranted and impermissible). *But see* RINGER REPORT, *supra* note 12, at 9 (arguing that *Hehman* is not an independent grounds decision because it makes no specific reference to the state constitution).

(2) State v. Simpson, 95 Wn. 2d 170, 181, 622 P.2d 1199, 1206 (1980) (plurality opinion) (relying on broader protection of article 1, § 7, the court rejected United States v. Salvucci, 448 U.S. 83 (1980), and maintained Washington's automatic standing rule). *See* Adams & Nock, *Search, Seizure and Washington's Section Seven: Standing from* Salvucci *to* Simpson, 6 U. PUGET SOUND L. REV. 1 (1982).

(3) State v. White, 97 Wn. 2d 92, 108, 640 P.2d 1061, 1070 (1982) (in rejecting Michigan v. DeFellippo, 443 U.S. 31 (1979), the court held that, unlike the fourth amendment, article 1, § 7 requires the exclusion of evidence obtained as a result of the "good faith" arrest of a citizen for failure to comply with a stop-and-identify statute subsequently held unconstitutional). *See infra* text accompanying note 183.

(4) State v. Ringer, 100 Wn. 2d 686, 699, 674 P.2d 1240, 1248 (1983) (rejecting automobile search incident to arrest doctrine as applied in United States v. Ross, 456 U.S. 798 (1982) and New York v. Belton, 453 U.S. 454 (1981), and holding that article 1, § 7 limits warrantless searches incident to arrest to areas within the arrested person's immediate control and only for the purpose of removing weapons or preventing the destruction of evidence probative of the crime charged). *See* Note, *New Limits on Police Vehicle Searches In Washington*, 60 WASH. L. REV. 177 (1984). For a criticism of *Ringer*, see RINGER REPORT, *supra* note 12.

(5) State v. Chrisman, 100 Wn. 2d 814, 821, 676 P.2d 419, 424 (1984) (the court refused to follow the Supreme Court's application of the plain view exception to the fourth amendment warrant requirement, holding that article 1, § 7 prohibits a police officer's warrantless entry into the residence of the person just arrested unless the officer possesses specific, articulable facts showing a threat to safety, a possibility that evidence of the crime will be destroyed, or a strong likelihood of escape).

(6) State v. Jackson, 102 Wn. 2d 432, 443, 688 P.2d 136, 141 (1984) (refusing to "blindly" follow the Supreme Court's lead, the state court rejected the Burger Court's new "totality of the circumstance" test for evaluating warrants based on informant tips adopted in Illinois v. Gates, 462 U.S. 213 (1983), in favor of continued adherence to the *Aguilar-Spinelli* two prong test).

(7) State v. Myrick, 102 Wn. 2d 506, 512, 688 P.2d 151, 155 (1984) (unlike the fourth amendment, article 1, § 7 does not recognize an "open fields" exception to the warrant requirement). For a complete survey of search and seizure law in Washington see Utter, *Survey of Washington Search and Seizure Law*, 9 U. PUGET SOUND L. REV. 1 (1985).

Each of these seven decisions is based on the same underlying reasoning. Although the United States Supreme Court is the final arbiter of controversies under the federal Constitution, state court decisions based clearly and expressly on independent state grounds are not reviewable by the Supreme Court. Michigan v. Long, 463 U.S. 1032, 1041 (1983). Supreme Court interpretations of the fourth amendment set minimum standards; greater rights may be afforded under the state constitution. State v. Chrisman, 100 Wn. 2d 814, 816–17, 676 P.2d 419, 422 (1984). Based on the intentional and substantial difference in wording between the fourth amendment and article 1, § 7, *see infra* note 316 and accompanying text, the Washington court concluded that the state constitution mandates that the freedom from unreasonable search and seizure be more expansively construed. State v. Jackson, 102 Wn. 2d at 439, 688 P.2d at 141.

However, these article 1, § 7 broader protection decisions lacked a unified theory of analysis and thus did not amount to a clear, predictable, and consistent jurisprudence. Nock, *supra* note 32, at 346. Professor Nock offers three theories, the "literal," "orthodox," and "exigency" theory, and urges the Washington Court to select one of them to place a foundation under its article 1, § 7 jurisprudence. *Id.*

Others, however, have criticized the court's independent grounds analysis as unprincipled. Justice Horowitz wrote a "strenuous" dissent in *Simpson*, criticizing his fellow justices for reaching a result based on their disagreement with the Supreme Court, rather than on the basis of neutral principles. State v. Simpson, 95 Wn. 2d 170, 200, 622 P.2d 1199, 1216 (Horowitz, J., dissenting). After the *Ringer* decision, a committee was formed at the request of the Washington State Attorney General in

D. *The Modern Period of Independence*

1. *The Burger Court Approach to Exclusion: A Complete Overhaul of the Federal Rule*

The need to reconsider applying the Washington rule began to resurface after 1974, when the Burger Court ignored the long established unitary approach and adopted a bifurcated analysis by deconstitutionalizing the federal rule in *Calandra v. United States.*[161] After *Calandra,* the federal exclusionary rule no longer automatically applied.[162] Rather, its application hinged upon an empirical measurement of the deterrent benefits gained from suppressing evidence.[163]

Although the Burger Court found roots for its selectively applied exclusionary rule in Warren Court decisions,[164] Burger Court jurisprudence has

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conjunction with the Washington Association of Prosecuting Attorneys and the Legal Advisors Division of the Washington Association of Sheriffs and Police Chiefs. RINGER REPORT, *supra* note 12, at 1. The committee issued a stinging criticism of the *Ringer* decision and the general use of article 1, § 7 to provide broader protection than the fourth amendment. *Id.* In its report, the *Ringer* Committee proposed wording for a constitutional amendment that was introduced in the 1985 session of the Washington legislature. *Id.* at 1; *See* H.J.R. 11, 49th Leg., Regular Session (1985). The "*Ringer* Amendment" sought to replace the present text of article I, § 7 with the wording of the fourth amendment and to limit suppression of evidence to those situations where the United States Supreme Court invokes the federal exclusionary rule. *Id.*

Similar proposals have succeeded in Florida and California. In 1982 the people of California approved Proposition 8 which amended California State Constitution art. I, to add § 28(d) entitled "Right to Truth in Evidence," which provides in part that "relevant evidence shall not be exluded in any criminal proceeding." *See* People v. Lance, 37 Cal. 3d 873, 112 Cal. Rptr. 631, 694 P.2d 744, *modified,* 38 Cal. Rptr. 3d 412 (1985); Blum and Lobaco, *The Prop. 8 Puzzle,* CAL. LAW., Feb. 1985, at 29; Note, *Wilson v. Superior Court: Voters Reject Judiciary's 27 Year Experiment With the Exclusionary Rule,* 6 CRIM. JUS. J. 111 (Fall 1982). Also in 1982, the people of Florida amended their state constitution, by approving H.J.R. 31-H which requires the right to be free from unreasonable search and seizure to "be construed in conformity with the 4th amendment . . . as interpreted by the United States Supreme Court." FLA. CONST. art. I, § 12.

Nevertheless, in Washington, the Ringer Amendment (H.J.R. 11) failed to get out of the Judiciary Committee during the regular session of the 49th Legislature. Despite the apparent failure of the move to amend the state constitution, the same result may be accomplished by independent action of the Washington Supreme Court. The Washington court as presently constituted may be more amenable to following the United States Supreme Court's lead on fourth amendment issues. Whitely, *Supreme Court Will Begin Session With Changed Lineup,* The Seattle Times/Seattle Post-Intelligencer, Dec. 2, 1984, at D11, Col. 1. (Sunday ed.).

161. 414 U.S. 338, 347–48 (1974). *Calandra* concerned whether a grand jury could compel a witness to answer questions derived from illegally seized evidence. *Id.* at 347. *See* Schrock & Welsh, *supra* note 17, at 119. For an in depth analysis and criticism of Justice Powell's *Calandra* opinion, see Schrock & Welsh, *supra* note 16.

162. *Calandra,* 414 U.S. at 348.

163. *Id.* at 349.

164. The *Calandra* Court's emphasis on the deterrent benefits of the rule was not unique. Justice Powell's opinion cited Warren Court decisions in support. *E.g.,* Alderman v. United States, 394 U.S. 165, 174–75 (1969) (giving birth to the cost-benefit calculus by holding that standing would still be required because added deterrent value does not justify extending exclusionary rule to one who was not

displayed an open hostility towards the exclusionary rule.[165] Beginning with *Calandra,* the Burger Court has interpreted the fourth amendment in a manner more closely attuned to the common law's literal construction than to the *Boyd* principle.[166] Accordingly, the Burger Court views the constitutional violation as fully accomplished by the unlawful search and seizure.[167] Application of the exclusionary rule is not intended, nor is it able, to cure the already accomplished wrong.[168] This interpretation of the fourth amendment regards exclusion as unconnected to the constitutional right; consequently, a court commits no constitutional wrong by admitting the unlawfully obtained evidence.[169] Under the Burger Court's interpretation, the exclusionary rule is a remedy judicially, not constitutionally, created to serve a single purpose: to vindicate fourth amendment rights generally by deterring future unlawful police conduct.[170] Based on an assumption that

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victim of the unlawful search); Linkletter v. Walker, 381 U.S. 618, 637 (1965) (deterrent purpose not served by applying *Mapp* retroactively); Elkins v. United States, 364 U.S. 206, 217 (1960) (the rule's purpose is to deter "by removing the incentive to disregard it").

165. Wasserstrom, *supra* note 157, at 259. The basis of this hostility lies first, in the belief that the exclusionary rule exacts "enormous" social costs in lost prosections, setting "countless" criminals free. Nix v. Williams, 104 S. Ct. 2501, 2510 (1984); Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 416 (1971) (Burger, C. J., dissenting). Second, while exacting this enormous cost, the rule's immediate effect is to provide a disproportionate benefit to the lawbreaker. *Bivens,* 403 U.S. at 418–20 (Burger, C.J., dissenting); Friendly, *supra* note 20, at 951. The rule provides no "succor" to the innocent victim of the search, whom, it is insisted, the fourth amendment is designed to protect. *Bivens,* 403 U.S. at 415–16 (Burger, C.J., dissenting); Wilkey, *supra* note 122, at 228. *But see* Loewy, *supra* note 18, at 1272 (arguing that the Burger Court fails to recognize the value of the exclusionary rule as a device for protecting the innocent).

166. Compare the approach taken in United States v. Calandra, 414 U.S. 338, 348–54 (1974), and United States v. Leon, 104 S. Ct. 3405, 3412 (1984), with the justification offered for the common law's nonexclusionary rule set out *supra* notes 36–39 and accompanying text, an approach rejected by the originators of the federal exclusionary rule in Boyd v. United States, 116 U.S. 616 (1886) and Weeks v. United States, 232 U.S. 383 (1914).

167. *Calandra,* 414 U.S. at 354.

168. *Leon,* 104 S. Ct. at 3412; Stone v. Powell, 428 U.S. 465, 540 (1976); *Calandra,* 414 U.S. at 348–49.

169. *Calandra,* 414 U.S. at 347; *Leon,* 104 S. Ct. at 3412.

170. *Calandra,* 414 U.S. at 348; *Leon,* 104 S. Ct. at 3412. Two factors influence the Court. First, since exclusion is incapable of curing the invasion of the defendant's rights, already suffered by the time the trial has begun, the Court concludes that exclusion is a judicially created remedy, rather than a personal right guaranteed the defendant under the Constitution. *Calandra,* 414 U.S. at 348; *Leon,* 104 S. Ct. at 3412. Second, the Burger Court has adopted a fragmentary model of a criminal prosecution, whereby the government as prosecuting and policing agent (the object of the fourth amendment) is separated from the government as court (the neutral conduit of evidence). Therefore, under this fragmentary model the "Constitution is not itself violated if the judge decides to admit the tainted evidence." *Leon,* 104 S. Ct. at 3432 (Brennan, J., dissenting); Schrock & Welsh, *supra* note 16, at 254–56. For these two reasons, the Burger Court views the exclusionary rule as a means contrived by judges to control police. Schrock & Welsh, *supra* note 16, at 256. For the argument in favor of exclusion as a personal right under the fourth amendment, see *Leon,* 104 S. Ct. at 3438 (Brennan, J., dissenting); Kamisar, *supra* note 10; Schrock & Welsh, *supra* note 16; Wasserstrom & Mertens, *supra* note 74.

deterrence can be empirically measured,[171] and on its characterization of exclusion as a remedial device,[172] the Burger Court refuses to apply the exclusionary rule unless the defendant can demonstrate that the rule's utilitarian deterrent benefits outweigh its societal costs.[173]

In sum, the Burger Court has adopted a bifurcated approach, separating its inquiry into whether the defendant's substantive rights were violated from its decision whether to exclude the unlawfully obtained evidence.[174] If it reaches the issue of exclusion, the Court selectively applies the exclusionary rule according to the results of a cost-benefit analysis.[175] Ironically, the Court no longer considers protection of the defendant's rights a benefit to be included in the cost-benefit calculus.[176] Using this empirical

171. *But see, e.g.*, United States v. Janis, 428 U.S. 433, 452 n.22 (1976) (no empirical researcher, proponent, or opponent of the rule has yet been able to establish with any assurance whether the rule has any deterrent effect). For an analysis of the reasons an empirical measure of deterrence "is possible in principle" but "impossible in fact," see Morris, *The Exclusionary Rule, Deterrence and Posner's Economic Analysis of Law*, 57 WASH. L. REV. 647, 653 (1982) ("Police compliance with the exclusionary rule produces a non-event which is not directly observable—it consists of *not conducting an illegal search.") (emphasis in original).*

172. *Calandra*, 414 U.S. at 348; *Leon*, 104 S. Ct. at 3413.

173. *Leon*, 104 S. Ct. at 3413.

174. *Id.* at 3412; Illinois v. Gates, 463 U.S. 213, 223 (1983). *See supra* notes 25–28 and accompanying text.

175. *Leon*, 104 S. Ct. at 3412. As the court itself has acknowledged, it is impossible to measure the effects of exclusion. Elkins v. United States, 364 U.S. 206, 218 (1960). Although it is apparent that the exclusionary rule exacts some cost in terms of acquittals and dismissals, the statistical significance of the available data is open to disagreement. Compare studies and statistics cited in *Leon*, 104 S. Ct. at 3413 n.6, with 1 W. LAFAVE, *supra* note 18, § 1.2 (1985 Cum. Sup.), and Kamisar, *The Court's Growing Hostility to the Exclusionary Rule:* Leon, Sheppard *and* Lopez-Mendoza, Prepared Remarks of Yale Kamisar delivered at U.S. Law Week's Constitutional Law Conference, September 14, 1984, Washington, D.C. (on file at the *Washington Law Review*). Meanwhile, the benefits are only conjectural. Morris, *supra* note 171, at 652–56. Some commentators have suggested that the Burger Court has dropped the unitary approach in favor of the bifurcated, selective application analysis in order to emasculate the exclusionary rule without specifically abandoning it. *See* Burkoff, *supra* note 129, at 159; *see also* Kamisar, *supra* note 10, at 662–63. By demanding that the defendant prove that excluding the evidence results in future deterrence sufficient enough to outweigh societal costs resulting from the loss of evidence probative of the defendant's guilt, the Burger Court places on the defendant the burden of proving the unprovable and thereby predetermines the outcome. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 330–31 (1973); *see also* Mertens & Wasserstrom, *supra* note 15, at 386–87 nn. 103–04 (Burger Court begins its analysis skeptical of the ability to measure deterrence, resulting in most decisions favoring the government). For discussions of the Supreme Court's cost-benefit approach, see Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention*, 23 SO. TEX. L.J. 559 (1982); Kamisar, *supra* note 10, at 642–50, 655–57; Wasserstrom & Mertens, *supra* note 74; White, *supra* note 72, at 1281–83.

176. Burkoff, *supra* note 129, at 151, 157. The Burger Court cost-benefit analysis only compares the benefit society derives from exclusion, in terms of protecting innocent citizens from future illegal searches, with the costs society bears in the form of freeing criminals. *See, e.g.*, United States v. Leon, 104 S. Ct. 3405, 3412–13, 3419–22 (1984). The cost-benefit analysis no longer takes into account the benefit derived from protecting the defendant's rights. Yet, the Court continues to require, as a threshold matter, the defendant to demonstrate a legitimate expectation of privacy in the area searched. Continued

approach, the United States Supreme Court has systematically narrowed the scope of the exclusionary rule's application in a variety of contexts.[177]

2. *The Return to Independent Application of the Washington Exclusionary Rule*

While it was only a matter of time before the Washington court would have been asked to decide whether article 1, section 7 compelled a stricter remedy than the federal exclusionary rule, the court jumped the gun in the 1982 case of *State v. White*.[178] The *White* court appears to have misconstrued the Supreme Court's holding in *Michigan v. DeFillippo*,[179] reading it as a decision curtailing the operation of the federal exclusionary rule.[180] In fact,

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adherence to the standing requirement is inconsistent with the deterrence rationale. *See supra* note 129. Nevertheless, the Supreme Court has maintained the standing requirement despite the inconsistency since Alderman v. United States, 394 U.S. 165, 173–76 (1969). Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 433 (1974). By placing the cost-benefit burden on the defendant and by continuing to require the defendant to demonstrate a form of standing, the Burger Court reveals a sub rosa motivation: its preoccupation with the substantive question of a defendant's putative guilt. Burkoff, *supra* note 129, at 153–54. In essence, the Court has allowed the nature of the unlawfully seized evidence to legitimatize the government's unconstitutional conduct to the extent of allowing its introduction against the victim of the illegal search. Thus, interest-balancing may not be the real basis for judgment in the exclusionary rule cases, but may instead be merely a stylish way to write an opinion once a judgment has already been reached on the basis of individual, subjective values. Kamisar, *supra* note 10, at 642–43.

