

ARTICLES

Dropping Anchor: Defining a Search in Compliance With Article I, Section 7 of the Washington State Constitution

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I. INTRODUCTION

The U.S. Constitution did not come with a glossary defining its terms. In breathing life into words such as “search” and “seizure,” the U.S. Supreme Court has been forced to look beyond the text of the Fourth Amendment.¹ In a progeny including *Boyd*,² *Olmstead*,³ and *Katz*,⁴ the Court has outlined and re-outlined the parameters of a search based on values not addressed in the Fourth Amendment such as tenets of property law,⁵ and common law torts including trespass⁶

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1. See Silas J. Wasserstrom and Louis M. Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 27 (1988). The Fourth Amendment reads,

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.

U.S. CONST. amend. IV.

2. *Boyd v. United States*, 116 U.S. 616 (1886).

3. *Olmstead v. United States*, 277 U.S. 438 (1928).

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

5. “Under *Boyd*, the Constitution allows an invasion of an individual’s privacy only if such an invasion is consistent with the rules of property law.” Ken Davis, *Washington Constitution Article I, Section 7: The Argument for Broader Protection Against Employer Drug Testing*, 16 U. PUGET SOUND L. REV. 1335, 1346 (1993) (citations omitted).

6. *Olmstead* is based on a notion of trespass. See Michael Campbell, Comment, *Defining a Fourth Amendment Search: A Critique of the Supreme Court’s Post Katz Jurisprudence*, 61 WASH.

and invasion of privacy.⁷ Such demarcations are important to protect people against violations of their constitutional rights because governmental activities that are not deemed to be a "search" by Fourth Amendment jurisprudence fall outside federal constitutional protection.⁸

The U.S. Constitution identifies and prohibits inappropriate governmental behavior. By doing so, it outlines the lowest common denominator of rights afforded to U.S. citizens. The principles of federalism, however, allow states to craft and interpret constitutions to provide state citizens a level of civil liberties equal to or greater than that afforded by the U.S. Constitution.⁹

While many state constitutions mirror the language of the U.S. Constitution, Washington constitution is unique. In 1889, three years after the Supreme Court decided *Boyd*,¹⁰ the Washington State Constitutional Convention met to craft its own state constitution. While little is known about the convention itself,¹¹ it is clear that the delegates expressly rejected the language of the Fourth Amendment,¹² and in its place drafted Article I, section 7, which reads, "No person

L. REV. 191, 193 (1986).

7. Justice Harlan's concurring opinion in *Katz* asks whether a reasonable expectation of privacy is breached. While it is true that the *Katz* Court expressly rejected the notion that the case was based upon privacy, it has been widely regarded as such. See Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 358 (1974).

8. See *id.* at 388.

9. See Robert Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1042 (1985). ("[S]tate constitutions grant affirmative rights to citizens while the federal constitution acts as a limitation on federal government."). A good example of this policy in action lies in *Washington v. Chrisman* where the United States Supreme Court reversed the Washington Supreme Court's holding that an officer's entry and search of two students' dormitory room violated the Fourth Amendment. 455 U.S. 1 (1982). Upon remand, the Washington court had the final word since the court decided the case on state grounds, rendering it unreviewable in light of *Michigan v. Long*, 463 U.S. 1032 (1983). See *Washington v. Chrisman*, 100 Wash. 2d 814, 815, 676 P.2d 419, 421 (1984). See also discussion of *Michigan v. Long*, *infra* note 17 and accompanying text.

10. Some believe that Article I, section 7 is based in part on the *Boyd* decision. See Sanford E. Pitler, Comment, *The Origin and Development of Washington's Independent Exclusionary Rule Constitutional Right and Constitutionally Compelled Remedy*, 61 WASH. L. REV. 459, 520 (1986) ("The unique language chosen by the framers from Article I, section 7 created a broad and inclusive privacy protection that directly reflects the *Boyd* theory of privacy."). See also Davis, *supra* note 5, at 1346.

11. Commentators bemoan the fact that there were few historical sources to provide insight into the framer's intent. See Pitler, *supra* note 10, at 520 n.316; Davis, *supra* note 5, at 1351 & n.97.

12. See George Nock, *Seizing Opportunity, Searching for Theory: Article I, Section 7*, 8 U. PUGET SOUND L. REV. 331, 332 (1985) (citing THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, at 497 (B. Rosenow ed. 1962)).

shall be disturbed in his private affairs, or his home invaded, without authority of law."¹³

Interestingly, although the Fourth Amendment and Article I, section 7 share only five words in common,¹⁴ the two passages were interpreted identically by the Washington courts for over ninety years.¹⁵ Perhaps spawned in part by the United States Supreme Court's recent contraction of citizen's rights,¹⁶ and *Michigan v. Long*,¹⁷ in which the U.S. Supreme Court warned that it would now be free to accept a state case unless the state court explicitly based its holding on adequate and independent state grounds, the Washington Supreme Court rediscovered the uniqueness of Article I, section 7 in a series of cases culminating in *State v. Myrick*.¹⁸

In *Myrick*, the court officially recognized the greater protection afforded by Article I, section 7, and expressly rejected the *Katz* two-prong definition of a search.¹⁹ However, *Myrick* failed to clearly identify a concrete test to fill the void left by *Katz*. In the wake of *Myrick*, Washington lower courts drifted about, confused as to the appropriate standard to apply in defining a search. This Article proposes that *Myrick* was correct in recognizing the ingenuity of Article I, section 7, and in rejecting the *Katz* definition. Unfortunately, the holding of *Myrick* did not go far enough in articulating a replacement for the *Katz* test. In the hope of providing an anchor for the Washington courts,²⁰ this Article offers a proposed test that encompasses the spirit and language of Article I, section 7, *Myrick*, and *Myrick's* recent progeny. By sewing together the essential themes from

13. WASH. CONST. art. I, § 7.

14. The five words are: "No," "be," "in," "or," and "of," as explained in Nock, *supra* note 12, at 331.

15. See *State v. Simpson*, 95 Wash. 2d 170, 197, 622 P.2d 1199, 1215 (1980) (Horowitz, J., dissenting).

16. See Nock, *supra* note 12, at 333 (citing *United States v. Leon*, 468 U.S. 897 (1984) and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984)).

17. 463 U.S. 1032 (1983). Justice Utter, the author of *State v. Myrick*, was undeniably aware of the importance of *Michigan v. Long* since he referred to it in his article as one explanation as to why state courts decide cases based on state rationales. See Utter, *supra* note 9, at 1026.

18. 102 Wash. 2d 506, 688 P.2d 151 (1984).

19. See *id.* at 510-11, 688 P.2d at 154.

20. The notion that a court has left the state of the law with "all sail and no anchor" comes from an article similarly titled referring to California state law. See George Deukmejian and Clifford Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L. Q. 975 (1979) (as cited in William Jennison, Comment, *Privacy in the Can: State v. Boland and the Right to Privacy in Garbage*, 28 GONZ. L. REV. 159, 165 n.54 (1992)). It is from this metaphor that this Article is named.

these sources, the proposed test embodies the Washington Supreme Court's intent in defining Washington's unique parameters of a search.

Section II examines *Myrick* itself, including the Washington Supreme Court's path that led to that decision, the facts of the case, its reasoning, and its holding. Section III discusses the reaction to and effects of *Myrick*, including the seemingly disingenuous and inconsistent cases that have followed *Myrick*. Section IV outlines a proposal that more precisely defines a search in Washington, discussing the sources of the proposed test, examining how it would help guide Washington courts, and explaining which cases would be decided differently using the proposed standard.

II. STATE V. MYRICK

A. *The Road to Myrick*

The Washington Supreme Court did not jump head first into the *Myrick* decision. Instead, it slowly tested the waters, gaining courage during the six years prior to the decision. *State v. Hehman*²¹ is considered the Washington Supreme Court's first modern,²² albeit small, step in the direction of its own search and seizure jurisprudence.²³ In *Hehman*, the court held that a full custody arrest for a minor traffic offense was an unreasonable seizure under the Washington Constitution where the defendant is willing to sign a promise to appear in court.²⁴ The *Hehman* decision contradicted earlier Supreme Court decisions holding that searches incident to an arrest were valid under the Fourth Amendment.²⁵ The *Hehman* court begged the question of the validity of the searches incident to an arrest, concluding instead that the arrest itself was unlawful.²⁶

Most notably, the *Hehman* court distinguished the contrary opinions of the U.S. Supreme Court noting that "[s]uch decisions, do not limit the right of state courts to accord to defendants greater rights."²⁷ Perhaps most telling of how significant the *Hehman*

21. 90 Wash. 2d 45, 578 P.2d 527 (1978).

