

SEARCHES WOVEN FROM *TERRY* CLOTH: HOW THE PLAIN FEEL DOCTRINE PLUS *TERRY* EQUALS PRETEXTUAL SEARCH

*[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.*¹

Pacing back and forth in front of the Seven-Eleven at 2:00 a.m., the disheveled man seems nervous and excited, or perhaps confused and disoriented. Police officers observe him repeatedly peering into the window of the convenience store, while fumbling with an object in his pants pocket. After studying this continued activity for approximately fifteen minutes, the officers decide to investigate. Suspicious that the man is "casing" the Seven-Eleven in contemplation of robbing it, and fearing that the man is armed and dangerous, the officers stop him and perform a protective search for weapons. While patting down the man's legs, an officer feels a number of small lumps in one of the suspect's pants pockets, which he immediately believes to be crack cocaine wrapped in cellophane. Based on his twenty years of law enforcement experience, the confused state of mind and suspicious nature of the suspect, and the officer's training in the recognition of crack cocaine, the officer reaches into the man's pocket and seizes its contents. Much to the zealous officer's chagrin, the pocket contains a number of pills in a plastic bag, along with a related prescription for treatment of paranoid schizophrenia, and a grocery list. The suspect is released to do his grocery shopping.

In the above hypothetical, although the seizure of the grocery list and pills—and the resulting discovery that the man apparently suffered from paranoid schizophrenia—may seem to be a serious invasion of privacy, it would be perfectly constitutional according to the United States Supreme Court's 1993 decision in *Minnesota v. Dickerson*.² In *Dickerson*, the Supreme Court recognized, for the first time, what is now known as the "plain feel" exception to the Fourth Amendment warrant requirement.³ The Court ruled unanimously that when a law

¹ *Arizona v. Hicks*, 480 U.S. 321, 329 (1987).

² See 113 S. Ct. 2130, 2137 (1993).

³ See *id.* at 2134.

enforcement officer conducting a lawful protective patdown search detects, by feel, something other than a weapon, he or she may seize it without a warrant if the officer's sense of touch makes it immediately apparent that the felt object is contraband.⁴

The Court stipulated, however, that the officer may only seize contraband if he or she discovered it while remaining within the bounds of a lawful patdown search.⁵ Thus, in a purely formal, logical and legal sense, the Court's decision arguably is sound. In a functional, practical sense, however, the decision has the potential to result in police abuse and misconduct. Faced with a strong desire to make an arrest, a police officer may conduct a search for contraband under the pretext of a weapons frisk, or may extend the scope of a patdown search if the officer feels something possibly resembling contraband. Confident that a trier of fact would more likely believe a police officer than a criminal defendant, the officer could claim that the illegal nature of the felt object became immediately apparent on touch. Thus, *Dickerson* provides an incentive for police officers to conduct illegal searches.

This Note examines the *Dickerson* decision and its legal and practical implications on the criminal justice process. Section I examines the backdrop of the plain feel doctrine, including stop-and-frisks, the plain view doctrine, and plain feel cases prior to *Dickerson*.⁶ Section II examines the details of *Dickerson*.⁷ Section III reviews plain feel decisions subsequent to *Dickerson*.⁸ Section IV examines the flaws in the Court's reasoning, and suggests that, although the decision may be logically consistent, its practical effects are frightening.⁹ Finally, Section V discusses alternatives and modifications to the plain feel doctrine that balance society's interest in fighting crime against the individual's interest in being free from unlawful searches.¹⁰

I. THE FOURTH AMENDMENT FRAMEWORK

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

⁴ See *id.* at 2136, 2139.

⁵ See *id.* at 2139. A patdown search is lawful if the officer performs the search in accordance with the United States Supreme Court's decision in *Terry v. Ohio*, 392 U.S. 1, 27 (1968). See *infra* notes 50-66 and accompanying text for a more detailed discussion of the Supreme Court's holding in *Terry*.

⁶ See *infra* notes 11-174 and accompanying text.

⁷ See *infra* notes 175-232 and accompanying text.

⁸ See *infra* notes 233-61 and accompanying text.

⁹ See *infra* notes 262-83 and accompanying text.

¹⁰ See *infra* notes 284-301 and accompanying text.

unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause"¹¹ This amendment is one of the clearest examples of balancing the age-old conflict between social control and individual liberty.¹² On the one hand, law enforcement wants free rein to maintain order and enforce the law.¹³ On the other hand, there is a deep-rooted human desire to retain autonomy, maintain privacy, and enforce the security of one's person and residence.¹⁴

Two threshold requirements must be met before the Fourth Amendment's protections will apply in a particular situation.¹⁵ First, the Fourth Amendment applies only to action by the government, not to private conduct.¹⁶ Second, the conduct in question must constitute a search.¹⁷ The Supreme Court, however, has had difficulty defining what constitutes a search.¹⁸ In early Fourth Amendment analysis, the Court closely tied its definition of a search to property concepts.¹⁹ Thus, the Court recognized a government invasion as a search only when government officials physically intruded into a "constitutionally protected area."²⁰

Modern methods of police investigation, which could be accomplished without the necessity for physical intrusion onto one's prop-

¹¹ U.S. CONST. amend. IV.

