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STATE V. YOUNG AND THE NEW TEST FOR PRIVACY IN WASHINGTON

Michael M. Suga

Abstract: In *State v. Young*, the Washington Supreme Court determined that the warrantless use of an infrared thermal detection device on the home of a suspected marijuana grower was a violation of Article I, Section 7 of the Washington State Constitution. This Note argues that the court's test for determining privacy rights under Article I, Section 7 is flawed in form and fails to achieve those goals set forth by the court. It suggests an alternative test for Article I, Section 7 privacy rights as well as a remedial prerequisite standard of proof in cases involving minimally intrusive surveillance techniques.

In 1949 George Orwell published his nightmarish novella "1984," depicting a world in which a governmental "Big Brother" monitored every aspect of people's lives.¹ Big Brother utilized "thought police" who were sanctioned to use invasive and oppressive surveillance to detect illegal thoughts in citizens and punished them for such "thought crimes." Orwell's work articulated fears that had been felt by people from all walks of life who, for one reason or another, worried about the ability of the state to intrude into their private lives.² This fear of Big Brother's watchful eye has provoked intense scrutiny of law enforcement techniques that may intrude on individual privacy regardless of the importance of the information to police efforts.

At the same time, the fear of crime has remained a major focus of social concern. With the rise of random violence, gang violence, and drug-related crimes in the past several decades, government officials have tried desperately to fashion some solution to this sweeping problem. These countervailing concerns have created a pitched battle in the courtrooms of America between advocates of increased privacy protection from governmental and police intrusions and law enforcement officials trying to win the war against crime by whatever means available to them.

Orwell's macabre vision has failed to materialize. Eleven years after 1984, the technology necessary to read people's thoughts has not yet

1. George Orwell, *1984* (1949).

2. The Fourth Amendment reads, in part: "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 . . ." U.S. Const. amend. IV.

been developed.³ Nevertheless, a number of technological advances now allow police to discover things they could not otherwise know. Such technological or "sense-enhanced" searches that allow law enforcement officers to sense that which they otherwise would not be able to see, hear, smell, feel or taste naturally, are the most recent topic over which Fourth Amendment advocates and law enforcement officials have battled.

The speed with which new technology is produced and old technology is improved, as well as the variety of devices that are being developed to aid police in conducting effective surveillance, make it important for courts and police to have a workable test for determining the constitutionality of each new device's warrantless use.⁴ Furthermore, it is important that this test strike an appropriate balance between effective law enforcement and the protections afforded by the Fourth Amendment and its state equivalents. In creating such a test, courts should be ever mindful of the fact that criminals, like police, are using increasingly sophisticated and technological methods to make their activities more efficient and less easily detected.

Federal courts, led by the U.S. Supreme Court, have responded by creating a single uncomplicated test that, while somewhat amorphous, can be used to determine when the use of some new piece of technology requires a warrant and when it does not.⁵ However, because the U.S. Constitution provides only the minimum protection that is to be provided to citizens, states have been free to find that their own constitutions provide greater protection against governmental intrusions on individual privacy. Due to the complexity and concerns about potential abuses, sense-enhanced searches have been a common area in which states, including Washington, have opted to provide greater protection.⁶

Part I of this Note will review the present state of privacy law as it relates to warrant requirements for sense-enhanced surveillance under

3. The fear of "thought police" through the advancement of psychic sciences was a motivation for Justice Brandeis's dissent in *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

4. See *State v. Young*, 123 Wash. 2d 173, 184, 867 P.2d 593, 598 (1994).

5. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). See also *infra* part II.A.

6. For examples of state courts that departed from *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979) (holding that the use of pen registers to record the telephone numbers called from a particular telephone did not require a warrant under the Fourth Amendment), to provide greater privacy protection, see *People v. Sporleder*, 666 P.2d 135, 144 (Colo. 1983); *State v. Thompson*, 760 P.2d 1162, 1169 (Idaho 1988); *State v. Hunt*, 450 A.2d 952, 969 (N.J. 1982).

both the U.S. Constitution's Fourth Amendment standard⁷ and the Washington Constitution Article I, Section 7 standard (art. I, § 7).⁸ The focus of this art. I, § 7 analysis will be on the Washington Supreme Court's most recent ruling on the topic, *State v. Young*.⁹ Part II will then provide a critical analysis of the standard created by *Young*. Finally, part III will suggest alternatives to the present art. I, § 7 construction, providing a more appropriate balance between the privacy rights of citizens and the ability of police officers to compete with criminals in an increasingly technological arena.

I. THE RIGHT TO PRIVACY

A. *The Fourth Amendment "Reasonable Expectation of Privacy" Test and the Right to Privacy Under the U.S. Constitution*

Since the introduction of flashlights and binoculars into police surveillance, courts have been forced to decide when the use of such technological, sense-enhancing devices constitutes a violation of a citizen's right to privacy under the Fourth Amendment.¹⁰ In the last several decades, federal courts have repeatedly ruled on the use of such devices, finding the need for a warrant in some cases, while finding other cases to not require a warrant.¹¹

7. Although this Note is directed toward the appropriate standard which should apply to sense-enhanced searches under Article I, Section 7 of the Washington Constitution, an understanding of Fourth Amendment rulings and policy are important because they remain at the center of any privacy analysis and are used by *Young* and its predecessors as the foundation of art. I, § 7 privacy analysis. Furthermore, the body of Fourth Amendment law which has been produced will provide a helpful reference point in examining the construction of art. I, § 7's privacy analysis.

8. Washington Constitution Article I, § 7 states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This is Washington's equivalent to the Fourth Amendment. See *supra* note 2.

9. *State v. Young*, 123 Wash. 2d 173, 184, 867 P.2d 593, 599 (1994).

