Wash. Const. art. I, § 7 states:

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

U.S. Const. amend. IV states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated [warrant clause omitted].

Laura Silva, STATE CONSTITUTIONAL CRIMINAL ADJUDICATION IN WASHINGTON SINCE STATE v. GUNWALL: "ARTICULABLE, REASONABLE AND REASONED" APPROACH? 60 Alb. L. Rev. 1871 (1997)

A. Primacy

The primacy model of state constitutional adjudication starts with analysis of the constitutional question under state law. "The primacy approach views state constitutions as the primary sources of individual rights, with the U.S. Constitution providing a second layer of protection." [FN10] Where the primacy method is utilized, constitutional issues first receive a state constitutional analysis. If the state constitution does not provide the protection sought or

claimed, then federal constitutional analysis is employed and the federal standard is applied. [FN11]

Judicial efficiency is an attractive reason for adopting the primacy approach. "[J]udicial energy is not expended on interpretations of *1874 federal constitutional provisions that are unnecessary to resolve the constitutional challenge." [FN12] Since state constitutional issues are decided solely and sufficiently on state constitutional law, there is no basis for United States Supreme Court review. [FN13] The primacy model allows state courts the opportunity to interpret their individual constitutions independent of analogous federal provisions, reflecting "the values of the state citizenry that created the state constitution." [FN14]

B. Interstitial

C.

The interstitial mode of analysis begins with the premise that precedent under federal law is presumptively valid. [FN15] "Under this model, the primary role of the state constitution is to supplement and 'fill in the spaces' where there is no federal counterpart to a state constitutional provision or where federal law is undeveloped." [FN16]

"Proponents of the interstitial approach argue that it reflects the modern role of the U.S. Constitution as the 'basic protector of fundamental liberties,' while allowing states the opportunity to supplement the minimum protections afforded by the U.S. Constitution." [FN17] The interstitial approach always begins with a discussion of federal constitutional law. Hence, the Supreme Court invariably has jurisdiction to review decisions from state courts employing this methodology if a "plain statement" is not provided. [FN18]

*1875 C. Dual Reliance

Under the dual reliance approach, a state court examines a constitutional issue under both the state and federal constitutions. [FN19] Some commentators consider the federal analysis in such an approach to be merely an advisory opinion. [FN20] However, Justice Utter, former justice of the Washington Supreme Court and the

foremost proponent of the dual reliance approach, believes that the federal analysis "may be of aid to other courts with similar problems who do not have state constitutional provisions similar to [Washington's] and must rely on the appropriate federal constitution provisions and decisions." [FN21]

D. Lockstep

The fourth general methodology is the lockstep approach. Under lockstep, the state court bases its constitutional decisions solely on federal constitutional precedent; it presumes that "state constitutional provisions should be interpreted to provide exactly the same protections as their federal constitutional counterparts." [FN22] Therefore, in a lockstep jurisdiction, there is no separate and independent body of state constitutional law.

Beyond these four approaches, the Washington Supreme Court places an additional burden upon "litigants raising state constitutional issues." [FN23] After Gunwall, litigants must brief six criteria before the court will hear their state constitutional claim.

[FN10]. John W. Shaw, Comment, Principled Interpretations of State Constitutional Law--Why Don't the 'Primacy' States Practice What They Preach?, 54 U. Pitt. L. Rev. 1019, 1025 (1993). See also Robert F. 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, 1028 (1985) [hereinafter Utter, Swimming] (stating that the primacy model relies on the state constitution "as an independent source of rights and...as the fundamental law").

[FN11]. See Shaw, supra note 10, at 1025-26. The Oregon, New Hampshire, and Maine Supreme Courts have each adopted some form of the primacy model. See id. at 1026. See also State v. Cadman, 476 A.2d 1148, 1150 (Me. 1984) ("It is only when we conclude that [the defendant's] claim under the state constitution fails, therefore, that we must then examine his conviction from a standpoint of federal constitutional law."); State v. Ball, 471 A.2d 347, 351 (N.H. 1983) (examining the New Hampshire Constitution

first, "and only then, if [the court] find[s] no protected rights thereunder, will [the court] examine the Federal Constitution to determine whether it provides greater protection"); Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981) ("The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim.").