177. *See, e.g.*, United States v. Calandra, 414 U.S. 338 (1974) (exclusionary rule does not operate in grand jury setting); United States v. Janis, 428 U.S. 433 (1976) (exclusionary rule does not operate in federal civil tax proceedings as to evidence illegally seized by state officers); Stone v. Powell, 428 U.S. 465 (1976) (full and fair opportunity to litigate fourth amendment claim in state court precludes federal habeas corpus relief sought on grounds of failure to exclude); United States v. Ceccolini, 435 U.S. 268 (1978) (witnesses may testify at trial, even though their identities were discovered as a result of unlawful search and seizure); United States v. Havens, 446 U.S. 620 (1980) (evidence inadmissible in prosecution's case-in-chief may be used to impeach defendant's statements made on cross-examination); United States v. Payner, 447 U.S. 727 (1980) (exclusion does not operate where defendant's personal rights not violated despite fact that police intentionally violated rights of a third party to obtain evidence against the defendant); United States v. Leon, 104 S. Ct. 3405 (1984) (exclusion does not bar evidence obtained pursuant to defective warrant from use in prosecution case-in-chief if police officers act in objective good faith reliance on the facial validity of the warrant); INS v. Lopez-Mendoza, 104 S. Ct. 3479 (1984) (exclusionary rule does not operate in civil deportation hearings). By comparing the incremental benefit to the overall cost, instances of benefit are severely reduced by each prior decision. Thus, by continuing to curtail the application of the rule, the Burger Court will reach the point where the benefits to be obtained through application of the rule will no longer outweigh the costs in any situation. Kamisar, *supra* note 10, at 664. At that point the total loss of the exclusionary rule may be the "ultimate cost." *Id.*

178. 97 Wn. 2d 92, 640 P.2d 1061 (1982). In *White*, the defendant was arrested for violating WASH. REV. CODE § 9A.76.020(1) and (2), Washington's stop-and-identify statute. After spending a night in jail, the defendant confessed to a burglary. *White*, 97 Wn. 2d at 95, 640 P.2d at 1063. The issue before the court was the constitutionality of the stop-and-identify statute and the admissibility of the confession. *Id.*

179. 443 U.S. 31 (1979).

180. *White*, 97 Wn. 2d at 102, 640 P.2d at 1066.

the Burger Court never reached the exclusion issue, holding instead that no fourth amendment violation occurred.[181]

Nevertheless, Justice Williams, writing for the *White* court, rejected the United States Supreme Court's selective application of the fourth amendment exclusionary rule, characterizing it as not only inconsistent with federal exclusionary rule jurisprudence,[182] but also inconsistent with the broader privacy protection contained in article 1, section 7 of the Washington constitution, and with the forty years of independent state exclusionary rule jurisprudence.[183] According to the *White* court, article 1, section 7 requires a unitary approach to exclusion; whenever the "right is unreasonably violated, the remedy must follow."[184]

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181. Michigan v. DeFillipo, 443 U.S. at 34–40. The defendant had been arrested for violation of a "stop-and-identify" city ordinance. In a search incident to that arrest, police officers discovered a controlled substance, and later the defendant was convicted of unlawful possession rather than for violation of the stop-and-identify statute. *Id.* at 33–34. Michigan state courts held the stop-and-identify statute unconstitutional and reversed the conviction on the grounds that the evidence should have been excluded. The Supreme Court reversed on the grounds that the arrest was based on probable cause and made in good faith reliance on a presumptively valid ordinance, even though the ordinance was subsequently held unconstitutional. Since the arrest was valid, so was the search incident to it. Since no constitutional violation occurred, the Supreme Court did not address whether or not the exclusionary rule applied. *Id.* at 40. *See* Note, *Constitutional Law: Search and Seizure—The Role of Police Officer Good Faith in Substantive Fourth Amendment Doctrine*—Michigan v. DeFillippo, 443 U.S. 31 (1979), 55 WASH. L. REV. 849, 850 (1980).

182. *White*, 97 Wn. 2d at 110–12, 640 P.2d at 1071–72. The court criticized the Burger Court for its failure either to adhere to the clear intent of Mapp v. Ohio or to overrule it. *Id.* at 111, 640 P.2d at 1071. Justice Williams also rejected the good faith arrest exception as subjective, unworkable, and "contrary to well established Fourth Amendment principles." *Id.* at 107, 640 P.2d at 1069. This discussion of the federal rule was unnecessary because the *White* court held the *DeFillippo* decision inapplicable on the grounds that, unlike the statute in *DeFillippo*, WASH. REV. CODE § 9A.76.020(1) was "flagrantly unconstitutional." *Id.* at 104, 640 P.2d at 1067.

183. *Id.* at 110–11, 640 P.2d at 1071. The *White* court rejected the characterization of the exclusionary rule as a remedial measure created to deter future unlawful police action. *Id.* at 105, 640 P.2d at 1068. Instead, the court found that article 1, § 7 clearly recognized an individual's right to privacy with no express limitations, in contrast to the fourth amendment, which focuses on delineating express limitations on governmental actions. *Id.* at 110, 640 P.2d at 1071. In Washington, the protection of the individual's privacy is the paramount concern. *Id.* at 110, 640 P.2d at 1071. As long as the defendant demonstrates that he had a reasonable expectation of privacy that society is prepared to recognize as legitimate, exclusion automatically attaches. *Id.* at 110 n.9, 640 P.2d at 1071 n.9. Consequently, article 1, § 7 mandates that exclusion not be selectively applied. *Id.* at 110–11, 640 P.2d at 1071. Justice Hicks in dissent criticized the majority, noting that even if article 1, § 7 affords a broader privacy protection, the court had broadened the exclusionary rule even beyond the language of article 1, § 7. *Id.* at 115–16, 640 P.2d at 1074 (Hicks, J., dissenting).

184. *Id.* at 110, 640 P.2d at 1071. The language employed by Justice Williams was unfortunate because it implies that a right may be reasonably violated without triggering a remedy. The context of the entire opinion, including footnote 9, demonstrates that Justice Williams did not intend to suggest that a good faith violation would not trigger exclusion. Rather, he used "reasonableness" to denote the standard to be used to determine whether a violation occurred. *Id.* at 110, 640 P.2d at 1071. Washington courts have long read reasonableness into the text of article 1, § 7 in that all searches and seizures without authority of law are unreasonable, while searches and seizures with authority of law are reasonable. *See, e.g.*, cases cited in State v. McCollum, 17 Wn. 2d 85, 106–12, 136 P.2d 165, 175–76

Nine months later, in *State v. Bonds*,[185] the court expounded on the independent nature of Washington's exclusionary doctrine.[186] *Bonds* required the court to determine whether the exclusionary rule applied to evidence obtained under unusual circumstances; evidence had been obtained by Washington police officers incident to arresting the defendant in Oregon and transporting him back to Washington in violation of Oregon law.[187] The court concluded that although the police conduct was offensive, no article 1, section 7 violation occurred because the officers had probable cause to arrest the defendant and did so without violating any Washington law.[188]

Having recognized a violation of Oregon law, rather than a violation of the Washington constitution, the *Bonds* court felt justified in employing a bifurcated, rather than a unitary approach.[189] Writing for the five member majority, Justice Pearson focused first on the Washington rule's historical development, identifying its objectives as (1) protecting the privacy rights of individuals against unreasonable government intrusions; (2) deterring future unlawful police conduct; and (3) preserving the judiciary's integrity by refusing to consider evidence obtained without authority of law.[190] The *Bonds* court then applied a cost-benefit analysis, from a slightly different perspective,[191] and concluded that under the circumstances the societal

(1943) (Millard, J., dissenting). Once a court determines that the right has been violated, exclusion automatically attaches. *White*, 97 Wn. 2d at 110, 640 P.2d at 1071. In a recent case presently awaiting a decision, the government seized upon the "unreasonable violation" language, arguing that *White* should be strictly limited on its facts because the language of the opinion was so broad as to remove any state action requirement. Respondent's Response to Appellant's Opening Brief at 14, State v. Huft, No. 50948-4 at 14 (Wash. Sup. Ct. heard Jan. 28, 1986). The government stretched the import of the *White* decision in an attempt to persuade the court to adopt the federal good faith exception. *See infra* note 202.

185. 98 Wn. 2d 1, 643 P.2d 1024 (1982), *cert. denied*, 464 U.S. 831 (1983).

186. *Id.* at 9–15, 643 P.2d at 1029–32. For a discussion of *Bonds*, see Note, *Illegal Extraterritorial Arrest and Extradition Does Not Give Rise to Application of the Exclusionary Rule as Long as Probable Cause is Present*, 18 GONZ. L. REV. 691 (1982/3).

187. *Bonds*, 98 Wn. 2d at 5–6, 653 P.2d at 1027–28.

188. *Id.* at 7, 8–9, 14–15, 653 P.2d at 1029–32. In concluding that the defendant's constitutional rights were not violated, the *Bonds* court may have been influenced by the heinous nature of the crime charged. Defendant had been convicted of the first degree murder, rape, and burglary of an elderly woman who was a customer on defendant's paper route. *Id.* at 3–4, 653 P.2d at 1026–27. Justice Utter argued in dissent that "[t]he arrest by the officers in this case was quite simply 'without authority of law' under both Oregon and Washington laws." *Id.* at 25, 653 P.2d at 1038 (Utter, J., dissenting). Justice Utter correctly pointed out that probable cause to arrest was not the only issue. *Id.* at 24, 653 P.2d at 1037. The *Bonds* majority recognized that article 1, § 7 mandates that even when probable cause exists, evidence must be suppressed if obtained pursuant to an arrest that fails to follow statutory requirements. *Id.* at 9–10, 653 P.2d at 1029–30.

189. *Bonds*, 98 Wn. 2d at 14–15, 653 P.2d at 1032.

190. *Id.* at 9–14, 653 P.2d at 1029–31.

191. *Id.* at 11–12, 653 P.2d at 1030. Unlike the United States Supreme Court, Justice Pearson placed the burden on the state to show that the "costs of suppression in the particular case outweigh the benefits achieved by suppression." *Id.*

costs caused by excluding the evidence outweighed the benefits.[192] Nevertheless, the *Bonds* court made it clear that when a violation of article 1, section 7 occurs, the unitary approach must be applied, and a cost-benefit analysis would be inappropriate and unnecessary.[193]

With *White* and *Bonds,* Washington's exclusionary rule moved into a new period of independent application. In addition to the historical sources and purposes underlying the rule, the court based the modern Washington rule on the more expansive privacy protection it found in article 1, section 7.[194] Although the *White* and *Bonds* courts recognized that a defendant had a right to a remedy when his privacy was unconstitutionally violated, both courts failed to explain why they automatically applied the exclusionary rule, rather than an alternative remedy.[195]

Few of the Justices who made up the *White* and *Bonds* majorities remain on the court.[196] Thus, given the Burger Court's continued development of the selective application approach, it is not surprising that the new court has been asked to decide the future of Washington's independent exclusionary requirement.[197]

III. HISTORICAL CONCLUSIONS: THE STATE EXCLUSIONARY RULE'S CONNECTION TO THE WASHINGTON DECLARATION OF RIGHTS

Although *White* and *Bonds* signaled the beginning of the Washington exclusionary rule's third stage of development, this third period may be

192. *Id.* at 14, 653 P.2d at 1031–32.

193. *Id.* at 10–11, 653 P.2d at 1030.

194. *Id.* at 9–14, 653 P.2d at 1029–31; State v. White, 97 Wn. 2d 92, 110, 640 P.2d 1061, 1071 (1982).

195. Justice Williams' approach in *White* has been described as exclusion based on a moral imperative. Adams & Nock, *supra* note 160, at 28 (evidence is excluded because "exclusion is morally right and legally necessary to uphold and vindicate the underlying privacy guarantee"). *See also* Nock, *supra* note 32, at 370 (*White* "began the process of articulating a theory that would recognize the exclusionary rule as a moral imperative not requiring utilitarian justification"). The danger of an exclusionary rule mandated by a moral imperative is that concepts like morality mean different things to different people and societal morality tends to change over time. Indeed, almost 60 years ago Justice Brandeis found morality on the side of exclusion. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). Today, however, both proponents and opponents of exclusion claim the high moral ground. For example, Justice Brennan asserts that abandonment of the exclusionary rule would threaten "the very foundation of our people's trust in their Government on which our democracy rests." United States v. Calandra, 414 U.S. 338, 360 (1974) (Brennan, J., dissenting). Conversely, Justice Burger has argued that "a vast number of people are losing respect for law and the administration of justice because they think that the Suppression Doctrine is *defeating* justice." Burger, *Who Will Watch the Watchman?,* 14 AM. U. L. REV. 1, 22 (1964) (emphasis in original). *See also* Barrett, *supra* note 133, at 582; Kaplan, *supra* note 16, at 1035–36.

196. *See infra* notes 199, 201 and accompanying text.

197. *See infra* notes 198–202 and accompanying text.

short lived. Due to changes in the Washington court's membership, the court majority that supported a broader state privacy protection no longer exists.[198] In its place a new majority appears to be forming behind a less protective interpretation of article 1, section 7, one that more closely reflects federal search and seizure jurisprudence.[199] Even though the *White*

198. For example, by 1985 three members of the five-member majority in *White* are no longer on the court. Of the five members concurring in the *Bonds* opinion only two remain on the court. In State v. Huft, No. 50948-4 (Wash. Sup. Ct. heard Jan. 28, 1986), the government argued that the change in the court membership could be used by the court to strictly limit *White* to the facts of the case. Respondent's Response to Appellant's Opening Brief at 14, *Huft*.

199. Since late 1984 four new members have joined the court: Justice Barbara Durham, Justice William C. Goodloe, Justice Keith M. Callow, and Justice James A. Anderson. After the makeup of the new court crystallized, newspaper articles speculated on the conservative direction the new court would take. After Justice Durham's appointment, the Seattle Times characterized the court as a body "in ideological transition," identifying the new justices as having "conservative reputations." Gelernter, *Into The Temple*, Seattle Times, Jan. 14, 1985, at C1, col. 1. Justice Durham is quoted as stating that "judges are responsible in part for crime in America" and that "the justice system isn't really doing justice to the victims yet." *Id.* at C1, col. 2. In an earlier article, the Seattle Times predicted that the new court majority would take a more conservative approach to the court's rulings. Whitely, *Supreme Court Will Begin Session With Changed Lineup*, Seattle Times/Seattle Post-Intelligencer, Dec. 2, 1984, at D11, col. 1 (Sunday ed.).

A sign that the new court may not apply independent state grounds analysis using article 1, § 7 came in State v. Marchand, 104 Wn. 2d 434, 706 P.2d 225 (1985). New Justices Callow and Goodloe joined with four holdover members of the court to hold that although authorized by WASH. REV. CODE 46.64.060–.070, police daylight "spot checks" of automobiles to check the driver's license and registration were unconstitutional because there were no constraints on police officer discretion as to which vehicles to stop. *Id.* at 440–41, 706 P.2d at 228. However, the *Marchand* majority based its decision, not on article 1, § 7, but rather on the fourth amendment, relying on the United States Supreme Court's analysis in Delaware v. Prouse, 440 U.S. 648 (1979). *Marchand*, 104 Wn. 2d at 436–38, 706 P.2d at 226–27. Although Justice Brachtenbach's opinion for the court stated that the issue required analysis of the relationship of the fourth amendment and article 1, § 7, the court never reached the question under the state constitution. *Id.* at 441, 706 P.2d at 228. Since the court found that the "spot checks" violated the federal provision, arguably, there was no need to look to article 1, § 7. *Id.* at 441, 706 P.2d at 228. While this approach can be criticized because no federal issue exists unless state law fails to provide the protection sought, *see infra* note 205 and accompanying text, it also leads to speculation that Justices Callow and Goodloe would not have joined a majority opinion based on state constitutional grounds. Although the dissent disagreed with the majority's view of *Prouse* and viewed the "spot checks" as constitutional under the fourth amendment, it neglected to take the next logical step, determining whether the police conduct violated article 1, § 7. *Marchand*, 104 Wn. 2d at 441–42, 706 P.2d at 228–29 (Durham, J., dissenting).

At this point, predictions as to the "new court's" attitude towards article 1, § 7 are speculative. However, the court has heard oral argument on two cases that provide opportunities to limit the state exclusionary rule or to overrule one or more broader protection decisions and thereby put an end to independent interpretation of article 1, § 7. State v. Stroud, No. 51501-8 (Wash. Sup. Ct. heard May 15, 1985); State v. Huft, No. 50948-4 (Wash. Sup. Ct. heard Jan. 28, 1986). *Stroud* concerned the validity of an automobile search conducted incident to the defendants' arrest for theft. Respondent, State of Washington's Opening Brief at 1–3, State v. Stroud, No. 51501-8 [hereinafter cited as Respondent's Opening Brief]. The search incident to arrest occurred prior to *Ringer*, in which the Washington court overruled prior case law and confined such searches to those meeting certain conditions. State v. Ringer, 100 Wn. 2d 686, 674 P.2d 1240 (1983). Police had spotted defendants at 5:00 AM breaking into a softdrink machine on the premises of a closed service station. Respondent's Opening Brief at 4. Parked just in front of the machine was an automobile with its lights on, the engine running, and the

and *Bonds* courts rejected the federal approach to exclusion,[200] it was inevitable that the court's new membership would be asked to conform the state exclusionary rule to the Burger Court's flexible, selectively applied exclusionary doctrine.[201] Consequently, the court now must decide whether to adopt the good faith exception—the Burger Court's most far-reaching exclusionary rule modification.[202]

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passenger door open. *Id.* at 4–5. Both defendants disclaimed any connection to the automobile. After placing the defendants in the patrol car, one of the officers spotted a loaded revolver in the automobile. The officer entered the vehicle, seized the revolver, conducted a thorough search of the auto, including the luggage and glove compartments, and discovered various narcotics related items covered with narcotics residue. *Id.* at 5–7. At the same time, the other officer contacted the owner of the vehicle. *Id.* at 8. At trial, the court denied a motion to suppress, concluding that the police officer had probable cause to enter the vehicle and, in any event, the seizure was justified as resulting from a search incident to a lawful arrest. *Id.* at 11. Defendants were convicted of unlawful possession of narcotics and they appealed to the Washington Court of Appeals, which certified the case directly to the Washington Supreme Court.