10. See *United States v. Dunn*, 480 U.S. 294, 305 (1987) (holding that the warrantless use of a flashlight by police does not violate Fourth Amendment right to privacy); *Fullbright v. United States*, 392 F.2d 432, 434-35 (10th Cir.), cert. denied, 393 U.S. 830 (1968) (holding that the warrantless use of binoculars allowed for surveillance); *State v. Manly*, 85 Wash. 2d 120, 124, 530 P.2d 306, 309, cert. denied, 423 U.S. 855 (1975) (holding that the warrantless use of binoculars allowed so long as the officer, if he had been closer, could have seen the objects observed).

11. See, e.g., *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986) (holding that the use of sophisticated photography equipment allowed without a warrant); *United States v. Knotts*, 460 U.S. 276, 285 (1983) (holding that the use of tracking beeper to follow a car does not require a warrant); *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979) (holding that the use of a device which records phone numbers dialed from a given phone does not require a warrant); *Katz v. United States*, 389 U.S. 347, 359 (1967) (holding that the use of a phone tap without a warrant is not allowed).

In *Katz v. United States*,¹² the U.S. Supreme Court held that the Fourth Amendment protects a citizen against unwarranted searches and seizures that intrude upon a reasonable and subjective expectation of privacy.¹³ If one of these conditions is found to be absent, then there is no privacy interest that is protected by the Fourth Amendment.¹⁴ Generally speaking, if there is no protected interest, then the police do not need to obtain a warrant based on probable cause, nor do they need any prerequisite level of suspicion to conduct their surveillance, as any such surveillance would be outside the scope of the Fourth Amendment.¹⁵

Courts have used a variety of considerations to determine whether or not a reasonable expectation of privacy exists, including: the nature of the search, the location of the officers, the nature of the property on which the search occurs, the information-gathering capabilities of a technique, and the activities observed.¹⁶ Under the protected places doctrine, which was an integral part of Fourth Amendment law prior to *Katz*, any manner of physical penetration of a home constituted a per se violation of the Fourth Amendment.¹⁷ *Katz*'s reasonable and subjective expectation of privacy test, however, abolished the previously maintained "protected places" doctrine of Fourth Amendment rights.¹⁸ Thus, under *Katz*, the fact that a surveillance technique is focused on a private residence is not determinative of a violation under the Fourth Amendment.¹⁹ Nevertheless, as Justice Harlan noted in his concurrence, people reasonably expect more privacy in their homes than elsewhere.²⁰

In cases pre-dating *Katz* and *State v. Myrick*,²¹ the case which abolished the protected places doctrine in Washington, the protected places doctrine took on an extremely simple form. If there was a physical penetration of a place that the court determined deserved special protection, most commonly a home, then there was a per se

12. 389 U.S. 347 (1967).

13. *Id.* at 361 (Harlan, J., concurring). Although part of a concurring opinion, Justice Harlan's language has been commonly accepted as the test created by *Katz*. See *Smith*, 442 U.S. at 740.

14. *Knotts*, 460 U.S. at 280-81.

15. *Id.* at 285.

16. *Smith*, 442 U.S. at 741; *Terry v. Ohio*, 392 U.S. 1, 12 (1968); *Lewis v. United States*, 385 U.S. 206, 211 (1966).

17. *Katz*, 389 U.S. at 352-53.

18. *Id.* at 353 (stating that "the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures").

19. *Id.* at 351.

20. *Id.* at 361 (Harlan, J., concurring).

21. 102 Wash. 2d 506, 688 P.2d 151 (1984).

constitutional violation.²² On the other hand, if no such penetration took place, then there was no violation.²³ In rejecting the protected places doctrine, however, the *Katz* and *Myrick* courts were not simply finding fault with the mechanics of the rule, but they were finding fault with the idea behind the rule. In overruling prior cases that used the protected places rule, the Court in *Katz* declared that the Fourth Amendment protects people, not places.²⁴ This simply means that places in and of themselves confer no rights or privileges.²⁵ Instead, it is the privacy that we reasonably expect in certain places that provides protection to activities and information related to those places.

B. Article I, Section 7 and Washington State's Departure from Fourth Amendment Privacy Rights

More than a decade ago, in *State v. Ringer*,²⁶ the Washington Supreme Court stated that art. I, § 7 is not merely a reflection of the Fourth Amendment, but rather, it incorporates the principles of privacy as they have been developed in Washington's common law since the adoption of its constitution.²⁷ In *Ringer*, the court used this notion to find that a search under art. I, § 7 must be considered under Washington's common law as it was adopted by the Constitutional Convention in 1889.²⁸ The *Ringer* court noted that the Constitutional Convention deliberately chose different language than that contained in the Fourth Amendment.²⁹

In a series of decisions, the Washington Supreme Court articulated the difference between art. I, § 7 and the Fourth Amendment. First, in *State*

22. See, e.g., *Katz*, 389 U.S. at 352–53.

23. See, e.g., *Olmstead v. United States*, 277 U.S. 438, 464 (1928) (finding that there was no violation based on the fact that, while tapping phone lines, the police never physically entered or penetrated Olmstead's home).

24. *Katz*, 389 U.S. at 353.

25. See *Lewis v. United States*, 385 U.S. 206, 213 (1966) (finding that, when a person turns his or her home into a place from which to conduct an illegal drug business, the home loses its sanctity and becomes no more private than a street corner).

26. 100 Wash. 2d 686, 674 P.2d 1240 (1983).

27. *Id.* at 691, 674 P.2d at 1243.

