COMMENTS

The Plain Feel Doctrine in Washington: An Opportunity to Provide Greater Protections of Privacy to Citizens of this State

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I. INTRODUCTION

It is late at night. You and your friend, Bob, have just finished your workout at the YMCA and he is giving you a ride home. On the way, Bob is stopped for a minor traffic offense. As Bob pulls the car to the side of the road, he hands you a piece of gum but you decide to chew it later, so you put the gum in your pocket. Bob stops the car and the officer approaches. While the officer is at the window of the car, Bob starts to reach down between the seat and door to open the trunk because his wallet is in his gym bag, in the trunk.

Before you know it, you and Bob are ordered out of the car to submit to a pat-down frisk because the officer interpreted your movements as indications that one or both of you might be armed and dangerous. That is, he saw you put something in your pocket before the car was stopped, and Bob reached for something under the seat while the officer was standing at the window. During the frisk, the officer feels a small hard object in your front pants pocket that is clearly not a weapon. It could be a tire valve, an aspirin, or a balled up foil wrapper. In fact, it is the piece of gum that Bob handed you. Nevertheless, the officer reaches into your pocket and grabs it because

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his experience leads him to believe that the object feels like a small piece of crack or cocaine.[1]

The preceding hypothetical is an example of the type of search that may be upheld under the United States Supreme Court's recent ruling in *Minnesota v. Dickerson*[2] and the Washington Supreme Court's decision in *State v. Hudson*.[3] These rulings state that the Fourth Amendment of the United States Constitution[4] permits the seizure of contraband during a protective search for weapons based on the sense of touch under two conditions: (1) the search must not exceed the scope of a *Terry* frisk,[5] and (2) the contraband nature of the object must be immediately apparent to the officer.[6] Permission to seize contraband under these two conditions is known as the "plain feel" or "plain touch" doctrine. By their adoption of this doctrine, the United States and Washington Supreme Courts have extended the rationale for conducting a pat-down search beyond the traditional concern for the safety of officers and bystanders, to include the discovery of contraband, that is, evidence of a crime.

Although some state and federal courts recognized the plain feel doctrine before the Supreme Court's decision in *Dickerson*,[7] Washington courts did not. In 1982, in *State v. Broadnax*,[8] the Washington Supreme Court expressly stated that the plain feel doctrine should not be recognized in Washington because the "tactile sense does not usually result in the *immediate* knowledge of the nature of the item."[9] In reaching this conclusion, the court relied primarily on two United

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1. This hypothetical is roughly based on the facts of a case that is currently pending before the Washington State Court of Appeals, Division II. Brief of Appellant at 2-4, State v. Goforth, No. 18109-6-II, (Wash. Ct. App. Aug. 5, 1994).

2. 113 S. Ct. 2130 (1993).

3. 124 Wash. 2d 107, 874 P.2d 160 (1994).

4. The Washington Supreme Court declined to consider whether Hudson was entitled to more protection under article I, section 7 of the Washington Constitution because the issue was not raised until his supplemental brief. *Hudson*, 124 Wash. 2d at 120, 874 P.2d at 167.

5. *See* Terry v. Ohio, 392 U.S. 1 (1968). Under the holding in *Terry*, an officer may conduct a reasonable search for weapons when the officer has reason to believe that the individual is armed and dangerous. This is true regardless of whether the officer has probable cause to arrest the individual. *Id.* at 27. The search must be confined in scope to the discovery of "guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Id.* at 29. The sole rationale for permitting such a search is the protection of officers and others nearby. *Id.*

6. *Dickerson*, 113 S. Ct. at 2137; *see also Hudson*, 124 Wash. 2d at 114, 874 P.2d at 164.

7. *See Dickerson*, 113 S. Ct. at 2134-35 n.1.

8. 98 Wash. 2d 289, 654 P.2d 96 (1982).

9. *Id.* at 298, 654 P.2d at 102.

States Supreme Court decisions: *Ybarra v. Illinois*[10] and *Sibron v. New York*.[11]

Despite Washington's rejection of tactile recognition of contraband in *Broadnax*, in 1994 the Washington Supreme Court reversed its position.[12] In *State v. Hudson*, the Washington court expressly adopted the plain feel doctrine, relying exclusively on the Fourth Amendment and the holding in *Dickerson*.[13]

Despite their adoption of the plain feel doctrine, however, both the *Dickerson* and *Hudson* courts refused to admit the evidence in question. In *Dickerson*, the Court held that the evidence was properly excluded because the officer exceeded the permissible scope of the pat-down frisk by manipulating the contraband with his finger.[14] Similarly, in *Hudson*, the court remanded the case for a determination of whether the officer impermissibly manipulated the object before determining that it was contraband.[15]

This Comment argues that Washington should return to an independent analysis of search and seizure doctrine under article I, section 7 of the state constitution and reject the admission of contraband seized during the course of a pat-down frisk.[16] The decisions in *Hudson* and *Dickerson* have established an unnecessary and unworkable standard, and involve an increased invasion of personal privacy without the counter-balancing need to protect the safety of others.

The plain feel doctrine as announced in *Dickerson* and *Hudson* developed from two well-established concepts in search and seizure law—the *Terry* frisk of persons to discover weapons and the plain view

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10. 444 U.S. 85, 92-93 (1979) (holding that the officer was not permitted to frisk a patron of a bar without a reasonable suspicion that the patron was armed and dangerous).

11. 392 U.S. 40, 65-66 (1968) (finding that the officer exceeded the permissible scope of a *Terry* frisk when he reached into the defendant's pocket to retrieve drugs).

12. *See Hudson*, 124 Wash. 2d at 114-15, 874 P.2d at 164-65.

13. *See id.* at 109, 114-16, 874 P.2d at 161, 164-65. Neither the Washington Supreme Court nor the United States Supreme Court overruled any prior decisions in their holdings. Rather, the Washington Supreme Court described the holding in *Hudson* as consistent with *Broadnax* because "*Broadnax* merely acknowledged that touch alone cannot 'usually' result in immediate recognition of contraband." *Id.* at 115, 874 P.2d at 165. Similarly, in *Dickerson*, the United States Supreme Court found that the decision was anticipated by *Ybarra*. *Dickerson*, 113 S. Ct. at 2137-38 n.4. Yet, because the facts in *Dickerson* were so similar to the facts in *Sibron*, the search "amounted to the sort of evidentiary search that *Terry* expressly refused to authorize." *Id.* at 2139 (citations omitted).

14. 113 S. Ct. at 2133, 2139.

15. 124 Wash. 2d at 118-20, 874 P.2d at 166-67.

16. While the plain feel doctrine has been applied to searches of containers and the seizure of non-contraband evidence, this Comment is limited to the seizure of contraband in the context of a *Terry* frisk.

doctrine. Both concepts involve specific exceptions to the requirement of the Fourth Amendment that searches may be conducted only with the authorization of a warrant. Accordingly, Part II describes the principles of the *Terry* frisk and the plain view doctrine. Part III details the Supreme Court's decision in *Dickerson*. Part IV discusses the holdings of the primary search and seizure cases decided in Washington before *Dickerson*, and is followed, in Part V, by a description of the two Washington cases that have been decided since *Dickerson*. Part VI is a brief discussion of Washington constitutional analysis, laying the groundwork for distinguishing the right to privacy under article I, section 7 of the Washington Constitution from the right to be free from unreasonable searches and seizures under the Fourth Amendment. Finally, Part VII argues that Washington courts should depart from the ruling in *Dickerson* and continue to exclude contraband that is seized during a frisk for weapons because the plain feel doctrine is unnecessary, unworkable, subject to abuse and, most importantly, does not adequately protect the privacy interests of Washington citizens.

II. BACKGROUND: THE EXCLUSIONARY RULE AND SELECTED EXCEPTIONS TO THE WARRANT REQUIREMENT

A. The Exclusionary Rule

The exclusionary rule provides that any evidence found as a result of an illegal search or seizure—one that violates a person's Fourth Amendment rights—cannot be introduced in a trial.[17] The rule exists to deter police officers from executing unreasonable searches and seizures,[18] to protect judicial integrity by preventing courts' involvement in the "willful disobedience of a Constitution they are sworn to uphold,"[19] and to maintain popular trust in the government by assuring citizens that the government will not profit from illegal conduct.[20]

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against

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17. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 391-93, 398 (1914). The exclusionary rule also applies to state tribunals. Mapp v. Ohio, 367 U.S. 643, 653 (1961).

18. *See, e.g.*, *Terry*, 392 U.S. at 12 (stating that the exclusionary rule "has been recognized as a principal mode of discouraging lawless police conduct"); *see also* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.1(b) (2d ed. 1992).