Stroud presents various options for resolution. For example, the government argued that the court could reject the appeal strictly on procedural grounds, in that the defendants failed to challenge the trial court's findings of fact and conclusions of law. *Id.* at 10. In addition to a possible procedural disposition of the case, the court has several alternatives to resolve the appeal on the merits. Since the search took place prior to the *Ringer* decision, even further choices are presented. Thus, the Washington Supreme Court's options for resolving the *Stroud* appeal include: (1) affirming the convictions by refusing to retroactively apply *Ringer;* (2) finding that the facts indicate the presence of the *Ringer* requirements for a search incident to arrest: the area searched was within the arrested person's immediate control, and the search was necessary either to prevent the suspect from reaching a weapon, effecting an escape, or destroying evidence of the crime for which he was arrested, *see Ringer,* 100 Wn. 2d at 699–700, 674 P.2d at 1248; (3) overruling *Ringer* and finding the search constitutional under the United States Supreme Court's interpretation of the fourth amendment in New York v. Belton, 453 U.S. 454 (1981) (police need not make search concurrent to the arrest; a contemporaneous search is constitutional); (4) overruling State v. Simpson, 95 Wn. 2d 170, 622 P.2d 1199 (1980), thereby discontinuing automatic standing for defendants charged with crimes that have, as an essential element, possession of the thing seized; (5) following the Burger Court decision in Nix v. Williams, 104 S. Ct. 2501 (1984), by adopting an inevitable discovery exception to the state exclusionary rule, finding that the police would have inevitably discovered the evidence in a lawful impoundment search; or (6) going beyond the good faith exception adopted by the Burger Court in United States v. Leon, 104 S. Ct. 3405 (1984), by adopting a good faith exception to the exclusionary rule in the warrantless context: since *Ringer* had not yet been decided, the police officers acted in the good faith belief that they did not need a warrant, and consequently no purpose would be served by suppression of the evidence.

How the court chooses to resolve *Stroud* will clearly indicate what direction it will take in search and seizure cases under article 1, § 7. In addition, in *Huft, supra,* the government argued that, inter alia, the facts of the case offered the Washington Supreme Court the opportunity to bring the exclusionary rule in line with its federal counterpart by limiting *State v. White* and adopting a good faith exception. *See infra* note 202.

200. *White,* 97 Wn. 2d at 108–12, 640 P.2d at 1070–72. *See supra* notes 182–84 and accompanying text.

201. Nock, *supra* note 32, at 374. Professor Nock correctly predicted that the court would be asked to adopt the good faith exception.

202. The Burger Court adopted a limited good faith exception in United States v. Leon, 104 S. Ct. 3405 (1984), and applied it in a companion case, Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984). Under the good faith exception, a court will not exclude evidence obtained by a police officer pursuant to a facially valid warrant subsequently held defective. *Leon,* 104 S. Ct. at 3416. *See infra* notes 261–80

and accompanying text. The good faith issue is now before the Washington Supreme Court in State v. Huft, No. 50948-4 (Wash. Sup. Ct. heard Jan. 28, 1986). *Huft* concerns an appeal by a defendant convicted of maintaining a marijuana growing operation in his home. Physical evidence and statements were obtained under a search warrant. Appellant's Opening Brief at 1, *Huft*. A neutral magistrate determined the existence of probable cause based on an anonymous tip, information secured from a public utility without a warrant that showed a large increase in the defendant's electrical usage, and further police investigation that confirmed certain elements of the informant's information. Respondent's Response to Appellant's Opening Brief, *Huft*, Affidavit, at app. A. At trial, defendant moved to suppress, challenging the sufficiency of the facts and circumstances used to determine probable cause and claiming that the warrantless search of defendant's utility records was an illegal search. Appellant's Opening Brief at 1–2, *Huft*. The trial court found that the warrantless search of utility records was not a constitutional violation. On the question of probable cause, the trial court at first found the warrant to be insufficient, but then reversed itself, applied the federal "totality of the circumstances" test articulated in Illinois v. Gates, 462 U.S. 213 (1983), and held that probable cause had been established. Appellant's Opening Brief at 1–2, *Huft*. The court then went on to hold that, in any event, the police officer acted in good faith reliance on a facially valid warrant, and the *Leon* good faith exception authorized the admission of all evidence and statements. *Id.* at 3. On appeal, defendant argued, inter alia, that *White* compelled application of the exclusionary rule. *Id.* at v. In response, the government contended that *White* should be limited to its facts and that adopting the good faith exception "would be an immense step in restoring the public's confidence in the criminal justice system." Respondent's Brief at 15–16. Thus, *Huft* presents the court with the good faith/selective application issue. The Washington court's first opportunity to adopt a good faith exception came in State v. Stroud, No. 51501-8 (Wash. Sup. Ct. heard May 15, 1985), which is currently before the court. *See supra* note 199. However, if the court chooses to adopt such an exception under the facts in *Stroud*, it will be a broader exception than that adopted thus far by the Burger Court. *Id.* Whether the Washington court seizes either opportunity to alter the exclusionary rule remains to be seen. This Comment argues that the theoretical basis underlying the Washington exclusionary rule is inconsistent with the Supreme Court's selectively applied exclusionary rule, as exemplified by the adoption of the good faith exception. *See infra* notes 261–80 and accompanying text. However, this Comment does not attempt to evaluate the wisdom of adopting a good faith exception. For a discussion of the *Leon* decision, see W. LAFAVE, *supra* note 18, § 1.2, at 8–35 (1985 Cum. Supp.); Bloom, United States v. Leon *and Its Implications*, 56 U. COLO. L. REV. 247 (1985); LaFave, *The Seductive Call of Expediency:* United States v. Leon, *Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895 (1984); Van de Kamp, *The Good Faith Exception—A Warning Letter to Prosecutors*, 26 S. TEX. L.J. 167 (1985); Comment, *I Come Not to Praise the Exclusionary Rule But to Bury It*, 18 CREIGHTON L. REV. 819 (1984–85); Comment, United States v. Leon *and* Massachusettes v. Sheppard: *How Far Should Good Faith Extend?*, 12 W. St. U. L. Rev. 859 (1985); Note, United States v. Leon: *The Long Awaited Good Faith Exception Has Finally Arrived*, 36 MERCER L. REV. 757 (1985); Note, United States v. Leon: *The Good Faith Exception to the Fourth Amendment Exclusionary Rule*, 30 S.D.L. REV. 169 (1984); Note, *The Good Faith Exception to the Exclusionary Rule—A Panel Discussion*, 6 WHITTIER L. REV. 979 (1984); Note, *Exclusionary Rule—Good Faith Exception*, 98 HARV. L. REV. 108 (1984). For discussions in support of "good faith" exceptions generally, see H. FRIENDLY, BENCHMARKS 260–62 (1967); Ball, *supra* note 17; Bernardi, *The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment?*, 30 DE PAUL L. REV. 51 (1980); Brown, *The Good Faith Exception to the Exclusionary Rule*, 23 S. TEX. L.J. 655 (1982); Carrington, *Good Faith Mistakes and the Exclusionary Rule*, 1 CRIM. J. ETHICS 35 (Summer/Fall 1982); Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 J. CRIM. L & CRIMINOLOGY 141 (1978); Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 TEX. L. REV. 736, 740 (1972). For criticism of "good faith" exceptions in general, see Kamisar, Gates, *"Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV. 551, 585–615 (1984); LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 333–59 (1982); Mertens & Wasserstrom, *supra* note 15; Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. CRIM. L. & CRIMINOLOGY 875 (1982); Wasserstrom, *supra* note 156, at 274–75, 304–09, 336–40 (1984); Comment, *The Exclusionary Rule And A Good-Faith Exception: Is it Time for a Change?*, 35 MERCER L. REV. 699 (1984).

No one challenges the Washington court's power to independently interpret the state constitution and reject the Supreme Court's approach to exclusion.[203] Rather, disagreement centers on the circumstances that make it "legitimate" for the court to reject Supreme Court reasoning and result.[204] Some jurists and scholars argue that United States Supreme Court decisions should not be accorded presumptive validity by state courts interpreting their own constitutions.[205] Others contend that disagreement

203. *See,* Nock *supra* note 32, at 334; Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result,* 35 S.C.L. REV. 353, 355 (1984). In Washington, even critics of the article 1, § 7 broader protection analysis have expressly recognized that the Washington court has the power to so interpret the state constitution. *See, e.g.,* State v. Simpson, 95 Wn. 2d 170, 199, 622 P.2d 1199, 1216 (1980) (Horowitz, J., dissenting); State v. Davis, 38 Wn. App. 600, 607, 686 P.2d 1143, 1147 (1984) (Durham, J., dissenting).

The United States Supreme Court has consistently held that since federal interpretation of constitutional guarantees establishes the minimum level of protection, state supreme courts have the power to interpret state constitutional provisions as providing broader protection for individual rights. Michigan v. Long, 463 U.S. 1032 (1983); Oregon v. Hass, 420 U.S. 714 (1975). The Supreme court will not review state decisions as long as the state court "indicates clearly and expressly that [the decision] is alternatively based on bona fide separate, adequate, and independent grounds." *Long,* 463 U.S. at 1041. However, the *Long* approach reverses the Supreme Court's traditional presumption that state court decisions are intended to be independent unless the record clearly shows otherwise. *Id.* at 1066 (Stevens, J., dissenting). This reversal of the traditional presumption is indicative of the attitude held by some members of the Supreme Court who are not pleased with the rise of independent grounds decisions in state courts. Chief Justice Burger, for example, demonstrated his displeasure by applauding the decision by the people of Florida to amend their state constitution to conform with the fourth amendment. Florida v. Casal, 462 U.S. 637, 638 (1983).

204. This Comment uses the term "legitimacy" to "refer to the debated propriety of the state courts reaching results under their constitutions, contrary to prior Supreme Court decisions rendered under similar or identical federal constitutional provisions." Williams, *supra* note 203, at 355 n.3.

205. Justice Brennan has argued that state courts should not view Supreme Court decisions as dispositive of state constitutional issues, but rather such decisions can claim precedential weight only if they are logically persuasive and well reasoned. Brennan, *supra* note 42, at 502. Justice Brennan did not address whether state courts need look at federal precedent at all. One view, the "second look doctrine," assumes that independent state constitutional analysis is unnecessary when the Supreme Court expansively construes the federal constitution. However, when the Supreme Court declines to provide protection under the federal Constitution, state courts must interpret their own constitutions. Because of the differences between the state and federal judicial systems, Supreme Court interpretations should not be viewed as presumptively valid. *See* Williams, *supra* note 203, at 396–97.

Others believe that state constitutional provisions and precedent should be examined before their federal counterparts. Justice Utter of the Washington Supreme Court believes that regardless of whether the state constitutional issue is raised before, after, or simultaneously with the United States Constitution, "lawyers and judges should feel free to adopt modes of analysis that differ from those employed by the United States Supreme Court." Utter, *supra* note 154, at 506. For Justice Utter, "United States Supreme Court decisions should be given the same weight and respect as decisions of courts of sister states interpreting similar provisions of their own constitutions [and] Washington . . . courts should not feel compelled to . . . explain why they chose not to follow the federal rule in a case involving a similar or even identical provision of our Declaration of Rights." *Id.* Justice Utter has identified five reasons why state courts should look first to the state constitution: (1) the very nature of the federal system places state courts under a duty to independently interpret and apply the state constitutions; (2) protection of the fundamental rights of Washington's citizens was intended to be a separate function of the state constitution; (3) turning to the state constitution first helps develop a body of independent

with the Supreme Court is often unprincipled, result-oriented decision making. Under this approach, state court disagreement with Supreme Court interpretations is legitimate only if based on a set of neutral, objective criteria.[206]

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jurisprudence; (4) a principled body of law will develop to dispel the appearance of a result orientation; and (5) it is improper and premature to apply the federal Constitution before the Washington constitution just as it is improper to decide a case on constitutional grounds when statutory grounds would suffice. State v. Coe, 101 Wn. 2d 364, 373–74, 679 P.2d 353, 359 (1984).

When a court looks first to the state constitution, "no federal issue is properly reached when the state's law protects the claimed right." Linde, *E Pluribus—Constitutional Theory & State Courts*, 18 GA. L. REV. 165, 178 (1984). Justice Linde of the Oregon Supreme Court argues that no judicial review of state action is required under the fourteenth amendment unless a state court decides, after looking to its own precedent and constitution, that the state constitution does not provide the protection sought. If a state court holds that the state constitution does not provide the protection sought, then it is proper for the court to determine if the failure to provide protection violates the due process clause of the fourteenth amendment. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 133–35 (1970). Supreme Court opinions are not "presumptively the right answer to be followed unless the state court explains why not." Linde, *E Pluribus*, *supra*, at 179. Justice Linde suggests that state courts should ask "what the state's guarantee means and how it applies to the case at hand," rather than looking to whether a state constitutional guarantee is broader than its federal counterpart. *Id.*; *see also* Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980). *But see* Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L. Q. 975, 990 (1979) (arguing that the "the existence of conflicting federally protected rights should foreclose resolution of a case on a basis of the state constitution"); *see also* Kelman, *Forward: Rediscovering the State Constitutional Bill of Rights*, 27 WAYNE L. REV. 413, 429 (1981); Comment, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1357 (1982); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297 (1977).

206. For example, then associate Justice Horowitz' dissent in *State v. Simpson* recognized the court's power to independently interpret the state constitution, but he argued that unless the court eschewed a result-oriented approach, confidence in the judiciary would be undermined. 95 Wn. 2d 170, 199, 622 P.2d 1199, 1216–17 (1980) (Horowitz, J., dissenting). Justice Horowitz put forward four objective criteria that would determine whether it was appropriate for a state court to interpret its constitution in a manner inconsistent with Supreme Court decisions: (1) are the differences in constitutional text significant enough to be seen as mandating an independent interpretation?; (2) does preexisting state jurisprudence justify a result different from Supreme Court decisions?; (3) do unique local conditions require an independent interpretation?; and (4) what has the Supreme Court said about the issue in question? *Id.* at 200–01, 622 P.2d at 1217. *See* Note, *supra* note 205, at 297, 318–19.

Justice Durham, while Chief Judge of the Washington Court of Appeals, Division One, also disagreed with the use of independent grounds, arguing that the majority had no principled basis for interpreting article 1, § 3 in a manner inconsistent with the Supreme Court interpretation of the fourteenth amendment. State v. Davis, 38 Wn. App. 600, 606–09, 686 P.2d 1143, 1146–47 (1984) (Durham, C. J., dissenting). In Justice Durham's view, United States Supreme Court decisions are controlling authority and state courts must have "sound historical reasons" for departing from federal precedent. *Id.* at 607–08 n.5, 686 P.2d at 1147 n.1.

Charges that independent grounds decisions are result-oriented or based purely on ideological differences are most often leveled by dissenters or by those who disagree with the substantive result reached by a state court. Williams, *supra* note 203, at 358. *See, e.g.*, Deukmejian & Thompson, *supra* note 205 (George Deukmejian, now Governor of California, was the California Attorney General and Clifford Thompson was an assistant Attorney General during the 1970's when they represented the losing side on many cases in which the California Supreme Court independently interpreted the state constitution).

Due to the formation of a new court majority, this Comment assumes, arguendo, that in the future the Washington court will continue to distinguish the state exclusionary rule from its federal counterpart only if one of two neutral criteria is present: (1) some meaningful difference, either historical or textual, between the parallel provisions of the state and federal constitutions; or (2) a preexisting state exclusionary rule jurisprudence inconsistent with Supreme Court interpretations. If the Washington Supreme Court modifies the state exclusionary rule to conform it to its federal counterpart, that modification must be consistent with the state rule's doctrinal and theoretical bases. Initially, the propriety of any modification hinges on the source in law from which the exclusion requirement derives. For example, the court may view exclusion as a personal right mandated by a provision of the Washington Declaration of Rights. The court then has a constitutional duty to exclude whenever law enforcement officers obtain evidence by violating the accused's personal article 1, section 7 rights. However, the court may determine that the rule springs from a court's inherent supervisory power. Then modification need only be consistent with the rule's purpose.[207]

During the origin and development stages of the state exclusionary rule, the Washington court discussed exclusion in terms of two state constitutional provisions—article 1, sections 7 and 9.[208] The nature of the connection between the rule and these two constitutional provisions determines the extent to which the court can modify the state exclusionary requirement.[209] Moreover, modification of the state exclusionary rule may be barred by the due process guarantee contained in article 1, section 3: the underlying, albeit unarticulated, premise of the Washington exclusionary rule.[210]

A. *Article 1, Section 7: Exclusion As a Constitutionally Compelled Remedy*

Whether the relationship between the exclusionary rule and article 1, section 7 is evaluated in terms of the purposes the remedy was created to serve or in terms of alternative mechanisms available to enforce article 1, section 7, the conclusion remains the same. Exclusion is the most effective remedy to vindicate the defendant's constitutional right to privacy; therefore, exclusion is constitutionally compelled by article 1, section 7.

207. *See supra* note 18 and accompanying text.
208. *See supra* notes 79–160, 182–97 and accompanying text.
209. *See supra* note 17 and accompanying text.
210. *See infra* notes 340–74 and accompanying text.

1. Purposes of the Article 1, Section 7 Exclusionary Rule

The Washington court has never specifically held that article 1, section 7 mandates the exclusionary rule. Rather, the court has viewed exclusion as a judicially created remedy necessary to enforce the state constitution's privacy guarantee.[211] While this view of exclusion's source in law appears identical to the Burger Court view, the Washington conception of the remedy's constitutional connection and the remedy's purposes differ markedly from that of the Burger Court. As the Washington Supreme Court observed in *State v. Bonds*,[212] the state rule emanates from a different perspective than its modern federal counterpart.[213] In Washington, the exclusionary rule is a personal remedy,[214] compelled by article 1, section 7 because only exclusion can effectively vindicate the defendant's right to privacy.[215] By contrast, the federal rule, after its overhaul by the Burger Court, is a general, future-oriented remedy, aimed at protecting the collective rights of innocent citizens[216] by deterring future unlawful police conduct.[217]

a. Redressing Invasion of Defendant's Privacy: The Paramount Purpose

As the *Bonds* opinion noted, the paramount concern of the Washington rule is to protect the "privacy interests of individuals against unreasonable government intrusions."[218] More specifically, however, from its very inception in *State v. Gibbons*,[219] the rule's paramount purpose has been to vindicate the defendant's right to privacy.[220] Throughout the exclusionary rule's development, the court has acted according to the principle that whenever the defendant's right to privacy is violated, a court must, by necessity, apply the exclusionary remedy.[221] With the formulation of the

211. *See supra* note 142 and accompanying text.

212. 98 Wn. 2d 1, 653 P.2d 1024 (1982), *cert. denied*, 464 U.S. 831 (1983).

213. *Id.* at 11–12, 653 P.2d at 1030.

214. The Washington Court invokes the exclusionary rule in order to redress the past violation to the defendant's rights and to cure the continuing wrong. *See supra* notes 122–46, 178–97 and accompanying text.

215. *See infra* notes 281–96 and accompanying text.

216. Yackle, *The Burger Court and the Fourth Amendment*, 26 KAN. L. REV. 335, 417 (1978). This collective remedy view is reflected in the Burger Court's reliance on the deterrence of future violations as the only justification for the federal exclusionary rule. *See also* Loewy, *supra* note 18, at 1268–69.