28. *Id.*

29. *Id.* at 690, 674 P.2d at 1243. See also *State v. Young*, 123 Wash. 2d 173, 179, 867 P.2d 593, 596 (1994). The *Young* court established that, in accordance with *State v. Gunwall*, 106 Wash. 2d 54, 720 P.2d 808 (1986), there is a sufficient difference between the wording of art. I, § 7 and the Fourth Amendment, as well as sufficient evidence of the state Constitutional Convention's intent, to warrant greater protection of privacy rights under art. I, § 7 than that provided by the Fourth Amendment.

v. Chrisman,³⁰ the court held that art. I, § 7 provides greater protection than that provided by the Fourth Amendment.³¹ The *Chrisman* court did not delineate the boundaries of this heightened protection, holding instead that an examination of facts on a case-by-case basis is preferable to a bright-line rule in the determination of when police activities violate constitutional standards.³²

Myrick provided a more developed discussion of the protection afforded under art. I, § 7.³³ According to *Myrick*, determining when a violation of art. I, § 7 has occurred turns on whether the state has unreasonably intruded into a person's private affairs.³⁴ *Myrick* clarified the difference between art. I, § 7 and the Fourth Amendment by finding that protection under art. I, § 7 is not limited by the Fourth Amendment's subjective expectation requirement.³⁵ Thus, after *Chrisman* and *Myrick*, art. I, § 7 was interpreted to provide heightened privacy protection similar to that provided under the Fourth Amendment, but without the requirement of a subjective expectation of privacy.³⁶

C. *State v. Young: The New Test for Privacy Rights Under Article I, Section 7*

*State v. Young*³⁷ is the Washington Supreme Court's latest decision on the constitutionality of sense-enhanced searches. According to *Young*, there are two separate areas, "private affairs" and "invasions of the home," where the Washington Constitution provides greater protection than the Fourth Amendment.³⁸ In *Young*, the court held that the use of a thermal detection device constitutes a search requiring a warrant under

30. 100 Wash. 2d 814, 676 P.2d 419 (1984).

31. *Id.* at 818, 676 P.2d at 422.

32. *Id.* at 820, 676 P.2d at 423.

33. *State v. Myrick*, 102 Wash. 2d 506, 688 P.2d 151 (1984).

34. *Id.* at 510, 688 P.2d at 153-54.

35. The *Myrick* court concluded that: "Const. art. I, § 7 analysis encompasses those legitimate privacy expectations protected by the Fourth Amendment, but is not confined to the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives." *Id.* at 510-11, 688 P.2d at 154.

36. *See, e.g., State v. Stroud*, 106 Wash. 2d 144, 159, 720 P.2d 436, 445 (1986) (Durham, J., concurring).

37. 123 Wash. 2d 173, 867 P.2d 593 (1994).

38. *Id.* at 181, 184, 867 P.2d at 597, 599.

art. I, § 7 of the Washington State Constitution.³⁹ The court reached this conclusion by first finding that the device's use constituted an unreasonable intrusion into the defendant's private affairs.⁴⁰ The court also held that the search constituted a separate violation of art. I, § 7 under an invasion of the home analysis and, finally, that it violated the Fourth Amendment as well.⁴¹ The dual analysis provided by *Young* represents the most detailed art. I, § 7 test that the Washington Supreme Court has fashioned to date.

1. State v. Young: *The Facts*

On August 14, 1990, Edmonds police received an anonymous note stating that Robert Young had a marijuana grow operation in his house.⁴² A follow-up investigation verified Young's address and phone number included in the note.⁴³ At the home, the investigating detective noticed that the basement windows were constantly covered, and that there was no detectable odor of marijuana.⁴⁴ The detective obtained the power consumption records for Young's home and found that there was an

39. *Id.* at 184, 867 P.2d at 599. A thermal detection device is a hand-held device which, at night, detects the heat emitted from the surface of objects targeted and transforms the data into a visual image. In the image displayed, white colors denote cool areas, and darker shades of gray denote increasing levels of heat. The device sends no rays into the object targeted, nor does the reading directly represent internal temperatures. See *United States v. Penny-Feeney*, 773 F. Supp. 220, 223, *aff'd on other grounds*, 984 F.2d 1053 (9th Cir. 1994).

40. *Young*, 123 Wash. 2d at 184, 867 P.2d at 599.

41. *Id.* at 188, 867 P.2d at 601. According to *Young*, its analysis regarding the Fourth Amendment is undertaken to provide "guidance" to courts faced with this issue in the future. *Id.* However, the district court in *United States v. Domitrovich*, 852 F. Supp. 1460, 1471 (E.D. Wash. 1994), declined to follow the *Young* decision, choosing instead to follow *Penny-Feeney*. In *Domitrovich*, the court stated that "the [*Young*] Court's ruling was based (in no small part) upon generalizations regarding potential invasions of privacy." 852 F. Supp at 1474 n.2. *Domitrovich* noted that a proper Fourth Amendment analysis concentrates instead on "the facts of each case, not . . . extravagant generalizations." *Id.* at 1474. A number of circuits likewise have found that use of thermal imaging does not violate the Fourth Amendment. See *United States v. Ishmael*, 48 F.3d 850, 851 (5th Cir. 1995); *United States v. Meyers*, 46 F.3d 668, 669-70 (7th Cir. 1995); *United States v. Ford*, 34 F.3d 992, 995-97 (11th Cir. 1994); *United States v. Broussard*, 987 F.2d 215, 217 (5th Cir. 1993).

42. *Young*, 123 Wash. 2d at 176-77, 867 P.2d at 595. The phrase "marijuana grow operation" refers to an illegal operation in which persons use sun lamps (similar to those used for in-home sun tanning) to grow marijuana plants indoors. See, e.g., *State v. Solberg*, 122 Wash. 2d 688, 691, 831 P.2d 754, 755-56 (1994).

43. *Young*, 123 Wash. 2d at 177, 867 P.2d at 595.