19. Elkins v. United States, 364 U.S. 206, 223 (1960).

20. United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting); *see also Weeks*, 232 U.S. at 394; LAFAVE & ISRAEL, *supra* note 18, § 3.1(b).

unreasonable searches and seizures."[21] The Supreme Court defines "persons" to include their bodies[22] and attire,[23] and has extended Fourth Amendment protection to all areas that a person seeks to preserve as private, even if those areas are accessible to the public.[24] A search is "*per se* unreasonable" if it is "conducted outside the judicial process, without prior approval by judge or magistrate."[25] This rule is "subject only to a few specifically established and well-delineated exceptions."[26]

Two exceptions to the warrant requirement are discussed in this Comment: the *Terry* frisk and the plain view doctrine, both of which developed on the theory of exigent circumstances. In these contexts, searches and seizures are exempt from the warrant requirement because the delay involved in obtaining a warrant would result in physical harm or in the loss of evidence.[27] While both the *Terry* frisk and the plain view doctrine are exceptions to the warrant requirement, searches and seizures conducted under the plain view doctrine are not exempt from the requirement that the officer have probable cause to believe that the item searched is associated with criminal activity.[28] Probable cause is determined with reference to a reasonable person with the expertise and experience of the officer in question.[29] In other words, the test is an objective one, and the officer's subjective belief that he had grounds for his action will be insufficient.[30]

Although few would argue that Fourth Amendment rights should be abandoned, some detractors argue that the exclusionary rule is not the appropriate remedy for violation of those rights. For example, some critics believe that the exclusionary rule handcuffs the police and limits their effectiveness.[31] Others argue that it only aids the guilty and that it does not deter the police from infringing on citizens' rights to privacy.[32] Finally, some critics are concerned that the exclusionary

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21. U.S. CONST. amend. IV.

22. *See* Schmerber v. California, 384 U.S. 757, 766-68 (1966).

23. LAFAVE & ISRAEL, *supra* note 18, § 3.2(a) (citing Beck v. Ohio, 379 U.S. 89 (1964)).

24. Katz v. United States, 389 U.S. 347, 350-52 (1967).

25. *Id.* at 357.

26. *Id.*

27. *See generally* Justice Robert F. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U. PUGET SOUND L. REV. 411, 562 (1988).

28. Arizona v. Hicks, 480 U.S. 321, 326 (1987); *see also* 1 JOHN W. HALL, JR., SEARCH AND SEIZURE 488-89 (2d ed. 1991).

29. *See* United States v. Ortiz, 422 U.S. 891, 897-98 (1975).

30. LAFAVE & ISRAEL, *supra* note 18, § 3.3(b); *see also* Beck v. Ohio, 379 U.S. 89, 97 (1964).

31. Utter, *supra* note 27, at 592.

32. *Id.*

rule will allow guilty people to escape conviction as a result of police error. These critics propose enacting statutes to provide for a civil remedy in the form of monetary damages for violations of Fourth Amendment rights.[33]

Responses to these criticisms point out that: (1) the Fourth Amendment restricts unreasonable searches and seizures because freedom and privacy are preferred over more efficient law enforcement,[34] (2) the exclusionary rule protects innocent people as well as the guilty, and (3) the rule really does deter, as illustrated by the fact that many police departments implemented training programs to teach officers how to obtain evidence without violating citizens' Fourth Amendment rights after the exclusionary rule was announced.[35] Moreover, the suggestion of substituting a civil remedy for the exclusionary rule does not adequately serve the deterrent function. Civil remedies would not effectively put pressure on police officers because, in most instances, the damages would be paid by the government, not by the individual officer.[36] In addition, civil remedies will not be available to everyone. Some will lack the financial resources to pursue a lawsuit, and those who do pursue a suit may be unsuccessful because plaintiffs who have been arrested and tried are unlikely to gain sympathy from jurors.[37]

The essence of this debate over the exclusionary rule is the balancing of citizens' rights to freedom and privacy against the need for efficient and effective law enforcement.[38] The question of an officer's ability to seize contraband in the context of a stop-and-frisk is the next step in this continuing debate.

B. The Terry *Frisk*

Stop-and-frisk jurisprudence begins with the United States Supreme Court's decision in *Terry v. Ohio*,[39] in which the Court held,

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . and where nothing in

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33. *See, e.g.*, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971); *see also* LAFAVE & ISRAEL, *supra* note 18, § 3.1(c).

34. LAFAVE & ISRAEL, *supra* note 18, § 3.1(c).

35. Utter, *supra* note 27, at 592.

36. *See* LAFAVE & ISRAEL, *supra* note 18, § 3.1(c).

37. *Id.*

38. *See generally id.*

39. 392 U.S. 1 (1968).

> the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled . . . to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[40]

The preceding paragraph describes what is commonly known as the *Terry* frisk. The *Terry* court reached this standard by balancing the opposing interests of privacy and effective law enforcement and determined, in the words of Professors LaFave and Israel, that "a brief stopping for investigation and a frisk incident thereto are permissible upon grounds falling short of probable cause . . . [because they] involve a significantly lesser intrusion into freedom and privacy."[41] The professors continue their analysis by stating that the lawfulness of a *Terry* frisk depends upon two factors: "whether the officer was rightly in the presence of the party frisked . . . and . . . whether the officer had a sufficient degree of suspicion that the party frisked was armed and dangerous."[42] Both factors are evaluated against "the Fourth Amendment's general proscription against unreasonable searches and seizures" rather than by the probable cause requirement.[43]

Thus, the standard of proof that must be satisfied for a stop and frisk is that the officer's observations lead him "reasonably to conclude . . . that the persons with whom he is dealing may be armed and presently dangerous."[44] Circumstances that might lead an officer to this conclusion include an unusual bulge in clothing, a sudden movement toward a pocket or other area that could contain a weapon, or an awareness that the suspect was armed on previous occasions.[45] The officer is not required to have probable cause in order to conduct an investigatory stop or an accompanying frisk for weapons,[46] nor must he actually be in fear.[47]

The Washington standard for conducting a *Terry* frisk "requires officers to have an individualized suspicion that the suspect is presently

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40. *Id.* at 30.
41. LAFAVE & ISRAEL, *supra* note 18, § 3.3(b).
42. *Id.* § 3.8(e).
43. *Terry*, 392 U.S. at 20.
44. *Id.* at 30.
45. LAFAVE & ISRAEL, *supra* note 18, § 3.8(e).
46. *See* Utter, *supra* note 27, at 470, 514 (citing Terry v. Ohio, 392 U.S. 1 (1968)).
47. *See* United States v. Tharpe, 536 F.2d 1098, 1101 (5th Cir. 1976); *see also* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.4(a) (2d ed. 1987). *But cf.* United States v. Lott, 870 F.2d 778, 785 (1st Cir. 1989).

dangerous."[48] For example, the sole fact that the detention occurs in a high crime area would not be sufficient.[49]

The United States Supreme Court clarified the reasonable suspicion standard in *Sibron v. New York*,[50] the case accompanying *Terry*, by stating that a "frisk may not be used as a pretext for a search for incriminating evidence when the officer has no reasonable grounds to believe that the suspect is armed."[51] Thus, the Court made clear that a frisk for weapons has a singular purpose: the discovery of weapons that could be easily grasped and used to harm the officer or others nearby.[52] In order to seize the weapon, the officer need not be absolutely certain that the individual is armed. "[T]he question is whether there was anything in the officer's perception to indicate it was not a weapon because of its size or density."[53] This standard would theoretically bar a seizure when only a soft object is felt.[54]

In the cases following *Terry* and *Sibron*, courts have expanded the traditional exceptions to the warrant requirement by testing police conduct against a standard of general reasonableness, rather than the more rigourous standard of probable cause, leading at least one commentator to conclude that the balance is weighted strongly in favor of law enforcement, perhaps at the expense of privacy concerns.[55] Justice Brennan appears to have agreed. In the conclusion to his dissenting opinion in *Michigan v. Long*,[56] he argued that by expanding the application of the *Terry* balancing rationale, "the Court [was] simply continuing the process of distorting *Terry* beyond recognition and forcing it into service as an unlikely weapon against the Fourth Amendment's fundamental requirement that searches and seizures be based on probable cause."[57]

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48. Utter, *supra* note 27, at 524 (citing State v. Hobart, 94 Wash. 2d 437, 446, 617 P.2d 429, 433 (1980)).

49. State v. Smith, 102 Wash. 2d 449, 452-53, 688 P.2d 146, 148 (1984).

50. 392 U.S. 40 (1968).

51. Utter, *supra* note 27, at 524 (citing Sibron v. New York, 392 U.S. 40, 64 (1968)). In *Sibron*, the officer observed the defendant speaking with known drug addicts in a restaurant. After some time, the officer told Sibron to leave the restaurant and said, "You know what I am after." *Sibron*, 392 U.S. at 45. When Sibron reached into his pocket, the officer reached into the same pocket and found packets of heroin. *Id.* The court held that "[t]he suspect's mere act of talking with a number of known narcotics addicts . . . no more gives rise to reasonable fear of life or limb . . . than it justifies an arrest for committing a crime." *Id.* at 64.