¹² See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (high school's interest in maintaining discipline and order justified the warrantless search of student's purse by high school authorities); *United States v. Place*, 462 U.S. 696, 703-04 (1983) (government interest in narcotics investigation may justify brief seizure of luggage); *Terry v. Ohio*, 392 U.S. 1, 22, 24 (1968) (government interest in protecting police and public justifies warrantless stop-and-frisk).

¹³ See, e.g., *T.L.O.*, 469 U.S. at 337; *Place*, 462 U.S. at 703; *Terry*, 392 U.S. at 22.

¹⁴ See, e.g., *T.L.O.*, 469 U.S. at 337; *Place*, 462 U.S. at 705; *Terry*, 392 U.S. at 24-25.

¹⁵ See *T.L.O.*, 469 U.S. at 333, 337.

¹⁶ See, e.g., *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) (Fourth Amendment intended as restraint upon activities of sovereign authority, and was not intended to be limitation upon other than government agencies); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (Fourth Amendment limits action of federal government, not individual misconduct of federal officials).

¹⁷ See *United States v. Jacobsen*, 466 U.S. 109, 122 (1984); *Katz v. United States*, 389 U.S. 347, 353 (1967).

¹⁸ See 1 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 2.1(a), at 223 (1978).

¹⁹ See *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (placing tap on telephone wires and thereby eavesdropping on defendant's telephone conversations did not amount to search within meaning of Fourth Amendment, because activity did not constitute trespass); *Hester v. United States*, 265 U.S. 57, 59 (1924) (revenue officers trespassing on defendant's land did not amount to search, because open fields were not constitutionally protected areas).

²⁰ See *Silverman v. United States*, 365 U.S. 505, 512 (1961) (Fourth Amendment violated where police officers attached microphone to heating duct of house used by defendants). "Constitutionally protected areas" were those enumerated in the Fourth Amendment itself: "persons," including the bodies and clothing of individuals; "houses," including apartments, hotel rooms, garages, business offices, stores and warehouses; "papers," such as letters; and "effects," such as automobiles. 1 LAFAVE, *supra* note 18, § 2.1(a), at 223-24.

erty, led the way to the abandonment of the property-based approach.²¹ It was not until 1967, in *Katz v. United States*, that the United States Supreme Court completely eradicated its reliance on property interests, and created the notion of a reasonable expectation of privacy.²² In *Katz*, the Court held that the Government's placement of a listening device on the wall of a public telephone booth, in order to listen to and record the defendant's conversation, constituted a search within the meaning of the Fourth Amendment.²³ The Court rejected the argument that no Fourth Amendment violation occurred because the electronic device did not physically penetrate the wall of the telephone booth.²⁴ According to the Court, the Fourth Amendment "protects people, not places," and therefore its scope cannot depend on the presence or absence of a physical intrusion into any given enclosure.²⁵ Rather, the Court reasoned that the Fourth Amendment's applicability depends on whether the government violated an individual's legitimate expectation of privacy.²⁶ Thus, the Court held that government activity which intruded on an individual's privacy constituted a search protected by the Fourth Amendment, regardless of whether a physical trespass occurred.²⁷

Upon a determination that the government executed a search within the meaning of the Fourth Amendment, a court must determine whether that search required a warrant.²⁸ The warrant requirement of the Fourth Amendment requires that an impartial judicial officer assess whether the police have probable cause to make an arrest or conduct a search.²⁹ Searches conducted without a warrant are "per

²¹ See *Katz*, 389 U.S. at 352-53 (electronic surveillance of public telephone booth constitutes search). The premise that property interests controlled the right of the government to search and seize was discredited by the Court's statement in *Warden v. Hayden* that "the principal object of the Fourth Amendment is the protection of privacy rather than property." 387 U.S. 294, 304 (1967) (reversing "mere evidence" rule which limited police to seizing only fruits, instrumentalities of crime and contraband, and which prohibited police from seizing items of mere evidentiary value).

²² See *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *Katz*, 389 U.S. at 360 (Harlan, J., concurring); see also Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154, 155 (1977).

²³ 389 U.S. at 353.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* In a concurring opinion, Justice Harlan suggested a twofold requirement for determining when an individual possesses a legitimate expectation of privacy. *Id.* at 361 (Harlan, J., concurring). First, the person must have exhibited an actual, subjective expectation of privacy. *Id.* (Harlan, J., concurring). Second, the expectation must be one that society is prepared to recognize as reasonable. *Id.* (Harlan, J., concurring).

²⁷ See *id.* at 353.

²⁸ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

²⁹ See *Warden v. Hayden*, 387 U.S. 294, 301-02 (1967). Probable cause is the level of suspicion

se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”³⁰ Over time, the Supreme Court has upheld warrantless searches based on a number of these exceptions.³¹