44. *Id.* Because marijuana grow operations commonly are located within a private home or garage, growers commonly cover windows or grow the plants in places without windows to make standard visual detection of such operations impossible. See, e.g., *Solberg*, 122 Wash. 2d at 691, 831 P.2d at 755-56.

increased rate of power consumption consistent with marijuana grow operations for the past three years.⁴⁵

It was at this point, when the gathered evidence strongly suggested a marijuana grow operation, that the police decided to use a thermal detection device to verify their suspicions. The device revealed that Young's house displayed abnormal heating patterns involving unusual warmth emanating from the foundation.⁴⁶ For the purpose of comparison, a number of neighboring houses were scanned with the device as well.⁴⁷ Based on the data acquired by the police using the thermal detection device, a search warrant was obtained.⁴⁸ Edmonds Police served the warrant on August 28, 1990, and a quantity of marijuana was discovered.⁴⁹ Young was charged with possession of marijuana with intent to manufacture or deliver and was found guilty on July 15, 1991.⁵⁰ Appeal to the Washington Supreme Court was direct.⁵¹

2. State v. Young: *The Reasoning of the Court*

The *Young* court began by re-establishing that art. I, § 7 affords citizens greater protection against governmental searches and surveillance than the Fourth Amendment.⁵² The court seems to have focused on the specific language of art. I, § 7 to find that the Constitutional Convention's choice of the phrases "private affairs" and "home invaded" provides greater protection in these two distinct areas.⁵³ Therefore, the court analyzed each of the provisions separately and created a two-part test for determining violations of art. I, § 7: first under the private affairs clause,⁵⁴ and then under a property-based analysis for the home invaded clause.⁵⁵

45. *Young*, 123 Wash. 2d at 177, 867 P.2d at 595. The increase in power consumption is caused by the constant running of multiple sun lamps. It is possible for marijuana grow operators to render power consumption searches ineffective by tampering with home electric meters. See *Penny-Feeny*, 773 F. Supp. at 224.

46. *Young*, 123 Wash. 2d. at 178, 867 P.2d at 595 .

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 179, 867 P.2d at 596. See also *supra* part I.C.

53. *Young*, 123 Wash. 2d at 184-85, 867 P.2d at 599. See also *supra* note 8.

54. *Young*, 123 Wash. 2d at 181, 867 P.2d at 597.

55. *Id.* at 184, 867 P.2d at 599.

a. *The Two-Part Private Affairs Analysis*

According to *Young*, the private affairs inquiry begins with a question of whether a search has occurred.⁵⁶ If it is determined that a search has occurred, a warrant is necessary to prevent an art. I, § 7 violation.⁵⁷ On the other hand, if there was no search, then no warrant is required, and art. I, § 7 privacy rights are not implicated.⁵⁸ Whether or not a search had occurred depends upon whether there has been an unreasonable intrusion into a person's private affairs.⁵⁹ In determining whether or not such an intrusion has occurred, the court preserved under art. I, § 7 many of the principles which existed as the basis for Fourth Amendment protection.⁶⁰ Therefore, the court suggested that the plain view doctrine described in past decisions is a product of the private affairs clause of art. I, § 7.⁶¹ Similarly, the notion that things knowingly exposed to the public are not protected is retained under the court's private affairs analysis.⁶²

Most of the court's analysis, however, focused on a two-part test that the court fashioned from prior decisions.⁶³ First, in determining whether or not there was a violation of the private affairs clause, the court asked if there was a "substantial and unreasonable departure from a lawful vantage point."⁶⁴ Second, the court asked whether there was a "particularly intrusive method of viewing."⁶⁵ According to the court, if the answer to either of these questions was yes, then the activity might constitute a search.⁶⁶ In determining that the use of thermal imaging devices violates the second prong of this test, the court looked at the intrusiveness of the surveillance technique and the nature of the property

56. *Id.* at 181, 867 P.2d at 597.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 182, 867 P.2d at 597.

61. *Id.* The plain view doctrine states that objects which are in plain view of an officer who is viewing from a legal vantage point are subject to search and seizure without a warrant. *State v. Kennedy*, 107 Wash. 2d 1, 9, 726 P.2d 445, 450 (1986).

62. *Young*, 123 Wash. 2d at 182, 867 P.2d at 597. Related to the plain view doctrine, the knowingly exposed doctrine denies privacy protection to those activities knowingly exposed to the public. *State v. Meyers*, 117 Wash. 2d 332, 345, 815 P.2d 761, 769 (1991).

63. The court cited *Meyers*, 117 Wash. 2d 332, 815 P.2d 761, and *State v. Seagull*, 95 Wash. 2d 898, 632 P.2d 44 (1981), as the cases which first suggested this test. *Young*, 123 Wash. 2d at 181-82, 867 P.2d at 597.

64. *Id.* at 182-83, 867 P.2d at 598.

65. *Id.*

66. *Id.* The court never clarified when failing one branch of this test might not constitute a violation of art. I, § 7.

being observed.⁶⁷ While considering how intrusive the surveillance technique was, the court determined that the thermal imaging device goes well beyond an enhancement of natural senses, allowing police to detect heat patterns that are otherwise undetectable.⁶⁸ The court also emphasized that the device allowed police to conduct their surveillance without the subject's knowledge.⁶⁹

The *Young* court continued by discussing how the nature of the property viewed was also a factor in whether the surveillance violated the subject's right of privacy.⁷⁰ The court concluded that the device allowed the officers to draw specific inferences about the inside of the house.⁷¹ These inferences included what rooms a homeowner is heating, where major heat-producing appliances are, and "possibly" even the number of people staying at the residence on a given night.⁷² From this information, the court felt that the police could further infer how financially able the homeowner is to heat his or her home.⁷³ Finally, the court stated that because the activities that were inferable from the device's use occurred within a home, they fell within those private affairs that are protected under art. I, § 7.⁷⁴ Based upon these facts, the court concluded that the thermal detection device represented a particularly intrusive means of surveillance requiring a warrant before use.⁷⁵

b. *The Property-Based Invasion of the Home Analysis*

Although the court already considered the nature of the property as relevant to its private affairs analysis, it nevertheless went on to make a separate analysis of the heightened privacy protection afforded to homes under art. I, § 7. The court maintained that the private affairs and the invasion of the home bases for protection are distinct concepts and should be considered separately, despite the occasional overlap.⁷⁶ Contrary to its private affairs analysis, however, the court did not create a

67. *Id.* at 183, 867 P.2d at 598. The court concluded that the police conducted the surveillance from a legal vantage point. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 183-84, 867 P.2d at 598.