22. According to Nock, *supra* note 12, at 332, for a period after the United States Supreme Court's decision in *Weeks v. United States*, 232 U.S. 383 (1914), the Washington Supreme Court cited Article I, section 7 in its decisions. Following the decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), however, this practice quickly ended. See Nock *supra* note 12, at 332.

23. See Nock, *supra* note 12, at 333.

24. *Hehman*, 90 Wash. 2d at 47, 578 P.2d at 528.

25. See *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973).

26. See *Hehman*, 90 Wash. 2d at 50, 578 P.2d at 529.

27. *Id.* at 49, 578 P.2d at 529.

decision was in opening the door to a separate Washington search and seizure doctrine, was the reaction of dissenting Justice Brachtenbach: "Under the majority ruling the officer almost needs an appellate court riding [in] his patrol vehicle to advise [him] of the changing nature of the rules."²⁸

The next case to address Washington's search and seizure doctrine was *State v. Simpson*.²⁹ *Simpson* concerned the so-called automatic standing rule presented to the U.S. Supreme Court in *State v. Salvucci*.³⁰ In *Simpson*, the Washington Supreme Court rejected the holding of *United States v. Salvucci* and concluded that Article I, section 7 mandated the existence of an automatic standing rule that allows defendants to assert a violation of privacy as a result of impermissible police conduct without having such assertion used against them as evidence of their possession of illegal contraband.³¹ Citing *Hehman*, the Washington court noted the greater protection offered by the Washington Constitution, and more importantly, attributed this greater protection to Article I, section 7.³²

Dissenting Justice Horowitz was not convinced. In his dissenting opinion he wrote, "Article I, section 7 . . . affords defendants protection identical to that of the federal Fourth Amendment."³³ He continued, "The majority does not explain why this state provision was subjected to interpretation identical to that given the Fourth Amendment during its first 91 years of its existence in our state constitution."³⁴ Finally, Justice Horowitz ominously warned that the majority "has opened the door to independent interpretation of Article I, section 7 of our state constitution without providing any guidelines for the use of this new tool of constitutional analysis."³⁵ In the wake of the *Myrick* decision, Justice Horowitz has been proven correct.

Following *Hehman* and *Simpson*, the Washington Supreme Court applied these holdings to expand Washington citizens' civil liberties

28. *Id.* at 51, 578 P.2d at 530 (Brachtenbach, J., dissenting).

29. 95 Wash. 2d 170, 622 P.2d 1199 (1980).

30. 448 U.S. 83 (1980).

31. *See Simpson*, 95 Wash. 2d at 181, 622 P.2d at 1206.

32. *See id.* at 178, 622 P.2d at 1205. It is interesting to note that the court engaged in a *Katz*-type analysis in deciding that *Simpson* had a subjective and objectively reasonable expectation of privacy in his vehicle identification number. It was not until *Myrick*, decided four years later, that this type of analysis was rejected. *See Myrick*, 102 Wash. 2d at 511, 688 P.2d at 154.

33. *Id.* at 196, 622 P.2d at 1215 (Horowitz, J., dissenting).

34. *Id.* at 197, 622 P.2d at 1215 (Horowitz, J., dissenting).

35. *Id.* at 202, 622 P.2d at 1218 (Horowitz, J., dissenting).

regarding the use of informant's tips,³⁶ the "plain view" doctrine,³⁷ and the good faith doctrine.³⁸ However, the court failed to define a search under the newly discovered expansive Article I, section 7 until the *Myrick* decision.

B. *The Facts of Myrick*

Edward Myrick owned eighty acres of property in a heavily wooded area which precluded casual observation.³⁹ In addition to his land's natural borders, Myrick constructed a fence surrounding the property, posted several "No Trespassing" signs, installed electronic sensors, and built an observation platform to detect intruders.⁴⁰ Acting on an anonymous tip that Myrick was growing marijuana on the property, the police borrowed a plane from the United States Drug Enforcement Agency, and from an altitude of 1,500 feet, observed with the naked eye what turned out to be approximately 500 marijuana plants.⁴¹ Based upon the observations from the plane and the information from the informant, the police obtained a warrant to search Myrick's land.⁴²

Using *Katz's* "legitimate expectation of privacy" test, the trial court held that the search from the plane was valid since Myrick did not have a reasonable expectation of privacy from aerial surveillance.⁴³ Myrick was ultimately convicted of manufacture and possession of marijuana.⁴⁴ Myrick appealed his conviction asserting that the aerial search violated his privacy rights under Article I, section 7.⁴⁵

36. See *State v. Jackson*, 102 Wash. 2d 432, 688 P.2d 136 (1984). In *Jackson*, the court agreed with the *Aguilar/Spinelli* test requiring the showing of both the informant's reliability and the informant's basis of personal knowledge. See *Nock*, *supra* note 12, at 341. Note that currently the United States Supreme Court requires only the "totality of circumstances" requirement as outlined in *Illinois v. Gates*, 462 U.S. 213 (1983).

37. See *State v. Chrisman*, 100 Wash. 2d 814, 676 P.2d 419 (1984). See discussion *supra* note 9 and accompanying text.

38. See *State v. White*, 97 Wash. 2d 92, 640 P.2d 1061 (1982). The *White* court concluded that the good faith exception to the exclusionary rule was unworkable under Article I, section 7 since the court rejects the premise that the exclusionary rule is merely remedial. See *id.* at 106, 640 P.2d at 1061.

39. See *Myrick*, 102 Wash. 2d at 508, 688 P.2d at 152.

40. See *id.*

41. See *id.*

42. See *id.*

43. See *id.* at 509, 688 P.2d at 153.

44. See *id.*

45. See *id.*

C. Reasoning and Holding of *Myrick*

When *Myrick* reached the Supreme Court of Washington, Justice Utter⁴⁶ noted the steps taken in *Hehman* and *Simpson*, especially the recognition that Article I, section 7 provides greater protection to Washington citizens than the Fourth Amendment provides to citizens generally.⁴⁷ The court acknowledged that although states may look to the U.S. Supreme Court's search and seizure jurisprudence for guidance, ultimately each state draws upon its own legal foundations to determine the scope and effect of its constitution.⁴⁸

To determine whether a search necessitating a warrant had taken place, the *Myrick* court noted that "the inquiry [under the Fourth Amendment] is whether the defendant possessed a 'reasonable expectation of privacy.'"⁴⁹ The court focused on the difference between Washington's Article I, section 7 and the Fourth Amendment: "due to the explicit language of Const. art. I, sec. 7, under the Washington Constitution the relevant inquiry . . . is whether the state unreasonably intruded into the defendant's 'private affairs.'"⁵⁰

For the first time, the court articulated two different inquiries. While the *Katz* two-part test asked whether the defendant exhibited an actual, or subjective, expectation of privacy,⁵¹ the *Myrick* court noted that Article I, section 7 was not concerned with such a requirement. The court explained that the protection under Article I, section 7 was not confined to the subjective privacy expectations of Washington citizens who were learning to expect diminished privacy in many

46. Justice Utter authored a law review article that provides some insight into his motivations in crafting *Myrick*. See Utter, *supra* note 9. In the article, he discussed *Michigan v. Long*, and the emerging need for state courts to explicitly base decisions on adequate and independent state grounds. See Utter, *supra* note 9, at 1026. Justice Utter also noted the use of states as laboratories for testing new ideas of jurisprudence. See *id.* at 1043.

47. See *Myrick*, 102 Wash. 2d at 510, 688 P.2d at 153.

48. See *id.* It is clear that Justice Utter was well aware of the *Long* case, as indicated in his article. See Utter, *supra* note 9, at 1026. In fact, the court was no stranger to this notion as evidenced by the *Chrisman* decision. See discussion *supra* note 9.

49. *Myrick*, 102 Wash. 2d at 510, 688 P.2d at 153. The "reasonable expectation of privacy" test is actually derived from Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347 (1976) (Harlan, J., concurring). That two-prong test (subjective and objective expectations of privacy) was adopted by the U.S. Supreme Court as the official test to determine if a search had taken place in *Rakas v. Illinois*, 429 U.S. 128, 142 (1978).

50. *Id.*, 688 P.2d at 154.