217. *See supra* notes 162–77, *infra* notes 261–75 and accompanying text.

218. *Bonds*, 98 Wn. 2d at 12, 653 P.2d at 1031.

219. 118 Wash. 171, 203 P. 390 (1922).

220. *See supra* notes 79–160, 178–97 and accompanying text.

221. State v. Dersiy *(Dersiy I)*, 121 Wash. 455, 458, 209 P. 837, 838 (1922). Although the *Gibbons*

Buckley principle, it became even clearer that, unlike the modern federal rule, the Washington rule acted as a remedy aimed at curing a past harm as well as preventing a present danger.[222] To the *Buckley* court, the rule's paramount purpose was to protect defendants against the state's attempt to "profit" from the violation of their rights.[223]

Application of the Washington exclusionary rule has never depended on the balance between societal and individual interests. The Washington court steadfastly adhered to its principled automatic approach to exclusion.[224] Yet, the court has recognized that it must somehow balance its responsibility to protect the defendant from the effects of the constitutional violation with its responsibility to protect innocent citizens from those who violate the law.[225] However, rather than achieving a balance by selectively applying the exclusionary rule, the court has recognized that the probable cause requirement[226] strikes the balance between these competing responsibilities.[227] In *State v. Miles*,[228] the court implicitly rejected a cost-benefit

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convergence theory quickly faded into the jurisprudential background, the Washington court adhered to the proposition that a right, once granted, cannot be curtailed simply because society would pay a further price for extending it. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 200 (1978). Failure to apply a remedy when the defendant's article 1, § 7 rights are violated would demonstrate that "recognition of the right in the original case is a sham, a promise that [the government] intends to keep only until that becomes inconvenient." *Id.*

222. *See supra* notes 124–25 and accompanying text.

223. *See supra* notes 121–22 and accompanying text. Consistent with the rule's primary purpose, the Washington court has always required a threshold showing that the defendant's personal privacy rights have been violated before exclusion can attach. *See supra* notes 108, 126–29 and accompanying text. This "standing" requirement is inconsistent with the federal future-oriented deterrence rationale. The Washington "standing" rule developed first as a logical extension of the convergence theory, under which exclusion is a constitutional right. *See* Burkoff, *supra* note 129, at 162. After *Buckley*, the Washington standing requirement was based on the theory that the evidence is excluded to provide a remedy for a wrong done to the defendant, and therefore, if the defendant was not wronged, then the defendant is not entitled to a remedy. *See* State v. Ditmar, 132 Wash. 501, 232 P. 321 (1925); State v. Vennir, 159 Wash. 58, 291 P. 1098 (1930); Kamisar, *supra* note 10, at 634 (discussing standing and its connection to rights in the context of the federal exclusionary rule).

224. *See supra* notes 130–46 and accompanying text.

225. State v. Young, 39 Wn. 2d 910, 917, 239 P.2d 858, 862 (1952).

226. The *Young* court employed a definition of probable cause used in Washington since 1930. *See Vennir*, 159 Wash. at 64, 291 P. at 1100. Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in believing the accused to be guilty. *Young*, 39 Wn. 2d at 917, 239 P.2d at 862. Although the Burger Court has lessened the stringency of the probable cause standard, the Washington court has thus far refused to follow. *See* State v. Jackson, 102 Wn. 2d 432, 688 P.2d 136 (1984). In *Jackson*, the court rejected the Burger Court's new "totality of the circumstances" test for probable cause adopted in Illinois v. Gates, 462 U.S. 213 (1983). Instead, the Washington court continued to adhere to the traditional two prong test: basis for the knowledge and credibility of the informant. However, the court now has the opportunity to overrule *Jackson* and follow the Burger Court. State v. Huft, No. 50948-4 (Wash. Sup. Ct. heard Jan. 28, 1986); *see supra* note 202.

227. *Young*, 39 Wn. 2d at 917–18, 239 P.2d at 862–63.

228. 29 Wn. 2d 921, 190 P.2d 740 (1948).

approach when it required strict adherence to the article 1, section 7 privacy guarantee,[229] even if search and seizure procedures made law enforcement more difficult and uncertain.[230]

In the development of the Washington exclusionary rule, the distinction between a constitutional right and a judicially created remedy was more semantic than substantive.[231] Whenever the right was violated, the exclusionary remedy had to be applied.[232] In effect, article 1, section 7 compels a remedy whenever it is violated and to deny the exclusionary remedy is tantamount to denying the right itself.[233]

b. Deterrence: At Most a Hoped-For Side Effect

If the Washington court adopts a selective application approach more in line with the federal rule, it must hold that the state exclusionary rule is based solely on the deterrence rationale.[234] Yet, the Washington rule's paramount purpose has been, from its inception, vindication of the defendant's rights, rather than deterrence of future police illegalities.[235] Although the *Bonds* court accurately identified the utilitarian-based deterrence rationale as a secondary objective of the Washington exclusionary rule,[236] the deterrence rationale did not play a major role in Washington jurisprudence

229. *Id.* at 926, 190 P.2d at 743.

230. *Id.* at 932–33, 190 P.2d at 746.

> We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designated our [c]onstitution to place obstacles in the way of too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who excuted them.

Id.(quoting from United States v. Di Re, 332 U.S. 581, 229 (1948)). The *Miles* court appears to have assumed that any balance in competing values had been conducted by the framers of article 1, § 7 and that the court had no power to alter that balance. Justice Simpson, writing in dissent for the four-justice minority in City of Bremerton v. Smith, 31 Wn. 2d 788, 199 P.2d 95 (1948), stated that although exclusion shields the guilty from the justice of the law they have flouted, nevertheless the obligation of the judicial oath requires courts to exclude evidence to maintain defendants' constitutional rights whenever they have been violated. *Id.* at 804, 199 P.2d at 103.

231. Whenever the defendant's article 1, § 7 right was violated, the exclusionary remedy had to be applied. *See supra* notes 79–147 and accompanying text. *See infra* notes 281–96 and accompanying text. Some commentators have reached the same conclusion about the federal exclusionary rule. *See* Burkoff, *supra* note 129, at 187.

232. *See supra* note 221 and accompanying text.

233. *See* Burkoff, *supra* note 129, at 186–87.

234. *See supra* notes 163–77 and accompanying text.

235. *See supra* notes 218–33 and accompanying text.

236. State v. Bonds, 98 Wn. 2d 1, 12, 653 P.2d 1024, 1031 (1982), *cert. denied*, 464 U.S. 831 (1983).

until after *Mapp v. Ohio*.[237] The history of the state exclusionary rule reveals that if deterrence played a role at all in the rule's origins and development, it was merely as a hoped-for side effect.[238] There is no suggestion in either *Gibbons, Buckley,* or any other pre-*Mapp* state exclusionary rule decision, that the rule's survival depended upon proof that it significantly deters future unlawful police behavior.[239]

Since the *Buckley* principle cites public policy as one source of the requirement that the state not profit from unlawfully obtained evidence, one could argue that by denying the state any profit, the thrust of the principle was to deter future violations.[240] However, the *Buckley* court expressed no concern with future deterrence in its discussion of the exclusionary rule. Rather, that secondary concern was implicit in the court's recognition of the deterrence already contained in Washington's criminal statutes.[241] The *Buckley* court explicitly noted that section 2240-1 of the Remington Compiled Statutes made it unlawful for police officers to search residences without a search warrant.[242] In fact, Justice Fullerton characterized this criminal statute as having been deficient before the legislature added section 2240-2, which made police violations a gross misdemeanor.[243] Given the preexisting deterrent capabilities of the statutes,[244] and the fact that the Washington court also encouraged tort damage actions to vindicate

237. 367 U.S. 643 (1961). Only after the federalization of the exclusionary rule in *Mapp* did Washington decisions begin to explicitly rely on the deterrence rationale. *See supra* notes 151–59 and accompanying text. Even Washington Supreme Court decisions based on the broader protection accorded by article 1, § 7 now cite the deterrence rationale as an objective of the state exclusionary rule. *See, e.g., State v. White,* 97 Wn. 2d at 108, 640 P.2d at 1070 (citing the need to deter future legislative as well as police conduct); State v. Hehman, 90 Wn. 2d 45, 49, 578 P.2d 527, 529 (1978) (to deter pretextual misdemeanor arrests).

238. *See supra* notes 79–146 and accompanying text.

239. *See supra* notes 79–146 and accompanying text. Professor Kamisar has reached the same conclusion concerning federal cases prior to Wolf v. Colorado, 338 U.S. 25 (1949). Kamisar, *supra* note 10, at 599–600.

240. Deterrence of future violations must certainly have played some role in the public policy formulation that mandated the *Buckley* principle's prohibition against the state profiting from its unconstitutional conduct. *See* State v. Buckley, 145 Wash. 87, 89, 258 P. 1030, 1031 (1927).

241. *Id.* at 90, 258 P. at 1031.

242. *Id.* at 90, 258 P. at 1031. REM. COMP. STAT. § 2240-1 (1922) provided that "[i]t shall be unlawful for any policeman or other peace officer to enter and search any private dwelling-house or place of residence without the authority of search warrant issued upon a complaint as by law provided."

243. *Buckley,* 145 Wash. at 90, 258 P. at 1032. REM. COMP. STAT. § 2240-2 (1922) provided that "[a]ny policeman or other peace officer violating the provisions of this act shall be guilty of a gross misdemeanor." At this time gross misdemeanors were punishable by imprisonment in county jail for not more than one year and/or by a fine not to exceed $1000. REM. COMP. STAT. § 2267 (1922).

244. The statute, especially after the institution of the stiff penalty, put policeman on notice as to what was expected of them. It follows that the statute was expected to deter policeman from violating article 1,§ 7 just as other criminal laws act as deterrents to the commission of crime. *See* H. PACKER, *supra* note 20, at 39–46.

the rights of the "innocent,"[245] it is illogical to assume that the Washington court created and applied the exclusionary rule for the purpose of deterring future law enforcement violations.[246]

c. *Judicial Integrity vs. Judicial Review*

Finally, the preservation of judicial integrity was not an historical objective of the Washington rule.[247] Like the deterrence rationale, judicial integrity was not offered as a justification for the state exclusionary rule until after *Mapp v. Ohio* required the Washington court to apply the federal exclusionary rule.[248]

Although the Washington Supreme Court has never applied exclusion solely to protect the judiciary's integrity, the court has, since *Buckley*, viewed exclusion as a judicial tool, essential to preserve the dignity of the state itself.[249] Presumably, the state's dignity is involved because allowing

245. *See, e.g.*, Ladd v. Miles, 171 Wash. 44, 52, 17 P.2d 875, 878 (1932) (where search warrant issued on the basis of hearsay and without probable cause, malice is inferred and the sheriff, as well as his deputies, can be held liable in tort for malicious prosecution); Olson v. Haggerty, 69 Wash. 48, 52, 124 P. 145, 147 (1912) (search proceedings maliciously instituted or prosecuted without probable cause may be made the basis for an action for malicious proceeding).

246. Over 30 years after *Buckley*, Justice Finley identified Washington's criminal sanctions and tort damage actions as sufficient deterrents to future unlawful police conduct. State v. Rousseau, 40 Wn. 2d 92, 99–101, 241 P.2d 447, 451 (1952) (Finley, J., concurring). If exclusion was aimed only at deterring future violations, then adding it to the already existing statutory deterrent and the common law tort deterrent would exemplify what Judge Posner calls an excessive sanction. *See* Posner, *Excessive Sanctions For Governmental Misconduct In Criminal Cases*, 57 WASH. L. REV. 635 (1982). For a response to Judge Posner, see Morris, *supra* note 171.

247. *But see* State v. Bonds, 98 Wn. 2d 1, 12, 653 P.2d 1024, 1031 (1982) (identifying judicial integrity as a secondary exclusionary rule rationale), *cert. denied*, 464 U.S. 831 (1983).

248. *See, e.g.*, State v. Cory, 62 Wn. 2d 371, 378, 382 P.2d 1019, 1023 (1963) (a court should not participate in, and in effect condone, the lawless activities of law enforcement officers by admitting the fruits of an illegal search). Despite the rhetorical appeal of the integrity rationale, it is doubtful that it ever served as the basis of a court's decision. Oaks, *supra* note 20, at 669; Schrock & Welsh, *supra* note 16, at 264. The Washington Supreme Court's failure to apply the exclusionary rule in a case like *Bonds* illustrates the point. There, the police, at a minimum, violated the laws of another state and illegally extradited a defendant back to Washington.

Many see judicial integrity as the original justification for the federal rule. United States v. Leon, 104 S. Ct. 3405, 3455 (1984) (Stevens, J., dissenting). The integrity rationale is often traced to Justices Holmes' and Brandeis' dissents in Olmstead v. United States, 277 U.S. 438, 469–85 (1928). *See* United States v. Calandra, 414 U.S. 338, 358–59 (1974) (Brennan, J., dissenting); Schrock & Welsh, *supra* note 16, at 258–60, 262–65. However, under the Burger Court's selective application approach, judicial integrity is no longer considered a separate rationale for the federal exclusionary rule. *Leon*, 104 S. Ct. at 3420–21 n.22 (whether a failure to exclude offends the court's integrity is essentially the same inquiry as to whether exclusion would serve its deterrent purpose).

249. State v. Buckley, 145 Wash. 87, 89, 258 P. 1030, 1031 (1927). The concept of exclusion as a method of prohibiting the government from profiting by its violation of the defendant's rights has no direct connection to the goal of preserving judicial integrity. State v. Davis, 295 Or. 227, 666 P.2d 802, 807 (1983).

the state to profit from its violation of article 1, section 7 eviscerates the state's constitutional provision in the defendant's case. Since *Marbury v. Madison,*[250] a court's power of judicial review has stood between the individual and governmental attempts to circumvent constitutional guarantees. Consequently, in the context of executive actions violative of article 1, section 7, the Washington court's strict and unwavering commitment to an automatically applied exclusionary rule can be seen as simply another manifestation of the court's inherent power to judicially review governmental actions and nullify them if the court finds them unconstitutional.[251]

Just as judicial review gives meaning and force to the entire state constitution by refusing to give judicial effect to government-initiated unconstitutional conduct,[252] the Washington exclusionary rule saves article 1, section 7 from becoming a meaningless promise.[253] Judicial review in the context of searches and seizures conducted by executive officers should be no different from judicial review of legislative conduct.[254] Since the court has an obligation to exercise its power of judicial review to maintain the defendant's constitutional rights,[255] exclusion allows the court to meet its responsibility to preserve and protect the constitution by nullifying unconstitutional governmental conduct.[256]

250. 5 U.S. (1 Cranch) 137 (1803).

251. *See* Kamisar, *supra* note 10, at 590–91; Schrock & Welsh, *supra* note 16, at 325, 333–36.

252. Schrock & Welsh, *supra* note 16, at 325.

253. If article 1, § 7 lacks meaning without exclusion, a court, in its attempts to effectuate the intention of the framers, must apply the exclusionary rule. It cannot be presumed that the framers of the state constitution intended article 1, § 7 to be without effect. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). *See infra* notes 281–339 and accompanying text.

254. Schrock & Welsh, *supra* note 16, at 325. When the Washington court finds a state statute unconstitutional, it invalidates the law, and refuses to uphold the defendant's conviction under the statute. *See, e.g.*, State v. White, 97 Wn. 2d 92, 640 P.2d 1061 (1982). The court's response should not be any different when the issue concerns what remedy to invoke when the executive's conduct violates the defendant's right to privacy without authority of law.

255. *Cf.* Bremerton v. Smith, 31 Wn. 2d 788, 804–05, 199 P.2d 95, 103 (1948) (Simpson, J., dissenting). *See supra* note 230, *infra* notes 358, 374 and accompanying text.

256. Nullification is the sanction most frequently invoked by courts in response to constitutional violations. Dellinger, *Of Rights and Remedies: The Constitution as a Sword,* 85 HARV. L. REV. 1532 (1972). The most complete remedy, and the only real way to nullify the executive's conduct, is to return the parties, so far as possible, to the situation that would have existed had the illegal search never occurred. White, *supra* note 72, at 1278 n.21. One of the first state courts to adopt the exclusionary rule did so on this basis. State v. Sheridan, 121 Iowa 164, 96 N.W. 730, 731 (1903). The *Buckley* principle's prohibition against the government profiting by its violation of the defendant's rights also seeks to restore the status quo ante, as if the "officers had stayed within the law." *See* State v. Davis, 295 Or. 227, 666 P.2d 802, 807 (1983).

2. *Modification of the Exclusionary Rule Would Not Effectuate Its Historical Purposes*

The Washington court has neither read the exclusionary rule into article 1, section 7 nor expressly characterized exclusion as judicial review. Assuming that article 1, section 7 was the only possible constitutional source mandating exclusion,[257] the Washington court's options with respect to the rule's future would include (1) continuing Washington's independently based exclusion doctrine; (2) rejecting the present rule in favor of the more "flexible," empirically-based federal rule; or (3) abandoning the rule in favor of an alternative remedy.

Before making this choice, the justices must confront the difficult question that separates a unitary from a bifurcated approach: whether it is appropriate to take into account the tension created by the court's competing responsibilities.[258] As the "guardian" of the defendant's personal constitutional rights, the court has a responsibility "to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."[259] However, the court must also protect "society, group interests and rights equated with the concepts of ordered liberty and freedom through government under law."[260]

257. Article 1, § 7 is not the only possible source of a constitutional mandate of exclusion. This Comment argues that both article 1, §§ 9 and 3 mandate the exclusionary rule. *See infra* notes 298–374 and accompanying text.

258. *See supra* notes 19–28, *infra* notes 259–60 and accompanying text.

259. James Madison, *Address to First Congress*, 1 ANNALS OF CONG. 439 (1789). The framers of the Washington Declaration of Rights took special care to ensure that courts would not forget their responsibility to preserve individual rights by expressly making mandatory provisions such as article 1, § 7. WASH. CONST. art. 1, § 29. In addition, the framers recognized the dangers of gradual encroachment on civil liberties and reminded all who read the Declaration that "frequent recurrence to fundamental principles is essential to the security of individual right, and the perpetuity of free government." WASH. CONST. art. 1, § 32. *See also* State v. McCollum, 17 Wn. 2d 85, 95–96, 136 P.2d 165, 169–70 (1943) (Millard, J., dissenting). One of these fundamental principles that the court must keep in mind is the *Boyd* principle, that constitutional guarantees such as article 1, § 7 must be liberally construed because a close and literal construction robs it of its efficacy, and leads to the gradual depreciation of the right. State v. Moore, 79 Wn. 2d 51, 65, 483 P.2d 630, 638 (1971) (Rosellini, J., dissenting) (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).