73. *Id.* at 183, 867 P.2d at 598.

74. *Id.* at 184, 867 P.2d at 598.

75. *Id.*

76. *Id.* at 184-85, 867 P.2d at 599.

structured test to guide lower courts through an invasion of the home analysis. Instead, the court stated the guiding principle that the home is an especially private place requiring greater constitutional protection.⁷⁷ In reaching this conclusion, however, the court was quick to point out that this augmented constitutional protection did not rise to the level of the protected places doctrine abolished by the court in *State v. Myrick*.⁷⁸

Although it did not clarify what the test was to be under the invasion of the home analysis of art. I, § 7, the court found an unconstitutional invasion of the home in *Young* because the thermal imaging device gathered information about the interior of the house that could not be seen by the naked eye.⁷⁹ According to *Young*, the device effectively allowed police to see through the walls of the house, thereby invading the home for purposes of art. I, § 7.⁸⁰ *Young* declared that such invasions of the home are unconstitutional unless a warrant is first obtained, or the State can make an extraordinary showing of need. The court, in justifying its result, noted its fear that the use of such surveillance techniques, unchecked by a warrant requirement, would act to “chill free expression.”⁸¹

II. CRITICAL ANALYSIS OF WASHINGTON’S ARTICLE I, SECTION 7 RIGHT TO PRIVACY AFTER *YOUNG*

A number of problems arise from the standard for art. I, § 7 protection created by the court in *Young*. First, the court set a dangerous precedent by using speculative inferences in its discussion of the information-gathering abilities of the thermal imaging device used in the case. This break with traditional privacy protection analysis could mark the demise of any useful open view surveillance if taken to its natural extreme. Next, the court revived the protected places doctrine in a new form. While *Young* does not reestablish the physical penetration doctrine of *Olmstead v. United States*,⁸² it nonetheless abandons the spirit behind the decisions in *Katz v. United States*⁸³ and *Myrick*, that protection is to be provided to

77. *Id.* at 185, 867 P.2d at 599.

78. *Id.* at 185 n.2, 867 P.2d at 599 n.2 (citing *Myrick*, 102 Wash. 2d 506, 688 P.2d 151 (1984)).

79. *Id.* at 186, 867 P.2d at 599.

80. *Id.*

81. *Id.* at 187, 867 P.2d at 600. The court failed to further explain the connection between privacy and free expression.

82. 227 U.S. 438 (1928). See *supra* notes 22–23 and accompanying text.

83. 389 U.S. 347 (1967). See *supra* notes 24–25 and accompanying text.

people, not places.⁸⁴ Finally, the court's departure from traditional Fourth Amendment analysis of sense-enhanced searches failed to provide an administratively workable model for lower courts to use as guidance under art. I, § 7 in determining the legality of the warrantless use of future technological surveillance techniques.

A. *Young's Use of Inferences in Its "Private Affairs" Analysis Closes the Door on Future Sense-Enhanced Warrantless Surveillance*

According to *Young*, the intrusiveness of a surveillance method is determined in part by looking at the means employed.⁸⁵ While the court characterized the information-gathering capabilities of the thermal imaging device as allowing the officers to effectively see through the walls of *Young's* home, it failed to precisely distinguish between the primary information police officers received from the thermal imaging device and the inferences attributed to such primary information by the court. The court explained that the thermal imaging device detected that there were warm spots on the foundation of the home, that the lower portion of the chimney was warm but that the top was cool, and that only one of the two chimney vents was warm.⁸⁶

However, the court's holding that the procedure violated art. I, § 7 was not based on the heating patterns themselves. Instead, the court relied on the police officer's ability to use this information to draw probing inferences about the inside of the house.⁸⁷ Therefore, the *Young* court supplemented the primary data gathered by police with its own opinion of what facts the police might have been able to infer from the data they had gathered. It is unclear how far the Washington Supreme Court is willing to stretch this imputation of inferable knowledge to those conducting surveillance.

The inferences that the court focused on in *Young* suggest that it is acceptable to stretch such inferences as far as a court's imagination will allow. The court's determination that a short thermal scan such as the one involved in *Young* could allow police to determine the family's ability to heat certain rooms is highly questionable. The possible reasons why a room or even an entire home might be left cool range from personal taste to vacancy. Additionally, because the device detects heat coming off of a home's surface, a cool zone might simply represent

84. See *supra* notes 24–25 and accompanying text.

85. *Young*, 123 Wash. 2d at 183, 867 P.2d at 598.

86. *Id.* at 177–78, 867 P.2d at 595.

87. *Id.* at 183–84, 867 P.2d at 598. See also *supra* notes 72–73 and accompanying text.

efficient insulation. In addition, any inference as to the financial ability of homeowners to heat their homes would be similarly questionable.⁸⁸ Even less clear is how the court came to the conclusion that heat patterns allow police to determine the number of people in a home at any given time.⁸⁹ Nevertheless, based almost entirely on facts that were questionably inferable from the thermal imaging device's data, the court found that the use of a thermal imaging device was "particularly intrusive" enough to constitute a search requiring a warrant.⁹⁰

When determining the intrusiveness of a particular surveillance technique, there is no question that courts must consider the range of potential information that the technique will allow police to discover.⁹¹ Courts must not be allowed, however, to permit broad speculation based on the primary information discovered to preclude the use of valuable surveillance techniques. The only limit on such a practice would be the imagination of the judge making the determination. To allow such speculation to guide the intrusiveness analysis would lead to patently absurd results, and the delicate balance between effective law enforcement and privacy rights would be severely impaired.

88. A homeowner's financial ability to pay also might be inferred from the exterior of the home, making related information inferred from the sense-enhancing thermal detection device harmless.