If the government commits a Fourth Amendment violation, the court must determine whether or not to exclude evidence seized during the search from an accused’s trial.³² The exclusion of evidence obtained in violation of the Fourth Amendment is embodied in a judicially created doctrine, known as the exclusionary rule.³³ The rule dictates that the government may not use evidence obtained in violation of the Fourth Amendment in prosecuting individuals whose rights have been violated.³⁴ Since 1914, when the United States Supreme Court first adopted the exclusionary rule,³⁵ lawyers, judges, and legal scholars have endlessly debated its purposes and desirability, and have

required to justify certain governmental intrusions upon interests protected by the Fourth Amendment. *See, e.g.,* *Illinois v. Gates*, 462 U.S. 213, 227 (1983) (probable cause to be determined by totality of circumstances); *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (arrest and subsequent search and seizure invalid due to lack of probable cause). As a general rule, probable cause for a search or seizure is required whether or not police obtain a warrant. *Carroll v. United States*, 267 U.S. 132, 155–56 (1925) (probable cause is standard for reasonableness of warrantless searches and seizures). The Supreme Court, however, has applied a lesser standard of “reasonable suspicion” to certain situations, where the intrusion on individual privacy is minimal and is outweighed by an important government interest. *See Maryland v. Buie*, 494 U.S. 325, 333–34 (1990) (reasonable suspicion that person in home posed danger to those on arrest scene justified protective sweep of home during in-home arrest); *United States v. Montoya de Hernandez*, 478 U.S. 531, 541 (1985) (reasonable suspicion that traveler smuggled contraband in alimentary canal justified prolonged detention of traveler at border); *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985) (reasonable suspicion that student violated or is violating law or school rules justified limited search of student and belongings); *Terry v. Ohio*, 392 U.S. 1, 22–24 (1968) (reasonable suspicion that suspect engaged in criminal activity justified brief investigatory detention; reasonable suspicion that suspect was armed and dangerous justified patdown search for weapons).

³⁰ *Katz*, 389 U.S. at 357 (Fourth Amendment imposes presumptive warrant requirement for all searches and seizures); *see also Terry*, 392 U.S. at 20 (“police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure”).

³¹ *See United States v. Ross*, 456 U.S. 798, 806–07 (1982) (automobile searches); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (road blocks); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) (border searches); *Schneekloth v. Bustamonte*, 412 U.S. 218, 222–23 (1973) (consent); *Chimel v. California*, 395 U.S. 752, 762–63 (1969) (search incident to arrest); *Terry*, 392 U.S. at 30 (stop-and-frisk); *Warden*, 387 U.S. at 298–99 (hot pursuit).

³² *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (exclusionary rule applies in state court to evidence obtained through Fourth Amendment violation); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (exclusionary rule applies in federal court to evidence obtained through Fourth Amendment violation). In its determination of whether the exclusionary rule applies in a particular situation, the court balances the societal costs against the benefits from exclusion. *See United States v. Calandra*, 414 U.S. 338, 349 (1974) (exclusionary rule not applied to grand jury proceedings).

³³ *See Mapp*, 367 U.S. at 655; *Weeks*, 232 U.S. at 398.

³⁴ *See Mapp*, 367 U.S. at 655; *Weeks*, 232 U.S. at 398.

³⁵ *See Weeks*, 232 U.S. at 398.

proposed alternatives to the rule.³⁶ Proponents claim that the exclusionary rule provides the only effective method by which courts can safeguard the rights protected by the Fourth Amendment.³⁷ Opponents argue that the rule is not justified in light of the burden that it imposes on effective law enforcement.³⁸

Deterrence of police misconduct is the primary justification for the exclusionary rule.³⁹ The rule rests on the hope that law enforcement officials will be deterred from unlawful searches and seizures if courts suppress illegally seized, albeit trustworthy, evidence often enough, thereby depriving officers of any benefits that might be gained from illegal conduct.⁴⁰ The United States Supreme Court created the rule in order to give meaning and teeth to the protections guaranteed by the Constitution.⁴¹ In the absence of the exclusionary rule, an individual was left with no remedy for a violation of his or her constitutional rights.⁴²

Since the 1970s, the Supreme Court has significantly chipped away at the warrant requirement of the Fourth Amendment and at the scope and applicability of the exclusionary rule.⁴³ The Supreme Court began this retrenchment of Fourth Amendment law not by overruling prior decisions, but by exploiting potential loopholes within existing Fourth Amendment jurisprudence.⁴⁴ With respect to the *Dickerson* decision, the two most pertinent exceptions to the warrant requirement are the stop-and-frisk and the plain view doctrines.⁴⁵

A. *The Warrantless Stop-and-Frisk*

Although police officers have temporarily detained suspects and even frisked them since the establishment of organized police forces,

³⁶ See, e.g., Comment, *Trends in Legal Commentary on the Exclusionary Rule*, 65 J. CRIM. L. & CRIMINOLOGY 373, 373 (1974).

³⁷ See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting) (damages recoverable upon proof of injuries resulting from violation of Fourth Amendment); see also Comment, *supra* note 36, at 375.

³⁸ See John B. Waite, *Judges and the Crime Burden*, 54 MICH. L. REV. 169, 169 (1955); Harvey Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 SW. L.J. 573, 583 (1971).

³⁹ See *Bivens*, 403 U.S. at 413 (Burger, C.J., dissenting).

⁴⁰ *Id.* at 415 (Burger, C.J., dissenting).

⁴¹ *Id.* (Burger, C.J., dissenting).

⁴² *Id.* (Burger, C.J., dissenting). In *Bivens*, however, the Court created a damage remedy for injuries suffered as a result of a Fourth Amendment violation. *Id.* at 397.

⁴³ See Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 259 (1984).

⁴⁴ Silas J. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119, 121 (1989).