51. See *Katz*, 389 U.S. at 359 (Harlan, J., concurring). Note that Justice Harlan himself actually felt this prong was useless, and in fact, the U.S. Supreme Court ultimately did not consider the prong as a necessary element. See *Amsterdam*, *supra* note 7, at 384. In addition, the Washington Supreme Court was not the first to find fault in this first prong. See *id.*; see also *infra* note 140 and accompanying text.

aspects of their lives due to "well publicized advances in technology."⁵² Rather, Article I, section 7 focused on those privacy interests Washington citizens held in the past, and more importantly it focused on those privacy interests that Washington citizens *should* be entitled to hold in the future, safe from warrantless searches.⁵³

This "should be entitled to hold" concept is ingenious. Even if no subjective or objective expectation of privacy existed, a court can label a certain intrusion into a person's private affairs as a search, thereby requiring a search warrant.⁵⁴

The court distinguished the federal "open fields" doctrine outlined in *Oliver v. United States*, which states that open fields (land beyond the curtilage of the home) are not entitled to Fourth Amendment protection from searches and seizures since individuals cannot hold a reasonable expectation of privacy in an open field.⁵⁵ The court boldly explained that in direct contrast to *Oliver*, "the language of Const. art. I, § 7 precludes a 'protected places' analysis and mandates protection of the person in his private affairs."⁵⁶

52. *Myrick*, 102 Wash. 2d at 511, 688 P.2d at 154.

53. *See id.*

54. An example may help identify the significance of this "should" language. Suppose, for example, that Washington authorities decided that because of the increased use of cellular telephones in criminal activity, all cellular calls would be monitored for one month. Suppose further that before such surveillance took place, all cellular telephone owners and users were notified of the impending month-long surveillance. Subjectively, an individual could not claim an expectation of privacy in using the cellular telephone during the month. Furthermore, objectively, society would not recognize that expectation of privacy as reasonable, based upon the notifications. Applying the *Katz* test, the surveillance would not constitute a search. The ingenuity of the "should" language, however, is that it allows Washington court to step in and decide that even though there exists no subjective or reasonable objective expectation of privacy in the calls for that month, such calls should qualify as an individual's private affairs, and any surveillance of such should, and therefore does, constitute a search.

55. 466 U.S. 170, 179 (1984).

56. *Myrick*, 102 Wash. 2d at 513, 688 P.2d at 155. It is interesting to note the similarity of this passage to the oft criticized language of *Katz* which asserted, "[T]he Fourth Amendment protects people, not places." *See, e.g.*, TELFORD TAYLOR, *Search, Seizure, and Surveillance*, in TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 19 (1969). Professor Taylor claims that the only merit in the passage is in its brevity. *Id.* at 112.

Much of the criticism of the *Katz* passage, however, concerns its incompleteness, in that it ignores the relevance of the places analysis inherent in determining the reasonableness of an individual's expectation of privacy. For example, if two individuals were performing the exact same activities, however one was in a public park and the other in his basement, the locations of the individuals would certainly be a relevant factor in determining the reasonableness of their respective expectations of privacy. Of course, if the *Katz* passage was only meant to imply that location itself is not determinative, then the open fields *per se* doctrine is directly contradictory to such a statement. In contrast, the Washington court recognized that location is not determinative, and therefore added, "[T]he question of whether all warrantless aerial surveillance violates Const. art. I, § 7 is not answered by looking at the nature of the property alone. This is but one factor" *Myrick*, 102 Wash. 2d at 513, 688 P.2d at 155.

Finally, after an expansion of privacy interests under Washington's constitution, the court abruptly concluded that since the fields were identifiable by the officer's unaided eye from a lawful and nonintrusive vantage point, the aerial surveillance of Myrick's marijuana plants did not constitute a search under Article I, section 7.⁵⁷ Unfortunately, the court did not comment on which of the three factors was determinative: the officer's unaided eye, his lawful vantage point, or his nonintrusiveness.

III. THE EFFECTS OF *MYRICK*

A. *Initial Reaction to Myrick*

In an article written just after the *Myrick* decision, Professor George Nock wrote, "The Washington Supreme Court's carefully articulated reliance on the difference [between the Fourth Amendment and Article I, section 7] is a welcome sign of the court's willingness to relate analysis of section 7 to its textual provisions. The rule fashioned by the court [in *Myrick*], however, is not particularly helpful."⁵⁸ Nock explained that the court failed to identify those privacy interests that citizens have held or should be entitled to hold. Without providing a mechanism to identify these interests, Nock maintained, the rule is a tautology.⁵⁹ Nock concluded that *Myrick* provided little guidance, and, at the time the article was written, he was not convinced that Article I, section 7 would provide the mechanism to offer any substantive departures from federal search and seizure jurisprudence.⁶⁰

This conclusion is similar to Justice Horowitz's fear as expressed in the *Simpson* dissent.⁶¹ Horowitz recognized the danger inherent in awaking the sleeping giant of Article I, section 7 without providing clear instructions on its use. Aware of Justice Horowitz's warning, why is it that the court left *Myrick* without any greater guidance for its future use? Professor Anthony Amsterdam, writing decades before *Myrick*, offers one explanation as to why monumental decisions such

57. See *id.*

58. Nock, *supra* note 12, at 345.

59. See *id.* Note the similarity of this criticism to that offered by Amsterdam in reference to the *Katz* test where he explained, "[I]n the end, the basis of the *Katz* decision seems to be that the Fourth Amendment protects those interests that may justifiably claim Fourth Amendment protection." Amsterdam, *supra* note 7, at 385.

60. See *id.* at 346.

61. See *supra* Part II.A.

as *Myrick* often do not go quite far enough in articulating a clear, "coherent analytical framework."⁶²

Courts, Amsterdam points out, are made up of a committee of members.⁶³ Rare is the legal opinion which unites every member of the committee in both its holding and every part of its reasoning.⁶⁴ The result of the committee process is often an opinion of the court that is a series of accommodations and compromises.⁶⁵ The *Myrick* decision undoubtedly suffered a similar fate. While there is no direct evidence indicating conflicting negotiations between the Justices in deciding this case, there is certainly circumstantial evidence which points to it. Most notably, the reasoning of *Myrick* advances a separate and expansive notion of privacy rights for Washington citizens, while the holding itself (finding the search of an open field constitutional) is synonymous with its federal counterpart.⁶⁶ The judicial tug-of-war that may have preceded the *Myrick* decision provides some insight into why the decision fails to provide a perfectly lucid analytical framework.⁶⁷

Without this concrete framework, the Washington Supreme Court and the lower courts were faced with the unpleasant task of attempting to formulaically apply a nonformulaic theory. Namely, while the Washington courts knew that they needed to rely on *Myrick* as it was the seminal case defining a search in Washington, they each had their own ideas about what *Myrick* stood for, or what *Myrick* required the outcome of a particular case to be. As the following two sections identify, both the Washington Supreme Court and the lower courts have drifted about in applying the "*Myrick* framework." An overview of the cases that have attempted to interpret *Myrick* reveals that for each court opinion that made a step forward in positively defining the

62. Amsterdam, *supra* note 7, at 350 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 483 (1971)).

63. *See id.*

64. *See id.*

65. While it is true that both concurring and dissenting opinions are available options for the disgruntled Justice, in building a majority or in attempting to show uniformity through a unanimous opinion of the court, often times the majority opinion becomes the object of negotiation.

66. Other evidence is the fact that the Washington Supreme Court decisions that followed *Myrick* fall in very different directions from each other. *See* discussion *infra* Part III.B. This may indicate that *Myrick* itself was a compromise of competing ideologies.

67. Amsterdam offers two other possible rationales for a less-than-lucid opinion by a court. Courts are not always able to state openly all of the considerations that affect their decisions. Also, the Justices themselves are ultimately responsible for the decisions. These two factors may have also added to the ambiguity in the *Myrick* decision. *See* Amsterdam, *supra* note 7, at 350-51.

scope of *Myrick*, there was another that took a step backward, only adding to confusion of the doctrine.

B. Applying (and Misapplying) *Myrick*

Just five months after *Myrick* was decided, a Washington lower court applied it incorrectly. In *State v. Crandall*, Division III of the Washington Court of Appeals upheld a warrantless search in which an officer, based on a tip from a local hunter, trespassed twenty to fifty feet onto the defendant's property, identified marijuana by looking through a rifle scope and, without a warrant, trespassed onto the defendant's property and seized a marijuana plant.⁶⁸

After correctly identifying *Myrick* as the applicable law governing the decision, the *Crandall* court concluded that while neither the *Oliver* "open fields" test, nor the *Katz* reasonable expectation test were dispositive by themselves, each served as "a factor" in concluding whether the defendant's private affairs had been unreasonably intruded upon.⁶⁹ The court then determined that defendant's property "was not an area in which one traditionally could reasonably expect privacy . . . and therefore does not rise to a privacy interest held by the citizens of this state."⁷⁰

In its brief analysis, the court made three errors in interpreting *Myrick*. First, the court incorrectly stated that the *Oliver* "open fields" test was a viable factor to be considered by the court.⁷¹ By definition, a *per se* rule such as the "open fields" doctrine is either controlling or it is not.⁷² While it is true that *Myrick* explained that the nature of the property can be taken into account by the court,⁷³ it is incorrect to then assume that the *per se* "open fields" doctrine should serve as this factor.