[FN12]. Shaw, supra note 10, at 1027.

[FN13]. See Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (holding that when a "state court decision appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so" and therefore, the Court will not lack jurisdiction to decide the case on the asserted ground that the decision rests on adequate and independent state grounds).

[FN14]. Shaw, supra note 10, at 1028.

[FN15]. See id. (noting that both Kentucky and New Jersey have each utilized the interstitial approach); Tracey Levy, Rediscovering Rights: State Courts Reconsider the Free Exercise Clauses of Their Own Constitutions in the Wake of Employment Division v. Smith, 67 Temp. L. Rev. 1017, 1035-40 (1994) (noting that both Minnesota and Vermont have each utilized the interstitial approach).

[FN16]. Atkins, supra note 5, at 574.

[FN17]. Shaw, supra note 10, at 1028.

[FN18]. See Long, 463 U.S. at 1041 (explaining that "[i]f a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a 'plain statement' in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached" and therefore, the Court "will not undertake to review the decision").

[FN19]. See Shaw, supra note 10, at 1028-29 (noting that both Vermont and Washington have each utilized the dual reliance approach); Utter, Swimming, supra note 10, at 1029-30 (noting that Michigan and Washington have each utilized the dual reliance approach).

[FN20]. See, e.g., Shaw, supra note 10, at 1028-29 (explaining that with the dual reliance approach the second analysis is conducted regardless of the results of the first).

[FN21]. See State v. Coe, 679 P.2d 353, 362 (Wash. 1984)); see also Utter, Swimming, supra note 10, at 1046-49.

[FN22]. Earl M. Maltz, Lockstep Analysis and the Concept of Federalism, 496 Annals Am. Acad. Pol. & Soc. Sci. 98, 99 (1988). See Stewart F. Hancock, Jr., The State Constitution, A Criminal Lawyers First Line of Defense, 57 Alb. L. Rev. 271, 284 (1993) (noting that both California and Illinois have each utilized the lockstep approach).

[FN23]. Shaw, supra note 10, at 1029.

From Hugh Spitzer, Which Constitution? Eleven Years of Gunwall…

As to the need to do the Gunwall analysis each time…

> Despite the potential for inflexibility in the criteria method, in recent years the court has found ways to elude its confines and to apply the Washington constitution when it desires. For example, in Seattle v. Montana, [FN127] the Washington Constitution's distinctive right to bear arms [FN128] was raised as a defense to a concealed-weapons conviction. Justice Talmadge's lead opinion noted that the litigants had not briefed the issues under Gunwall, [FN129] but in footnotes he nevertheless presented his own painstaking analysis of the history and meaning of the state provision. [FN130] Justice Alexander could not resist answering with an alternative analysis of the language in a concurring opinion. [FN131] In other cases, to save lawyers and the court the trouble of "reinventing the wheel," the court has permitted less Gunwall analysis on Declaration of Rights sections for which independent Washington jurisprudence has already been fully developed. In State v. Hobble, the court noted that additional jury-trial rights had ***1209** previously been established through a previous Gunwall-briefed decision and did not have to be reexamined. [FN132] In State v. Johnson, Justice Smith noted that "[t]his court previously analyzed Constitution article I, section 7 in Gunwall, covering factors (1), (2), (3) and (5). We need now only to analyze factors (4) and (6) in a different context." [FN133] Similarly, the extensive development of article I, section 7 jurisprudence caused one Court of Appeals judge to write:
>
> > We need not conduct an exhaustive examination of the Gunwall factors . . . because article 1, section 7 has already been often interpreted as providing broader protection of privacy interests than that provided by the Fourth Amendment. . . . Thus, we focus here only on those factors unique to the factual context of the present issue . . . . [FN134]

[FN127]. 129 Wash. 2d 583, 919 P.2d 1218 (1996).

[FN128]. See Wash. Const. art. I, § 24.