52. *See* 3 LAFAVE, *supra* note 47, § 9.4(b).

53. LAFAVE & ISRAEL, *supra* note 18, § 3.8(e).

54. *Id.*

55. Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 264 (1984).

56. 463 U.S. 1032 (1983).

57. *Id.* at 1054 (Brennan, J., dissenting).

Central to the balancing test in *Terry* is the idea that a lesser intrusion is involved in stop-and-frisk cases.[58] Thus, the Supreme Court originally emphasized that a frisk must "be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."[59] This lesser intrusion is based on the premise that the frisk is limited to the outer clothing of the suspect unless and until the officer becomes aware that a weapon may be found. It is only at that point that the officer may intrude underneath the clothing. This limitation protects the individual because "the officer will not be able to justify an intrusion beneath the surface of the suspect's clothing without first showing that he felt a hard object, a matter which often could be subject to later verification by showing that there was such an object."[60]

C. *The Plain View Doctrine*

Under the plain view doctrine, police may seize evidence in plain view without a warrant as long as the intrusion that allowed the officer to view the evidence was lawful.[61] In *Coolidge v. New Hampshire*,[62] the Supreme Court explained that prior cases involving the seizure of articles in plain view had three elements in common that supported application of the doctrine.[63] The Washington Supreme Court followed *Coolidge* in *State v. Daugherty*,[64] but stated the rule more succinctly. It stated that in order to seize an item under the plain view doctrine, the following requirements must all be met: (1) the police officer must have a *prior justification* for the intrusion into the constitutionally protected area;[65] (2) the discovery of the incriminating evidence must be *inadvertent*;[66] and (3) the police must immediately realize that the object they observe is evidence—that is, the incriminat-

58. LAFAVE & ISRAEL, *supra* note 18, § 3.3(b).

59. *Terry*, 392 U.S. at 29.

60. 3 LAFAVE, *supra* note 47, § 9.4(b).

61. *See* Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971); *see also* LAFAVE & ISRAEL, *supra* note 18, § 3.7(f).

62. 403 U.S. 443 (1971).

63. *Id.* at 466.

64. 94 Wash. 2d 263, 616 P.2d 649 (1980), *cert. denied*, 450 U.S. 958 (1981).

65. *Id.* at 267, 616 P.2d at 651.

66. *Id.* The inadvertence requirement was rescinded by the United States Supreme Court in Horton v. California, 496 U.S. 128, 137-42 (1990). The Washington Supreme Court apparently intends to drop the requirement because it recognized the change in *Hudson*, 124 Wash. 2d at 114 n.1, 874 P.2d at 164 n.1, and determined that the change did not affect the analysis in that case. *Id.* Similarly, the inadvertence requirement does not alter the arguments or the analysis pertinent to this Comment.

ing character of the evidence must be *immediately apparent*.[67] This means that probable cause must be determined without further examination of the object.[68] Additionally, any seizure of items in plain view must be based on probable cause that the items are evidence of a crime.[69]

The United States Supreme Court extended the plain view doctrine to the concept of plain feel in *Minnesota v. Dickerson*,[70] stating that an officer may seize contraband even though the contraband was only identified by the sense of touch.[71]

III. *MINNESOTA V. DICKERSON*: THE SUPREME COURT'S RECOGNITION OF THE PLAIN FEEL DOCTRINE UNDER THE FOURTH AMENDMENT

A. *Facts and Procedural History*

At approximately 8:15 p.m. on November 9, 1989, two officers in a marked squad car spotted Dickerson leaving a known crack house. The defendant began walking toward the officers, but when he spotted the squad car, he turned and began walking in the opposite direction. Based on these facts, the officers decided to stop Dickerson and investigate further.[72]

After stopping the defendant, one of the officers conducted a pat-down search. Although the search revealed no weapons, the officer noticed a small lump in the defendant's jacket.[73] The officer examined the lump with his fingers and determined that it felt like a piece of crack cocaine in cellophane.[74] The officer then reached into Dickerson's pocket and retrieved two tenths of a gram of crack cocaine.[75]

Before trial, Dickerson moved to suppress the cocaine but the motion was denied.[76] The Minnesota court of appeals reversed, declining to adopt the plain feel exception to the warrant require-

67. *Daugherty*, 94 Wash. 2d at 267, 616 P.2d at 651.
68. *See Coolidge*, 403 U.S. at 466; LAFAVE & ISRAEL, *supra* note 18, § 3.7(f).
69. HALL, *supra* note 28, at 488-89.
70. 113 S. Ct. 2130 (1993).
71. *Id.* at 2137.
72. Minnesota v. Dickerson, 113 S. Ct. 2130, 2133 (1993).
73. *Id.*
74. *Id.*
75. *Id.* at 2133-34.
76. *Id.* at 2134.

ment.[77] The Minnesota Supreme Court affirmed the court of appeals' holding that "the sense of touch is inherently less immediate and less reliable than the sense of sight" and "the sense of touch is far more intrusive into the personal privacy that is at the core of the [F]ourth [A]mendment."[78] Moreover, the Minnesota Supreme Court found that even if it recognized the plain feel exception, the officer in this case went too far by probing and investigating with his fingers what he knew was not a weapon.[79]

B. The United States Supreme Court's Decision

In deciding *Dickerson*, the United States Supreme Court reaffirmed its position that a pat-down frisk must be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby,"[80] and that "[i]f the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed."[81] Nevertheless, the Court held that "officers may seize non-threatening contraband detected during a protective patdown search . . . so long as the officer's search stays within the bounds marked by Terry."[82]

The Court drew an analogy between plain feel and plain view and held that the rationale for the plain view exception applied equally well to circumstances involving touch or feel.[83] The rationale behind the plain view doctrine is that "if contraband . . . is observed by a police officer from a lawful vantage point, there has been no invasion of . . . privacy and thus no 'search' within the meaning of the Fourth Amendment—or at least no search independent of the initial intrusion that gave the officers their vantage point."[84] Similarly, the Court found that if an officer discovers contraband during a pat-down search, there has been no invasion of the individual's rights beyond that authorized by the search for weapons.[85] Furthermore, the Court held

77. State v. Dickerson, 469 N.W.2d 462, 466 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn. 1992), *aff'd*, 113 S. Ct. 2130 (1993).

78. State v. Dickerson, 481 N.W.2d 840, 845 (Minn. 1992), *aff'd*, 113 S. Ct. 2130 (1993).

79. *Id.* at 843-44.

80. 113 S. Ct. at 2136 (quoting Terry v. Ohio, 392 U.S. 1, 26 (1968)).

81. *Id.* (citing Sibron v. New York, 392 U.S. 40, 65-66 (1968)).

82. *Id.*

83. *Id.* at 2137.

84. *Id.* (citations omitted).

85. *Id.*

that a warrantless seizure would be justified by the practical consideration that delay would result in the destruction or loss of evidence.[86]

The Court's application of the plain view analogy is based on the premise in *Terry* that "officers will be able to detect the presence of weapons through the sense of touch,"[87] thereby demonstrating that the sense of touch can be a reliable indicator.[88] Like the seizure of evidence under the plain view doctrine, the seizure of contraband requires that the officer have probable cause, based on touch through the outer clothing, to believe that item is, in fact, contraband.[89] The Court stated that even if the sense of touch is less reliable than sight or smell with regard to sensing contraband, the probable cause requirement will act as a sufficient constraint on speculative seizures.[90] In other words, because officers must have probable cause to believe that an item is contraband, if the sense of touch is less reliable than the sense of sight, officers will have fewer opportunities to justifiably seize unseen contraband.[91]

The Court then dismissed the concern that discovery of an item through the sense of touch is more intrusive than discovery through the sense of sight.[92] The Court found this concern to be unfounded because the intrusion would already be authorized by the frisk for weapons.[93]

Although the *Dickerson* court ostensibly recognized the plain feel doctrine, it found that because the officer continued to explore the defendant's pocket (by squeezing, sliding, and otherwise manipulating the contents of the pocket), the search "amounted to the sort of evidentiary search that Terry expressly refused to authorize and that [the Court has] condemned in subsequent cases."[94] Nevertheless, the Court determined that contraband may be seized during the course of a lawful *Terry* frisk as long as (1) the search does not exceed what is needed to discover weapons, and (2) the nature of the object is immediately apparent without further manipulation.[95] The decision

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86. *Id.*

87. *Id.*

88. *Id.*

89. Note that although the pat-down search can be conducted on grounds less than probable cause, the higher standard of probable cause applies if contraband is to be seized. *See supra* notes 28-30, 67-69 and accompanying text.

90. *Dickerson*, 113 S. Ct. at 2137.

91. *Id.*

92. *Id.* at 2137-38.

93. *Id.* at 2138.

94. *Id.* at 2138-39.