260. Finley, *supra* note 16, at 384. Judges cannot insulate themselves from the public perception that the exclusionary rule frees large numbers of criminals, thus increasing the crime rate and frustrating society's ability to prosecute criminals and protect itself. *See, e.g., Q & A With The Attorney General*, 71 A.B.A. J. 44, 45 (July 1985). In addition, it is impossible for the justices to completely put aside their own personal preferences, political slants, and values. F. RODELL, NINE MEN 29–30 (1955). Thus, many scholars and jurists make a persuasive argument that the courts must take positions that further the governmental and societal goal of enforcing the law and combatting crime. *See* H. PACKER, *supra* note 20, at 158; Gelernter, *supra* note 199 (quoting Justice Durham). As Justice Durham's comments to the newspapers reveal, individual justices are concerned with the freeing of the undeniably guilty on what they perceive as technicalities in the law. Gelernter, *supra* note 199. Attorney General Meese also expressed publicly the view that criminal suspects are guilty and undeserving of protection

Altering the scope of the exclusionary doctrine to balance the competing values would be appropriate if the Washington Supreme Court operated in a jurisprudential vacuum. However, the court's prerogative is constrained by the Declaration of Rights and the principles established by the over forty years of independent state exclusionary rule jurisprudence developed prior to the Burger Court's adoption of the selective application approach. Unless the court is willing to repudiate Washington's independent jurisprudence, any modification in the application of the exclusionary remedy must be logically consistent with the purposes underlying the *Gibbons/Buckley* doctrine.

a. Selective Application, Good Faith, and the Washington Rule

The Washington rule's underlying principles and paramount purpose are inconsistent with the theoretical underpinnings of the flexible, selectively applied federal rule.[261] This inconsistency can be demonstrated by comparing, for example, the Washington rule's underlying principles and purposes with the doctrinal elements relied upon by the Burger Court to adopt the good faith exception in *United States v. Leon*,[262] the most far-reaching selective application decision to date.[263]

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under the *Miranda* rule. Shenon, *Meese and His New Vision of the Constitution*, N. Y. Times, Oct. 17, 1985, at B10, col. 3. Nevertheless, objective analysis refutes this line of thinking. First, it is disingenuous to argue, as many do, that the framers meant the guarantee against unlawful search and seizure to protect only the innocent. *See, e.g.*, Barrett, *supra* note 133, at 581; Wilkey, *supra* note 122, at 228. The fourth amendment guarantee against unreasonable searches derived out of the use of writs to enforce unpopular laws. Colonial Americans wished to protect the illegal business of "smuggling" the ingredients of New England rum. *Search and Seizure in the Old Days*, *supra* note 54, at 712. *See* R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776–1791, 11, 25 (1983); Comment, *Defining Fourth Amendment Searches: A Critique of The Supreme Court's Post-*Katz *Jurisprudence*, 61 WASH. L. REV. 191, 203–04 (1985). Second, it is irrelevant that, in cases where police conduct is only "marginally illegal," the defendant receives a benefit totally disproportionate to the wrong suffered. *See* Friendly, *supra* note 20, at 951. The important point is the fact that police have acted illegally, not the quantum of the illegality. The necessity of bringing criminals to justice cannot justify illegal search and seizure. People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905, 907 (1955) (opinion of Traynor, J.). Nor is criminal guilt a factor. Justices must be concerned with protecting the rights of the defendant before them, without regard to guilt. *Cahan*, 282 P.2d at 907. The framers of article 1, § 7 made the choice that the privacy of the guilty, as well as the innocent, should be secure from unlawful police activities, despite the cost. *See* Harris v. U.S., 331 U.S. 145, 197 (1947) (Jackson, J., dissenting); State v. Miles, 29 Wn. 2d 921, 190 P.2d 740 (1948).

261. *See supra* notes 161–77 and accompanying text.

262. 104 S. Ct. 3405 (1984).

263. Kamisar, *supra* note 175, at 12–14. *Leon* and its companion case, Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984), marked the first time that the Supreme Court employed the selective application analysis to hold that exclusion does not operate in the prosecution's case-in-chief against the victim of the search. *Leon*, 104 S. Ct. at 3430 (Brennan, J., dissenting); *id.* at 3456 (Stevens, J., dissenting). Currently, this good faith "reliance" exception only applies in the warrant context. *Sheppard*, 104 S. Ct. at 3428. However, there is every reason to believe that the Court will, at its first opportunity, adopt the more inclusive "good faith mistake" exception that extends to warrantless searches, where the

The *Leon* Court adopted a good faith exception that makes exclusion inapplicable whenever "the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid."[264] To reach this conclusion, the Supreme Court employed its selective application analysis.[265] First, the *Leon* Court rearticulated the *Calandra* conception of exclusion; the federal exclusionary rule is not a constitutionally mandated personal right of the defendant, but rather a judicially-created remedy.[266] On its face, this appears to be consistent with the historic relationship between the Washington exclusionary rule and article 1, section 7, but the similarity is semantic rather than substantive.[267]

Second, the Court observed that the federal remedy seeks to vindicate fourth amendment rights generally by deterring future unlawful police conduct.[268] This view is inconsistent with the Washington remedy's paramount purpose: the vindication of the defendant's personal right to privacy as opposed to article 1, section 7 rights generally.[269]

Third, the *Leon* opinion notes that as a remedy, the exclusionary rule is applied only when it efficaciously serves its sole purpose—deterring future unlawful police conduct.[270] Washington jurisprudence also requires that exclusion apply only when it serves its paramount purpose.[271] In Washington, however, the paramount purpose has always been the protection of the defendant's personal right to privacy.[272]

Fourth, the *Leon* Court applied the deterrence rationale's concomitant cost-benefit analysis and determined that excluding evidence obtained in good faith reliance on a facially valid warrant would not deter future police

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officer has an objectively reasonable, although mistaken, good faith belief that his actions conform to fourth amendment requirements. *Leon,* 104 S. Ct. at 3413–14. Kamisar, *supra* note 175, at 49; Note, *Exclusionary Rule—Good Faith Exception, supra* note 202, at 109. Overhauling of the federal rule will not cease with the adoption of the broader "good faith mistake" exception. The Burger Court has indicated a willingness to abandon application of the exclusionary rule, even in cases of substantial and deliberate violations, should a more efficacious sanction be developed. *Leon,* 104 S. Ct. at 3413–14.

264. Massachusetts v. Sheppard, 104 S. Ct. 3424, 3428 (1984).

265. For a description of the selective application approach, *see supra* notes 161–77 and accompanying text.

266. *Leon,* 104 S. Ct. at 3412.

267. *See supra* notes 218–33 and accompanying text.

268. *Leon,* 104 S. Ct. at 3412.

269. *See supra* notes 79–146, 182–93 and accompanying text.

270. *Leon,* 104 S. Ct. at 3413.

271. *See supra* notes 182–93 and accompanying text.

272. *See supra* notes 108, 126–29 and accompanying text. Although a "standing" requirement is inconsistent with the deterrent-based federal rule, the Burger Court continues to require the defendant to demonstrate that he had a reasonable and legitimate expectation of privacy in the area searched. *See* Burkoff, *supra* note 129, at 164–67. *See also supra* note 176 and accompanying text.

misconduct.[273] Consequently, there was nothing to be gained by society's willingness to bear the "substantial" costs incurred when exclusion is required.[274] Use of such a cost-benefit analysis to balance competing interests is inconsistent with the purposes and underlying theoretical basis of the Washington exclusionary doctrine. Since the paramount purpose of the Washington rule is the vindication of the defendant's rights, an empirical measurement is both inappropriate and impossible.[275]

Under the good faith exception, the Supreme Court recognizes that the defendant's rights have been violated but a court need do nothing about it.[276] Such a view contradicts the principle that lies at the very heart of the Washington exclusionary rule and the doctrine of judicial review: when a right is violated a remedy must attach[277] because "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[278] Furthermore, the Washington court has recognized that it is inappropriate for a court to make the state exclusionary rule's application contingent upon balancing the defendant's rights against those of society.[279] Consequently, unless the Washington court is prepared to repudiate the *Gibbons/Buckley* rule applied in Washington since 1922, the court must reject the good faith exception, as well as the selective application analysis on which it is based.[280]

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273. *Leon*, 104 S. Ct. at 3420–21.

274. After determining that officers acting in good faith could not possibly be deterred, and that magistrates who misapply the standards for determining probable cause are not the object of exclusion's deterrent purpose, Justice White concluded that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Id.* at 3420–21.

275. It is impossible to quantify the benefit accrued from protecting "privacy" or individual liberties. Kamisar, *supra* note 10, at 647. *See supra* notes 175–76 and accompanying text.

276. *Leon*, 104 S. Ct. at 3456 (Stevens, J., dissenting).

277. *See supra* notes 218–33 and accompanying text.

278. Marbury v. Madison, 5 U. S. (1 Cranch) 137, 163 (1803). *See supra* notes 247–56 and accompanying text.

279. *See, e.g.*, State v. Miles, 29 Wn. 2d 921, 190 P.2d 740 (1948). *See supra* notes 230, 259–60 and accompanying text.

280. Although selective application is not the solution to the exclusionary controversy, much of the controversy surrounding exclusion can be avoided by decriminalizing victimless crimes, such as liquor, gambling, and narcotics offenses, which most frequently provoke police to invade an individual's privacy. For an exploration of this alternative, see Geller, *supra* note 11, at 624; Kaplan, *supra* note 16, at 1028, 1034.

Another related proposal would selectively repeal the exclusionary rule so that it would only apply to these lesser, more numerous victimless crimes. Geller, *supra* note 11, at 624; Kaplan, *supra* note 16, at 1048–49. Consequently, exclusion would not apply in the most serious crimes, such as "treason, espionage, murder, armed robbery, and kidnaping by organized groups." *Id.* at 1046. It is asserted that this would allow a court to protect privacy without exacerbating the political hostilities created by the rule's frustration of the public's need for retribution. Schrock & Welsh, *supra* note 16, at 267–68 n.55; *see also* Kaplan, *supra* note 16, at 1035–36. However, making the Washington exclusionary rule crime-

b. *Abandoning the Exclusionary Rule in Favor of an Alternative Remedy*

If article 1, section 7 compels a remedy to enforce its guarantee of the defendant's right to privacy, why have Washington courts automatically applied the exclusionary rule as that remedy, rather than an alternative enforcement mechanism? In both *White* and *Bonds,* the Washington Supreme Court failed to explain the automatic application of exclusion to remedy article 1, section 7 violations.[281] The answer lies in the fact that in the article 1, section 7 exclusionary context, the "distinction between a right and a remedy is semantic, not substantive."[282] Whenever a violation occurs, article 1, section 7 compels the most effective remedy possible, and to deny that remedy amounts to a denial of the right itself.[283] Exclusionary rule opponents have offered various alternative remedies including criminal prosecution of the offending officer, injunction against department-wide violations, an administrative system of rewards and punishments, and civil damages arising out of a tort action against the offending officer.[284] In

specific would be an unprecedented step requiring the repudiation of the historical basis upon which the state exclusionary rule was founded. The substantive requirements do not vary according to the crime charged. A defendant's rights are violated to the same degree by an illegal search regardless of whether the evidence uncovered is probative of a narcotics violation or a murder charge. In addition, a crime-specific exclusionary rule would violate the basic premise underlying the state exclusionary doctrine: whenever a constitutional violation occurs, the remedy must follow. *See supra* notes 218–33 and accompanying text.

281. *See supra* note 195 and accompanying text.

282. *See supra* note 231 and accompanying text.

283. *See supra* note 232 and accompanying text.

284. *See, e.g.,* Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 422 (1971) (Burger, C.J., dissenting) (proposing a damage remedy); Amsterdam, *supra* note 176, at 409–39 (proposing a system of administrative rules adopted by police departments); Finley, *supra* note 16, at 389 (contempt charges, administrative remedies, and damage actions); Oaks, *supra* note 20, at 756 (proposing abolition of exclusionary rule in favor of an effective tort remedy); Posner, *Rethinking the Fourth Amendment,* 1981 SUP. CT. REV. 49 (1981) (offering common law tort remedies, tort actions under the Federal Tort Claims Act, and actions under civil rights statutes such as 42 U.S.C. § 1983); Wilkey, *The Exclusionary Rule: Costs and Viable Alternatives,* 1 J. CRIM. JUST. ETHICS 16, 17 (1982) (proposing legislative alternatives of an administrative review board, civil tort action, criminal trial for offending officer). *See generally* Wilkey, *Constitutional Alternatives to the Exclusionary Rule,* 23 S. TEX. L.J. 30 (1982). Other commentators conclude that alternative remedies are ineffective and thus exclusion is a consitutionally mandated remedy. *See* Atkinson, *supra* note 15, at 24–26; Geller, *supra* note 11; Stewart, *supra* note 10, at 1385–89. For a more general discussion of the effectiveness of alternatives, see 1 W. LAFAVE, *supra* note 18, § 1.2 (1985 cum. supp.).

Proposals to abandon the exclusionary rule in favor of these various alternatives develop out of the two main criticisms of the rule. First, the rule is seen as incapable of protecting the rights of innocent search victims, the only rights the fourth amendment is meant to protect. *See Bivens,* 403 U.S. at 415–16 (Burger, C.J., dissenting); Oaks, *supra* note 20, at 736–37. Second, many believe that "the benefit received [exclusion of evidence probative of the defendant's guilt] is wholly disproportionate to the wrong suffered." Friendly, *supra* note 20, at 951. *See also,* Brief for Government at 32–33, United States v. Leon, 104 S. Ct. 3405 (1984). *But see* Loewy, *supra* note 18, at 1248, 1264 (although fourth amendment exists to protect the innocent, abandonment of the exclusionary rule in favor of tort actions

theory, since article 1, section 7 does not specify any particular enforcement mechanism, the Washington court could replace exclusion with one of these alternatives. However, the concept of alternatives is deceptive because it inherently suggests that one possibility is as effective as the next.[285]

The constitutional provision requires a court to apply the most effective remedy at its disposal.[286] However, alternatives proposed thus far fail to provide as effective a remedy as the exclusionary rule.[287] Civil damage suits are too expensive, time consuming, not readily available, and seldom successful.[288] Moreover, it is highly unlikely that juries would award damages to compensate guilty defendants for the violation of their rights or that a police officer would be charged and convicted of a crime for successfully apprehending the guilty party.[289] Such a proposal would allow the government to "buy" its way out of its obligation to comply with article 1, section 7.[290] Damage actions cannot effectively serve the exclusionary rule's most important function: to protect and vindicate the defendant's personal right to privacy.[291]

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would be detrimental to the innocent). For a complete listing of the various criticisms lodged against the exclusionary rule, see Wilkey, *The Exclusionary Rule: Costs and Viable Alternatives, supra.*

285. Wolf v. Colorado, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting).

286. *See* People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, 913 (1955) (opinion of Traynor, J.); Atkinson, *supra* note 15, at 26; Stewart, *supra* note 10, at 1383–85.

287. Atkinson, *supra* note 15, at 26; Kamisar, *supra* note 10, at 618–20; Stewart, *supra* note 10, at 1388–89; *see also Cahan,* 282 P.2d at 913. Those who have argued that exclusion is inferior to other remedies, do so in the context of protecting only innocent victims of illegal searches. *See, e.g.,* Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 421–24 (1971) (Burger, C.J., dissenting); Oaks, *supra* note 20, at 756–57; Wilkey, *supra* note 122, at 227–32.

288. Geller, *supra* note 11, at 656. The United States Supreme Court has recognized that it is unrealistic to expect the poor and powerless of our society to pursue remedies against the power structure. Irvine v. California, 347 U.S. 128, 137 (1954) (opinion of Jackson, J.). Justice Jackson's opinion for the Court also noted that innocent victims usually do not care to take steps that will air the fact that they have been under suspicion. *Id.*

289. The unlikelihood that defendants would recover demonstrates that damage actions are inconsistent with one of the main assumptions underlying the state exclusionary rule: that the defendant's right to privacy deserves protection to the same extent as the rights of innocent victims of illegal searches. *See supra* notes 79–146, 179–93, 211–56 and accompanying text.

290. Dellinger, *supra* note 256, at 1563.

291. State v. Bonds, 98 Wn. 2d 1, 28 n.2, 653 P.2d 1024, 1039 n.1 (1982) (Utter, J., dissenting) (the Washington court has found such remedies to be inadequate as an alternative to the exclusionary rule), *cert. denied,* 464 U.S. 831 (1983); Atkinson, *supra* note 15, at 26; Stewart, *supra* note 10, at 1387. Damages are awarded as an affirmative remedy, a nonequity concept through which the government grants the right to pursue a remedy for a wrong. Hill, *Constitutional Remedies,* 69 COLUM. L. REV. 1109, 1111–12 (1969). By contrast, exclusion is a defensive remedy meant to protect the defendant from the effects of the illegal search. *Id.* As a defensive remedy, exclusion is a constitutional remedy, i.e., a remedy available "as a matter of constitutional right for the redress of constitutional wrongs." *Id.* In essence, "damages are awarded and motions to suppress granted for entirely different reasons, and are hence not fungible 'alternative remedies.'" Schrock & Welsh, *supra* note 16, at 334 n.199. Moreover, in all cases in which the good faith exception to the exclusionary rule would operate, there would also be

Criminal prosecutions and injunctions are rarely brought and even more rarely succeed.[292] While such procedures, along with a system of police administrative regulations, are probably the the most effective deterrents, and do not require injured parties to pursue their own remedies, neither do they serve the state exclusionary remedy's primary purpose, preserving the effectiveness of the defendant's rights.

Finally, and perhaps most importantly for the guilty and innocent alike, alternatives to the exclusionary rule provide little incentive for the victim of the unlawful search and seizure to bring the legality of the law enforcement officer's action to the attention of the court.[293] The exclusionary rule, however, assures that the judiciary pays a great deal of attention to police practices,[294] which results in comprehensive and clear statements of the constitutional search and seizure requirements.[295]

Arguably, each of the alternative remedies would effectuate the federal rule's sole objective—protection of the innocent by deterring future violations. However, the alternatives fail to provide a remedy capable of protecting and preserving the defendant's right to privacy—the paramount purpose of the Washington exclusionary rule. From the defendant's perspective, the alternatives are, in reality, no sanction at all.[296] Consequently, article 1, section 7 compels the exclusion remedy: the only enforcement mechanism capable of effectuating the state privacy guarantee by restoring the defendant and the government to the status quo ante.[297] Exclusion, as the only effective enforcement mechanism, is therefore compelled by article 1, section 7.