Second, the *Crandall* court determined that the *Katz* test was a factor which the court should consider in determining whether an individual's "private affairs" had been intruded upon.⁷⁴ Since the *Myrick* court expressly rejected the *Katz* test, there is no basis for this conclusion.

68. 39 Wash. App. 849, 850-851, 697 P.2d 250, 252, review denied, 103 Wash. 2d 1036 (1985).

69. See *id.* at 853-54, 697 P.2d at 253.

70. *Id.* at 854, 697 P.2d at 253.

71. See *id.*

72. Pregnancy serves as an example. One is either pregnant, or not. Similarly it is difficult to see how a *per se* rule can be "a factor" of consideration.

73. See *Myrick*, 102 Wash. 2d at 513, 688 P.2d at 155.

74. See *Crandall*, 39 Wash. App. at 854, 697 P.2d 253.

Third, and perhaps most importantly, in applying the second prong of the *Katz* test and concluding that traditionally an individual did not have a reasonable expectation of privacy in this area,⁷⁵ the *Crandall* court failed to ask whether the defendant *should* be entitled to hold a privacy interest in such property, as is required by *Myrick*.⁷⁶

In 1986, just two years after *Myrick*, the Washington Supreme Court spoke again with regard to Washington's unique search and seizure jurisprudence. In two cases decided the same day, the court both expanded and contracted Article I, section 7's notion of an extended privacy right.

In the case *State v. Gunwall*,⁷⁷ the court made two important rulings. First, the court outlined six factors with which to decide whether it was appropriate to resort to independent state constitutional grounds in deciding a case, rather than to simply apply the federal counterpart.⁷⁸ Second, the court decided, in direct contradiction to *Smith v. Maryland*,⁷⁹ that police use of pen registers⁸⁰ constituted a search.⁸¹

In its reasoning, the court expressly rejected the assumption of risk rationale that was presented in *Katz*, which stated, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."⁸² In federal cases after *Katz*, this sentence has been used to conclude that telephone numbers exposed to the phone company are not private,⁸³ garbage exposed to garbage collectors and scavengers is not private,⁸⁴ and a person's travels exposed to disinterested members of the public

75. See *id.*, 697 P.2d at 254.

76. See *Myrick*, 102 Wash. 2d at 511, 688 P.2d at 154.

77. 106 Wash. 2d 54, 720 P.2d 808 (1986).

78. See *id.* at 61, 702 P.2d at 812-13. These six factors, known as the "*Gunwall* factors" include the following: (1) the textual language, (2) differences in the text, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern.

79. 442 U.S. 735 (1979).

80. A pen register is defined as "a mechanical device, usually installed at a central telephone company facility, that records on paper the numbers dialed from a particular telephone by monitoring the electronic impulses caused when the dial is rotated. Such a device reveals only the numbers that have been dialed." See *Gunwall*, 106 Wash. 2d at 63 n.15, 720 P.2d at 813 n.15 (citing *Fishman, Pen Registers and Privacy: Risks, Expectations, and the Nullification of Congressional Intent*, 29 CATH. U. L. REV. 557, 558 n.3 (1980)).

81. See *Gunwall*, 106 Wash. 2d at 68, 720 P.2d at 816.

82. *Katz*, 389 U.S. at 351 (1967) (citations omitted).

83. See *Smith v. Maryland*, 442 U.S. 735 (1979).

84. See *California v. Greenwood*, 486 U.S. 35 (1988).

are not private.⁸⁵ The *Gunwall* court responded, "It is unrealistic to say that the cloak of privacy has been shed because the telephone company and some of its employees are aware of this information [numbers dialed from the defendant's telephone]." ⁸⁶ The court then created what it called a "limited-business purpose" exception to the assumption of risk rationale.⁸⁷ While it was clear that the court rejected the assumption of risk rationale, it remained to be seen how narrowly it would define this "limited business purpose" exception.

Without adding any further indicia to its definition of "private affairs," the court conclusively determined that in accordance with *Myrick* and Article I, section 7, the use of the pen register did constitute an unreasonable intrusion into the defendant's private affairs.⁸⁸

While *Myrick* and *Gunwall* seem to bloom from the same seed, *State v. Stroud*,⁸⁹ decided the same day as *Gunwall*, indicates a diverging notion of Washington search and seizure jurisprudence.

In *Stroud*, the court partially agreed with the reasoning in *New York v. Belton*,⁹⁰ concluding that after a valid arrest the arresting officer can conduct a warrantless search of the passenger department of the defendant's automobile.⁹¹ This case overruled *State v. Ringer* which had previously required an officer's finding of exigent circumstances before allowing such a warrantless search.⁹² While it is true that *Stroud* did not directly contract the expanded definition of a search that *Myrick* and *Gunwall* had advanced, the nature of the decision did cause some confusion for lower courts in defining a search.

In crafting *Stroud*, the court expressed an interest in favoring a bright line rule over the *ad hoc* totality of the circumstances test implemented by *Ringer*.⁹³ Note that in *Myrick*, the court rejected a

85. See *United States v. Knotts*, 460 U.S. 276 (1983) (holding police use of a tracking device attached to the defendant's car did not constitute a search since the defendant exposed his travels to members of the public). Interestingly, *Katz* itself would be overruled if this language were taken to its logical conclusion; because *Katz* exposed his conversation to the telephone operator, he too could not claim Fourth Amendment protection. This idea is presented in *Serr*, *infra* note 156, at 626.

86. See *Gunwall*, 106 Wash. 2d at 68, 720 P.2d at 816.

87. See *id.*

88. See *id.*

89. 106 Wash. 2d 144, 720 P.2d 436 (1986). Note that the court expressly indicated that it was mindful of *Michigan v. Long*. *Id.* at 149, 720 P.2d at 439.

90. 453 U.S. 454 (1981) (agreeing that an automobile exception should apply, however, disagreeing as to where the line should be drawn).

91. See *Stroud*, 106 Wash. 2d at 150, 720 P.2d at 440.

92. 100 Wash. 2d 686, 674 P.2d 1240 (1983).

93. See *Stroud*, 106 Wash. 2d at 151, 720 P.2d at 440.

similar bright-line rule regarding "open fields," instead favoring an analysis that required more of an *ad hoc* determination of a privacy interest.⁹⁴

Additionally, the concurring opinion in *Stroud* has provided a great deal of confusion to some lower courts.⁹⁵ In an opinion that attempted to summarize the status of the law after *Myrick*, the concurrence authored by Justice Durham misstated the court's reasoning in *Myrick*. Justice Durham wrote,

Our state provision [Article I, section 7] appears to place a greater emphasis than the Fourth Amendment on privacy interests. This mandates that our court analyze search and seizure issues in terms of a person's reasonable expectation of privacy. This is an objective 'reasonable man' standard, not a test of a person's subjective expectation of privacy.⁹⁶

Justice Durham incorrectly concluded that because *Myrick* expressly rejected the subjective prong of the *Katz* test, the objective prong was still the controlling test.⁹⁷ Among the other problems associated with the second, or "objective" prong of the *Katz* test,⁹⁸ it notably fails to address the "should be entitled to hold" language in *Myrick*. Justice Durham overlooked the ingenuity of the *Myrick* decision, and offered a hybrid test for lower courts in its place.

For the period of time after *Stroud* and prior to 1993, it appeared that the Washington Supreme Court and some of the lower courts had a sufficient handle on the fundamentals of *Myrick*, or at least were not deciding opinions in direct opposition to these principles. In 1987, for example, in *State v. Butterworth*, Division I of the Washington Court of Appeals decided that the police acquisition of an unpublished number from Pacific Northwest Bell constituted a search.⁹⁹ The *Butterworth* court specifically noted the defendant's request to keep his

94. See *Myrick*, 102 Wash. 2d at 513, 688 P.2d at 157. Note that the "should be entitled to hold" language of *Myrick* holding necessarily contradicts a bright-line test, requiring each court to make an *ad hoc* conclusion as to what privacy interests citizens should be entitled to hold. Even if the *Myrick* case only intended the "should" language to allow courts discretion, the decision nonetheless mandates an *ad hoc* examination at some level.