[FN129]. 129 Wash. 2d at 591, 919 P.2d at 1222.

[FN130]. See id. at 591 nn.1, 2, 919 P.2d at 1222 nn.1, 2.

[FN131]. See id. at 600-01, 919 P.2d at 1226 (Alexander, J., concurring).

[FN132]. 126 Wash. 2d 283, 298, 892 P.2d 85, 94 (1995).

[FN133]. 128 Wash. 2d 431, 445, 909 P.2d 293, 301 (1996).

[FN134]. State v. Richman, 85 Wash. App. 568, 573, 933 P.2d 1088, 1090- 91, review denied, 133 Wash. 2d 1028, 950 P.2d 478 (1997).

During the first 12 years of Gunwall, the following sections were subject to court opinions

Provision Relied Upon by Party	Frequency
Art. I, ß 7 (Privacy/Search & Seizure	22
Art. I ß 3 (Due Process)	19
Art. I ß 5 (Freedom of Speech)	14
Art. I ß 12 (Privileges & Immunities)	11
Art. I ß 9 (Self-Incrim./Double Jeopardy)	10
Art. I ß 22 (Rights of Accused, Speedy Trial)	9
Art. I ß 21 (Jury Trial)	8
Art. I ß 11 (Freedom of Religion)	4
Other	15

IV. State Constitutional Adjudication in Criminal Cases

A. Search and Seizure

The Washington Supreme Court has interpreted the prohibition against illegal searches and seizures under the Washington Constitution [FN55] independent of the Fourth Amendment to the United States Constitution. [FN56] A main reason cited for such an independent interpretation is the textual difference between the federal and state provisions. [FN57] The court has determined that not only do the citizens of Washington have a right to be free from governmental intrusions in their homes, but they also have a right to "an explicit protection not found in the Fourth Amendment--'private affairs.'" [FN58] Private affairs are said to include "'those privacy interests which citizens of [Washington] have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'" [FN59] In the context of private affairs, the Washington high court has interpreted the state constitution as providing greater protection to its citizens with *1882 respect to the use of pen registers, [FN60] sobriety checkpoints, [FN61] garbage searches, [FN62] infrared thermal searches, [FN63] and investigative searches. [FN64] The foregoing areas of extended protection are discussed in more detail in the following section.

1. Sobriety Checkpoint

In Seattle v. Mesiani, [FN65] the Washington Supreme Court held that a Seattle sobriety checkpoint program was invalid under the state constitution, as well as the Fourth Amendment. [FN66] The checkpoint program involved police stopping "all oncoming motorists without warrants or individualized suspicion of any criminal activity." [FN67] The drivers were asked to produce their licenses in order to give the officers an opportunity to look for signs of intoxication. [FN68]

*1883 Justice Utter, [FN69] writing for the majority, began his analysis with the state constitution [FN70] and a Michigan v. Long plain statement. [FN71] Utter noted that the Washington court "has acknowledged the privacy interest of individuals and objects in automobiles" and that a reasonable expectation of privacy is not lost simply because automobiles are subject to government regulation. [FN72] Moreover, he pointed out that sobriety checkpoints constitute a search and seizure subject to protection

under the state constitution and "are valid only if there is 'authority of law.'" [FN73]
The court, in past opinions, held that warrantless searches are unreasonable per se, unless one of the narrow exceptions to the warrant requirement is present. [FN74] Furthermore, the state has the *1884 burden to prove the existence of one of the exceptions. [FN75] In Mesiani, Utter stated that the City of Seattle did not demonstrate to the court that the sobriety checkpoint program met any of the exceptions or "any possible interpretation of the constitutionally required 'authority of law.'" [FN76] Thus, the program was deemed invalid. Because Justice Utter was a strong proponent of the dual reliance methodology, he analyzed the sobriety checkpoint program under the Fourth Amendment to "assist other courts who do not have state constitutional provisions similar to ours." [FN77] Utter found that the program also violated the Fourth Amendment because it "gave police officers unbridled discretion to conduct intrusive searches." [FN78]
Justices Dolliver, Andersen and Durham authored a separate concurrence contending that a sobriety checkpoint program could pass constitutional muster if "properly authorized by statute or ordinance." [FN79] The concurring justices chastised the majority's opinion for going too far and possibly invalidating "any legislation which would authorize a sobriety checkpoint program." [FN80] Thus, the justices offered eight factors for determining whether a sobriety checkpoint program would satisfy the balancing test between the state's interest and the individual's privacy. [FN81] In addition, the concurring justices concluded that a sobriety checkpoint could be constitutional because the state has a governmental interest in preventing drunk driving, and the checkpoints provide a "minimal *1885 intrusion into the driver's privacy" in the war on detecting and deterring drinking and driving. [FN82]