89. The court later noted that a person pressed against a thin plywood door, or pressed against a curtained window might be directly detected by the device. *Young* 123 Wash. 2d at 193, 867 P.2d at 603. If this is the case, then only if all of the home's occupants pressed against thin plywood doors or curtained windows, would it be possible for police to determine the number of occupants without counting them as they entered.

90. The court also found the fact that the surveillance could occur without the subject's knowledge to be a factor in determining the intrusiveness of the thermal detection device. *Id.* at 183, 867 P.2d at 598. This argument is indicative of the court's fear of governmental abuse. The court further found the fact that the officers also scanned other houses in the neighborhood for comparison disturbing, stating: "If we were to hold the use of the device does not constitute a search, no limitation would be placed on the government's ability to use the device on *any* private residence, on any particular night, even if no criminal activity is suspected." *Id.* at 187, 867 P.2d at 600. However, this same notion was posed by the respondent in *United States v. Knotts*, 460 U.S. 276 (1983), to which the court responded: "[I]f such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." *Id.* at 284.

91. The Supreme Court rejected the practice of looking only at the data actually gathered by police in a particular instance in *Katz v. United States*, 389 U.S. 347, 356 (1967). The *Katz* Court asserted that courts must also look at what could have been discovered by using the device (a telephone wiretap) because limitations on surveillance must not be result-based, or within the discretion of police. *Id.*

B. *The "Home Invaded" Clause as Understood by the Court Marks the Rebirth of the Protected Places Doctrine in a New, More Powerful Form*

By creating an independent home invasion violation of art. I, § 7, the *Young* court essentially created its own version of the protected places doctrine. The court's "invasion of the home" analysis and the "nature of the property" branch of its private affairs analysis both focus on the fact that a home was the subject of the surveillance, and suggest that as a result of the special nature of the home, the technique is overly intrusive and deserves constitutional protection.⁹² The court precluded the possibility that the invasion of the home analysis is merely a redundant reconsideration of the nature of the property observed doctrine by stating that the two analyses are conceptually distinct.⁹³ This insistence that the two analyses are distinct suggests that within the invasion of the home analysis, the nature of the property observed has some additional significance beyond that already taken into account by the private affairs analysis. Granting such talismanic significance to homes, however, mirrors closely the protected places doctrine explicitly rejected by the U.S. Supreme Court and the Washington Supreme Court in *Katz* and *Myrick*, respectively.

When the U.S. Supreme Court and the Washington Supreme Court rejected the protected places doctrine, they stated that the Fourth Amendment and art. I, § 7 protect people, not places.⁹⁴ Despite the Washington court's adoption of this view in *Myrick*, the *Young* court failed to provide any facts, other than the fact that it was a house that was subjected to the surveillance, to support its classification of the subject matter as within the scope of the "home invaded" clause.⁹⁵ The only fact that the court seemed to discuss within its substantive analysis was that the search effectively allowed police to know things about the inside of *Young's* home that they otherwise would not have known.⁹⁶ Thus, the

92. Both sections deal with the generally private nature of people's homes and both decisions turn on the fact that the court felt the police were able, in effect, to see through the walls of *Young's* house.

93. See *supra* notes 77-79 and accompanying text.

94. See *supra* note 24 and accompanying text.

95. The court even went so far as to suggest that a narcotics dog sniff may be unconstitutional under art. I, § 7 if the object of the search or the location of the search was a home. Such searches, however, have never been deemed to rise to the level of a protected search because the only information that can be gathered by their use is the presence of an illegal substance. *Young*, 123 Wash. 2d at 194, 867 P.2d at 603-04. It is unclear how, after saying this, the court can still contend that the "protected places" doctrine is abolished.

96. *Id.* at 183, 867 P.2d at 598.

only fact noted by the court in determining that invasion of the home protection was appropriate was that which, by rejecting protected places, it claimed was insufficient to warrant automatic privacy protection.

By focusing exclusively on the nature of the property observed, the *Young* court's home invasion analysis essentially resurrects a more powerful version of the protected places doctrine in that it requires no physical penetration of a home to trigger protection.⁹⁷ Under the court's analysis, even mundane and innocuous pieces of information that might be inadvertently discovered will invalidate valuable police surveillance merely because of the fact that the information is related to a private residence. After *Young*, for example, information about the heating of a home, and possibly the location of certain appliances within the home, will trigger art. I, § 7 protection. As Justice Harlan suggested in his concurring opinion in *Katz*, the fact that the information relates to a private residence should bear only upon the invasiveness of the search to the extent that it reflects the naturally private nature of such places.⁹⁸

C. *The Divided Test Created in Young Fails to Provide Lower Courts and Law Enforcement Officials with the Proper Guidance of an Understandable Test*

The *Young* court declared that it would not create a right to privacy that depends on the ever-changing state of technology, stating that such a right would be administratively unworkable.⁹⁹ The court stated its concern that, if such a broadly defined right was created, law enforcement agents, and presumably lower courts as well, would not have an adequately defined test to know what is to be allowed and what is not.¹⁰⁰ Apart from the substantive difficulties of the test created by the *Young* court the test itself is administratively unworkable.

By dividing the analysis under art. I, § 7 into two distinct parts, but failing to distinguish these two analyses, the *Young* court has left lower courts unable to accurately determine when a situation falls under one test or the other. Because both clauses may sometimes apply, it is necessary to distinguish between the two parts of the test. The court, however, failed to adequately make this distinction. Also, the question remains whether or not the court intended art. I, § 7 to provide

97. The protected places doctrine created in *Young* admittedly is limited to homes rather than the nonspecific private places conceivable under the old doctrine.

98. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

99. *Young*, 123 Wash. 2d at 184, 867 P.2d at 598.