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immunity from civil damages. United States v. Leon, 104 S. Ct. 3405, 3456 n.35 (1984) (Stevens, J., dissenting); *see also* Briggs v. Malley, 748 F.2d 715, 718 (1st Cir. 1984), *cert. granted*, 105 S. Ct. 2654 (1985).

292. *See* Stewart, *supra* note 10, at 1387.

293. Geller, *supra* note 11, at 655.

294. *Id.* at 654.

295. *Id.* at 654–56; *see* 1 W. LAFAVE, *supra* note 18, §1.2, at 28 (1978); *see also* Kamisar, *supra* note 10, at 569. Even critics of exclusion recognize that it provides occasion for judicial review, and it gives credibility to constitutional guarantees. Oaks, *supra* note 20, at 756. *See also* Amsterdam, *supra* note 176, at 429. For an illustration of the effect of ignoring police practices by failing to adopt an exclusionary rule, see *supra* note 50. Justice Linde argues that abolishing the exclusionary rule will be seen as a decision freeing law enforcement officers from having to abide by substantive constitutional guarantees. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 242 (1972); *see also* Burkoff, *supra* note 129, at 160–61; Kamisar, *supra* note 10, at 597.

296. Wolf v. Colorado, 338 U.S. 25, 39 (1949) (Murphy, J., dissenting).

297. *See* White, *supra* note 72, at 1278 n.21 ("The most natural and complete remedy is to place the parties so far as possible in the situation that would have existed had the wrong never occurred."). Although damages may be preferred at private law, such a preference is not applicable "where one party is the government and the other an individual who holds constitutional rights of liberty and property against it." *Id.* Damages constitute an enforced exchange and, although they may be appropriate in the commercial context "where all things are in principle exchangeable," such an exchange is incompatible with rights against the government and the reasons for the existence of such rights. *Id.*

B. *Exclusion as a Mandate of Article 1, Section 9: The Influence of* Boyd v. United States *on the Framers of the Washington Declaration of Rights*

Although the preceding developmental history demonstrates the existence of a preexisting independent state jurisprudence inconsistent with the Supreme Court's approach to exclusion, the Washington court may decide to repudiate prior case law in order to follow the Supreme Court's lead.[298] However, rejection of the Supreme Court's approach to exclusion in favor of continuing Washington's independent exclusionary rule is more than just a legitimate exercise of state supreme court power: the state constitution requires the court to exclude evidence seized without authority of law.[299]

In *State v. Gibbons,* the Washington Supreme Court adopted the *Boyd* convergence theory, holding that the introduction of unconstitutionally seized evidence, in effect, compelled defendants to give evidence against themselves in violation of article 1, section 9.[300] While its adoption of the exclusionary rule under a convergence theory reflected the meaning intended by the framers for article 1, sections 7 and 9, the *Gibbons* court reached its conclusion on an incorrect basis. In *Gibbons,* Chief Justice Parker analogized to the court's earlier decision in *State v. Jackson.*[301] In *Jackson,* the court held that the prosecution violated the defendant's article 1, section 9 privilege against self-incrimination by demanding, in front of the jury, that the defendant produce incriminating documents claimed to be in his possession.[302] The *Gibbons* court concluded that the introduction of illegally seized evidence violated article 1, section 9 in much the same way as the demand in *Jackson.*[303] Although the *Gibbons* court failed to explain

298. The Washington court has recently repudiated prior case law dealing with the search incident to arrest doctrine on the grounds that the reasoning employed to reach such decisions was unsound. *See, e.g.,* State v. Ringer, 100 Wn. 2d 686, 699, 674 P.2d 1240, 1247 (1983) (overruling prior case law that had expanded the search incident to arrest exception to the warrant requirement as being "without historic foundation and . . . inconsistent with traditional protections"). For a detailed argument in favor of courts overruling prior case law, see State v. McCollum, 17 Wn. 2d 85, 112–96, 141 P.2d 613, 615–47 (1943) (Millard, J., dissenting) (attempting to convince the court to overrule cases expanding the search incident to arrest doctrine as neither well-founded nor well-reasoned). Repudiation, however, is not a step that should be taken lightly. As the Burger Court recently recognized, "any departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, 104 S. Ct. 2305, 2311 (1984).

299. *See infra* notes 300–37 and accompanying text.

300. 118 Wash. 171, 184–88, 203 P. 390, 395–96 (1922). *See supra* notes 79–92 and accompanying text.

301. *Gibbons,* 118 Wash. at 188, 203 P. at 396 (citing State v. Jackson, 83 Wash. 514, 145 P. 470 (1915)).

302. *Jackson,* 83 Wash. at 517–18, 145 P. at 471–72. *See supra* note 91 and accompanying text.

303. *Gibbons,* 118 Wash. at 188, 203 P. at 396 (1922). Although *Jackson* concerned documents rather than physical evidence such as whiskey, 83 Wash. at 515, 145 P. at 471, the *Gibbons* court attached no significance to the nature of the evidence. *See supra* notes 72, 86 and *infra* note 331 and

the logical connection,[304] it must have concluded that the exclusionary rule was mandated by that aspect of article 1, section 9 that protects the defendant's right not to testify and prohibits prosecutorial conduct that would cause a jury to draw negative inferences from the defendant's decision not to take the witness stand.[305]

The logic of such an interpretation cannot withstand close scrutiny. The prosecution's demand in *Jackson* had no purpose other than to create a negative inference in the minds of the jury.[306] By contrast, the prosecution's purpose for introducing evidence, even if illegally seized, is to put before the jury evidence highly probative of the defendant's guilt, not to raise a negative inference concerning the defendant's failure to testify. The illegal nature of the evidence in *Gibbons* was irrelevant. The same inference would be raised by highly probative evidence seized in a legal search.[307]

To the extent that the *Gibbons* court also implicitly adopted the reasoning underlying the *Boyd* convergence theory, its decision was consistent with the historical context in which article 1, sections 7 and 9 were drafted. In 1889, federal law viewed compelling the defendant to produce evidence and obtaining evidence by an illegal search as equivalents; both methods of acquiring evidence turned the defendant into the unwilling source of the evidence in violation of the self-incrimination clause.[308] Fifty years later, in

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accompanying text.

304. Justice Parker merely stated:

> If it be the law, as it clearly is, that the prosecution has no right to make such a demand upon the accused in the presence of the jury . . . , such demand suggesting that what is sought will be incriminating evidence against the accused, how can it be said that evidence procured in an unlawful manner through the violation of an accused's [article 1, § 7 right] may be used against him, as was done in this case?

Gibbons, 118 Wash. at 188–89, 203 P. at 396 (1922).

305. The *Jackson* court held that the demand in front of the jury violated article 1, § 9 because the prosecution sought to circumvent the constitutional prohibition against compulsory production of evidence. The demand placed the defendant under the imputation of guilt. Thus, the prosecution succeeded either in compelling the accused to defend himself or causing the jury to draw negative inferences from his failure to do so. *Jackson*, 83 Wash. at 516–18, 145 P. at 471–72.

306. *Id.* at 519, 145 P. at 47.

307. However, the point that seemed most important to the *Jackson* court was that the prosecution's demand, in effect, accomplished indirectly what the constitution said could not be done directly. *Jackson*, 83 Wash. at 518, 145 P. at 472. An illegal search circumvents the privilege against self-incrimination in much the same way. If evidence cannot be obtained legally, through a valid search under a warrant, an exception to the warrant requirement, or through a legal subpoena, then unlawfully acquiring the evidence achieves indirectly what cannot be done directly. It is possible that Justice Parker and the *Gibbons* court used this reasoning to find the *Jackson* holding apposite.

308. *See supra* note 64 and accompanying text. The importance of the *Boyd* doctrine in Washington is whether the framers of article 1, §§ 7 and 9 intended to reflect the *Boyd* convergence theory and the broad trespassory-based privacy right. Subsequent United States Supreme Court decisions limited the scope of the fifth amendment privilege against self-incrimination and overruled the *Boyd* convergence theory. *See, e.g.*, Schmerber v. California, 384 U.S. 757 (1966) (fifth amendment privilege covers compulsion of testimonial or communicative evidence only, not real or physical evidence, and

State v. Moore,[309] the Washington court adopted the Supreme Court's "testimonial" interpretation of the privilege against self-incrimination, an interpretation that would make the *Gibbons* convergence theory untenable.[310] However, the *Moore* court relied exclusively on the intentions of the framers of the federal provision, incorrectly assuming that the framers of

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therefore compulsory blood alcohol level tests do not violate the fifth amendment); Fisher v. United States, 425 U.S. 391, 397 (1976) (fifth amendment protects person asserting privilege only from compelled self-incrimination and consequently the contents of business records are not privileged because they are created voluntarily without compulsion); Andresen v. Maryland, 427 U.S. 463, 472 (1976) ("the continued validity of the broad statements contained in *[Boyd]* has been discredited by later opinions); United States v. Doe, 465 U.S. 605, 617 (1984) (business documents are not privileged but the act of producing subpoenaed documents cannot be compelled without a grant of statutory immunity); *see also id.* at 618 (O'Connor, J., concurring) (*Boyd* convergence theory is dead; "Fifth Amendment provides absolutely no protection for the contents of private papers of any kind"). *But see id.* at 618–19 (Marshall, J., concurring in part and dissenting in part) (arguing that the Court did not decide that the fifth amendment provides no protection whatever for private papers because there are certain documents, like private diaries, which no person should be compelled to produce). *See also* United States v. Leon, 104 S. Ct. 3405, 3412 (1984) ("[t]he Fifth Amendment theory [of exclusion] has not withstood critical analysis or the test of time"). However, determining the intent of the framers of the state Declaration of Rights requires this Comment to focus on federal law as it stood in 1889, making subsequent Supreme Court decisions concerning *Boyd* irrelevant.

309. 79 Wn. 2d 51, 483 P.2d 630 (1971).

310. In *Moore*, the Washington Supreme Court rejected a challenge to the constitutionality of Washington's Implied Consent Law, WASH. REV. CODE § 46.20.308 (1969) (requiring motorists suspected of DWI offenses to submit to breathalyzer tests). Justice Finley, writing for the majority, incorrectly cited State v. Schoel, (54 Wn. 2d 388, 341 P.2d 481 (1959)), for the proposition that where the state and federal constitutional text is similar, they should receive the same interpretation. *Moore*, 79 Wn. 2d at 56–57, 483 P.2d at 634. As the dissent pointed out, the *Schoel* court compared the identically worded double jeopardy provisions and concluded that they were "identical in thought, substance and purpose." *Id.* at 66, 483 P.2d at 639 (Rosellini, J., dissenting) (quoting *Schoel*, 54 Wn. 2d at 391, 341 P.2d at 481). Justice Finley ignored Washington's history of independence from United States Supreme Court interpretations of parallel federal constitutional provisions, even where the text is identical as in article 1, § 3 and the fourteenth amendment's due process clause. *See supra* note 83. However, the *Moore* court followed *Schmerber* and held that article 1, § 9 protects against compelled production of testimonial rather than real or physical evidence. *Moore*, 79 Wn. 2d at 57, 483 P.2d at 634. Ten years later, the Washington court again refused to rely on independent state grounds to interpret article 1, § 9 differently from the fifth amendment. State v. Franco, 96 Wn 2d. 816, 829, 639 P.2d 1320, 1327 (1982). Justice Dimmick's opinion declined to overrule *Moore*, characterizing it as "stare decisis" on the issue." *Id.* at 829, 639 P.2d at 1327. Most recently, the Washington court followed *Moore* and *Franco* in State v. Zwicker, 105 Wn. 2d 228, 713 P.2d 1101 (1986). Like *Moore* and *Franco*, *Zwicker* involved a challenge to the constitutionality of breathalyzer tests under WASH. REV. CODE § 46.20.308 (1983). *Zwicker*, 105 Wn. 2d at 232, 713 P.2d at 1103. Defendants argued that art. 1, § 9 barred the statutory authorization of the use against them at trial of their refusal to submit to the Breathalyzer. *Id.* at 238, 713 P.2d at 1106–07 . While the court held that refusal evidence could not be admitted in the prosecution's case-in-chief on relevancy grounds, it rejected the self-incrimination challenge. *Id.* at 238, 713 P.2d at 1106–07. Invoking *Moore* and *Franco*, the court noted that article 1, § 9, like its federal counterpart, only protected the accused from being compelled to give a testimonial communication. *Id.* at 242, 713 P.2d at 1108–09. Without reaching the issue of the nature of the evidence, the court held that no compulsion was involved; therefore, no article 1, § 9 violation occurred. *Id.* at 241–43, 713 P.2d at 1108–09.

the Washington constitution intended to adopt a guarantee identical to that embodied in the federal constitution.[311]

Analysis of the language chosen for article 1, sections 7 and 9, in light of the historical context in which the Declaration of Rights was drafted, reveals that the framers were probably heavily influenced by *Boyd v. United States*.[312] Therefore, the textual differences between the state constitutional provisions and their federal counterparts may be far more meaningful than previously thought.[313] The textual differences between the state and federal guarantees against self-incrimination are readily apparent. Article 1, section 9 provides that "[n]o person shall be compelled in any criminal case to give *evidence* against himself."[314] The fifth amendment, on the other hand, provides that "nor shall [any person] be compelled in any criminal case to be a *witness* against himself."[315] As in the case of article 1, section 7, the framers of the Washington Declaration rejected use of the federal text for article 1, section 9.[316] Instead, they chose wording for each of the constitutional provisions that, on its face, created a civil liberty protection

311. *Moore*, 79 Wn. 2d at 56, 483 P.2d at 633 (quoting from E. DUMBAULD, THE BILL OF RIGHTS, AND WHAT IT MEANS TODAY 77 (1957)). A century separated the drafting of the fifth amendment and article 1, § 9. Justice Utter has observed that there were vast differences in the social, political and historical environment in which the framers of the two documents worked. Utter, *supra* note 154, at 498. Based on these vast differences, Justice Utter concluded that it is highly unlikely that the framers of the Washington Declaration had anything more in common with the federal framers than a common language and a similar, although vague, democratic philosophy. *Id.* At most, the framers probably sought to reflect the breadth of federal protections as they understood them at the time, rather than intending that their document conform to future interpretations of the federal Constitution.

312. 116 U.S. 616 (1886). *See infra* notes 316–25 and accompanying text.

313. *See infra* notes 326–38 and accompanying text.

314. WASH. CONST. art. 1, § 9 (emphasis added).

315. U.S. CONST. amend. V (emphasis added).

316. The Committee on Preamble and Declaration of Rights adopted article 1, § 7, expressly rejecting the fourth amendment text. 1889 JOURNAL, *supra* note 12, at 51, 497. Unfortunately, available historical sources provide little information as to what the framers intended by their choice of the specific language in article 1, § 7. *See generally id. See also* State v. Ringer, 100 Wn. 2d 686, 690, 674 P.2d 1240, 1243 (1983). However, contemporaneous accounts do describe article 1, § 7. 1, as having made private affairs "sacred." 1889 JOURNAL, *supra* note 12, at 497 n.14. As to article 1, § 9, Washington's first constitution, ratified by the people on November 4, 1878, in an unsuccessful bid for statehood, contained language identical to the fifth amendment. WASHINGTON'S FIRST CONSTITUTION, 1878 AND PROCEEDINGS OF THE CONVENTION, ARTICLE V, §8, at 67 (E. Meany & J. Condon ed. 1919). However, the drafters of the 1889 constitution chose to depart from the earlier state constitution and never considered the federal language as an option. 1889 JOURNAL, *supra* note 12, at 498. They also deliberately rejected a proposal that would have limited the privilege to one prohibiting compelling persons to "testify" against themselves. *Id.* Justice Rosellini interpreted the 1889 JOURNAL as demonstrating that the framers specifically indicated that the word "testify" was inappropriate to express their intended meaning. *Moore*, 79 Wn. 2d 51, 65, 483 P.2d 630, 638 (1971) (Rosellini, J., dissenting) (citing 1889 JOURNAL, *supra* note 12, at 498). The drafters also rejected another proposed amendment, the text of which went unreported. 1889 JOURNAL, *supra* note 12, at 498. Thus, the drafters settled on the "give evidence" language in a measured and deliberate fashion.

commensurate with parallel federal provisions as interpreted by the United States Supreme Court in *Boyd v. United States*.[317] The *Moore* court did not realize that this purposeful departure from the federal text reflected the influence of the trespassory theory of privacy rights and the convergence theory of exclusion articulated in *Boyd*—three years before the drafting of the state constitution.[318]

The unique language chosen by the framers for article 1, section 7 created a broad and inclusive privacy protection that directly reflects the *Boyd* theory of privacy. The *Boyd* court erected an impenetrable barrier between an individual's "privacies of life," as defined by a nineteenth century conception of property rights, and unlawful governmental actions.[319] Under this broad property-based privacy right, violations of the fourth amendment's procedural protections contained in the warrant clause or violation of the

317. The term "evidence" embodies more than just testimonial or communicative evidence. Thus, "give evidence" provides a broader privilege than the narrower "testify" terminology rejected by the framers. Three members of the drafting committee were attorneys. 1889 JOURNAL, *supra* note 12, at 19, 469 (George Comegys), 475 (Francis Henry), 488 (C.H. Warner). The three attorney members would have been familiar with the then prevailing legal meaning of the terms employed. At the time of the drafting of article 1, § 9, evidence was defined in one well known treatise as "all means by which any legal matter of fact is established or disproved." GREENLEAF, EVIDENCE §1 (1842). A *Harvard Law Review* article published in 1889 defined evidence as "*any matter of fact* which is furnished to a legal tribunal otherwise than by reasoning, as the basis of inference in ascertaining some other matter of fact." Thayer, *Presumptions and the Law of Evidence*, 3 HARV. L. REV. 142, 143 (1889) (emphasis added). Professor Wigmore's evidentiary treatise concluded that many state constitutions in using the "give evidence" language intended to mirror the federal guarantee. *See* 4 J. WIGMORE, *supra* note 36, at § 2252. However, Wigmore did not publish his first edition until 1905. What the framers of the Washington provision had in mind in choosing the "give evidence language" depended on the legal meaning of those terms in 1889.