95. *Id.* at 2136-37.

has been criticized on several grounds that will be raised later in this Comment.

IV. WASHINGTON LAW BEFORE *DICKERSON*

Prior to *Dickerson*, the plain feel doctrine was soundly rejected by the Washington Supreme Court in *State v. Broadnax*.[96] The *Broadnax* decision was the last in a brief line of state court decisions holding that the authority to search for weapons could not be extended to seize other items.[97]

The first well-known case raising the issue, *State v. Allen*,[98] involved the search of a suspect's wallet. The Washington Supreme Court found that upon determining the "bulge" (wallet) was not a weapon, "the officer had no valid reason to further invade Allen's right to be free of police intrusion absent reasonable cause to arrest."[99] The court reached its decision by relying on several federal cases, including *Terry*, and concluded that "once it is ascertained that no weapon is involved, the government's limited authority to invade the individual's right to be free of police intrusion is spent."[100]

The next primary case involving frisks and contraband was *State v. Hobart*.[101] In that case, the officer discovered two spongy objects in the defendant's shirt pocket while conducting a pat-down frisk.[102] The officer squeezed the objects and concluded that they were balloons containing narcotics.[103] The court concluded that squeezing the spongy objects to determine whether they contained narcotics was a search beyond the scope permitted under the Fourth Amendment because it included a search for evidence of a crime.[104] In addition, the court found the fact that the defendant had a prior arrest for narcotics possession, while providing some reason for the officer to suspect that the defendant was in possession of drugs, did not amount

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96. 98 Wash. 2d 289, 298, 654 P.2d 96, 102 (1982).

97. *Id.* at 299, 654 P.2d at 102; *see* State v. Loewen, 97 Wash. 2d 562, 647 P.2d 489 (1982); State v. Hobart, 94 Wash. 2d 437, 617 P.2d 429 (1980); State v. Allen, 93 Wash. 2d 170, 606 P.2d 1235 (1980).

98. 93 Wash. 2d 170, 606 P.2d 1235 (1980).

99. *Id.* at 172, 606 P.2d at 1236.

100. *Id.* at 173, 606 P.2d at 1237 (citing Terry v. Ohio, 392 U.S. 1 (1968)).

101. 94 Wash. 2d 437, 617 P.2d 429 (1980).

102. *Id.* at 439-40, 617 P.2d at 430.

103. *Id.* at 440, 617 P.2d at 430. The officer did not seize the balloons from the suspect's pocket at that time but later asked the suspect about them. The suspect then reached for his pocket and a scuffle ensued. The balloons containing the narcotics were found on the ground after the scuffle. *Id.*

104. *Id.* at 446, 617 P.2d at 433-34.

to the probable cause needed to conduct a search without a warrant.[105]

Furthermore, the officer admitted that he was not searching just for weapons, but that the search included "an exploration of the possibility that the defendant might be in possession of narcotics."[106] This admission apparently persuaded the court to conclude that "[t]o approve the use of evidence of some offense unrelated to weapons would be to invite the use of weapons' searches as a pretext for unwarranted searches, and thus to severely erode the protection of the Fourth Amendment."[107]

The seizure of contraband during a protective frisk also arose in *State v. Loewen*[108] during a search of an unconscious woman who had been involved in a car accident.[109] The officers decided to conduct the frisk based on a concealed weapons permit they had discovered while trying to identify the defendant.[110] Before placing the defendant in the car to transport her to the hospital, the officer patted her down and felt a small tubular-shaped object in her pocket.[111] The officer then reached in and pulled out a cocaine sniffer.[112] The state supreme court determined that the search was not incident to a lawful arrest and that its "sole justification" would be the protection of the officers.[113] However, the actual size of the tube, coupled with one officer's admission that the search was also to discover drugs,[114] indicated that the search was not limited in scope to the discovery of weapons. Therefore, the seizure of the sniffer was unlawful.[115]

With this background, the Washington Supreme Court decided *Broadnax*. That case arose during the execution of a search warrant of Broadnax's home, in which Thompson was present.[116] Although the

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105. *Id.* at 446, 617 P.2d at 433.

106. *Id.*

107. *Id.* at 447, 617 P.2d at 434.

108. 97 Wash. 2d 562, 647 P.2d 489 (1982).

109. *Id.* at 563, 647 P.2d at 490.

110. *Id.* at 563-64, 647 P.2d at 491.

111. *Id.* at 564, 647 P.2d at 491.

112. *Id.*

113. *Id.* at 567, 647 P.2d at 492.

114. It is interesting to note that *Loewen* is another case in which the officer admitted that his search was conducted, in part, to discover drugs. *Id.* From these decisions, one could argue that police officers have learned not to admit their actual purposes for conducting searches. This possibility increases the risk that pretextual searches will occur.

115. *Id.* at 567, 647 P.2d at 492-93.

116. State v. Broadnax, 25 Wash. App. 704, 705, 612 P.2d 391, 393 (1980), *appeal after remand*, 29 Wash. App. 443, 628 P.2d 1332 (1981), *rev'd*, 98 Wash. 2d 289, 654 P.2d 96 (1982).

officers had no information linking Thompson to the crime under investigation, they ordered him to keep his hands on his head while the search was conducted.[117] About thirty seconds later, another officer entered the house and asked whether Thompson should be searched;[118] he received an affirmative response.[119] This officer later testified that he searched Thompson under the assumption that contraband had been found and that Thompson had been placed under arrest.[120] In fact, Thompson had not been placed under arrest; nor was there any indication that the officer was concerned that Thompson may have been armed with a weapon.[121] To the contrary, another officer at the scene "twice stated that he saw no reason to do a 'patdown' for weapons '[a]s long as we could see their hands.'"[122]

The court first analyzed the case under the holding in *Ybarra v. Illinois*.[123] In that case, the defendant, Ybarra, was a patron of a public tavern who was frisked during the execution of a search warrant at the tavern.[124] The United States Supreme Court suppressed the evidence seized during the patdown because the frisk "was simply not supported by a reasonable belief that [Ybarra] was armed and presently dangerous."[125] The court refused to permit the search of individual patrons by virtue of their mere presence on the premises.[126]

Based on *Ybarra*, the Washington Supreme Court found that the officer had no authority to frisk Thompson solely because he happened to be present in Broadnax's house.[127] The frisk would have been justified only if the officer had a reasonable suspicion that Thompson was armed and dangerous.[128] Furthermore, the court held, even if the frisk had been justified, it exceeded the permissible scope of a *Terry* frisk because the officer did not believe that he was retrieving a weapon when he reached into Thompson's pocket and removed a balloon containing heroin.[129]

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117. *Broadnax*, 98 Wash. 2d at 291-92, 654 P.2d at 98-99.
118. *Id.* at 292, 654 P.2d at 99.
119. *Id.*
120. *Id.*
121. *Id.* at 292-93, 654 P.2d at 99.
122. *Id.* at 293, 654 P.2d at 99 (quoting Report of Proceedings at 21).
123. 444 U.S. 85 (1979).
124. *Id.* at 88.
125. *Id.* at 92-93.
126. *Id.* at 91-92.
127. *See Broadnax*, 98 Wash. 2d at 295-96, 654 P.2d at 101.
128. *See id.* at 296, 654 P.2d at 101.
129. *Id.* at 297, 654 P.2d at 101.

The court also found that the search did not fall within the plain view exception because the immediately apparent requirement was not met:

> [T]he [immediately apparent] requirement is not met if the sense of touch is relied upon exclusively for the recognition of contraband. The tactile sense does not usually result in the *immediate* knowledge of the nature of the item. The officer in this case could not know the bulge was a balloon containing heroin. His observations lacked "the distinctive character of the smell of marijuana or the hardness of a weapon."[130]

The court went on to distinguish the sense of touch from that of sight or smell because sight and smell do not involve a physical intrusion of one's person, while evidence discovered by the tactile sense does.[131] Thus, the court concluded that the plain feel doctrine should not be adopted because it is less reliable and involves more of a physical intrusion than plain smell or plain view.[132]

Nevertheless, after the United States Supreme Court decided *Dickerson*, the Washington Supreme Court reversed its position and stated that the sense of touch *can* reveal evidence that will be admissible at trial.[133]

V. WASHINGTON LAW AFTER *DICKERSON*: *STATE V. HUDSON* AND *STATE V. TZINTZUN-JIMENEZ*

Two cases have been decided in Washington since the United States Supreme Court's decision in *Dickerson*: *State v. Hudson*[134] and *State v. Tzintzun-Jimenez*.[135] *Hudson* involved an undercover drug operation in which the defendant was the suspected supplier.[136] The police officers observed two controlled buys between a confidential police informant and Kelly Higgins.[137] During the first buy, Hudson arrived and spent a few minutes in the trailer where the transaction was taking place and then left.[138] The second purchase occurred the next

130. *Id.* at 298, 654 P.2d at 102 (quoting State v. Broadnax, 25 Wash. App. 704, 718, 612 P.2d 391, 399 (1980) (Ringold, J., dissenting), *appeal after remand*, 29 Wash. App. 443, 628 P.2d 1332 (1981), *rev'd*, 98 Wash. 2d 289, 654 P.2d 96 (1982)).