100. *Id.*

heightened protection in all areas traditionally covered by Fourth Amendment search and seizure law, or just in those instances involving "private affairs" and "invasions of the home." That is, it is unclear whether there will be cases in which neither clause is appropriate and that Fourth Amendment rights should instead be applied. The failure of the court to definitively state what constitutes a "private affair" or an "invasion of the home" makes the comprehension of such issues murky at best. Finally, the court's sanction of the use of inferences in determining the invasiveness of technological surveillance techniques opens a door without defining any limits. Barring the limited examples provided in *Young* itself, lower courts cannot know, nor can police officers in the field be expected to guess, which inferences are appropriate and which go too far.

III. ALTERNATIVES

A. *Refocusing the Privacy Analysis*

In an attempt to create an administratively workable test for privacy rights, the court in *Young* sacrificed the simplicity of the federal test for a more complex, yet bright-line rule. As the U.S. Supreme Court noted in *Rakas v. United States*,¹⁰¹ however, rights against unreasonable search and seizure are of such a nature that bright-line rules are inappropriate. While such bright-line rules may be simpler to state and to apply, they fail because such rights are not so simply defined. What is private and what is to be protected are extremely fact-specific considerations. In determining when such rights adhere, a court must consider the totality of the circumstances.¹⁰²

The private affairs analysis in *Young* is essentially the same type of analysis that both federal and Washington state courts have made under the *Katz* test. The *Young* court determined that, due to the private nature of those activities that occur in a person's home, any search that significantly infringes upon such privacy violates a reasonable expectation of privacy. The court gained nothing by employing an analytical dichotomy under the "private affairs" and "home invaded" clauses of art. I, § 7.

The Washington Supreme Court should return to the state of Washington privacy law that arguably existed after *Myrick*. Under such an art. I, § 7 construction, courts would make their own determinations

101. 439 U.S. 128 (1978).

102. *See id.* at 147-48.

under the reasonable expectation of privacy test without considering the subjective expectations of individuals, as is required under the Fourth Amendment. Thus, while Washington courts may provide greater protection under art. I, § 7, they still can draw as much as they wish from persuasive federal analysis and opinions. Furthermore, strict guidelines as to when something should fall within one category of privacy or another would be unnecessary as all considerations would be considered within a single analysis based on the reasonableness of the expectation of privacy.

This proposed analysis is consistent with the well-established holding that the Washington State Constitution provides greater protection than the Fourth Amendment. This additional protection would simply be characterized in a way that comports with the basic principles of privacy as established in *Katz* and adopted by the Washington courts. Thus, even in circumstances that qualify as a subject's private affairs or that constitute invasions of the home, the test should remain the subject's reasonable expectation of privacy. Under the suggested approach to privacy rights, the additional protection guaranteed in art. I, § 7 would manifest itself as allowing a higher level of "reasonable" expectation. The choice of language by the State Constitutional Convention would simply state a truism under art. I, § 7: that Washington residents reasonably expect a great deal of privacy in their home and private affairs.

In the context of a reasonableness test for art. I, § 7 protection, the analysis of facts would be case specific. In each instance, the capabilities of a given surveillance technique would be considered. This analysis, instead of focusing on those thresholds maintained by the protected places doctrine, would focus on actual privacy interests involved and their reasonableness. Furthermore, in considering the use of each surveillance technique, the analysis would be limited to the primary data obtained and reasonable conclusions that could be derived from them, rather than allowing unlikely inferences to act as determinative facts.

B. Two Levels of Privacy

Another beneficial change to the *Young* test for art. I, § 7 privacy would be to require a showing less stringent than probable cause to validate the use of minimally intrusive surveillance techniques. Such an approach, used by the Washington Supreme Court in *In re Rosier*,¹⁰³

103. 105 Wash. 2d 606, 615, 717 P.2d 1353, 1359 (1986). This case involved the ability of public officials to get the names, addresses, and electrical usage of the power company's customers in their

would provide greater flexibility both to courts and law enforcement officials, while adequately protecting legitimate privacy interests.

Washington courts still tend to hold that a search or surveillance technique either requires a warrant, or that it requires nothing at all. Under this black-and-white approach, there is no flexibility to allow courts to find that certain surveillance techniques are minimally intrusive or reveal limited information. Without such a middle ground, courts are forced either to limit the usefulness of minimally intrusive techniques by demanding warrants, or to allow them to be used without any supervision at all, thereby leaving the door open for those abuses that the court tried to prevent in *Young*. Within the last three decades, the U.S. Supreme Court and the Washington Supreme Court have shown rare instances of flexibility in this area that reject an all-or-nothing analysis.¹⁰⁴ Within such decisions lies a logical and more reasonable way to look at constitutional privacy.

One way to create a privacy right that is more sensitive to the specific facts of a search technique would be to require police, in certain situations, to have a documented suspicion of illegal conduct before conducting a search. The court previously used this technique to resolve a borderline privacy rights issue. In *Rosier*, the Washington Supreme Court noted that individuals have a significant privacy interest in the distribution of their electricity consumption records.¹⁰⁵ Rather than finding that police could not gain access to such records without a warrant, however, the court required that police articulate to the power company a "specific suspicion of particular illegal conduct."¹⁰⁶

The method approved by the court in *Rosier* essentially matches a new, less intrusive level of search with a less stringent version of the probable cause warrant requirement. Under this model, officers wishing to conduct a borderline search would be required to file a written description of their basis for suspicion as well as an explanation of how the search would aid in affirming or contradicting that suspicion. This approach would allow police to conduct progressive investigations in which they could, with minimal intrusion into the private affairs of

official capacities. Although this case did not deal specifically with the issue of police use of such records to track down marijuana grow operations, the court specifically addressed this issue as a likely extension of the general issue.

104. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 17 (1968) (criticizing "rigid all-or-nothing" models in the area of Fourth Amendment search and seizure law).

105. *Rosier*, 105 Wash. 2d at 613, 717 P.2d at 1358.