⁴⁵ See *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2136-37 (1993).

the law traditionally was silent on the legality of this custom.⁴⁶ In the 1960s, however, several state statutes and cases attempted to define the authority of the police to make such stops on less than probable cause to arrest.⁴⁷ Some police officers allegedly used these forms of stop-and-frisk for harassment rather than for legitimate preventive law enforcement.⁴⁸ This harassment underscored the need for controls that reconciled these competing problems under the Fourth Amendment.⁴⁹

In 1968, in *Terry v. Ohio*, the United States Supreme Court held that a police officer may stop and frisk a person when the officer can reasonably conclude that the suspect may be engaged in criminal activity and may be armed and dangerous.⁵⁰ While on patrol, a Cleveland police detective observed two men, Terry and Chilton, alternately walk past some stores.⁵¹ While walking, each man paused to peer into a particular store window, continued past the store, turned around to again peer into the store window, and then rejoined his companion.⁵² The men repeated this pattern approximately twelve times, for a period of ten to twelve minutes.⁵³ Suspecting that the men were planning a robbery, and fearing they had a gun, the officer approached the men, identified himself as a police officer and asked the men for their names.⁵⁴ When the men "mumbled something" in response, the officer grabbed Terry, spun him around, and patted down the outside of his clothing.⁵⁵ The officer felt a pistol in Terry's breast pocket, which he removed.⁵⁶ The officer then arrested Terry for carrying a concealed weapon.⁵⁷ The officer later testified that he patted the men down only to discover whether they were carrying weapons.⁵⁸

In determining whether the officer's patdown weapons search violated the Fourth Amendment, the United States Supreme Court

⁴⁶ See Wayne R. LaFare, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 MICH. L. REV. 39, 42-43 (1968).

⁴⁷ See *id.* at 44.

⁴⁸ See Paul G. Chevigny, *Police Abuses in Connection with the Law of Search and Seizure*, 5 CRIM. L. BULL. 3, 22 (1969); see also *Terry v. Ohio*, 392 U.S. 1, 14-15 (1968).

⁴⁹ See *Terry*, 392 U.S. at 12.

⁵⁰ *Id.* at 30. This is now referred to as the "reasonable suspicion" test. See, e.g., *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2136 (1993).

⁵¹ *Terry*, 392 U.S. at 5-6.

⁵² *Id.* at 6.

⁵³ *Id.*

⁵⁴ *Id.* at 6-7.

⁵⁵ *Id.* at 7.

⁵⁶ *Terry*, 392 U.S. at 7.

⁵⁷ *Id.*

⁵⁸ *Id.*

applied a balancing test.⁵⁹ The Court weighed the governmental interest in investigating crime, together with the more immediate interest of protecting police and the public, against the intrusion on individual rights.⁶⁰ The Court concluded that the governmental interest outweighed the intrusion on individual rights.⁶¹ Accordingly, the Court held that reasonable suspicion, rather than the higher standard of probable cause, could support a protective search for weapons.⁶² Because protective searches are not supported by probable cause, however, the Court warned that the scope of the search must be very limited.⁶³ According to the Court, the sole justification of the search is to protect the police officer and others nearby.⁶⁴ Thus, police officers must confine the scope of the search to an intrusion reasonably designed to discover weapons.⁶⁵ The Court concluded that the officer lawfully stopped and frisked Terry to investigate a possible crime, and evidence seized by the officer could be admitted at trial.⁶⁶

B. *The Plain View Doctrine*

The plain view doctrine is an exception to the warrant requirement in the sense that when an object is in "plain view," the Fourth Amendment does not apply.⁶⁷ The doctrine allows police officers to make a warrantless seizure of contraband and other evidence open to view.⁶⁸ Police officers may seize evidence in plain view because an individual does not have a reasonable expectation of privacy in items that the officer can plainly see.⁶⁹ By authorizing the *seizure* of the item,

⁵⁹ *Id.* at 20-21.

⁶⁰ *Id.* at 22-24.

⁶¹ *Terry*, 392 U.S. at 27.

⁶² *See id.*

⁶³ *See id.*

⁶⁴ *Id.* at 29.

⁶⁵ *Id.*

⁶⁶ *Terry*, 392 U.S. at 30-31.

⁶⁷ *See, e.g., Arizona v. Hicks*, 480 U.S. 321, 326 (1987); *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971). Although plain view was initially characterized as an independent exception to the warrant requirement, this description may be somewhat inaccurate. *Texas v. Brown*, 460 U.S. 730, 738 (1983). Plain view provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment. *Id.* Plain view is perhaps better understood, therefore, not as an independent "exception" to the warrant clause, but simply as an extension of whatever the prior justification for an officer's access to an object may be. *Id.* at 738-39.

⁶⁸ *See, e.g., Hicks*, 480 U.S. at 326; *Coolidge*, 403 U.S. at 465.

⁶⁹ *See, e.g., Minnesota v. Dickerson*, 113 S. Ct. 2130, 2137 (1993); *Illinois v. Andreas*, 463 U.S. 765, 771 (1983) (no Fourth Amendment violation upon warrantless reopening of container, where officer initially lawfully opened container and identified contents as illegal).

and not an additional *search*, the plain view doctrine does not compromise the individual interest in privacy; it merely deprives the individual of his or her possessory interest in the property.⁷⁰

In 1971, in *Coolidge v. New Hampshire*, the United States Supreme Court established the three basic criteria of the law regarding the plain view doctrine.⁷¹ After a three week investigation into Coolidge's involvement in a murder, police arrested Coolidge in his house and obtained a warrant to search his car.⁷² Upon searching Coolidge's car, police seized vacuum sweepings which, along with other evidence, were used against Coolidge at trial.⁷³ The jury found Coolidge guilty of murder.⁷⁴