2. Warrantless Search of Garbage
The Washington Supreme Court has also exercised independent state constitutional analysis with regard to warrantless searches of a citizen's garbage. In State v. Boland, [FN83] the defendant was suspected of distributing legend drugs. [FN84] This prompted police to begin a "series of four warrantless searches" of his garbage to locate incriminating evidence to obtain a warrant to search his residence. [FN85] The garbage searches were successful and the

defendant was charged with unlawful possession of legend drugs and possession of a controlled substance with intent to deliver. [FN86] The defendant filed a motion to suppress the evidence arguing that it was obtained as "the fruit of the warrantless search of his garbage" in violation of the federal and state constitutions. [FN87] Because the United States Supreme Court concluded in California v. Greenwood [FN88] that there is no reasonable expectation of privacy "in garbage which has been left on the curbside for collection," [FN89] the Washington Supreme Court reviewed the case under the search and seizure provision of the Washington Constitution after finding that the Gunwall factors were adequately briefed. [FN90]

*1886 Justice Dolliver, [FN91] writing for the majority, found that the defendant had a reasonable expectation of privacy in the garbage that he laid out for the "licensed" trash collector to pick up. [FN92] His opinion was based, in part, on two local ordinances for regulating trash collection. One ordinance required residents to place their cans in a location convenient for the collector, and another provided that it was unlawful for anyone other than the collector or owner of the garbage to remove its contents from the receptacle. [FN93] Dolliver concluded that since the law enforcement officers were neither the owners of the trash nor "licensed garbage collector[s]," defendant's "private affairs were unreasonably intruded upon . . . when [the officers] removed the garbage of his trash can and transported it to the police station in order to make it available to state and federal narcotics agents." [FN94] For those reasons, the court found that the defendant's rights under the state constitution were violated.

In keeping with Justice Utter's dual reliance approach to state constitutional analysis, Dolliver acknowledged that the United States Supreme Court came to the opposite conclusion when deciding Greenwood under the Fourth Amendment. [FN95] Dolliver was mindful that Supreme Court opinions, although not binding on state courts when construing analogous provisions of their state constitutions, nonetheless serve as persuasive authority when deciding difficult issues. [FN96] However, the majority was willing to reject federal precedent because of the reference in Washington's search and seizure provision to "private affairs"; protection from unreasonable intrusions does not cease merely because the defendant placed his trash "outside the curtilage of [his] home."

[FN97] In addition, Dolliver also stated that the "regulated collection of garbage . . . is [ ] necessary to the proper functioning of modern society" and with this *1887 comes a reasonable expectation that Washington residents will be free from governmental intrusions into their garbage. [FN98]
The dissent, authored by Justice Guy, [FN99] argued that the Gunwall factors of preexisting state law and matters of state interest or local concern were not met, and thus, the case did not deserve an independent state analysis. [FN100] The dissent admonished the majority for basing its decision on two local ordinances regulating trash collection. [FN101] The dissenters did not accept the majority's argument that the two ordinances evinced a "long preexisting history of protecting privacy interests in garbage," nor that they "demonstrate[d] a history of legislative or judicial protection of privacy interests in garbage." [FN102] Guy summed up the dissent's position thus:
Resort to our state constitution must be derived from a process that is at once 'articulable, reasonable and reasoned.' The majority's resolution of factors four and six frustrates the policy behind the adoption of the Gunwall criteria. I would hold that Gunwall has not been met. As such, there is no basis upon which to extend broader protection to garbage under article 1, section 7. [FN103]