318. *Boyd* was a landmark case in its time because it was the first significant fourth and fifth amendment case to reach the Supreme Court. Comment, *Formalism, Legal Realism, and Constitutionally Protected Privacy under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 951–52 (1977). Fourth amendment cases were rare during the nineteenth century partly because Congress did not grant the Supreme Court jurisdiction to hear a criminal defendant's appeal until 1891 (26 Stat. ch. 517, §5 at 826). *Id.* at 952 n.42; Mertens & Wasserstrom, *supra* note 15, at 376 n.51. The government could not appeal criminal cases until 1907. Act of March 2, 1907 ch. 2564, 34 Stat. 1246. *See* 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 332 n.2, 727 (1937); F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 119–20 (1927); *see also* Mertens & Wasserstrom, *supra* note 15, at 376 n.51.

319. Boyd v. United States, 116 U.S. 616, 630 (1886). The exclusionary rule developed in *Boyd* and later reasserted in Gouled v. United States, 255 U.S. 298 (1921), was an automatic consequence of the view that personal property was immune from seizure. White, *supra* note 72, at 1279. For a discussion of property rights influences in *Boyd*, see Comment, *supra* note 318, at 945–60; Comment, *The Life and Times of* Boyd v. United States *(1886–1976)*, 76 MICH. L. REV. 184, 184–90 (1977) [hereinafter cited as Comment, *Life and Times*]. However, the property rights influence on the right to privacy did not mean that only physical invasions of one's person and property were barred. Individuals were also protected against governmental trespass into certain types of information as well. *See infra* note 320 and accompanying text. For an excellent discussion of privacy rights in the nineteenth century, see generally Comment, *The Right To Privacy In Nineteenth Century America*, 94 HARV. L. REV. 1892 (1981) [hereinafter cited as Comment, *Nineteenth Century*].

"unreasonable search and seizure" clause amounted to unlawful governmental trespass against an individual's home and "privacies of life."[320]

The framers of the state provision rejected the ambiguity of separate warrant and unreasonable search clauses in favor of language that, on its face, prohibits the government from trespassing against an individual's home or privacy.[321] The unique language chosen for article 1, section 7 seems to have come *directly* out of *Boyd*. Article 1, section 7 states that "no person shall be disturbed in his *private affairs*, or his *home invaded, without authority of law.*"[322] The *Boyd* Court relied on the English precedent of *Entick v. Carrington*[323] to recognize an indefeasible right of

320. Under the *Boyd* trespassory theory of exclusion the Court placed property subject to search in two categories. First, stolen goods and contraband were considered as items that the government had a greater right to possess than did the accused. *Boyd*, 116 U.S. at 623. As long as the procedural safeguards contained in the warrant clause were honored, the government could search for these items without trespassing. *Id.* at 623–25; Comment, *supra* note 318, at 960. On the other hand, personal effects, such as books and papers, were items in which the government had no superior property right. *Boyd*, 116 U.S. at 624–28. The government was barred from searching for those, even if the search was procedurally reasonable. *Id.* Any search for such items, even with a warrant, was a trespass. Comment, *Life and Times*, *supra* note 319, at 186. Under the traditional view of *Boyd*, the federal Constitution permitted the government to intrude into an individual's privacy only if the exercise of that power was consistent with the rules of property law. *Id.* at 194. This property rights concept stems from *Boyd*'s reliance on a landmark English case, Entick v. Carrington, 19 Howell's State Trials 1029 (C.P. 1765). Consequently, the *Boyd* Court designed the exclusionary rule to provide a meaningful remedy for the "trespassory violation" against individual rights protective of a person's indvidual security and privacy. *Boyd*, 116 U.S. at 627. *See infra* note 323 and accompanying text.

The breadth of the privacy protection afforded prior to 1889 has often been misunderstood. An article published in 1890 by Samuel Warren and Louis Brandeis (*The Right To Privacy*, 4 HARV. L. REV. 193 (1890)) is often credited with originating the concept of an independently protectable right to privacy. However, by 1889, American courts and legislatures had already recognized privacy as an independent interest worthy of protection in a variety of contexts. *See generally* Comment, *Nineteenth Century*, *supra* note 319, at 1893–94. The legal community in the nineteenth century took the proverb "a man's home is his castle" very seriously, using the law of trespass and constitutional provisions regulating searches and seizures (such as article 1, § 7) to safeguard the family home, and its domestic privacy, against official and unofficial intrusions. *Id.* at 1895. When the framers drafted § 7, the boundaries of this privacy right included any physical trespass against the person or into the sanctity of the home. Moreover, the right to privacy in the nineteenth century also included protection from unwarranted invasion for confidential communications, as well as personal information. *Id.* at 1899, 1904.

321. At the time of the drafting of the state constitution, unlawful searches and seizures were considered aggravated trespasses. T. COOLEY, THE LAW OF TORTS 346 (2d ed. 1888). Trespass was commonly defined as an unlawful interference with one's person, property or rights. BLACK'S LAW DICTIONARY 1187 (1st ed. 1891). This seems interchangeable with the wording of art. 1, § 7, which prohibits disturbing a person's private affairs and invasions of his home without "authority of law."

322. WASH. CONST., art. 1, § 7 (emphasis added).

323. 19 Howell's State Trials 1029 (C.P. 1765). In *Entick*, Lord Camden observed that:

> The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances . . . . Every invasion of private property, be it ever so minute, is a trespass. . . . It is now incumbent upon the [government] to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.

Id. at 1066, *quoted in Boyd*, 116 U.S. at 627.

personal security, personal liberty, and private property against "all [unlawful] *invasions* on the part of the government and its employe[e]s of the *sanctity of a man's home and the privacies of life.*"[324]

At the same time, the "give evidence" language in article 1, section 9 probably reflected the framers' intent to incorporate the *Boyd* convergence theory. Like article 1, section 7, the text of the self-incrimination guarantee seems to have come directly from *Boyd*. In *Boyd*, Justice Bradley carefully examined the fourth and fifth amendments and concluded that searches and seizures conducted in violation of the fourth amendment, were "almost always made for the purpose of *compelling a man to give evidence against himself,* which in criminal cases is condemned in the Fifth Amendment."[325]

Under the convergence theory adopted by the framers, article 1, section 9 mandates the exclusion of physical and real evidence obtained in violation of the defendant's constitutionally guaranteed right to privacy. Although the Washington court's most recent interpretation of the self-

324. *Boyd*, 116 U.S. at 630 (emphasis added).

325. *Id.* at 633. Justice Bradley found the fourth and fifth amendments to be so interrelated as to require the exclusion of evidence obtained in violation of fourth amendment guarantees. *Id.* When Justice Bradley referred to the fifth amendment in the same passage, he switched from the give evidence language to the more restrictive wording contained in the fifth amendment, "compelled to be a witness against himself." *Id.* The *Boyd* Court's perception of the interrelation, or convergence, of the fourth and fifth amendement, gave birth to the *Boyd* exclusionary rule and arose out of a particular passage of *Entick:*

> [I]t is very certain that the law obligeth no [person] to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem, that search for evidence is disallowed upon the very same principle.

Entick, 19 Howells State Trials at 1073–74, *quoted in Boyd*, 116 U.S. at 629. The *Boyd* Court's interpretation of this passage has been severely criticized. *See, e.g.*, Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 694–98 (1960) (criticizing the fourth and fifth amendment interrelation theory and pointing out that *Boyd* misread *Entick*). However, neither the correctness of *Boyd's* interpretation of *Entick* nor the validity of the perceived interrelation between the constitutional guarantees has any relevance for determining what the framers of article 1, § 7 intended. In 1889, *Boyd* and its interpretation of the fourth and fifth amendments was the law in federal court and *Boyd's* effect on the framers of the state constitution is the key point.

Boyd also seems to have influenced the wording chosen for article 1, § 32 which provides: "Fundamental Principles. A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." According to sources compiled at the time, the framers based this provision on three sister state constitutions: (1) ILL. CONST. of 1870, art. II, § 20 (now contained in ILL. CONST. art. I, § 23 (West 1971); (2) N.H. CONST. of 1792, § 38 (now contained in N.H. CONST. Part I, art. 38 (West 1970); and (3) WIS. CONST. of 1848, art. I, § 22 (West 1957). 1889 JOURNAL, *supra* note 12, at 517 n.51. A comparative analysis reveals that all three cited state provisions contain the reference to the importance of "frequent recurrence to fundamental principle." However, none of the cited provisions contain Washington's "security of individual right" language. The concept that fundamental principles must be referred to as essential to protect "the security of individual right" seems to reflect *Boyd's* emphasis on the need to give full force and effect to constitutional rights protective of "the security of the person and property." *Boyd*, 116 U.S. at 635.

incrimination clause[326] conflicts with the convergence theory, the modern interpretation is incorrect for two reasons. First, under the Washington court's current interpretation, the privilege against self-incrimination only bars compelling the accused to make an incriminating testimonial communication; the government does not violate the privilege when it compels the accused to produce physical or real evidence.[327] Given the history of the ancient guarantee on which the fifth amendment is based and given the federal text, this "testimonial" or "communicative" evidence limitation may be persuasive in the federal context.[328] However, it is inapplicable to the privilege contained in article 1, section 9.

The framers of article 1, section 9 implicitly chose not to employ the narrow federal language and explicitly rejected a narrow "testimony" based guarantee.[329] It seems likely that the framers intended to give effect to the *Boyd* Court's explicit recognition that illegal searches in general, not just those seeking private books and papers, compel an individual to give evidence against himself.[330] Moreover, from the time of *Gibbons* up until the 1960's, the Washington court did not construe article 1, section 9 as only applying to testimonial evidence.[331]

Second, the modern interpretation misses a central historical point by requiring that the accused must be "compelled" to some action that produces the evidence for the prosecution.[332] True, an illegal search does

326. State v. Franco, 96 Wn 2d. 816, 829, 639 P.2d, 1320, 1326–27 (1982). The modern interpretation requires that defendants demonstrate that the government compelled them to produce the evidence and that the evidence was testimonial or communicative in nature rather than real or physical. *Id.* at 829, 639 P.2d at 1325–26. *See supra* notes 308–10 and accompanying text.

327. *Id.* at 827, 639 P.2d at 1326; *see also* State v. Zwicker, 105 Wn. 2d 228, 241–42, 713 P.2d 1101,1108–09 (1986).

328. *See* E. DUMBAULD, *supra* note 311, at 77 (privilege against self-incrimination developed in early England out of "reaction against the ecclesiastical practice of inquisition").

329. *See supra* note 316 and accompanying text.

330. *Boyd*, 116 U. S. at 633.

331. The *Gibbons* court attached absolutely no significance to the nature of the evidence seized. *See supra* notes 72, 303 and accompanying text. In *Moore*, Justice Finley cited several cases to support his claim to the contrary, that courts observed a distinction between physical and testimonial evidence. State v. Moore, 79 Wn. 2d 51, 57, 483 P.2d 630, 634 (1971) (citing Mercer Island v. Walker, 76 Wn. 2d 607, 458 P.2d 274 (1969)); State v. Duckett, 73 Wn. 2d 692, 440 P.2d 485 (1968); State v. West, 70 Wn. 2d 751, 424 P.2d 1014 (1967)). However, two of the cases cited by the majority opinion were based on the modern federal interpretation of the privilege against self-incrimination, not on prior Washington case law. *Walker*, 76 Wn. 2d at 612–13, 458 P.2d at 277–78; *West*, 70 Wn. 2d at 752–53, 424 P.2d at 1015. Moreover, according to the *Walker* court, *West* and *Duckett* reached only the more limited holding that bodily exhibition tests, such as the observation of the person or his movements in a police lineup where nothing has been taken from the accused, were not violative of the privilege. *Walker*, 76 Wn. 2d at 613, 458 P.2d at 278; *see also Moore*, 79 Wn. 2d at 64, 66, 483 P.2d at 637–39 (Rosellini, J., dissenting).

332. *See supra* note 322–26 and accompanying text. Wigmore's treatise attacked *Boyd* forcefully on the compulsion point, arguing that the crucial protective element of the self-incrimination privilege's

not compel the defendant to take any action; the entire evidentiary transaction is government initiated and conducted. However, unlike modern courts which focus on the specific act the government compelled the defendant to undertake,[333] the *Boyd* and *Gibbons* courts based their convergence theories on the result of the search and concluded that the privilege against self-incrimination barred turning the defendant into the unwilling conduit of incriminating evidence.[334]

One could argue that since the accused is also the unwilling source of evidence obtained pursuant to a legal search and seizure, the reasoning underlying the *Boyd* convergence theory is unsound. However, the convergence theory reflected in article 1, section 9 is based upon the trespassory theory of privacy rights.[335] As a member of society, the accused implicitly enters into, and is bound by, the social compact and thus can be seen as impliedly consenting to invasions of his or her privacy that are conducted with authority of law.[336] Consequently, since the accused impliedly consents to the legal search, evidence is not seized against his or her will. However, no consent is given, either expressed or implied, when the government trespasses against an individual's privacy and seizes evidence in violation of the constitution.

Although recent decisions by the Washington court may be inconsistent with recognition of the article 1, section 9 exclusionary mandate, the Washington court should reevaluate its position.[337] The court should note

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protection was the requirement that no force be exerted against the accused to compel conduct or to "extract from the person's own lips an admission of his guilt." 4 J. WIGMORE, supra note 36, § 2263.

333. Comment, *supra* note 318, at 946.

334. *See supra* notes 64, 300–07 and accompanying text.

335. *See supra* notes 318–25 and accompanying text.

336. According to John Locke and the social compact theory, individuals join together in society mainly to insure the protection of their preexisting property rights. J. LOCKE, TWO TREATISES OF GOVERNMENT 303–20 (P. Laslett ed. 1960). Under Locke's view of natural law, the concept of protected property included a body of innate, indefeasible, individual rights. G. SABINE, A HISTORY OF POLITICAL THEORY 529 (3d ed. 1965). Justice Bradley, who authored *Boyd*, was one of the leading advocates of natural law on the Court in the late nineteenth century. Comment, *supra* note 318, at 952 n.43. The *Boyd* Court explicitly recognized that "the great end for which men entered into society was to secure their property." 116 U.S. 616, 627 (1886) (quoting Entick v. Carrington, 19 Howell's State Trials 1029 (C.P. 1765)). *See supra* notes 319–24 and accompanying text. In exchange for the protection of such rights, which extended beyond the mere title to goods and land, Comment, *supra* note 318, at 950, individuals implicitly agree to abide by the rules of society such as allowing the government to "disturb" their "private affairs" so long as it is done under "authority of law." The Washington legislature employed this implied consent concept in enacting WASH. REV. CODE §46.20.308 (1970), the mandatory breathalyzer test requirement challenged in both State v. Moore, 79 Wn. 2d 51, 483 P.2d 630 (1971) and State v. Franco, 96 Wn. 2d 816, 639 P.2d 1320 (1982). *See supra* note 310.

337. By adopting the federal approach to the self-incrimination guarantee in *Moore*, 79 Wn. 2d at 57, 483 P.2d at 634, and declaring it stare decisis on the issue in *Franco*, 96 Wn. 2d at 829, 639 P.2d at 1327, the court failed to effectuate the framers intent and in effect eroded the protection provided by article 1, § 9. *See supra* notes 316–25 and accompanying text.

that the framers, influenced by *Boyd,* intended article 1, section 7 as a prohibition against any trespass against an individual's natural and inviolate property-based privacy rights.[338] Furthermore, article 1, section 9 reflects the *Boyd* convergence theory, requiring the exclusion of all evidence obtained by such a trespass because, by violating the social compact, the government compels the defendant to involuntarily supply incriminating evidence.[339]

C. *Article 1, Section 3: The Due Process Exclusionary Right*

The Washington Supreme Court has never viewed exclusion as specifically mandated by article 1, section 7[340] and it has recently refused to overrule *State v. Moore* concerning the scope of the article 1, section 9 self-incrimination guarantee.[341] However, the due process guarantee embodied in article 1, section 3 of the Washington constitution may be the underlying, albeit unarticulated, source of the Washington exclusionary rule.[342]

Two basic themes underlie the Washington Supreme Court's exclusionary rule jurisprudence: (1) a concern with the defendant's constitutionally protected privacy rights;[343] and (2) the principle that since article 1, section 7 compels a remedy, to deny the remedy is tantamount to denying the right itself.[344] This concern with vindicating and protecting the rights of the individual immediately jeopardized by the process lies at the heart of the article 1, section 3 due process right.[345]

Since the due process guarantee has no specific substantive requirements, the framers gave the Washington Supreme Court the responsibility to breathe life into the due process clause.[346] In its attempts to define the general term "due process of law," the Washington court has often observed that creating a precise formulation is impossible.[347] However, from its earliest attempts at construing article 1, section 3, the court has viewed due process as placing the liberty of every citizen under the protection of

338. *See supra* notes 316–36 and accompanying text.

339. *See supra* note 336 and accompanying text.

340. *See supra* note 211 and accompanying text.

341. State v. Franco, 96 Wn. 2d 816, 829, 639 P.2d 1320, 1327 (1982).

342. "No Person shall be deprived of life, liberty, or property, without due process of law." WASH. CONST. art. 1, § 3.

343. *See supra* notes 218–56 and accompanying text.

344. *See supra* notes 100, 221 and accompanying text.

345. Linde, *supra* note 295, at 242.

346. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring).

347. *See, e.g.*, Olympic Forest Products v. Chaussee Corp., 82 Wn. 2d 418, 422, 511 P.2d 1002, 1005 (1973); State v. Strasburg, 60 Wash. 106, 116–17, 110 P. 1020, 1023 (1910).

the general laws and rules of society—the "law of the land."[348] While the requirements of the procedural aspect of due process change over time as society alters its concept of fairness between the individual and the government,[349] the due process guarantee also makes certain rights inviolate.[350]

Article 1, section 3 does not, of itself, provide an undifferentiated due process exclusionary right to every defendant.[351] However, when viewed in tandem with the right granted by article 1, section 7, there can be no such thing as due process of law when the government deprives an individual of life or liberty on a criminal charge by introducing evidence seized in violation of that individual's constitutionally guaranteed right to privacy. For example, the Washington Supreme Court has held that due process by itself does not require a trial by jury, but since a jury trial is guaranteed in the state constitution, due process requires that the government view the

348. *Strasburg*, 60 Wash. at 117–18, 110 P. at 1027; *see also id.* at 128–29, 110 P. at 1026–27 (Rudkin, C. J., concurring).