On appeal, the United States Supreme Court first held that the warrant authorizing the seizure and subsequent search of Coolidge's car was invalid.⁷⁵ The Court next addressed the State's argument that the plain view doctrine justified a warrantless seizure and search of the car.⁷⁶ The Court reasoned that the legality of any plain view seizure must rest on three criteria.⁷⁷ First, the initial intrusion must be lawful.⁷⁸ According to the Court, the initial intrusion must be justified by a warrant or by an exception to the warrant requirement.⁷⁹ Second, the discovery of the item must be inadvertent and not planned.⁸⁰ The Court reasoned that this second requirement protects against general exploratory searches conducted under the pretext of a plain view search.⁸¹ Third, the grounds for seizure must be immediately apparent to the police.⁸²

Applying these requirements to the facts of the case, the Court held that the plain view doctrine did not justify the police seizure of Coolidge's car.⁸³ The Court determined that the police knew the location and description of the car well in advance, and intended to seize

⁷⁰ See *Horton v. California*, 496 U.S. 128, 133 (1990).

⁷¹ See 403 U.S. at 466, 468-70.

⁷² *Id.* at 445-47.

⁷³ *Id.* at 448.

⁷⁴ *Id.*

⁷⁵ *Coolidge*, 403 U.S. at 449. The Court found that the warrant was not issued by a neutral and detached magistrate. *Id.*

⁷⁶ See *id.* at 464.

⁷⁷ See *id.* at 466, 468-70.

⁷⁸ See *id.* at 468.

⁷⁹ See *id.* at 467.

⁸⁰ See *Coolidge*, 403 U.S. at 469-70.

⁸¹ See *id.* at 470.

⁸² See *id.* at 466. The Court has interpreted this third requirement to mean that there must be probable cause to associate the item seized with criminal activity. See *Arizona v. Hicks*, 480 U.S. 321, 326 (1987).

⁸³ See *Coolidge*, 403 U.S. at 472.

the car when they came upon Coolidge's property.⁸⁴ Thus, the Court reasoned that the discovery of the car was not inadvertent.⁸⁵ In addition, the Court reasoned that the car was not contraband, stolen property, or dangerous in and of itself.⁸⁶ Thus, the Court reasoned that the illegal character of the car was not immediately apparent to the police.⁸⁷ The Court concluded that the seizure and subsequent search of the car were unconstitutional, and the evidence obtained during the search was improperly admitted at trial.⁸⁸

In 1987, in *Arizona v. Hicks*, the United States Supreme Court provided guidance on the third requirement articulated in *Coolidge*—the “immediately apparent” requirement.⁸⁹ The Court held that a police officer performed an unlawful search when he moved stolen stereo equipment without probable cause to believe that the equipment was stolen, in order to view its serial numbers.⁹⁰ Police officers lawfully entered the defendant's apartment to search for evidence of a shooting.⁹¹ While inside, one officer noticed two sets of expensive stereo equipment in an otherwise ill-furnished apartment.⁹² Suspecting that the equipment was stolen, the officer moved some of the components in order to read and record their serial numbers.⁹³ The officer then phoned in the numbers to police headquarters.⁹⁴ Upon learning that one of the components had been stolen in an armed robbery, the officer seized it.⁹⁵

According to the Court, when the officer took action unrelated to the objectives of the authorized intrusion, he further invaded the defendant's privacy.⁹⁶ The Court determined that moving the equipment was unjustified by the circumstances that validated the initial entry into the apartment.⁹⁷ The Court stressed that shifting the equipment “even a few inches” constituted a search for which the officer needed probable cause.⁹⁸ The Court concluded that because the in-

⁸⁴ *Id.*

⁸⁵ *See id.*

⁸⁶ *Id.*

⁸⁷ *See id.*

⁸⁸ *See Coolidge*, 403 U.S. at 473.

⁸⁹ *See Hicks*, 480 U.S. at 325; *see also* David M. Seid, Note, *The Aftermath of Arizona v. Hicks: An Expectation of Privacy at Home*, 17 AM. J. CRIM. L. 81, 88–89 (1989).

⁹⁰ *See Hicks*, 480 U.S. 321, 324–25 (1987).

⁹¹ *Id.* at 323.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Hicks*, 480 U.S. at 323.

⁹⁶ *See id.* at 324–25.

⁹⁷ *See id.* at 325.

⁹⁸ *Id.*

criminating nature of the stereo equipment was not immediately apparent, the officer's action resulted in an invasion of the defendant's privacy unjustified by the exigent circumstance that validated the entry.⁹⁹

In 1990, in *Horton v. California*, the United States Supreme Court rejected the *Coolidge* inadvertence requirement.¹⁰⁰ In *Horton*, the police developed probable cause to search Horton's home for the proceeds of a robbery, and for the weapons used in the robbery.¹⁰¹ In applying for a search warrant to a magistrate, the officer submitted an affidavit mentioning both the robbery proceeds and the weapons.¹⁰² The warrant issued by the magistrate, however, mentioned only the stolen property.¹⁰³ When executing the warrant, the officer did not discover the stolen property, but he did discover the weapons in plain sight.¹⁰⁴ The officer later testified that he was interested in finding other evidence during the search for stolen property.¹⁰⁵ Thus, he did not discover the evidence "inadvertently."¹⁰⁶ Nevertheless, the Court denied Horton's motion to suppress, and he was convicted of armed robbery.¹⁰⁷

In determining that the inadvertence requirement was unnecessary, the Court reasoned that the requirement adds nothing to the protection of an individual's right to privacy.¹⁰⁸ First, the Court determined that evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.¹⁰⁹ Second, the Court reasoned that the particularity requirement of the Fourth Amendment already serves to prevent the police from conducting general or pretextual searches, and thus the inadvertence requirement is unnecessary.¹¹⁰ According to the Court, if the scope of the search exceeds either the terms of a valid warrant or the permissible limits of a warrantless search, any subsequent seizure is unconstitutional, regard-

⁹⁹ See *id.* at 324-25.