3. Infrared Thermal Detection Searches
Employing the dual reliance approach, the Washington court declared the warrantless use of a thermal detection device on a private residence to be an unlawful search and seizure under both state and federal constitutions. In State v. Young, [FN104] the police department received an anonymous tip that the defendant was operating a marijuana growing operation. [FN105] The tip gave defendant's name, address, and telephone number, which prompted detectives to begin an investigation by stopping at defendant's home on numerous occasions. [FN106] Each time the detectives observed the *1888 basement windows covered, but never witnessed any bright lights associated with growing plants. [FN107] The detectives subsequently obtained defendant's power consumption records for his home for the previous six years and found an abnormally high level of power usage, especially over the past three years. [FN108] A few days after obtaining the records, the detectives sought help from drug enforcement agents who had been

trained in the use of infrared thermal detection devices. [FN109] One week after receiving the tip, detectives performed a thermal surveillance on defendant's home. [FN110] The device detected abnormal heating patterns when compared to other homes within the surrounding neighborhood. [FN111] Based on this information, a warrant was issued to search the defendant's home. The search proved fruitful and charges were brought against the defendant for "possession of marijuana with intent to manufacture or deliver." [FN112] The defendant was found guilty at trial and the Washington Supreme Court granted direct review. [FN113]

The court announced its opinion by stating that "[w]hen violations of both the federal and Washington constitutions are alleged, it is appropriate to examine the state constitutional claim first." [FN114] At first, it appears that the court embraced the primacy approach to state constitutional adjudication. [FN115] However, the majority, speaking through Justice Johnson, [FN116] did not proceed with independent state analysis until first determining, albeit briefly, that such analysis was warranted because the Gunwall factors had been adequately addressed. [FN117]

*1889 Johnson noted that the court "previously outlined the limits to which the police can go in conducting a warrantless surveillance without intruding on a person's private affairs." [FN118] Reasonable methods of surveillance include "utilization of one or more of [the officer's] senses while lawfully present at the vantage point where those senses are used." [FN119] The court observed that the officers proceeded from a lawful vantage point as their surveillance was conducted from the street. Thus, the proper inquiry was whether the means used were unreasonably intrusive. [FN120]

Johnson concluded that the infrared device allowed officers to "in effect 'see through the walls' of the home" disclosing information about the defendant's activities "which a person is entitled to keep from disclosure absent a warrant." [FN121] Thus, Johnson determined that the warrantless infrared search violated the defendant's private affairs under the state constitution. [FN122] Because Washington's provision prohibiting illegal searches and seizures protects invasions of both private affairs and of the home, Johnson analyzed whether the infrared device constituted a *1890 warrantless search of the defendant's home. [FN123] The state argued that there was no violation of the Washington Constitution because there was no actual "physical invasion" into the defendant's

residence. [FN124] Johnson dismissed this argument by emphasizing that the "absence of a physical intrusion" does not make a search constitutional. [FN125] He stated:

The infrared device invaded the home in the sense the device was able to gather information about the interior of the defendant's home that could not be obtained by naked eye observations. Without the infrared device, the only way the police could have acquired the same information was to go inside the home. Just because technology now allows this information to be gained without stepping inside the physical structure, it does not mean the home has not been invaded for the purposes of Const. art. 1, § 7. [FN126]

Thus, the majority not only found that the warrantless infrared thermal search violated the defendant's private affairs, "but also constituted a violation of the state constitution's protection against the warrantless invasion of his home." [FN127]

Notably, Johnson employed the dual reliance approach to state constitutional adjudication. Therefore, after finding the warrantless infrared search violated the state constitution, he proceeded to analyze whether the infrared search also violated the Fourth Amendment. [FN128]