131. *Id.* at 298, 654 P.2d at 102.

132. *Id.* at 298-99, 654 P.2d at 102.

133. *See* State v. Hudson, 124 Wash. 2d 107, 109, 874 P.2d 160, 161 (1994).

134. 124 Wash. 2d 107, 874 P.2d 160 (1994).

135. 72 Wash. App. 852, 866 P.2d 667 (1994).

136. *Hudson*, 124 Wash. 2d at 109-10, 874 P.2d at 161-62.

137. *Id.* at 109, 874 P.2d at 161-62.

138. *Id.* at 109, 874 P.2d at 161.

day.[139] Before paying Higgins, the informant insisted that she have the drugs in hand. In order to comply, Higgins left the trailer and returned a few moments later.[140] After the sale was completed, the officer placed Higgins under arrest.[141]

The officers, believing that the source of the drugs would come looking for the money, waited on the steps of the trailer until Hudson arrived.[142] Because Hudson refused to remove his hands from his pockets when the officers ordered and because they feared he might be armed, the officers proceeded to conduct a pat-down search.[143] During the search, one officer felt what he described as "a quite substantial bulge, hard something" in Hudson's jacket pocket.[144] Not sure whether the hard object was or was not a weapon, the officer reached into the pocket.[145] The officer then instantly recognized the hard object as a pager.[146] He also felt paperwork and a baggie containing a "ragged edge chunk," which the officer claimed he "knew immediately . . . was likely cocaine."[147] The officer removed the baggie, placed the defendant under arrest, and searched the rest of Hudson's pockets, which revealed additional baggies of cocaine and a large quantity of money.[148]

Relying on the state supreme court's decision in *Broadnax*, both the trial court and the Division I Court of Appeals ruled that the cocaine was not admissible.[149] The court of appeals found that Washington "ha[d] not recognized a plain touch exception to the search warrant requirement"[150] and that even if such an exception were recognized, the "suppression was proper because substantial evidence supported a finding that the detective did not have immediate knowledge that the substance was cocaine."[151] Thus, according to the court of appeals, the trial court's suppression of the evidence was proper.[152]

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139. *Id.* at 109, 874 P.2d at 161-62.
140. *Id.* at 109, 874 P.2d at 162.
141. *Id.*
142. *Id.* at 109-10, 874 P.2d at 162.
143. *Id.*
144. *Id.* at 110, 874 P.2d at 162.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 111, 874 P.2d at 162-63.
150. *Id.* at 111, 874 P.2d at 163 (quoting State v. Hudson, 69 Wash. App. 270, 275, 848 P.2d 216, 220 (1993), *rev'd*, 124 Wash. 2d 107, 874 P.2d 160 (1994)).
151. *Id.*
152. *Id.* at 111, 874 P.2d at 163.

The Washington Supreme Court granted review and held that "the trial court and the Court of Appeals incorrectly held that *Broadnax* precluded such a plain touch exception."[153] The court went on to repeat much of the holding in *Broadnax* while casting a different light on the decision as "merely acknowledg[ing] that touch alone cannot 'usually' result in immediate recognition of contraband."[154] Consequently, while the court continues to assert that "the sense of touch is inherently less immediate and less accurate than other senses,"[155] the court's conclusion in *Hudson* is the exact opposite of its holding in *Broadnax*. In *Hudson*, the court followed the United States Supreme Court's lead and decided that touch can satisfy the requirements of plain view "[i]f recognition of the contraband is as immediate and as accurate as recognition of a weapon."[156]

Analyzing the facts in light of this holding, the Washington Supreme Court raised the question of whether the officer immediately recognized the contraband.[157] The court indicated that in order to satisfy the immediately apparent prong of the plain feel doctrine, the officer's suspicion must rise to the level of probable cause.[158] The court stated that although the facts may have supported an inference that the detective immediately recognized the contents of the baggie, the officer's detailed testimony indicated that he had manipulated the baggie and exceeded the scope of a *Terry* frisk.[159]

The supreme court also found that the trial court failed to make a clear finding of probable cause.[160] The officer's testimony that the substance was "likely" to be or was "consistent with" cocaine was not "sufficiently certain to constitute an immediate knowledge that it [was] cocaine."[161] Therefore, the court remanded the case to the trial court to determine whether the "nature of the particular object . . . is such that there can be a credible claim of recognition by touch"[162] or whether the object could have been consistent with "hard rock candy, a food item, a small part to a car, or some other such item."[163]

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153. *Id.* at 114, 874 P.2d at 164.
154. *Id.* at 115, 874 P.2d at 165.
155. *Id.*
156. *Id.*
157. *See id.* at 117, 874 P.2d at 165-66.
158. *See id.* at 118, 874 P.2d at 166 (citing Arizona v. Hicks, 480 U.S. 321, 326 (1987)).
159. *Id.* at 118-19, 874 P.2d at 166-67.
160. *Id.* at 119, 874 P.2d at 167.
161. *Id.*
162. *Id.* at 120, 874 P.2d at 167 (citing United States v. Pace, 709 F. Supp. 948 (C.D. Cal. 1989), *aff'd*, 893 F.2d 1103 (9th Cir. 1990)).
163. *Id.* at 119-120, 874 P.2d at 167.

Because the facts of *Hudson* indicate that the officer manipulated the object before recognizing it as contraband,[164] it appears that the end result in *Hudson* may be identical to *Dickerson*. That is, the trial court, on remand, will probably conclude that the nature of the contraband was not immediately apparent to the officer, thereby making the seizure unlawful. In such circumstances, the evidence must be suppressed.

Although the *Hudson* court briefly addressed Hudson's claim that he was entitled to greater protections under the Washington Constitution, it found that Hudson's failure to raise the issue until his supplemental brief precluded its consideration of the issue.[165] Thus, the court's decision raises, but does not answer, the question of whether it would reach a different conclusion if persuaded to consider the plain feel doctrine under article I, section 7 of the Washington Constitution.

The other decision recognizing the plain feel doctrine in Washington, *State v. Tzintzun-Jimenez*,[166] emerged from the Division II Court of Appeals. Although this decision preceded the supreme court's ruling in *Hudson*, the court of appeals had a clear indication that the supreme court was considering adopting the plain feel doctrine because the supreme court had instructed the parties arguing *Hudson* to address the United States Supreme Court's ruling in *Dickerson*.[167]

The facts of *Tzintzun-Jimenez* are somewhat different from the facts in *Hudson* because the contraband came to light during a scuffle that began after the officer commenced a pat-down frisk.[168] The defendant pulled away from the detective during the frisk, and the officer, in an attempt to gain control, hooked his fingers into the defendant's pocket where he felt a "slippery material."[169] When the officer removed his fingers from the pocket, he pulled out the slippery material, which turned out to be a baggie of cocaine.[170] Once again, the case turned on the immediate recognition prong of the plain feel test.[171]

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164. *Id.* at 118-19, 874 P.2d at 166.

165. *Id.* at 120, 874 P.2d at 167.

166. 72 Wash. App. 852, 866 P.2d 667 (1994).

167. Compare *State v. Tzintzun-Jimenez* decided February 4, 1994 with *State v. Hudson* petition for review granted October 7, 1993. 122 Wash. 2d 1009, 863 P.2d 64 (1993).

168. *Tzintzun-Jimenez*, 72 Wash. App. at 853, 866 P.2d at 668.

169. *Id.*

170. *Id.*

171. *Id.* at 857, 866 P.2d at 670.

The court of appeals found that the evidence should have been suppressed because there was no finding that the officer knew the material was "likely to be cocaine."[172] In light of the supreme court's finding in *Hudson*, however, it now appears that even knowing the object was likely to be cocaine would not have been sufficient. In *Hudson*, the court found that the officer's testimony that the substance in question was likely to be cocaine was "not the same or sufficiently certain to constitute an immediate knowledge that it [was] cocaine."[173] Moreover, the court of appeals rested its decision on the Fourth Amendment and federal precedent, once again failing to consider whether the discovery of contraband under the plain feel exception might involve an unreasonable intrusion into Washington citizens' privacy rights under the state constitution.

VI. THE HISTORY OF SEARCH AND SEIZURE UNDER THE WASHINGTON CONSTITUTION: ARTICLE I, SECTION 7

The privacy language of the Washington Constitution differs substantially from the language of the Fourth Amendment,[174] and has prompted Washington courts to place a greater emphasis on protecting individual rights than on curbing governmental action.[175] Consequently, Washington courts have, at times, provided greater protection of individual privacy rights under article I, section 7 than federal courts have provided under the Fourth Amendment.[176]

Article I, section 7 provides, "No person shall be disturbed in his *private affairs*, or his home invaded, without authority of law."[177] Although this language differs significantly from the Fourth Amendment and does not mention any prohibition against unreasonable searches and seizures, article I, section 7 is considered to be the state corollary to the Fourth Amendment.[178] The difference in wording

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172. *Id.* at 858, 866 P.2d at 670.