¹⁰⁰ 496 U.S. 128, 130 (1990).

¹⁰¹ *Id.* at 130-31.

¹⁰² *Id.* at 131.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Horton*, 496 U.S. at 131.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 130, 131.

¹⁰⁸ See *id.* at 139-140.

¹⁰⁹ *Id.* at 138.

¹¹⁰ See *Horton*, 496 U.S. at 139-40. The Fourth Amendment requires that a warrant describe with particularity "the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. This limitation safeguards the individual's privacy interest against "the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

less of the existence of the inadvertence requirement.¹¹¹ On the other hand, if the scope of the search is lawful, the Court reasoned that the government has already invaded the individual's interest in privacy, and thus no additional right against seizure is required other than the "immediately apparent" requirement.¹¹² The Court concluded that the plain view doctrine authorized the seizure, even though discovery of the evidence was not inadvertent.¹¹³

Justice Brennan, joined by Justice Marshall, dissented in *Horton*.¹¹⁴ According to Justice Brennan, the majority, in eschewing the inadvertence requirement, ignored the Fourth Amendment's express command that warrants particularly describe not only the places to be searched, but also the items to be seized.¹¹⁵ The dissent stressed that the Fourth Amendment protects both privacy interests *and* possessory interests.¹¹⁶ While conceding that the inadvertence requirement does not further any privacy interests, the dissent reasoned that the requirement does protect possessory interests.¹¹⁷ Thus, the dissent reasoned that by eliminating the inadvertence requirement, the majority modified the Fourth Amendment to give preference to privacy interests over possessory interests¹¹⁸—a result contrary to both the express terms and recent interpretation of the Fourth Amendment.¹¹⁹

In sum, the plain view doctrine permits an officer to make a warrantless seizure of incriminating items that the officer discovers while engaged in an otherwise lawful search, as long as the incriminating nature of the items is immediately apparent to the officer.¹²⁰ The doctrine does not permit a *search*, but only a *seizure* of an item already discovered.¹²¹ The rationale of the plain view doctrine is that an individual can have no legitimate expectation of privacy in items that the individual has left open to view.¹²² Although *Horton* rejected the inad-

¹¹¹ See *Horton*, 496 U.S. at 140.

¹¹² See *id.* at 136, 141-42.

¹¹³ See *id.* at 130, 142.

¹¹⁴ *Id.* at 142 (Brennan, J., dissenting).

¹¹⁵ *Id.* (Brennan, J., dissenting).

¹¹⁶ *Horton*, 496 U.S. at 143 (Brennan, J., dissenting).

¹¹⁷ *Id.* at 147 (Brennan, J., dissenting).

¹¹⁸ *Id.* (Brennan, J., dissenting).

¹¹⁹ See *id.* at 143 (Brennan, J., dissenting). In *Arizona v. Hicks*, the Supreme Court stated: "[a]lthough the interest protected by the Fourth Amendment injunction against unreasonable searches is quite different from that protected by its injunction against unreasonable seizures, neither the one nor the other is of inferior worth or necessarily requires only lesser protection." 480 U.S. 321, 328 (1987).

¹²⁰ See *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2136-37 (1993).

¹²¹ See *id.*

¹²² See *id.* at 2137.

vertence requirement originally articulated in *Coolidge*, the remainder of the plain view doctrine remains firmly entrenched in Fourth Amendment jurisprudence.¹²³

C. The Plain Feel Corollary

The plain feel exception to the warrant requirement evolved as a corollary to the plain view doctrine.¹²⁴ The plain feel doctrine provides that when an officer feels an object in the course of a *Terry* stop, and this touching provides probable cause for a further search or seizure, the further intrusion need not be authorized by a warrant.¹²⁵ Although most state and federal courts recognized this exception prior to the United States Supreme Court decision in *Dickerson*, some state courts have rejected the plain feel corollary.¹²⁶

Courts that have adopted the plain feel doctrine reason that a law enforcement officer should be able to use all of his or her senses in the determination of whether probable cause exists.¹²⁷ For example, in 1987, in *United States v. Williams*, the United States Court of Appeals for the District of Columbia Circuit expressly adopted the plain feel doctrine.¹²⁸ The court held that a police officer who, upon touching a paper bag immediately realized that it contained contraband, justifiably seized that bag.¹²⁹ In *Williams*, four narcotics officers traveling in an unmarked van observed Williams and two other individuals seated in

¹²³ See *id.* at 2136-37; *Horton*, 496 U.S. at 130.

¹²⁴ See David L. Haselkorn, Comment, *The Case Against a Plain Feel Exception to the Warrant Requirement*, 54 U. CHI. L. REV. 683, 683 (1987).