*1891 Johnson disagreed with the federal Supreme Court's opinion in United States v. Penny-Feeney [FN129] and determined that the infrared thermal search of the defendant's residence also violated the Fourth Amendment. [FN130] In Penny-Feeney, the federal district court analogized the heat waste the infrared device detects to garbage set out for collection. [FN131] The court went on to hold that an individual does not have a reasonable expectation of privacy in either garbage set out for collection or heat waste emitted from a home. [FN132] Johnson dismissed the Penny-Feeney holding by reasoning that while a person voluntarily places his garbage out for collection, an individual has no control over heat leaving his home unless that person turns off all heat sources. [FN133] In addition, because use of infrared surveillance reveals information about a person's home that would not be discovered without a warrant, it violates one's "reasonable expectation of privacy." [FN134] Thus, Johnson concluded that the warrantless infrared surveillance of defendant's home also violated the Fourth Amendment. [FN135]

Interestingly, four justices concurred separately in the majority opinion. Justice Guy simply stated that he concurred only with the

result. [FN136] Justices Durham [FN137] and Andersen [FN138] stated that they concurred with the majority's result but only on the basis that "the use of the infrared device in this case constituted a search under the fourth amendment to the United States Constitution." [FN139] They did not "concur in the majority's analysis of article 1, section 7 of the Washington State Constitution." [FN140] Justice Madsen, whose voting *1892 record is generally moderate, [FN141] argued for a more independent stance in this case and concurred "only with the majority's analysis and result under article 1 § 7." [FN142] Unfortunately, none of the four provided any reason for their disagreement with the majority's analysis.

In a subsequent case, where a defendant relied on the reasoning in Young, the court held that a warrantless search aided by a flashlight shined through a window of a mobile home was not an illegal search and seizure under the state constitution. In State v. Rose, [FN143] the defendant's landlord called police after he suspected that the defendant was using marijuana. [FN144] When a police officer arrived, he observed water and electrical lines running into a storage shed and the smell of marijuana, but the shed door was locked. [FN145] The officer then walked around to the front of the defendant's mobile home and, by shining a flashlight through a window of the mobile home, observed "cut marijuana and a scale on a table inside." [FN146] The officer then "obtained a telephonic search warrant based upon the information he had gathered." [FN147] The search procured fourteen pounds of marijuana from the defendant's growing operation, and he was charged with possession of marijuana with intent to manufacture or deliver. [FN148] The defendant moved to suppress the evidence, claiming it was obtained by a warrantless search in violation of the state constitution and the Fourth Amendment. [FN149] The trial court granted his motion and the court of appeals affirmed. [FN150]

The majority opinion, authored by Justice Madsen (a proponent of independent state constitutional analysis in Young), [FN151] concluded that the warrantless search aided by the flashlight was not an illegal *1893 search under the state constitution or the Fourth Amendment. [FN152] In keeping with an interstitial approach, the majority began its analysis with a discussion of the "open view" doctrine under the Fourth Amendment. [FN153] Under this doctrine, when an officer uses "one or more of his senses" to

detect something from a lawful vantage point, an unlawful search does not occur. [FN154] Moreover, the doctrine deprives the individual of a reasonable expectation of privacy with respect to objects left open to public viewing. [FN155] According to Madsen, because the mobile home was located next to a large parking area, the defendant's "porch was impliedly open to the public." [FN156] Just as it is permissible for an officer to step onto the front porch, it is acceptable for the officer to look into the window. [FN157] The court also found that shining a flashlight through the window did "not transform an observation which would fall within the open view doctrine during daylight into an impermissible search simply because darkness [fell]." [FN158]

After finding there was no violation of the Fourth Amendment, Madsen proceeded to analyze the case under the Washington Constitution. [FN159] The Rose Court compared the use of a flashlight to the infrared thermal detection device used in Young. [FN160] However, the majority pronounced that "[t]his case is wholly unlike Young" because a flashlight is not a device that goes "'well beyond an enhancement of natural senses'" nor does it allow "officers to see 'more than what [is] left exposed to public view.'" [FN161] The court reasoned that "the flashlight used by the officer was no more invasive than observations with natural eyesight during daylight would have been" because the defendant left the marijuana on the table in plain sight. [FN162] Thus, Madsen concluded the warrantless *1894 search of the defendant's home with the aid of a flashlight did not violate the state constitution.