95. See, e.g., *State v. Berber*, 48 Wash. App. 583, 587-588, 740 P.2d 863, 867 (1987) ("It is unclear after *Myrick* and *Stroud* whether the 2-prong expectation of privacy test developed by the United States Supreme Court for purposes of Fourth Amendment analysis is to be retained under an [Article I, section 7] analysis.").

96. *Stroud*, 106 Wash. 2d at 159, 720 P.2d at 445 (Durham, J., concurring).

97. Recognize that this was the same error that the *Crandall* court had made. See *Crandall*, 39 Wash. App. at 853-54, 697 P.2d at 253-54.

98. See discussion *infra* note 134, and accompanying text.

99. 48 Wash. App. 152, 737 P.2d 1297 (1987).

number private, and cited *Gunwall* to illustrate that the defendant had not assumed a risk of exposure simply because the telephone company had the information.¹⁰⁰

In 1990, the Washington Supreme Court, in direct opposition to *California v. Greenwood*,¹⁰¹ decided *State v. Boland*, in which the court recognized a protectable state privacy interest in a person's garbage.¹⁰² The *Boland* court rejected the assumption of risk notion in *Greenwood*, applying a variant of the "limited-business exception" first offered in *Gunwall*.¹⁰³ The court stated, "While a person must reasonably expect a licensed trash collector will remove the contents of his trash can, this expectation does not also infer an expectation of governmental intrusion."¹⁰⁴

In 1993, however, this brief period of clarity ended. In a series of cases both the Washington Supreme Court and the lower courts began backing away from the picture of *Myrick* and Article I, section 7, that had begun to take focus.

In *State v. Faydo*, Division III of the Washington Court of Appeals determined that the police did not violate the defendant's Article I, section 7 rights in obtaining the address of the defendant through the billing records of U.S. West Communications.¹⁰⁵ The *Faydo* court concluded that such activity did not constitute a search since, "In this day and age in which private businesses routinely sell customer lists to other businesses, it is unreasonable to believe customer's name and the names of others he lists at his residence for billing purposes will be kept private."¹⁰⁶

Faydo directly contradicts the language of *Myrick* which warns that the definition of private affairs must not turn on citizens' diminished expectations of privacy.¹⁰⁷ Based on *Myrick*, the *Faydo*

100. See *id.* at 156-57, 737 P.2d at 1301.

101. 486 U.S. 35 (1988).

102. 115 Wash. 2d 571, 574, 800 P.2d 1112, 1114 (1990). For a detailed discussion of *State v. Boland*, see Jennison, *supra* note 20.

103. *Greenwood* was based in part on the United States Supreme Court's belief that it was objectively unreasonable to hold a privacy interest in garbage left outside the curtilage of the home; and, in using a *Smith v. Maryland* analogy, also unreasonable to maintain privacy in something one exposed to a host of people including trashmen, children, scavengers, etc. See *Boland*, 115 Wash. 2d at 580-81, 800 P.2d at 1116-17.

104. *Id.* at 581, 800 P.2d at 1117. Of course, by concluding that an individual does hold a reasonable privacy interest in his trash even though he has exposed it to the trash collector, the Court did not reach the question of whether or not the individual *should* be entitled to hold that privacy interest even if it were an unreasonable belief.

105. 68 Wash. App. 621, 623, 846 P.2d 539, 540 (1993).

106. *Id.* at 625, 846 P.2d at 541.

107. See *Myrick*, 102 Wash. 2d at 513, 688 P.2d at 155.

court should have asked whether this was a private affair for which Washington citizens *should* be protected. The court could have come to the same conclusion, upholding the search, without having to decide that such activity did not constitute a private affair.¹⁰⁸

The next year, in *State v. Young*, the Washington Supreme Court took a noteworthy step in defining a search.¹⁰⁹ While the *Young* holding was in line with *Myrick* and its progeny, its reasoning can be interpreted as being a step away from this line of cases. The *Young* Court determined that the police use of infrared surveillance to identify abnormal heating patterns inside the defendant's home, normally indicative of a marijuana grow, constituted a search.¹¹⁰

Included in the *Young* opinion, however, was the following language: "[W]hat is voluntarily exposed to the general public and observable without the use of enhancement devices from an unprotected area is not considered part of a person's private affairs."¹¹¹ This "voluntary exposure" language has been interpreted as being synonymous with *Katz's* "knowing exposure," or assumption of risk notion.¹¹² *Gunwall*,¹¹³ *Butterworth*¹¹⁴ and *Boland*,¹¹⁵ however, all reject such a comparison.

The court later misinterpreted this language from *Young* in *State v. Goucher*, holding that the defendant waived his right to privacy by voluntarily engaging in a conversation with a detective who answered the defendant's telephone call during a lawful search of a suspected drug dealer's home.¹¹⁶ The *Goucher* court noted that the defendant had a conversation with an acknowledged stranger, yet failed to identify exactly how that differed from *Gunwall* giving phone numbers

108. Compare this case with *State v. Butterworth*, in which the court said that the defendant did not waive his right to privacy simply because he exposed the information to the phone company. *Butterworth*, 48 Wash. App. at 159, 737 P.2d at 1301. While it is true that in *Butterworth* the defendant specifically asked that his phone number not be listed, in *Faydo*, there was no similar option for individuals attempting to keep their addresses private from the billing department. See *Faydo*, 68 Wash. App. at 624, 846 P.2d at 541.

109. 123 Wash. 2d 173, 867 P.2d 593 (1994). For a detailed discussion of this case, see Michael Suga, Comment, *State v. Young and the New Test for Privacy in Washington*, 70 WASH. L. REV. 907 (1995); see also Melinda Foster, Comment, *State v. Young: A Cool View Towards Infrared Thermal-Detection Devices*, 30 GONZ. L. REV. 135 (1994).

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

111. *Id.* at 182-83, 867 P.2d 597-98.

112. See *State v. Goucher*, 124 Wash. 2d 778, 784, 881 P.2d 210, 213 (1994).

113. 106 Wash. 2d at 63-64, 720 P.2d at 813-14.

114. 48 Wash. App. at 154-55, 737 P.2d 1298-99.

115. 115 Wash. 2d at 580-81, 800 P.2d at 1116-17 (1990).

116. 124 Wash. 2d at 782, 881 P.2d at 212 (1994).

to a stranger at the phone company or Boland giving the trash to a stranger with a garbage truck.¹¹⁷

Division I of the Washington Court of Appeals took the *Goucher* decision one step further in *State v. Gonzales*, holding that an officer who was lawfully conducting a search of the defendant's home did not violate Article I, section 7, when he answered defendant's telephone.¹¹⁸ The court reasoned that the defendant did not have a reasonable expectation of privacy in the incoming call with regard to persons lawfully on his premises.¹¹⁹ The *Gonzales* court was clearly applying the second prong of the *Katz* test, ignoring *Myrick's* question of whether or not the defendant should be entitled to hold such affairs as private.

C. Lower Courts' Expressed Confusion Over *Myrick*

The types of errors springing from *Myrick* were varied. Many of the aforementioned courts simply applied the second prong of *Katz*.¹²⁰ Other courts implemented *Oliver's* "open fields" doctrine as a factor for consideration.¹²¹ Some examined the assumption of risk notion presented in *Katz*.¹²² In addition, most courts have notably ignored the "should be entitled to hold" language of *Myrick*.¹²³ Based upon these diverging applications of *Myrick*, it is no wonder that two divisions of the Court of Appeals expressly voiced their confusion in defining a search in accordance with Washington law.

As early as 1987, Division III recognized the ambiguity left in the wake of *Myrick*. In *State v. Berber*, the court wrote,

It is unclear after *Myrick* and *Stroud* whether the 2-prong expectation of privacy test developed by the U.S. Supreme Court for purposes of Fourth Amendment analysis is to be retained under art. I, § 7 analysis. In the absence of any clear indication from the Washington Supreme Court as to the applicability of the federal

117. *See id.* at 784, 881 P.2d at 213.

118. 78 Wash. App. 976, 984-85, 900 P.2d 564, 568-69 (1995).

119. *See id.*

120. *See, e.g., State v. Young*, 123 Wash. 2d 173, 867 P.2d 593 (1994); *State v. Gonzales*, 78 Wash. App. 976, 900 P.2d 564 (1995); *State v. Crandall*, 39 Wash. App. 849, 697 P.2d 250 (1985).

121. *See, e.g., Crandall*, 39 Wash. App. at 853-54, 697 P.2d at 253.

122. *See, e.g., State v. Faydo*, 68 Wash. App. 621, 846 P.2d 383 (1983).