¹²⁵ Haselkorn, *supra* note 124, at 683.

¹²⁶ Compare *United States v. Coleman*, 969 F.2d 126, 132 (5th Cir. 1992) (seizure of pouch containing weapon during valid automobile search justified under plain feel doctrine) and *United States v. Buchannon*, 878 F.2d 1065, 1067 (8th Cir. 1989) (seizure of cocaine during valid patdown search justified under plain feel doctrine) and *United States v. Williams*, 822 F.2d 1174, 1184-86 (D.C. Cir. 1987) (seizure of bag containing contraband during patdown search justified under plain feel doctrine) and *People v. Chavers*, 658 P.2d 96, 102 (Cal. 1983) (seizure of weapon in opaque shaving kit during valid automobile search justified under plain feel doctrine) and *State v. Guy*, 492 N.W.2d 311, 317 (Wis. 1992) (seizure of bag containing cocaine during lawful patdown search justified under plain feel doctrine), *cert. denied*, 113 S. Ct. 3020 (1993) with *State v. Collins*, 679 P.2d 80, 81-82 (Ariz. Ct. App. 1983) (seizure of objects that were obviously not weapons violates Fourth Amendment; no plain feel exception to Fourth Amendment exists) and *People v. Diaz*, 612 N.E.2d 298, 301 (N.Y. 1993) (plain feel exception is contrary to both state and federal constitutions) and *State v. Rhodes*, 788 P.2d 1380, 1381 (Okla. Crim. App. 1990) (officer not justified in seizing object that he felt in course of patdown search unless object reasonably resembles weapon) and *State v. Broadnax*, 654 P.2d 96, 102 (Wash. 1982) (soft bulge in defendant's shirt pocket was not itself sufficient information to find probable cause).

¹²⁷ See, e.g., *State v. Wilson*, 437 S.E.2d 387, 390 (N.C. Ct. App. 1993).

¹²⁸ 822 F.2d at 1184.

¹²⁹ *Id.* at 1177, 1184.

a parked automobile.¹³⁰ The officers observed that Williams and his front seat passenger were "bent over" and apparently concentrating on "something in their laps."¹³¹ Based on their experience investigating narcotics offenses and the fact that the car was parked in an area known for extensive drug use, the officers suspected a narcotics violation.¹³² As two of the officers approached the van, they saw Williams shove a "brown object" or "paper bag" underneath his leg.¹³³ Believing that the bag might contain a weapon, one officer asked Williams to step out of the car.¹³⁴ As Williams began to step out, he put his right hand under his leg and attempted, unsuccessfully, to throw the bag into the back seat of the car.¹³⁵ At that point, the officer picked up the bag and felt it with both hands.¹³⁶ According to the officer, when he touched the bag, he could "feel that inside were numerous small rolled-up objects" that "felt like plastic baggies."¹³⁷ Based on this touching and his experience and training in narcotics detection, the officer believed that the bag contained "numerous quarter bags of heroin."¹³⁸ Upon opening the bag, the officer found five large bags with forty-four small bags containing heroin.¹³⁹ He then placed Williams under arrest.¹⁴⁰ The district court judge trying the case admitted the evidence.¹⁴¹ Williams was convicted of possession of a controlled substance with intent to distribute.¹⁴²

On appeal, the D.C. Circuit upheld the warrantless seizure of the heroin based on a plain feel principle.¹⁴³ The court, however, established three limitations to the principle.¹⁴⁴ First, the court noted that the plain feel doctrine applies only when an officer may legally touch the container in the first place.¹⁴⁵ The court reasoned that the officer's fear that the bag contained a weapon justified the officer in touching the bag.¹⁴⁶ Second, the touching must be limited to that justified by the

¹³⁰ *Id.* at 1176.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Williams*, 822 F.2d at 1176.

¹³⁴ *Id.* at 1177.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Williams*, 822 F.2d at 1177.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1176.

¹⁴² *Id.* at 1175-76.

¹⁴³ *Williams*, 822 F.2d at 1184.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1179-80.

initial contact with the object.¹⁴⁷ The court noted that nothing in the record established that the officer continued to manipulate the container after the absence of a weapon became apparent.¹⁴⁸ Third, the touching must convince the officer, to a reasonable certainty, that the felt object is contraband or evidence of a crime.¹⁴⁹ The court reasoned that the specificity of the officer's determination of the bag's contents, along with the officer's training and experience in the area, supported the conclusion that the officer was reasonably certain that the bag contained contraband.¹⁵⁰ Thus, the court upheld the warrantless seizure of the contraband, and the lower court's denial of the motion to suppress the evidence.¹⁵¹

Courts that have declined to extend the plain view doctrine to the sense of touch reason that the sense of touch is inherently less immediate and less reliable than the sense of sight, and is far more intrusive into the personal privacy that lies at the core of the Fourth Amendment.¹⁵² For example, in 1993, in *People v. Diaz*, the Court of Appeals of New York rejected the plain feel exception to the Fourth Amendment warrant requirement.¹⁵³ While on patrol, two officers observed several groups congregating on the sidewalks, apparently passing objects from hand to hand.¹⁵⁴ The officers further observed Diaz at various times at the center of several of these groups.¹⁵⁵ The officers became suspicious when Diaz walked away from them as their squad car approached.¹⁵⁶ The officers drove alongside Diaz and called him over to the car.¹⁵⁷ In walking toward the car, Diaz repeatedly placed his hand in his pocket, despite the officers' warnings against doing so.¹⁵⁸ As Diaz reached the car, one of the officers noticed a bulge in Diaz's pocket

¹⁴⁷ *Id.* at 1184.