173. *See Hudson*, 124 Wash. 2d at 119, 874 P.2d at 167.

174. Compare WASH. CONST. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.") with U.S. CONST. amend. IV (guaranteeing "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures").

175. State v. White, 97 Wash. 2d 92, 110, 640 P.2d 1061, 1071 (1982); *see also* Utter, *supra* note 27, at 591.

176. *See* Kurt Walters, Comment, *The Stop and Frisk Doctrine in Washington and the Rise and Fall of Independent State Constitutional Analysis*, 64 WASH. L. REV. 179, 179 (1989) (citing State v. Williams, 102 Wash. 2d 733, 689 P.2d 1065 (1984)).

177. WASH. CONST. art. I, § 7 (emphasis added).

178. *See* State v. Myrick, 102 Wash. 2d 506, 510-11, 688 P.2d 151, 154 (1984) (stating that "Const. art. 1, § 7 analysis encompasses those legitimate privacy expectations protected by the Fourth Amendment"). One basis for this conclusion may be that the originally proposed

of the two provisions, however, has prompted Washington courts to focus on different policy justifications when applying the exclusionary rule to evidence seized during searches. While the United States Supreme Court primarily emphasizes the deterrent effect of the exclusionary rule in its decisions,[179] the Washington Supreme Court emphasizes the protection of individual rights.[180]

In defining the difference between article I, section 7 and the Fourth Amendment, the Washington Supreme Court stated that, unlike the Fourth Amendment, article I, section 7 clearly recognizes an individual's right to privacy with no express limitations.[181] Thus, while application of the exclusionary rule under the Fourth Amendment turns on whether police misconduct will actually be deterred,[182] application of the rule under article I, section 7 may be automatic[183]—it may not be influenced by the fact that in certain cases exclusion of the evidence has no deterrent effect on unlawful police conduct.

For many years, the Washington Supreme Court has relied on this reasoning to extend greater privacy protections to Washington citizens. For instance, in *United States v. Robinson*,[184] the United States Supreme Court held that a full body search incident to a lawful arrest is reasonable, *per se*, under the Fourth Amendment.[185] "Washington . . . rejected this approach under [its] own constitution[] and require[s] full body searches to be reasonable and no broader than necessary under the circumstances."[186] Similarly, while the United States Supreme Court has held that a defendant has no standing to object to the search of premises owned by another person,[187] Washington allows a defendant charged with a possessory offense automatic standing to challenge the search without regard to who owns the

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language of section 7 was identical to the Fourth Amendment. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 497 (Beverly P. Rosenow ed., 1962).

179. *See* United States v. Leon, 468 U.S. 897, 916 (1984).

180. Utter, *supra* note 27, at 591 (citing State v. White, 97 Wash. 2d 92, 110-12, 640 P.2d 1061, 1071-72 (1982)).

181. *White*, 97 Wash. 2d at 110, 640 P.2d at 1070-71.

182. *Terry*, 392 U.S. at 12.

183. Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 501-02 (1984).

184. 414 U.S. 218 (1973).

185. *Id.* at 235.

186. Utter, *supra* note 183, at 501 (citing State v. Hehman, 14 Wash. App. 770, 773, 544 P.2d 1257, 1260 (1976), *rev'd on other grounds*, 90 Wash. 2d 45, 578 P.2d 527 (1978)).

187. *See* United States v. Salvucci, 448 U.S. 83, 86-95 (1980).

premises searched.[188] A final example is the United States Supreme Court's decision in *Michigan v. DeFillippo*,[189] in which the Court held that the Fourth Amendment did not require the exclusion of evidence obtained during an arrest that was made in reliance on a subsequently invalided statute.[190] In contrast, the Washington Supreme Court ruled, in *State v. White*,[191] that evidence obtained under a statute, which is later determined to be unconstitutional, must be excluded.[192]

As these cases illustrate, the Washington Supreme Court distinguished article I, section 7 from the Fourth Amendment in several cases during the late 1970s and early 1980s. However, in a 1986 case, *State v. Gunwall*,[193] the court announced that in future cases, a determination of whether the Washington Constitution should extend broader rights than the federal constitution will be made only after consideration of the following six nonexclusive criteria: (1) the textual language; (2) differences in texts; (3) constitutional history; (4) pre-existing state law; (5) structural differences; and (6) matters of particular state or local concern.[194] These criteria are intended to provide guidance to practitioners by identifying what the court considers relevant in determining whether the state constitution should be interpreted to provide greater protection than the federal constitution.[195]

In *Gunwall*, the court applied these criteria in the context of a search conducted through wiretapping and concluded that the Washington Constitution provides greater privacy protections than does the Fourth Amendment. With regard to the first and second criteria, the court found that, unlike the text of the Fourth Amendment, the text of article I, section 7 explicitly focuses on a citizen's "private affairs."[196] In addition, the state constitutional history (the third criterion) shows that the framers specifically rejected a proposal to adopt language identical to that of the Fourth Amendment.[197] Under the fourth criterion, the court determined that Washington has

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188. Utter, *supra* note 183, at 502 (citing State v. Simpson, 95 Wash. 2d 170, 179, 622 P.2d 1199, 1205 (1980)).

189. 443 U.S. 31 (1979).

190. *Id.* at 35-38.

191. 97 Wash. 2d 92, 640 P.2d 1061 (1982).

192. *Id.* at 102-04, 640 P.2d at 1067-68.

193. 106 Wash. 2d 54, 720 P.2d 808 (1986).

194. *See id.* at 58, 720 P.2d at 811.

195. *See id.* at 62, 720 P.2d at 813.

196. *Id.* at 65, 720 P.2d at 814.

197. *Id.* at 65-66, 720 P.2d at 814.

"a long history of extending strong protections to telephonic . . . communications."[198] The court also found, in analyzing the fifth criterion, that while the federal "[c]onstitution is a *grant* of limited power . . . [the] state constitution imposes *limitations* on the otherwise plenary power of the state to do anything not expressly forbidden by the state constitution or federal law."[199] The court did not specifically analyze the sixth criterion finding that the issues involved overlapped those outlined in the discussion of the fourth criterion.[200]

Two years after *Gunwall*, the Washington Supreme Court held that if a party fails to discuss the *Gunwall* criteria when arguing that the state constitution provides greater protection than the federal constitution, the court will refuse to consider the matter on the ground that it was insufficiently argued.[201] Two years later, the court held that in challenging a search or seizure under article I, section 7, a party need only address the fourth and sixth criteria because the other criteria have already been established in the context of searches and seizures.[202] Therefore, because the plain feel doctrine is a matter of search and seizure, only the fourth and sixth criteria require detailed examination.

The fourth *Gunwall* factor examines pre-existing state law. Prior to its decision in *State v. Hudson*,[203] the Washington Supreme Court held that evidence seized under the plain feel exception should be suppressed.[204] But because those cases preceded the *Gunwall* decision, each was decided by analyzing the protections provided by the Fourth Amendment. It was not until the United States Supreme Court issued its decision in *Dickerson* that an independent evaluation based on the state constitution became necessary. It is clear, however, that pre-existing state law under article I, section 7 has provided greater privacy protections to the citizens of Washington.[205]

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198. *Id.* at 66, 720 P.2d at 815.

199. *Id.*

200. *Id.* at 67, 720 P.2d at 815.

201. *See* State v. Wethered, 110 Wash. 2d 466, 475, 755 P.2d 797, 802 (1988); Utter, *supra* note 27, at 422.

202. *See* State v. Boland, 115 Wash. 2d 571, 576, 800 P.2d 1112, 1114 (1990).

203. 124 Wash. 2d 107, 874 P.2d 160 (1994).

204. *See supra* notes 98-132 and accompanying text.

205. *See Myrick*, 102 Wash. 2d at 510, 688 P.2d at 153 (explaining that a recent series of cases recognized that the unique language of article I, section 7 provides greater protections to Washington citizens); State v. Jackson, 102 Wash. 2d 432, 443, 688 P.2d 136, 143 (1984); *White*, 97 Wash. 2d at 110, 640 P.2d at 1071; *see also supra* notes 174-92 and accompaning text.