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

test, we will analyze search and seizure issues with reference to that test.¹²⁴

Interestingly, in spite of such a clear call for assistance, the Washington Supreme Court denied review of the case.¹²⁵

Division III, however, was not alone in expressing its confusion. In 1989, Division I made its own cry for help in *City of Tukwila v. Nalder*.¹²⁶ The court cited the language of *Myrick*, then cited the confusion expressed by Division III in *Berber*, and finally added, "Assuming that the federal test yields no less restrictive guidelines that [sic] those required by our Const. art. I, § 7, we analyze *Nalder*'s privacy right accordingly."¹²⁷

From the path of the law in this area, it is clear that confusion still exists as to exactly how *Myrick* and its progeny define a search in accordance with Article I, section 7. For this reason, the following proposal attempts to embody the language and intent of the Washington Supreme Court's most recent expressions in defining a search pursuant to the Washington Constitution.

IV. PROPOSAL

When faced with a case requiring the court to determine whether or not a search has taken place, the court should expressly ask the following three questions:

1. Is it appropriate for this court to resort to state constitutional grounds to decide this case?
 - (a) Is there a preexisting state law in this area?
 - (b) Is this a matter of particular state interest?
2. Did the state intrude upon what has been, or should be considered an individual's "private affairs"?
3. Did the individual waive his or her right to privacy by displaying these private affairs to any curious, but not obtrusive, member of the public not employed in the collection of such affairs?

A. *Origins of the Proposed Test*

Prong one of the proposed test comes directly from factors four and six outlined in *Gunwall*.¹²⁸ The Washington Supreme Court has

124. 48 Wash. App. 583, 587-88, 740 P.2d 863, 867 (internal citations omitted), *review denied*, 109 Wash. 2d 1014 (1987).

125. See *State v. Berber*, 109 Wash. 2d 1014 (1987).

126. 53 Wash. App. 746, 770 P.2d 670 (1989).

127. *Id.* at 750, 770 P.2d at 673.

128. See *Gunwall*, 106 Wash. 2d at 66-69, 720 P.2d at 815 (factor four is preexisting state law; factor six is matters of particular state or local concern). For a detailed explanation of these

officially and consistently noted that these two factors comprise the total relevant inquiry in deciding whether or not a case is to be decided on state or federal constitutional grounds.¹²⁹ Note that in cases where factors four and six were not met, the court felt free to decide the merits on federal grounds.¹³⁰

The language from prong two of the proposed test comes directly from *Myrick*. By and large, this was the test *Myrick* asked courts to apply in determining whether a search had taken place. There are, however, two important differences between prong two of the proposed test and the *Myrick* test. First, unlike the language of *Myrick*, the above proposal has eliminated the word “unreasonably” before the word “intrude.”¹³¹ The proposal relies upon prong three to determine whether the intrusion was reasonable. This bifurcation enables a court to conclude affirmatively that an individual’s private affairs were intruded upon, yet still conclude that such an intrusion was reasonable.¹³²

Second, it is important to recognize that the “should” language of *Myrick* appears directly in prong two, lest it not be forgotten. This language was overlooked by many of the lower courts,¹³³ probably because it was buried in the *Myrick* court’s discussion rather than appearing in the test itself.¹³⁴ By emphasizing this language, courts may be less apt to overlook it.

One aspect that prong two of the proposed test does not change about the original *Myrick* test is the ambiguity of the term “private affair.” The term is left intentionally broad to allow courts to use the second prong simply as a threshold determination.¹³⁵

two factors, see *Davis*, *supra* note 5, at 1347 and 1348-49.

129. See, e.g., *State v. Johnson*, 128 Wash. 2d 431, 909 P.2d 293 (1996); *State v. Boland*, 115 Wash. 2d 571, 800 P.2d 571 (1990); *Seattle v. Yeager*, 67 Wash. App. 41, 834 P.2d 73 (1992).

130. See, e.g., *State v. McCrorey*, 70 Wash. App. 103, 851 P.2d 1234 (1993); *State v. Wojtyna*, 70 Wash. App. 689, 855 P.2d 315 (1993).

131. The *Myrick* court asked, “whether the state has *unreasonably* intruded into the defendant’s ‘private affairs.’” *Myrick*, 102 Wash. 2d at 510, 688 P.2d at 154 (emphasis added).

132. See discussion, *infra* note 152, for the advantage of such bifurcation.

133. See, e.g., discussion of *Gonzales* and *Faydo* *supra* Part III.2.B.

134. In *Myrick*, the court explicitly stated, “the relevant inquiry for determining when a search has occurred is whether the State *unreasonably* intruded into the defendant’s ‘private affairs.’” 102 Wash. 2d at 510, 688 P.2d at 154. It is only at the end of that paragraph that the court adds the important “should” language. *Id.* at 511, 688 P.2d at 154.

135. For guidance, a definition of “private affairs” was offered in a recent University of Washington Law Review article as cited in *State v. Goucher*, 124 Wash. 2d 778, 784, 881 P.2d 210, 213 (1994) as follows: “A ‘private affairs’ interest may be defined as a matter or object personal to an individual such that intruding upon it would offend a reasonable person.” (citing James W. Talbot, Comment, *Rethinking Civil Liberties Under the Washington State Constitution*,

Prong three of the proposed test is where the true determination of reasonability lies. It is an attempt to reconcile two competing interests that are inherent in defining a search. On the one hand, it is imperative that individuals be allowed to function normally in society without being forced to waive all notions of privacy.¹³⁶ If every interaction with the public constitutes a waiver of such privacy, individuals will ultimately be forced to live a life of complete isolation in order to retain any privacy interests.¹³⁷ On the other hand, individuals should not be allowed to claim "privacy-immunity" for that which they willingly display to any curious member of the public.¹³⁸ Prong three attempts to reconcile this problem. While it is true that an individual should not be allowed to waive the white flag of privacy to shield an affair he publicizes boldly throughout the community, neither should an individual be penalized for performing normal daily functions such as using the telephone, taking out the trash, or driving around the neighborhood.¹³⁹

In an attempt to take these competing concerns into consideration, prong three of the proposed test offers a solution. The individual needs to take enough precautions to protect the private affair from a curious member of the public, but need not anticipate shielding such an affair from the obtrusive viewer.¹⁴⁰ Indeed, the individual need

66 WASH. L. REV. 1099, 1113 (1991)).

136. The idea of ensuring that citizens function normally in society comes from *Gunwall* and *Boland*. In *Gunwall*, the court agreed with the Colorado Supreme Court which stated that a telephone "is a personal and business necessity indispensable to one's ability to effectively communicate in today's complex society." 106 Wash. 2d at 67, 720 P.2d at 815 (1986) (citing *People v. Sporleder*, 666 P.2d 135, 141 (Colo. 1983)). In *Boland*, the Court stated, "The proper and regulated collection of garbage . . . is as necessary to the proper functioning of modern society as is the telephone company." 115 Wash. 2d at 581, 800 P.2d at 1117.

137. This idea was presented by Professor Amsterdam, who asked whether the assumption of risk rationale in *Katz* required individuals, in attempting to preserve privacy, to "[R]etir[e] to the cellar, cloak[] all the windows with thick caulking, turn[] off the lights and remain[] absolutely quiet." Amsterdam, *supra* note 7, at 402.

138. So while the Washington Supreme Court considers it important that an individual feel free to leave his or her trash on the curb to be picked up by the trash collector and still retain his or her right to keep the contents of his or her garbage private, he or she cannot claim the same privacy protection when he or she spreads his or her trash all over his or her front lawn. See *Boland*, 115 Wash. 2d at 574, 800 P.2d at 1114; *California v. Greenwood*, 486 U.S. 35, 37 (1988).

139. Using *Boland* and *Greenwood* as an example: a person who places his trash on the curb in a nontransparent bag, with the bag closed, cannot be said to have waived his right to privacy. Spreading the trash on the lawn, using a clear bag, or even failing to close the bag, would, however, constitute a waiver since the individual did not protect the affairs from a curious member of the public.

140. An example may help clarify the distinction. If an individual was interested in keeping activities on his front lawn private, erecting a chain-link fence around his yard would not protect against the curious passerby, while constructing a six-foot high wall around the yard would protect

not combat nor even anticipate the obtrusive to retain his notion of privacy. Rather, he or she need only shield the affair from the mere curious. This, then, would also serve as the standard for police conduct. Police officers would be guided by the notion that they can act as any curious member of the public, so long as their conduct does not cross the line of obtrusiveness.¹⁴¹

This idea of equating a police officer's conduct with that of curious but not obtrusive citizens comes, in part, from *State v. Rose*.¹⁴² In *Rose*, the Washington Supreme Court held that an officer's observations with the aid of a flashlight through an unobstructed window did not constitute a search. The court concluded that "[a]n officer may act as any reasonably respectful citizen. . . . A resident who leaves unobstructed a window immediately to the left of the front entrance should expect that reasonably respectful persons will look in, even if just out of curiosity."¹⁴³ As the aforementioned language indicates, the court is concerned with whether the defendant

against such an intrusion. While it is the curious passerby who looks through the chain-link fence, it is only the obtrusive who scales the wall, climbs an adjacent tree, or flies above the area to get a view. As such, with the wall in place, the individual's lawn remains a private affair without the need to post a guard atop the wall, chop down adjacent trees or construct a roof over the lawn.