The dissent, written by Justice Johnson, declared that the majority lost sight of what they were "to decide: whether an unconstitutional warrantless search occurred." [FN163] Johnson contended that the majority's analysis should have started with the proposition that all "warrantless searches are per se unreasonable" unless one of the narrow exceptions to the warrant requirement applies. [FN164] Johnson explained that the court in State v. Seagull [FN165] crafted seven factors to consider "in determining whether an officer's conduct was unreasonably intrusive such that it exceeded the scope of the implied invitation." [FN166] Applying those factors to Rose, Johnson found that the officer:

[S]pied into the mobile home; he acted secretly and after dark; he used a circuitous route to reach the front porch and door; he tried to contact the resident only after determining that no one could be

home; and he made his discovery as the direct result of an intentional warrantless search. [FN167]
Therefore, the officer's conduct was unreasonably intrusive because he proceeded from start to finish "collecting evidence[ ] without a warrant." [FN168] In addition, the state did not meet "its burden of showing the objects in the front room were in open view" because the state did not show that the officer was at Rose's doorstep "for the purpose of ascertaining whether anyone was home." [FN169] Thus, according to the dissent, the search was illegal under both the state and federal constitutions.

*1895 4. Investigative Search
The Washington Supreme Court, in a unanimous opinion using the primacy approach, [FN170] held a warrantless investigative search of an automobile to be invalid. In State v. Hendrickson, [FN171] the defendant was arrested and charged with delivering a controlled substance after returning to jail from a work release program while in possession of cocaine. [FN172] At the time of the arrest, officers impounded the defendant's truck and performed an inventory search. [FN173] No further evidence was uncovered. However, an anonymous informant later told police that the defendant's truck contained an additional package of cocaine hidden inside a speaker vent. [FN174] Relying on a consent form that the defendant had signed as part of his work release program and based on the informant's tip, the police performed a warrantless investigative search on the defendant's truck four days after his arrest. [FN175] The search produced a "one-half ounce of cocaine, packaged the same way as the cocaine the defendant had delivered to the jail" on the day of his arrest. [FN176] The defendant moved before trial to suppress the evidence gathered as a result of the warrantless truck search, claiming his privacy rights had been violated by the search under both the state and federal constitutions. [FN177] The court denied the motion and the defendant appealed.
As the Washington Supreme Court had stated many times before, because the defendant claimed a violation of his rights under both the federal and state constitutions, the alleged violation would be analyzed first under state law. [FN178] Justice Talmadge [FN179] authored the opinion for the court and restated the court's position that *1896 warrantless searches are unreasonable per se unless one of the narrow exceptions applies. [FN180] In Hendrickson, the state

asserted "that [the defendant] had a diminished expectation of privacy in his vehicle" due to his participation in a work release program. [FN181] The state also contended that the defendant consented to the search by virtue of his signed agreement to participate in the work release program. [FN182] However, the court dismissed this proposition because even though the defendant may have waived his state and federal search and seizure rights when he signed the release, his termination from the program at the time of his arrest discontinued his consent. [FN183]

The court also dismissed the state's assertion that the truck search was incident to an arrest. [FN184] Talmadge emphasized that the defendant's arrest occurred four days before his truck was searched and that the defendant "was arrested in jail, not in his truck." [FN185] Thus, the court refused to regard the second search of the defendant's truck as an inventory. "The inventory search actually occurred on [the date of the defendant's arrest] and revealed nothing of significance to the police. The search here pertained to the investigation of an entirely new crime brought to the attention of the police by an anonymous informant." [FN186] The court concluded that the warrantless search violated the state constitution and that the evidence should have been suppressed because the prosecution did not demonstrate that any exception to the warrant requirement properly applied to the second search of the defendant's truck. [FN187]