For example, in *Washington v. Chrisman*,[206] the United States Supreme Court found that, subsequent to an arrest, it was not unreasonable under the Fourth Amendment for an officer to enter the defendant's dorm room because the officer needed to monitor the movements of the arrested person.[207] On remand, the Washington Supreme Court concluded that the officer had no prior justification for entering the room, and that the state had failed to meet its burden of proving a compelling need under the state constitution.[208] Thus, the plain view doctrine could not be used to justify the seizure of evidence that was seen only after the police officer entered the room.[209]

The sixth *Gunwall* factor examines whether the matter is of particular local or state concern. Application of the plain feel doctrine is a matter of state concern because Washington's exclusionary rule is particularly intended to protect individual privacy interests.[210] While the Fourth Amendment establishes a baseline for determining when searches and seizures are unreasonable, article I, section 7 affirmatively protects the private affairs of Washington citizens.[211] Thus, the state constitution has distinguished privacy interests as a matter of state concern, separate from the protections provided by the Fourth Amendment. Furthermore, there is no overriding need for national uniformity as long as all states provide for the minimum protections guaranteed by the Fourth Amendment. The Washington Supreme Court has demonstrated its agreement with this proposition by providing greater protection in other search and seizure cases.[212]

The stage is now set for the Washington Supreme Court to find that article I, section 7 provides greater privacy protection for the citizens of Washington by prohibiting the search or seizure of contraband during a *Terry* frisk. In the words of Justice Utter, "An independent interpretation and application of the Washington Constitution is not just legitimate, historically mandated, and logically essential; it is . . . a 'duty' that all state courts owe to the people of Washington."[213]

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206. 455 U.S. 1 (1982).

207. *Id.* at 7.

208. State v. Chrisman, 100 Wash. 2d 814, 822, 676 P.2d 419, 424 (1984).

209. *Id.*

210. *Boland*, 115 Wash. 2d at 577, 800 P.2d at 1115; State v. Bonds, 98 Wash. 2d 1, 12, 653 P.2d 1024, 1031 (1982), *cert. denied*, 464 U.S. 831 (1983); *White*, 97 Wash. 2d at 108-10, 640 P.2d at 1070-71; *see also supra* notes 174-83 and accompanying text.

211. WASH. CONST. art. I, § 7.

212. *See supra* notes 184-92 and accompanying text.

213. Utter, *supra* note 183, at 499.

VII. ARGUMENT

A. The Plain Feel Doctrine Should Not Be Recognized In Washington Because the Washington Constitution Confers Greater Civil Liberty Protections than the Federal Constitution

The Washington Supreme Court has "often independently evaluated [the] state constitution and [has] concluded that it should be applied to confer greater civil liberties than its federal counterpart."[214] The court has also recognized, however, that cooperation in the form of some "consistency and uniformity between state and federal governments in certain areas of judicial administration is desirable."[215] Thus, the crux of the conflict is determining when the protection of individual rights outweighs the desire for uniformity, an issue that depends on the fundamental principles of the state constitution.

"A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."[216] The fundamental purpose of our state's constitution and government is "to protect and maintain individual rights."[217] "[A]rticle 1, section 7 of the Washington Constitution provides express constitutional protection for certain privacy rights of Washington citizens."[218] Thus, the State, in order to protect individual rights, must carefully consider whether the right to frisk and discover contraband is so essential to the State's interest that the personal privacy of our citizens may be violated in that way. Because the plain feel doctrine is used strictly to discover evidence, and because it is highly unlikely that a great number of convictions will be achieved through its application, the balance should fall in favor of protecting the privacy interests of Washington citizens. Moreover, because state courts are not as constrained in exercising their power as are the federal courts, they are able to experiment with broader social policies. Unlike the United States Supreme Court, which because its decisions have broad application must choose the "lowest common denominator of individual rights," state courts are "left free to try a broad range of

214. Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 238, 635 P.2d 108, 113 (1981).

215. *Gunwall*, 106 Wash. 2d at 60, 720 P.2d at 812 (citing State v. Hunt, 450 A.2d 952, 964 (N.J. 1982) (Handler, J., concurring)).

216. WASH. CONST. art. I, § 32.

217. WASH. CONST. art. I, § 1.

218. Utter, *supra* note 183, at 495.

social, political, and legal experiments."[219] Thus, state courts are free to provide greater privacy protection to their citizens by rejecting application of the plain feel doctrine.

B. The Plain Feel Doctrine Should Not be Recognized In Washington Due to the Number of Problems Such Application Creates

Despite its recognition of the plain feel doctrine in theory, Washington courts have never applied it to admit evidence discovered by the sense of touch during a *Terry* frisk.[220] Moreover, because the immediately apparent requirement has not been met, evidence of contraband has not been admitted in any of the cases that recognized the plain feel doctrine.[221] Thus, this may be the perfect time for the Washington Supreme Court to consider whether Washington citizens who are subject to a *Terry* frisk are entitled to greater protection under article I, section 7. Because of the difficulties with the doctrine—its impossible standard of certainty, its potential for abuse, and the fact that its application is not necessary for effective law enforcement—Washington courts should reject its application to the discovery of contraband during a pat-down frisk.

The standard of certainty required by the plain feel doctrine will almost never be met; thus, few officers will be able to use the doctrine to justify a search or seizure, and few courts will admit the evidence once seized. The high standard of certainty required by the doctrine is found in its immediately apparent requirement. Although this requirement has often been equated to a probable cause standard,[222] it appears that officers must, in fact, have something more than

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219. *Id.* at 496.

220. This statement reflects only published Washington opinions. *See, e.g.*, State v. Hudson, 124 Wash. 2d 107, 874 P.2d 160 (1994); State v. Loewen, 97 Wash. 2d 562, 647 P.2d 489 (1982); State v. Broadnax, 98 Wash. 2d 289, 654 P.2d 96 (1982).

221. In *Dickerson*, the United States Supreme Court held that the officer's own testimony "belie[d] any notion" of immediate recognition because he "determined that the lump was contraband only after 'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket.'" 113 S. Ct. at 2138 (quoting State v. Dickerson, 481 N.W.2d 840, 844 (Minn. 1992)). Similarly, in *Hudson*, the Washington Supreme Court remanded the case for a factual determination of whether the recognition of the contraband was immediate because the particularity with which the officer described the substance indicated the possibility of excessive manipulation. 124 Wash. 2d at 119-120, 874 P.2d at 167. Finally, in *Tzintzun-Jimenez*, the court of appeals suppressed the evidence because there was no finding that the officer identified the material as cocaine before removing the item from the defendant's pocket. 72 Wash. App. at 858, 866 P.2d at 167.

222. *See* George M. Dery III, *The Uncertain Reach of the Plain Touch Doctrine: An Examination of* Minnesota v. Dickerson *and Its Impact on Current Fourth Amendment Law and Daily Police Practice*, 21 AM. J. CRIM. L. 385, 398 (1994).

probable cause—they must have some higher level of immediate certainty.[223] For instance, the *Hudson* court stated that the officer's belief must amount to more than just the likelihood that the item is contraband; it must be a certainty.[224]

As illustrated by the results in *Hudson* and *Tzintzun-Jimenez*, evidence seized under the plain feel doctrine will frequently be found inadmissible because officers will rarely be certain of the illegal nature of an object without first manipulating it. Although proponents of the plain feel doctrine argue that the reliability of the sense of touch has been proved by its use to discover weapons,[225] they ignore the fact that "guns and knives are generally of a large size, a heavy feel and a particular shape that immediately distinguish them from other articles."[226] The same is not necessarily true of contraband. Because drugs can be, and often are, carried in small quantities of a gram or less,[227] what could be a small amount of cocaine could also be many other objects that are not crime-related and are not seizable, such as "hard rock candy, a food item, or a small part to a car."[228] Therefore, the immediately apparent prong will rarely be met by the initial pat of an item through the suspect's clothing.

Furthermore, the sense of touch is much less reliable than the sense of sight: "A tactile encounter generally will provide less information than a visual encounter, primarily because the sighting will usually be of the incriminating object itself, while the tactile contact will usually be with something that surrounds the object in question."[229] This diminished reliability along with other variables make the plain feel exception to the warrant requirement highly questionable. For example, because the item felt will be covered by clothing, "a person's possessory interests and . . . reasonable expectation of privacy . . . will be affected by clothing thickness."[230] Lay persons are not

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223. *See id.* at 405-06.

224. 124 Wash. 2d at 119, 874 P.2d at 167.

225. *See* Linda F. Beuthe, Note, Minnesota v. Dickerson: *Police Can Seize Nonthreatening Contraband Without Warrant if Found During Frisk; Extension of Plain-View Doctrine*, 20 J. CONTEMP. L. 245, 249 (1994); *see also Dickerson*, 113 S. Ct. at 2137.

226. Dery, *supra* note 222, at 395-96.

227. In *Dickerson*, for example, the defendant had only one-fifth of one gram of crack cocaine in his pocket. 113 S. Ct. at 2133-34.

228. *Hudson*, 124 Wash. 2d at 119, 874 P.2d at 167.

229. David L. Haselkorn, Comment, *The Case Against a Plain Feel Exception to the Warrant Requirement*, 54 U. CHI. L. REV. 683, 695 (1987).