141. This is not, of course, as concrete a standard as a *per se* rule, such as the "open fields" doctrine. For a discussion of this criticism of the proposal see *infra* note 142, and accompanying text.

142. 128 Wash. 2d 388, 909 P.2d 280 (1996). Outside of *Rose*, the notion of determining the appropriateness of police activity based upon the activities of citizens in general was stated by Melvin Gutterman. See Melvin Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647 (1988). Gutterman discussed *Lo-Ji Sales v. New York*, 442 U.S. 319 (1979), in which the U.S. Supreme Court held, "The government could view the magazines and films only as any other member of the public ordinarily would . . ." *Id.* at 684. In addition, Michael Campbell proposed a standard by which the court defined a federal search in reference to a social norms of privacy standard. See Campbell, *supra* note 6, at 212. Under such a standard the court would determine whether the government's conduct would be socially acceptable if engaged in by a private citizen. See *id.* Such a standard, however, fails to account for circumstances when the police engaged in conduct that is unavailable to citizens, such as in the case of infrared thermo-detection devices used by police in *State v. Young*. The article proposed handling such cases by analogy. *Id.*

Prong three of the proposed test differs from this standard since it only asks if the defendant waived his or her privacy right by displaying the affair to the curious citizen. Use of such devices unavailable to citizens in general would thereby qualify as obtrusive behavior. Cf. Scott Sundby, "Everyman's Fourth Amendment," 94 COLUM. L. REV. 1751, 1777 (1994) (discussing the loss of trust that takes place between the government and the citizen when an illegal search takes place). In addition, prong three differs from the current test in that it focuses on the norms of trust between two citizens. Accordingly, in prong three, the government trust is, in fact, defined by that trust which exists between citizens.

143. *Rose*, 128 Wash. 2d at 396, 909 P.2d at 285.

took action in protecting his private affairs from the curious.¹⁴⁴ In *Rose*, by not pulling the blinds, the answer was "no," and thus the officer's conduct did not rise to the level of a search.

While the *Rose* court used the term "reasonably respectful citizen," such a standard may be a bit misleading in its application. Even under the facts of *Rose*, it would be difficult to conclude that a reasonably respectful citizen would approach an unobstructed window of a stranger's home and shine a flashlight into it. Since the court is ultimately concerned with what the *curious* member of the public would do, prong three proposes the "curious, but not obtrusive" standard.¹⁴⁵

The last part of prong three of the proposed test, "member of the public not employed in the collection of such affairs," also draws a separate distinction between those individuals in society whose job it is to collect what may be defined as private affairs versus general members of the public.¹⁴⁶ This clause stems, in part, from *Gumwall's* notion of a "limited-business exception" to *Katz's* assumption of risk rationale.¹⁴⁷ Citizens employed in the collection of the private affairs cannot be equated with run-of-the-mill curious members of the general public. If no distinction is drawn, individuals could not hand postcards to their mail carrier, or cash checks in front of their bank teller without first waiving their right to keep those affairs private from curious citizens. Put another way, some basic functions in society mandate disclosure of private affairs to specific citizens whose job

144. Further indication of the court's rationale can be seen in a contrast the court drew in articulating the facts of *Rose*. The court stated, "In contrast, where the window through which an officer looked was eight feet from the fire escape and well out of view of anyone engaged in normal use of the fire escape, the officer's view through the window was a search." *Id.* at 396 n.3, 909 P.2d at 397 n.3 (citations omitted). Note that the court was discussing normal usage of the fire escape by an average citizen further solidifying the comparison of an officer to a normal, albeit curious, but nonobtrusive member of the public.

145. Incidentally, it is not entirely clear that the activity in *Rose* would not qualify as obtrusive. This only indicates that the "curious, but not obtrusive" standard is, of course, subject to interpretation.

146. This includes garbage collectors, bank tellers, postal employees, phone company employees, etc. The term "employed" should not be implied to mean that volunteers or other individuals who do not receive compensation do not qualify.

147. In addition, this idea was also cultivated by Gutterman, who notes, "Risking observation by a limited category of persons is not equivalent of 'public exposure'" Gutterman, *supra* note 142, at 685. This notion was extended in *Boland* and *Butterworth* as well. *Boland*, 115 Wash. 2d 571, 800 P.2d 1112 (1990); *Butterworth*, 48 Wash. App. 152, 737 P.2d 1297 (1987).

requires them to be "curious."¹⁴⁸ Such limited disclosures should not constitute a waiver of an individual's private affairs.

B. How the Proposed Test Would Assist Washington Courts

The proposed test would be of great use to Washington courts. Primarily, the proposed test would serve to unify many of the existing, albeit somewhat scattered, principles of jurisprudence defining a search as articulated by the Washington Supreme Court. The test would provide more predictability and guidance for lower courts.

As cases emerge, the courts would further define the line between curious and obtrusive behavior. Ultimately this would provide police officers with a notion of which activity constitutes a search and thereby requires a warrant and which activity qualifies simply as being a curious observation, not amounting to a search.

The test would also help bring the "should" language of *Myrick* into effect. There is no Washington case in which a court has said that while in the past citizens of the state have not held a certain affair private, we find that they should be entitled to hold it as such. The ingenuity of the *Myrick* decision, however, is that it specifically allows such a decision. As technology advances and reasonable notions of privacy diminish, it will be this "should" language that allows the court to step in and carve out that which the Washington Constitution should protect as sacred.¹⁴⁹

Additionally, the proposed test offers the courts a more intuitive definition of privacy. Prong two isolates the question of whether something qualifies as a private affair. This is a different inquiry from prong three which determines whether the private affair was unreasonably intruded upon. By bifurcating the *Myrick* test, which had previously joined the two inquiries, the court need not speak with its tongue in its cheek. Under the current test, for a court to conclude that police activity did not rise to the level of a search, it must first determine that no private affair was intruded upon. Such a broad statement, however, leads to confusion when the facts suggest police activity within a zone or medium traditionally associated with privacy (for example, a home or telephone call). For instance, in *Florida v. Riley*, the Court held that a warrantless aerial surveillance above the defendant's greenhouse was not a search because a police officer was

148. By this I mean, the mail carrier needs to look at the postcard to see where to send it, just as the bank teller needs to authorize the check before cashing it.

149. The ingenuity of the "should" language is described in Sundby, *supra* note 142, at 1760-61.

able to see through an opening in the greenhouse roof and side, even though the entire greenhouse was shielded from ground level observation by trees and shrubs.¹⁵⁰ The Court further held that the defendant did not have a reasonable expectation of privacy in the contents of the greenhouse due to the openings in the roof and sides.¹⁵¹

By bifurcating the question of whether something qualifies as a private affair, and whether the intrusion constitutes a search, the proposed test would allow courts to apply a more realistic definition of privacy, without being forced into such awkward alternatives. The advantage of the bifurcated test, therefore, is that it would allow courts to find that while something may qualify as a private affair (under prong two), the state intrusion upon it may be reasonable (pursuant to prong three).¹⁵²

It is important to note that had the Washington Supreme Court implemented this proposed test in *Myrick*, many of the subsequent cases would have come out differently. In fact, had the court applied the proposed test to the *Myrick* decision itself, it too would have had a different holding.¹⁵³

Assuming that prong one of the proposed test is satisfied,¹⁵⁴ prong two asks whether Myrick's field has qualified, or should qualify, as a private affair. Using prong two merely as a threshold requirement, it seems clear that a citizen's property tucked away from public exposure should constitute a private affair. Examining prong three, the question is thus: did Myrick waive his right to privacy by displaying

150. 488 U.S. 445 (1989).

151. See *id.* at 448. Note that the greenhouse was well within the curtilage of the home.

152. For example, in *Gonzales*, the court could have said that while the defendant did have a privacy interest in his incoming telephone calls, the state intrusion was justified for some other reason. See *Gonzales*, 78 Wash. App. at 984-85, 900 P.2d at 568-69. In *Faydo*, the court could have said that while the defendant did have a privacy interest in his address that he gave only for billing purposes to the phone company, the search was justified for another reason. See *Faydo*, 68 Wash. App. at 623, 846 P.2d at 540. Without the bifurcated test, however, the court was forced into the awkward position of claiming that neither the incoming calls nor the information qualify as private affairs, rather than simply explaining that while they may be private, the respective searches were justified for other reasons.