106. *Id.* at 615, 717 P.2d at 1359.

suspected individuals, build their case and acquire the evidence necessary to get a warrant to search or arrest.

The marijuana grow operation at issue in *Young* is a good example of how this alternative procedure could work. In Washington, for police to obtain a warrant to search a home for a marijuana grow operation, they must have either a proven reliable confidential informant, or a combination of a less reliable tip and a positive identification by police of the distinctive smell produced by such operations.¹⁰⁷ Warrants are frequently denied, even in cases in which police have a tip, power records indicating an operation, and other indicia such as “sweaty” or covered windows.¹⁰⁸ Because adequate ventilation can make the scent undetectable to police outside the home, it often is difficult for police who have other strong indications of a grow operation to get the probable cause demanded of them.¹⁰⁹ Under the *Rosier* alternative approach, police who could build a reasonable case against a subject would be allowed to use the thermal imaging device to get over the hump and obtain the probable cause necessary for a full search warrant with only a limited intrusion into the suspect’s privacy.

Under this proposed approach, a trial judge finding that a method of observation constituted some level of a search would not have to exclude the evidence. If the court determined first that the search was conducted in the least intrusive manner, and second, that the information-gathering capabilities were sufficiently innocuous, the judge could determine that, given a valid suspicion, there was no violation of the right to privacy.¹¹⁰ This analysis essentially would be a determination under the reasonable expectation of privacy test illustrated above.¹¹¹

Under this method, all of the court’s concerns regarding abuse by police would be effectively resolved. Just as in *Rosier*, the practice of documenting a valid suspicion would sufficiently protect against “fishing expeditions.”¹¹² The defendant could, at trial, challenge the existence of such a suspicion, and the state would then be forced to defend the truthfulness of the officer’s suspicion.¹¹³ In the event that the suspicion

107. Conversation with King County Deputy Prosecuting Attorney Tami Perdue, April 11, 1995 (notes on file with the *Washington Law Review*).

108. *Id.*

109. *Id.*

110. *See Rosier*, 105 Wash. 2d at 614–15, 717 P.2d at 1359.

111. *See supra* note 37 and accompanying text.

112. *See Rosier*, 105 Wash. 2d at 615, 717 P.2d at 1359.

113. *See id.*

was based upon the word of a secret informant, the judge could examine such evidence or testimony by the informant in camera for sufficiency.¹¹⁴

If the Washington Supreme Court fails to follow the model suggested above, the same result could be reached through statutory reform. Just after the court's decision in *Rosier*, the Washington Legislature enacted RCW § 42.17.314 regarding police requests for electrical utility records.¹¹⁵ This statute was simply a statutory restatement of the court's holding that, prior to inspecting electricity records of individuals, an officer must first submit to the electric company a written statement articulating suspicion and stating that the electricity records will help determine if such suspicions are true.¹¹⁶ Accordingly, the Legislature could enact similar statutes for the use of devices such as the thermal imaging device. Such a statute could simply be a restatement of the common law principles drawn from *Rosier* and applied to the thermal device.¹¹⁷ The failure of the courts to strike down RCW § 42.17.314 suggests that this approach is an acceptable resolution of the constitutional issues raised by *Rosier*.

The drawback of this statutory technique is twofold. First, without prompting by the courts, the time lag between the development of a new, minimally intrusive surveillance technique and legislative action will be great. Second, the courts, which are more closely involved with police efforts, are in a better position to monitor the advances in technological surveillance and their subsequent applications. Therefore, ultimately, a common law solution is preferable.

114. See *State v. Casal*, 103 Wash. 2d 812, 820–22, 699 P.2d 1234, 1239–40 (1985).

115. Wash. Rev. Code § 42.17.314 reads:

A law enforcement authority may not request inspection or copying of records of any person, which belong to a public utility district or a municipally owned electrical utility, unless the authority provides the public utility district or municipally owned electrical utility with a written statement in which the authority states that it suspects that the particular person to whom the records pertain has committed a crime and the authority has a reasonable belief that the records could determine or help determine whether the suspicion might be true. Information obtained in violation of this rule is inadmissible in any criminal proceeding.

116. *Rosier*, 105 Wash. 2d at 614–15, 717 P.2d at 1359.

117. The statute might read:

A law enforcement authority may not conduct, order another to conduct, or inspect the results of a thermal imaging of an individual's home or place of business, unless the authority first submits to the court a written statement in which the authority states that it suspects that the particular person who works or resides in such home or place of business has committed a crime and the authority has a reasonable belief that the thermal imaging could determine or help determine whether the suspicion might be true. Information obtained in violation of this rule is inadmissible in any criminal proceeding.

IV. CONCLUSION

The construction of art. I, § 7 created by the Washington Supreme Court in *State v. Young* fails to supply the structure necessary for lower courts and law enforcement officers to determine the constitutionality of new search techniques. The court's establishment of a bright-line rule for all technological sense-enhanced searches will result in confusion and the re-emergence of the protected places doctrine. Finally, by allowing for the use of questionable inferences when determining the information gathering capability of a surveillance technique, the court unnecessarily limits the future use of sense-enhanced search technology.

The court should abandon this model of privacy rights in Washington in favor of a modified Fourth Amendment "reasonable expectation of privacy" test. Ultimately, such a switch will preserve the heightened protection of privacy under art. I, § 7 without recreating the protected places doctrine. The court should also allow lower courts to broadly apply the solution arrived at in *Rosier*. By allowing courts an intermediate option for privacy problems, the court could in many instances increase the accountability of police for the surveillance they conduct. At other times, this approach would allow police greater freedom to responsibly conduct investigations necessary to obtain search warrants. Such investigations could uncover vital but relatively innocuous information without violating art. I, § 7. Adopting these alternatives would provide a more efficient protection of individual privacy rights in the spirit of the Fourth Amendment rather than sacrificing the tools of law enforcement to the spirit of George Orwell.