349. *See* Finley, *supra* note 16, at 384–88. Justice Finley saw due process interpretations as products of judges' attempts to balance competing responsibilities in an effort to seek an accommodation between individual and societal rights. *Id.* at 388. However, Justice Frankfurter warned that courts must interpret due process in a manner "detached from passing and partisan influences." *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 163. Due process represents fairness between the individual and government as developed by history and prior case law. *Id.* The history of the state exclusionary rule and prior case law have, in and of themselves, established the exclusionary rule as a due process right of the defendant. *See supra* notes 247–56 and accompanying text. Moreover, while balancing may be appropriate for procedural due process unconnected to a right expressly guaranteed by the state constitution, article 1, § 22 of the Washington Declaration of Rights makes the protection in article 1, § 7 mandatory. Consequently, the privacy guarantee contained in article 1, § 7 should not be susceptible to value judgments and interest balancing. *See supra* notes 247–56, *infra* notes 352–59 and accompanying text. *But see* Wingo, *Rewriting* Mapp & Miranda: *A Preference for Due Process*, 31 KAN. L. REV. 219, 234 (1983) (arguing that since due process is based on fairness, a due process-based exclusionary rule need only be applied after weighing governmental interests against interests of the defendant).

350. *See, e.g.*, Olympic Forest Products v. Chaussee, 82 Wn. 2d 418, 422–23, 511 P.2d 1002, 1005 (1973) (right to a hearing is an inviolate due process guarantee).

351. This Comment suggests that exclusion is a due process right under the Washington constitution only when the defendant's personal right to privacy has been violated. A standing requirement is necessary because the due process exclusionary right derives from defendants' right to have the government-as-prosecutor respect their personal constitutionally guaranteed right of privacy. Some observers disagree with a due process standing requirement, viewing the due process clause as the last fundamental protection protecting the individual from illegal government conduct. *See, e.g.*, Comment, *The Due Process Exclusionary Rule: A Fifth Amendment Approach to the Regulation of Intentional Government Misconduct*, 17 U.S.F.L. REV. 277, 297 (1983). Under this view, a standing requirement is inappropriate because the due process exclusionary rule requires the court to focus on the conduct and nature of the illegal governmental activity. *Id.* Others contend that the fourth amendment is personal not only in its guarantee of personal physical privacy but also in that it guarantees each individual a personal right "to insist that the state utilize only lawful means of proceeding against him." Alderman v. United States, 394 U.S. 165, 206 (1969) (Fortas, J., concurring in part, dissenting in part). Although Justice Fortas referred to the fourth amendment, his argument applies to the due process clause of the fifth and fourteenth amendments as well.

right to a jury trial as inviolate.[352] If the court is to meet its responsibility of ensuring that the Declaration of Rights "protect[s] and maintain[s] individual rights,"[353] and of ensuring that each provision in the declaration is "mandatory," then it must require the state to obey the constitution in enforcing the law[354] and abide by constitutional privacy protections when it seeks to prosecute a citizen.[355]

In terms of due process, exclusion is neither solely a product of the right to privacy nor is it a part of the defendant's right to a fair trial.[356] Rather, it is a due process right to a fair prosecution: a guarantee that the state, in all its parts, will protect and preserve the defendant's article 1, section 7 rights.[357] Consequently, one aspect of this due process exclusionary right flows from the court's obligation to exercise its power of judicial review to maintain the defendant's constitutional rights.[358] Exclusion can be seen as nullifying the executive's unconstitutional actions in order to maintain the inviolate nature of the defendant's article 1, section 7 rights. A court's failure to exclude violates the defendant's right to a fair prosecution by denying the defendant's due process right to judicial review of government actions and nullification of unconstitutional governmental conduct.[359]

Excluding evidence as an element of due process is not a novel approach. Due process has long been invoked to exclude coerced confessions.[360]

352. State v. Strasburg, 60 Wash. 106, 116–17, 110 P. 1020, 1023 (1910).

353. WASH. CONST. art. 1, § 1.

354. White, *supra* note 72, at 1280.

355. *Id.*

356. *See* Mapp v. Ohio, 367 U.S. 643, 683 (1961) (Harlan, J., dissenting). Justice Harlan argued that exclusion is only an incidental means used by the court to penalize past official conduct and deter it in the future, rather than a means to reach the correct resolution of the controversies before it. *Id.* at 680, 683. Justice Harlan recognized only two kinds of rights—the right to a fair trial and the right to privacy. However, a third right exists: the due process right to a fair prosecution, including judicial review by an appellate court. Schrock & Welsh, *supra* note 16, at 314–16. *See supra* notes 247–56 and accompanying text.

357. Schrock & Welsh, *supra* note 16, at 370–71.

358. City of Bremerton v. Smith, 31 Wn. 2d 788, 803–05, 199 P.2d 95, 103 (1948) (Simpson, J., dissenting) (the only satisfaction a court can derive from maintaining the constitutional rights of a guilty defendant arises from the knowledge that the obligation of the judicial oath requires it).

359. Schrock & Welsh, *supra* note 16, at 314–16.

360. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936) (first fourteenth amendment due process confession case). Originally, these confession cases involved the violent extraction of a confession. Consequently, the underlying rationale for exclusion was the untrustworthiness of the confession. Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 554 (5th ed. 1980). As long as courts grounded the exclusion of coerced confessions on the "trustworthiness or "reliability" rationale, no analogy could be drawn to the exclusion of illegally seized evidence; the unlawful nature of the search had no effect on the reliability or probativeness of the evidence. However, the Supreme Court held coerced confessions as violations of due process even when independent evidence provided corroboration. *See, e.g.*, Watts v. Indiana, 338 U.S. 49 (1949) (due process clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime; due process clause assures that

After deciding in *Wolf v. Colorado*[361] that exclusion need not be incorporated through the fourteenth amendment's due process clause,[362] the Supreme Court began developing a due process exclusionary right for the most egregious violations.[363] Later, in *Mapp v. Ohio*,[364] the Court overruled *Wolf* and held that exclusion was an essential part of both the fourth and the fourteenth amendments.[365] Since the Burger Court continues to require state courts to apply the federal exclusionary rule in state prosecutions, the suppression of unlawfully obtained evidence must be a requirement of the fourteenth amendment's due process clause.[366] Although the

appropriate procedure be followed before liberty is curtailed or life taken); Rochin v. California, 342 U.S. 165, 173 (1952) (the due process clause mandates the suppression of coerced confessions "even though statements contained in them may be independently established as true"). The voluntariness standard has continued to evolve as the Supreme Court has made it clear that probable truth or falsity of the confession is not the issue, but rather "whether the behavior of the State's law enforcement officers was such as to overbear [the] will to resist and bring about confessions not freely self-determined." Rogers v. Richmond, 365 U.S. 534, 544 (1961). Washington courts have applied the *Rogers* standard to assess the voluntariness of a confession. *See, e.g.*, State v. Braun, 82 Wn. 2d 157, 162, 509 P.2d 742, 745 (1973).

In his *Mapp* dissent, Justice Harlan attempted to distinguish the use of the due process clause to exclude involuntary but truthful confessions from illegally seized evidence probative of the defendant's guilt. Mapp v. Ohio, 367 U.S. 643, 684–85 (1961) (Harlan, J., dissenting). According to Harlan, the former is not concerned with an appropriate remedy for illegal police conduct, rather it is concerned with fairness and is a procedural right, the violation of which occurs at the time the improperly obtained statement is admitted at trial. Without this right, all the careful safeguards erected around giving testimony would become empty promises. *Id.* On the other hand, according to Justice Harlan, the exclusion of illegally obtained evidence has as its true basis "the disciplining of the police." *Id.* For Justice Harlan the trial became unfair if a coerced confession was introduced, but he saw nothing unfair about the state allowing the trier of fact to consider other relevant evidence regardless of how it was obtained. *Id.* at 683. Apparently, while Justice Harlan disapproved of the fifth amendment being an empty formality, *id.*, he did not have a similar concern for the fourth amendment.

361. 338 U.S. 25 (1949).

362. *Id.* at 27–28. *See* Perlman, *Due Process and the Admissibility of Evidence*, 64 HARV. L. REV. 1304, 1305 (1951).

363. Rochin v. California, 342 U.S. 165, 174 (1952). The Court barred the use of trustworthy evidence because the use of a stomach pump to extract the evidence, as well as other unlawful police conduct, amounted to "methods that offend the Due Process Clause." *Id.* at 174. *Rochin* was grounded in the judicial integrity rationale, rather than the deterrence rationale that underlies the Burger Court's remedy or the "vindication of the defendant's rights" rationale underlying the Washington remedy. *See* Wingo, *supra* note 349, at 239. Due process was not violated, however, when the police repeatedly entered into a defendant's home to install a secret microphone, which remained hidden and monitored for over a month. Irvine v. California, 347 U.S. 128, 131–32 (1954). For a discussion of exclusion and due process in the 1950's, see Kamisar, Wolf *and* Lustig, *Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1080–90 (1959); Kamisar, *supra* note 10, at 614–15.

364. 367 U.S. 643 (1961).

365. *Id.* at 657.

366. Specific guarantees contained in the federal Bill of Rights apply against the states only if the guarantee is incorporated into the fourteenth amendment's due process clause. *See supra* notes 82, 139 and accompanying text. The *Mapp* Court overruled *Wolf* on the basis of the fourth and fourteenth amendments, not the Court's use of its supervisory power. *Mapp*, 367 U.S. at 678 (Harlan, J., dissenting); *see* Kamisar, *supra* note 10, at 626–627. However, the Burger Court predicates its selective application approach to exclusion on its conclusion that the rule is a judicially created remedy, rather

language of article 1, section 3 and the federal due process clause is virtually identical, the Washington Supreme Court has never viewed federal interpretations of due process as controlling the substantive requirements of the state guarantee.[367] Consequently, even if one argues that the selectively applied exclusionary rule satisfies the fourteenth amendment's flexible due process requirement, the state due process clause can require a stricter, automatically-applied exclusionary remedy consistent with state jurisprudence.[368]

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than a constitutional right. *See supra* notes 166–70 and accompanying text. This shift from the federal rule's original conception as a constitutional right presents difficulties for the "due process" premises of the federal rule. State v. Davis, 295 Or. 227, 666 P.2d 802, 807. The Oregon Supreme Court observed that "[i]t is not easy to explain how 'due process' of the defendant actually on trial, the necessary premise for applying the federal rule to state trials under the fourteenth amendment, depends on the Supreme Court's estimate of its effectiveness in one or another context affecting future police behavior." *Davis*, 666 P.2d at 807 n.9. Moreover, during the 1983 term the Supreme Court stated that "there comes a point at which courts . . . cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches." INS v. Lopez-Mendoza, 104 S. Ct. 3479, 3490 (1984) (holding that exclusionary rule does not operate in civil deportation hearings; quoting United States v. Janis, 428 U.S. 433, 459 (1976)). *Lopez-Mendoza* suggests that the federal exclusionary rule is now to be considered an exercise of the Court's supervisory power. Wasserstrom & Mertens, *supra* note 74, at 130. Moreover, by basing its exclusionary remedy on the deterrence rationale, the Burger Court implies that exclusion derives from the Court's supervisory power rather than any constitutional connection. Schrock & Welsh, *supra* note 16, at 367.

If the federal rule is, in fact, based on the Court's supervisory power, then as a matter of federalism, the Washington Supreme Court should ask where the United States Supreme Court derives its authority to impose the rule on the states. The Supreme Court's supervisory power does not bind state courts. *Mapp*, 367 U.S. at 678 (Harlan, J., dissenting); State v. Winters, 39 Wn. 2d 545, 236 P.2d 1038 (1951) (arguing that if federal rule springs from supervisory power, Supreme Court has no authority to impose it on states). However, one commentator has suggested that the modern federal exclusionary rule exemplifies the Supreme Court's inherent power to develop and impose on the states rules of "constitutional common law." Monaghan, *The Supreme Court, 1974 Term—Foward: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–6, 22–23. For a discussion of this issue, see Ball, *supra* note 17, at 650; Schrock & Welsh, *supra* note 17 (criticizing Professor Monaghan's constitutional common law argument as just another name for the supervisory power and proposing the judicial review theory of exclusion); Wasserstrom & Mertens, *supra* note 74, at 130 (1984); Wingo, *supra* note 349, at 234 (federal exclusionary rule no longer constitutionally based; since Supreme Court has no supervisory power over states, the Court should either abandon the rule or construct its own constitutional foundation).

367. *See, e.g.*, Herr v. Schwager, 145 Wash. 101, 258 P. 1039 (1927). In construing article 1, § 3, the Washington Supreme Court's decision whether to follow the United States Supreme Court's lead is based on the persuasiveness of the federal Court's reasoning, not on the basis of the Court's authoritativeness. State v. Bartholomew, 101 Wn. 2d 631, 639, 683 P.2d 1079, 1085 (1984) (using independent grounds and broader protection analysis, court held that portions of capital punishment statute (WASH. REV. CODE §10.95.100), while not violative of fourteenth amendment, did violate article 1, § 3). *But see* State v. Davis, 38 Wn. App. 600, 606–09, 686 P.2d 1143, 1146–47 (1984) (Durham, C.J., dissenting) (as court of appeals judge, Justice Durham argued that interpretations of article 1, § 3 should not be inconsistent with Supreme Court interpretations of the fourteenth amendment unless an historic basis exists for doing so).

368. Some argue that the due process requirements under the fourteenth amendment are more flexible than requirements under the fifth amendment's due process clause. *See generally* Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 187–92 (1969); Geller, *supra* note 11, at

Viewing Washington's independent exclusionary rule as a due process exclusionary right provides meaning to the *Buckley* principle.[369] By their very nature, due process violations result in both error and harm, conditions that a court seeks to remedy by invoking the exclusionary rule.[370] Washington courts have long adhered to the principle that when article, 1 section 7 rights are violated, by necessity the exclusionary remedy must attach.[371] The most natural remedy is to undo the harm.[372] By excluding evidence to prevent the state from profiting from its violation of the defendant's rights, a court undoes the harm to the defendant by, in effect, restoring the parties to the status quo ante, as if the state's officers had stayed within the limits of their authority.[373] Clearly it is beneath the dignity of a government said to be of laws, not of people, for a defendant to be convicted upon evidence obtained in violation of the "law of the land."[374]

IV. CONCLUSION

During the 1985 term the Washington Supreme Court will decide whether to alter the automatic nature of Washington's independent exclusionary rule to conform to its federal counterpart. The court should refuse to do so because of the rule's inextricable connection to three state constitutional provisions. First, the framers of article 1, sections 7 and 9 intended to reflect the federal interpretation of search and seizure and the privilege

642 n.101. Under this view the fourteenth amendment's due process clause does not require the same exclusionary rule as the fourth amendment. *Id.* Thus, the fourteenth amendment would not require suppression unless a police officer intentionally violated a person's fourth amendment rights. *Id.*

369. The *Buckley* principle addresses the responsibilility of the state, not just the prosecutorial arm of the state. State v. Buckley, 145 Wash. 87, 88–89, 258 P. 1030, 1031 (1927). *But see* State v. Cyr, 40 Wn. 2d 840, 842, 246 P.2d 480, 483 (1952) (substituting "prosecutorial authority" for "state" in citing the *Buckley* principle). Given that the *Buckley* court identified exclusion as necessary to preserve the dignity of the state as a whole, it would be inconsistent for a court to find that the state had obtained evidence in violation of the defendant's rights, and yet to find that it is consistent with due process of law for the state to profit from its violation by convicting the defendant on the basis of the illegally seized evidence. Geller, *supra* note 11, at 641 (quoting from A.C.L.U. Brief Amici Curiae for respondent at 6, California v. Krivda, 409 U.S. 33 (1972)).

370. White, *supra* note 72, at 1280 ("the major thrust of the 'due process of law' standard . . . is more obviously concerned with remedy and procedure . . . ").

371. *See supra* notes 100, 218–233 and accompanying text.

372. White, *supra* note 72, at 1278 n.21.

373. State v. Davis, 295 Or. 227, 666 P.2d 802, 806–07 (1983); White, *supra* note 72, at 1278 n.21. *See supra* notes 220–23, 297 and accompanying text.

374. Recognition of a due process exclusionary right will not come easy for the present court. Instinctively, reluctance develops at the realization that by insuring that an individual may not be deprived of his liberty without due process of law, a court may be preventing the justice of the law from reaching the guilty. However, the judicial oath requires Washington courts to maintain the constitutional rights of defendants, regardless of the appearance of guilt. City of Bremerton v. Smith, 31 Wn. 2d 788, 804, 199 P.2d 95, 103 (1948) (Simpson, J., dissenting).

against self-incrimination as embodied in the United States Supreme Court's landmark decision of 1889, *Boyd v. United States*. Under that interpretation, the language of article 1, section 9 requires the exclusion of all evidence seized in violation of the defendant's privacy without authority of law. Second, the accused has a due process exclusionary right under article 1, section 3, which requires the state to adhere to the law of the land at each stage of the prosecutorial process. Any refusal by a court to review and nullify the government's unconstitutional conduct by suppressing evidence acquired in violation of article 1, section 7 denies the accused's due process exclusionary right.

Finally, article 1, section 7 compels the exclusionary rule as the remedy most capable of protecting and giving full force and effect to the defendant's constitutionally guaranteed right of privacy. From the very inception of the article 1, section 7 exclusionary rule, the Washington Supreme Court viewed the rule as a method of protecting and giving full force and effect to the defendant's right to privacy. Over the past sixty-four years the court steadfastly adhered to its unitary approach, taking seriously the state exclusionary rule's underlying principle: whenever a violation of the defendant's article 1, section 7 rights occurred, by necessity, the state exclusionary remedy followed. This independent state jurisprudence stands as an obstacle to any attempt by the court to jettison or curtail Washington's exclusionary rule.

Washington Supreme Court justices have an obligation to effect the purposes of the framers of article 1, sections 7 and 9, especially when the framers deliberately chose language that differed from counterpart federal provisions. To effectuate those purposes, the court must look to the intent of Washington's founding fathers, rather than the intent of the framers of the federal Constitution. The court may decide to abandon Washington's independent approach to the exclusionary rule. Such a decision, at a minimum, ought to be made knowingly and openly, with a full articulation of the court's reasons for disregarding the framers' intention to adopt the *Boyd* view of search and seizure and the privilege against self-incrimination. Moreover, compelling reasons must exist for disregarding stare decisis and repudiating the rich history of thoughtful independent state exclusionary rule jurisprudence.

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