153. Ironically, had the court in *Katz* applied the "assumption of risk" rationale in *Katz*, it too would have forced the opposite holding. See generally *Amsterdam*, *supra* note 7. Namely, because *Katz* was exposing his conversation to a third party (the telephone operator), he no longer had a reasonable expectation of privacy in his words. Indeed, had *Smith v. Maryland* preceded *Katz*, this may very well have been the result.

154. For purposes of this examination, prong one, which is the application of *Gunwall* factors four and six, will not be discussed. Note, however, that this should not imply that prong one is a nonentity, for indeed the Washington courts have used *Gunwall* to preclude state discussion. See *State v. McCrorey*, 70 Wash. App. 103, 851 P.2d 1234 (1993); *State v. Wojytina*, 70 Wash. App. 689, 855 P.2d 315 (1993) (both cases failed the *Gunwall* threshold test).

his land to any curious but not obtrusive member of the public? Looking at the facts of *Myrick*, the court noted several indicia of Myrick's attempts to keep his land free from curious onlookers: a fence, several no trespassing signs, electronic sensors, and a platform to detect intruders.¹⁵⁵ Using the proposed test, it appears that Myrick satisfied his duty of protecting his land from the curious onlooker, rendering the officer's action obtrusive.¹⁵⁶

The *Faydo* case provides yet another example of how the proposed test would reach a different result. In *Faydo*, the defendant listed his name and phone number, but not his address in the telephone directory.¹⁵⁷ The officer was able to receive the defendant's address through the billing records of U.S. West Communications.¹⁵⁸ Assuming that prongs one and two of the proposed test are satisfied, the relevant inquiry under prong three is whether the defendant waived his right to keep his address private by displaying it to any curious but not obtrusive person not employed at the phone company. Here it is clear that the defendant did not make such a waiver. By asking that his address not appear in the telephone directory, the defendant sufficiently guarded his address from the curious. As such, the officer's activities should have been considered a search.

The *Crandall* case provides an interesting comparison with *Myrick*, with ultimately the same conclusion. Crandall's land was adjacent to a known hunting area, and while the property was bordered by a single strand of wire, there were no signs instructing hunters to keep out.¹⁵⁹ The police officer, unable to get a view of the property from behind the border, crossed the wire and used a rifle scope to see the marijuana plants growing on Crandall's land.¹⁶⁰ Under the proposed test, the relevant inquiry pursuant to prong three is whether Crandall waived his right to privacy by exposing his land to any curious, but not obtrusive, member of the public. While Crandall did not erect signs or use electronic sensors, he did mark and border his

155. See *Myrick*, 102 Wash. 2d 506, 688 P.2d 151 (1984).

156. It is true that Myrick did not build a roof over his property, and so technically he did not protect his property from the curious person flying above his land. The proposed test does not require such activity, however, since it is only the obtrusive viewer who deliberately flies over the defendant's property close enough to see the type of crops growing, or who uses visual enhancement devices to see the same. The curious casual observer in the air offers no significant threat to privacy. See Brian Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583, 615 (1989).

157. See *Faydo*, 68 Wash. App. 621, 846 P.2d 383 (1983).

158. See *id.*

159. See *Crandall*, 39 Wash. App. at 849, 697 P.2d at 250 at 850-51.

160. See *id.* at 850, 697 P.2d at 252.

land with wire. Had the officer merely stood at the wire and looked in with the rifle scope, that activity could be properly seen as curious. Crossing the wire, however, probably enters more into the realm of the obtrusive. While it is certainly debatable under the proposed test, the *Crandall* court should have deemed the officer's activity a search.

C. Counterarguments

As the *Crandall* case illustrates, the demarcation between sufficiently protecting against the curious onlooker and waiving a right to privacy is not always well defined. This, however, is to be expected. As Mr. Justice Holmes once commented, "[w]henever the law draws a line there will be cases very near each other on opposite sides."¹⁶¹ While it is true that the proposed test requires something more than simply plugging numbers into a formulaic equation, it is not as amorphous or elusive as the *Myrick* "test" it would replace. What the test lacks in its definitions of "curious" or "obtrusive," it makes up for in its uniformity of application in lower courts' rediscovery of *Myrick's* "should" language, and its ability to provide intuitive definitions of privacy.

Washington citizens may argue that the proposed test unfairly requires affirmative action on their part to maintain a right already afforded to them in Article I, section 7. This is incorrect. The careful wording of prong three only asks whether the individual waived his or her constitutional right to this privacy. Note that this is different than asking whether the individual did all he could do in protecting his right to privacy.¹⁶² While this may seem to be simply an issue of semantics, according to the wording of the proposal, the individual is presumed to start with the privacy right, and need only avoid shedding the right by disclosure.

One commentator has argued that accidental disclosure of a private affair should not qualify as a waiver of privacy.¹⁶³ Prong three, however, does not probe into the individual's thought process in displaying the private affair. In strict liability terminology, even accidental disclosure of the private affair to the curious would constitute a waiver under prong three.

161. As cited in Amsterdam, *supra* note 7, at 388.

162. This is the standard that one commentator has proposed. See William McAninch, *Unreasonable Expectations: The Supreme Court and the Fourth Amendment*, 20 STETSON L. REV. 435, 471 (1991).

163. See Lewis Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L. J. 549, 573-75 (1990) (commenting on the Katz "assumption of risk" language).

It is difficult to see what advantage a knowledge requirement would add to the rule. Should such a provision be added, police officers would be burdened with (1) not only deciding if their surveillance borders on the curious or obtrusive, but (2) also attempting to inquire into the defendant's thought process in making the private affair public. While the police officer will hopefully be guided by common sense and case law with regard to the former, the latter requires an advanced degree in mind reading. A knowledge requirement would frustrate the applicability of such a standard.

Finally, some may disagree with the premise underlying prong three; namely, that the government may only act in a manner commensurate with a member of the curious public. The argument is as follows: It is the job of the police to ferret out and control crime. To perform this function, it is sometimes necessary to pry into people's private affairs. Because the police have more of a legitimate interest in prying into private affairs than do individual citizens, the police should not be held to the same standard as everyday citizens.¹⁶⁴

This argument fails to account for the fact that, by itself, prong three does not limit the government's ability to perform a search. Prong three of the proposed test merely decides whether the prying can occur with or without a warrant, depending on whether or not the activity constitutes a search. By equating police activity with that of a curious citizen, prong three does not curtail government activities *per se*.

VI. CONCLUSION

One commentator notes that as society has advanced, privacy has become more and more of a limited commodity.¹⁶⁵ In accordance with the *Katz* test, the less privacy citizens expect from the government, the less the government needs to afford.¹⁶⁶ Washington,

164. This argument is made explicitly in *Campbell*, *supra* note 6, at 210.

165. *Sundby*, *supra* note 142, at 1759-60.

166. Through well publicized advances in technology, the government can advise citizens to expect a minimum level of privacy. Because citizens expect little privacy from the government, the test would afford little privacy. See *Gutterman*, *supra* note 142, at 676. If, for example, the government posted a sign next to every telephone which read, "your conversation is being recorded and may be monitored by your local police station," not only would it be unrealistic for an individual to have a subjective expectation of privacy, but objectively it would be unreasonable as well. See *Amsterdam*, *supra* note 7, at 384; *Gutterman*, *supra* note 142.

This is exactly where the "should" language of the *Myrick* test and the proposal come into play. Prong two of the proposed test asks whether such activity *should* be considered private. See *Sundby*, *supra* note 142, at 1760. In response to the above hypothetical, a court could legitimately say that even though it would not be reasonable to expect the conversation to be private under

however, has recognized the danger of such a system. *Myrick* was a bold step in articulating and defining new search and seizure jurisprudence for Washington citizens. Unfortunately, the *Myrick* court did not go far enough in offering a concrete test to take the place of the rejected *Katz* two-prong test. The proposal serves to fill this void, sewing together scraps of noteworthy advances made both in *Myrick*, and in many of the cases that followed its lead. While expectations of privacy continue to fall with each new advance in surveillance technology, by adopting the proposed test the state of Washington can offer its citizens a make-shift shelter under which they may attain protection.

those conditions, the call should be considered a private affair, and is therefore eligible for protection (assuming the caller does not yell into the phone, or in some other way waive his privacy right under prong three analysis).