230. Dery, *supra* note 222, at 395.

likely to consider how their choice of apparel may affect their legal rights.[231]

In light of this strict constraint on the perception of officers, it is questionable how useful the plain feel doctrine will be in the fight against drug crimes. Many prosecutors will probably instruct officers not to seize objects in reliance on the plain feel doctrine because it will be narrowly construed by the courts and rarely, if ever, applied. Furthermore, the strict standards of the exception will result in extended fact-specific hearings at great expense to the public. Consequently, the few convictions obtained as a result of this exception will not justify the vast amount of money that will be spent litigating the issue.

Not only does the plain feel doctrine require a standard of certainty that can rarely be met, it permits searches that are highly intrusive and invites its abuse by law enforcement personnel. Proponents of the doctrine argue that the intrusiveness of a search for contraband is justified on two grounds. First, they argue that the seizure of contraband is no more intrusive than the seizure of a weapon in similar circumstances.[232] However, the intrusiveness involved in seizing a weapon is justified by the need to protect the safety of officers and other nearby. The seizure of contraband is not justified by similar safety concerns.

Second, proponents argue that the seizure of contraband is justified by the desire to detect evidence of a crime and prevent its destruction.[233] However, the United States Supreme Court "has recognized that concern over destruction of evidence is a very weak ground on which to base an exception to the warrant requirement. The loss of some evidence is accepted as the cost of maintaining the sanctity of the [F]ourth [A]mendment."[234] The same can be said of article I, section 7, particularly because Washington's application of the exclusionary rule focuses on the protection of individual rights.[235]

Moreover, the court must recognize the potential for abuse that the plain feel doctrine poses to each individual's privacy rights. The Washington Constitution purports to protect the privacy interests of our citizens to a greater degree, in many cases, than the federal constitution.[236] Privacy expectations are measured by a "twofold

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231. *See id.*
232. *Dickerson*, 113 S. Ct. at 2138.
233. *See* Haselkorn, *supra* note 229, at 696-97.
234. *Id.* at 697 (citations omitted).
235. *See supra* note 176 and accompanying text.
236. *See supra* notes 174-83 and accompanying text.

requirement": First, the person must "have exhibited an actual (subjective) expectation of privacy." Second, the expectation must "be one that society is prepared to recognize as 'reasonable.'"[237] The reasonable expectation of privacy can also be measured by "whether the incriminating evidence was seen or heard from a place accessible to people who are not unusually inquisitive."[238]

Application of these tests to the discovery of contraband during a pat-down frisk reveals that such contraband is protected by the state constitution. First, a person who places items inside or underneath his or her clothing unquestionably has an actual, subjective expectation of privacy in those items—the citizen intends to protect them from public view. Second, most citizens would agree that it is reasonable for that person to expect those items to remain private. Finally, only unusually inquisitive individuals would gain access to those items. Thus, they are subjects of a citizen's privacy interests and are protected by the state constitution.

The proponents of the plain feel doctrine argue that contact with items inside the clothing only occurs when the officer has sufficient cause to believe that the suspect is armed and dangerous.[239] Thus, they argue, there is no greater invasion of privacy than could lawfully occur. However, the possibility remains that officers will be encouraged to search for weapons in a greater number of cases, particularly when patrolling in high drug-crime areas, whether or not they believe the suspect is armed.[240] Moreover, once officers have initiated the search, they may "inappropriately reach for plain touch by . . . rush[ing] to a conclusion of probable cause before the nebulous sense of touch merits it, . . . or [by being] tempted to prolong their patdowns in order to increase their ability to form probable cause."[241] It is not farfetched to conclude that officers will attempt to rationalize prolonged searches by arguing that advanced technology is allowing "ever-more-dangerous weapons [to be] built in ever-decreasing sizes."[242]

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237. Utter, *supra* note 27, at 424 (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

238. *Id.* (citing United States v. Taborda, 635 F.2d 131 (2d Cir. 1980)).

239. *See Dickerson*, 113 S. Ct. at 2137.

240. Similar concerns have been voiced regarding pretextual arrests in order to conduct a search incident to arrest. LAFAVE & ISRAEL, *supra* note 18, § 3.5(b).

241. Dery, *supra* note 222, at 402.

242. *Id.* at 403.

In addition, most officers manipulate the objects before concluding that they are contraband.[243] Because such evidence has been excluded by Washington courts, officers know they should not admit they were searching for anything but weapons, nor that they did more than pat the object before determining it was contraband, regardless of the facts of the case. This state of affairs invites abuse because only the officer will know for sure whether he examined the object after establishing probable cause in his mind or whether he had probable cause because he or she digitally examined the object.[244]

The plain feel doctrine, in addition to being highly intensive and subject to abuse, is also completely unnecessary. If officers restrict their frisk to a limited pat-down and abide by the probable cause standard, they will be unable to seize contraband because of their lack of certainty. Thus, there is no need for the courts to recognize such an exception to the warrant requirement. Furthermore, the officer's perception of the object through the suspect's clothing may provide sufficient cause for the officer to place the suspect under arrest. Once arrested, the suspect may be searched under the search-incident-to-arrest exception, which would allow removal of all items from the arrestee's clothing.[245]

Despite these difficulties with the plain feel doctrine—its impossible standard of certainty, its potential for abuse, and the fact that its application is not necessary for effective law enforcement—proponents of the doctrine assert various arguments in its favor. For example, supporters of the doctrine argue that officers should not be required to turn their backs on patent unlawfulness.[246] However, because the item in question is typically in the suspect's clothing, not in plain sight, it can rarely be characterized as patent unlawfulness. For example, one would not expect an officer to ignore a marijuana joint sitting in plain view on a car seat; yet if the same object were in a coat pocket rather than on a car seat, the officer would rarely be able to identify it with certainty. Thus, the officer is not ignoring evidence of a crime because he is not certain it is such. The court of appeals took this view in *Tzintzun-Jimenez* when it noted that by not seizing the slippery material in the defendant's pocket, the officer was not required to ignore his experience because there was no indication that

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243. *See supra* note 164 and accompanying text.

244. *See* Baker, Note, *"I Examined It with My Fingers": Immediate Recognition Is Key in "Plain Feel" Cases According to the United States Supreme Court*, ARMY LAW., Aug. 1993, at 35, 37.

245. United States v. Robinson, 414 U.S. 218, 235 (1973).

246. Haselkorn, *supra* note 229, at 694.

the officer possessed sufficient information to identify the item as cocaine.[247]

Supporters of the plain feel doctrine also argue that the seizure of contraband under the doctrine is not harmful to most defendants because the inevitable discovery doctrine allows discovery of the same evidence once the suspect is arrested.[248] Under this rule, evidence that is discovered as a result of improper police conduct is admissible if the prosecution can show that "the information . . . inevitably would have been discovered by lawful means."[249] However, there will undoubtedly be cases where a citizen's rights are violated by a warrantless search, but no evidence of a crime is found. In these situations the inevitable discovery rule has no application.

VIII. CONCLUSION

Although the Washington Supreme Court adopted the plain feel doctrine in reliance on federal precedent and the Fourth Amendment, the doctrine has yet to be applied to allow the admission of evidence of contraband that was seized during a protective frisk for weapons. In each case raising the issue of plain feel, the officers exceeded the scope of the *Terry* frisk and the evidence was suppressed. Arguably then, the language recognizing plain feel is simply dicta upon which future courts can choose to rely or not, and which the Washington Supreme Court can certainly ignore by holding otherwise in future cases.

Moreover, the constitutionality of the exception has not yet been argued under article I, section 7, which protects the private affairs of Washington citizens. Now is the time for defense attorneys to argue the requirements of the state constitution and for the courts to reconsider their position in light of the inherent problems in applying such a doctrine to items like contraband, which come in many different shapes and sizes, most of which are not unique to drugs.

The doctrine, as applied, has been so narrowly construed that one wonders if officers can actually satisfy the immediately apparent requirement or if they should even be encouraged to try. Washington

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247. *See* 72 Wash. App. at 858, 866 P.2d at 670.

248. The inevitable discovery doctrine is defined in Nix v. Williams, 467 U.S. 431, 444 (1984), and State v. White, 76 Wash. App. 801, 808, 888 P.2d 169, 173 (1995), *review granted*, 127 Wash. 2d 1017, 904 P.2d 300 (1995). Until the *White* decision, Washington had specifically declined to adopt this doctrine. *See* Utter, *supra* note 27, at 605-06. One might argue that this recent development is another area where the Washington Supreme Court should continue to distinguish state constitutional protections from those of the federal constitution.

249. *Nix*, 467 U.S. at 444.

has a long history of providing greater protection for its citizens while balancing the needs of law enforcement. This is one instance in which the federal precedents provide an unnecessary and unwieldy tool that should not be adopted in Washington.