While the Washington court has liberally construed the state constitution's provision against unreasonable searches and seizures to include protection from governmental intrusions into private affairs, there are several cases where the court declined to do so. In State v. Carter, [FN188] the defendant moved to suppress evidence obtained during a warrantless drug raid on a motel room. The *1897 defendant briefed the Gunwall factors, but Justice Smith, [FN189] who authored the opinion for the majority, concluded that an independent state analysis was unnecessary because a business transaction with the public (the buying of drugs) does not fall within the realm of private affairs. [FN190] The majority added that the result would have been the same under federal or state analysis. Under the Fourth Amendment, "[t]here is no reasonable expectation of privacy when the occupant of a motel room invites outsiders into the room to transact illegal business." [FN191] The court declared that the defendant's business in the motel room was "entitled to 'no

greater sanctity' than if it were conducted in the streets." [FN192] Further, the majority also found "exigent circumstances which justified search of the motel room," [FN193] because "there was great risk that the drugs would be destroyed by persons in the motel room who were alerted by noises from the slamming door and the hallway scuffle." [FN194]

Justice Alexander [FN195] speaking for the dissenters, maintained that no exigent circumstances were present; he relied on state precedent [FN196] where the court "identified five circumstances which could be [considered] exigent: '(1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence.'" [FN197] Alexander asserted that none of these circumstances were present and therefore the officer's act of entering the motel room without a warrant was not justified. [FN198] Thus, suppression of the evidence should have been ordered.

Another search and seizure case where the Washington Supreme Court refused to recognize broader state constitutional protection is *1898 State v. Johnson. [FN199] In Johnson, the defendant was pulled over for failing to signal when changing lanes. He was subsequently released with a warning. However, upon checking Johnson's license further, the officer discovered an outstanding bench warrant for the defend-ant and attempted to overtake the truck. [FN200] The defendant was caught, handcuffed, and arrested. When searching for ownership papers for the truck, the officer examined the defendant's sleeping compartment and found a litter bag type pouch which contained methamphetamine and marijuana. [FN201] The defendant sought suppression "on the ground that the search of the sleeper exceeded the lawful scope of a search incident to an arrest." [FN202] The trial court denied the defendant's motion and the court of appeals affirmed. [FN203]

The defendant claimed that because the container holding the drugs was a litter bag, the state constitutional precedent of Boland should apply. [FN204] However, the Washington Supreme Court rejected that argument, reasoning that Boland was inapplicable because that case dealt with garbage placed outside the home. [FN205] The court relied on the fact that the defendant's sleeper compartment was part of the passenger compartment of an automobile and not a temporary residence, and thus concluded that the passenger

compartment should not be afforded the same protection as a home under either the state or federal constitutions. [FN206]
The court also pointed out that in State v. Stroud, [FN207] it had "held that during a warrantless search of an automobile incident to arrest, officers may search the passenger compartment, but may not search any locked containers found inside the compartment." [FN208] Subsequently, *1899 in State v. Fladebo, [FN209] the court "clarified the Stroud rule, holding that any unlocked containers found in the passenger compartment may be searched." [FN210] The majority in Johnson argued that, consistent with Stroud and Fladebo, the search of the litter bag incident to the automobile arrest of the defendant did not violate either the state or federal constitution.

Justices Alexander and Johnson, in a special concurrence, maintained that the court may be interpreting the search parameters in Stroud too broadly. [FN211] Alexander stated that Stroud "merely stands for the proposition that the 'passenger compartment of a vehicle' may be searched during the time immediately subsequent to the arrest of the suspect"; [FN212] Stroud did not hold that "if a vehicle is not a 'fixed residence,' then any area within the vehicle that is readily accessible from the passenger compartment, except for locked containers, may be searched incident to a lawful arrest." [FN213] However, the dissenters were satisfied that, in Johnson, "the sleeping quarters in the cab of the defendant's truck were part of the passenger compartment of the vehicle, as opposed to being merely an area accessible from the passenger compartment." [FN214] The dissent noted that this "conclusion might not, however, be supportable in another case where a vehicle contains living quarters that are separate and distinct from the portion of the vehicle where the driver and passengers would ordinarily be located." [FN215]