¹⁴⁸ *Williams*, 822 F.2d at 1186.

¹⁴⁹ *Id.* at 1184. According to the court, this third limitation distinguishes a plain feel analysis from a plain view analysis. *Id.* Unlike plain view, where probable cause—a predictive judgment that further investigation will yield particular results—suffices to exempt the seizure from Fourth Amendment warrant requirements, the information gleaned in plain feel must be good enough to eliminate all need for additional search activity. *Id.* at 1184–85. This can only occur when sensory information acquired by the officer rises to a state of certitude, rather than mere prediction, in regard to the object of the investigation. *Id.* at 1185.

¹⁵⁰ *See id.* at 1185, 1186.

¹⁵¹ *Id.* at 1186.

¹⁵² *See, e.g., State v. Dickerson*, 481 N.W.2d 840, 845 (Minn. 1992) [hereinafter *Dickerson II*], *aff'd*, *Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993); *People v. Diaz*, 612 N.E.2d 298, 301–02 (N.Y. 1993).

¹⁵³ *Diaz*, 612 N.E.2d at 301.

¹⁵⁴ *Id.* at 299.

¹⁵⁵ *Id.*

¹⁵⁶ *See id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Diaz*, 612 N.E.2d at 299.

and again told Diaz to remove his hand.¹⁵⁹ Fearing a weapon, the officer grabbed Diaz's pocket.¹⁶⁰ He felt no weapon, but did detect what "appeared to be a bunch of vials."¹⁶¹ Diaz attempted to flee, but the officer grabbed him, reached into Diaz's pocket, and removed eighteen vials of crack cocaine.¹⁶² The officers then placed Diaz under arrest.¹⁶³ At trial, the court granted Diaz's motion to suppress.¹⁶⁴ The Appellate Division reversed and denied the motion.¹⁶⁵ Contrary to the trial court, the appellate court found reasonable suspicion to justify the stop and patdown.¹⁶⁶ Diaz then appealed the ruling of the Appellate Division.¹⁶⁷

The New York Court of Appeals held in favor of Diaz, and refused to recognize a plain feel doctrine.¹⁶⁸ According to the court, an owner holds no expectation of privacy for an object in plain view.¹⁶⁹ When an owner conceals an object by clothing or other covering, however, that owner retains a legitimate expectation that the item's existence and characteristics will remain private.¹⁷⁰ Although in most instances seeing an object will instantly reveal its identity and nature, the court reasoned that touching an object is inherently less reliable and cannot conclusively establish an object's identity or criminal nature.¹⁷¹ Moreover, the court noted, in drawing conclusions as to the nature of an object by feeling it through an exterior covering, the police officer relies solely on expert opinion that cannot be equated with information obtained by seeing the object.¹⁷² The court also feared that a plain feel doctrine would invite the use of weapon searches as a pretext for unwarranted searches, thus severely eroding the protection of the Fourth Amendment.¹⁷³ The court concluded, therefore, that the claimed analogy of plain feel to plain view did not withstand analysis.¹⁷⁴

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 299-300.

¹⁶³ *Diaz*, 612 N.E.2d at 300.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *See id.*

¹⁶⁸ *Diaz*, 612 N.E.2d at 301.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 302.

¹⁷² *Id.*

¹⁷³ *Diaz*, 612 N.E.2d at 302.

¹⁷⁴ *Id.* at 301.

II. THE *DICKERSON* DECISION

In 1993, in *Dickerson*, the United States Supreme Court explicitly recognized a plain feel exception to the Fourth Amendment warrant requirement.¹⁷⁵ The Court ruled unanimously that when a law enforcement officer conducting a lawful protective patdown search detects, by feel, something other than a weapon, he or she may seize it without a warrant if the officer's sense of touch makes it immediately apparent that the felt object is contraband.¹⁷⁶ The Court justified its holding by analogizing to the plain view doctrine.¹⁷⁷

On November 9, 1989, Minneapolis police officers Vernon Rose and Bruce Johnson were patrolling an area on the city's north side, when Officer Rose spotted the defendant, Timothy Dickerson, leaving a twelve-unit apartment building.¹⁷⁸ Officer Rose, having previously responded to complaints of drug activity in the building's hallways, considered the building to be a "crack house."¹⁷⁹ Officer Rose testified that Dickerson began walking toward him but, upon spotting the squad car and making eye contact with Rose, abruptly halted and began walking in the opposite direction.¹⁸⁰ Based upon Dickerson's seemingly evasive actions and the fact that he had just left a building known for cocaine traffic, the officers decided to stop Dickerson and investigate further.¹⁸¹

¹⁷⁵ See *Dickerson*, 113 S. Ct. at 2137.

¹⁷⁶ *Id.* In the facts of this case, however, the Court held that the search exceeded the bounds of *Terry* because the search was not limited to that which was necessary for the discovery of weapons. *Id.* at 2139. Three Justices, concurring in part and dissenting in part, agreed on the adoption of a plain feel doctrine, but would have remanded the case in order to further examine whether the frisk exceeded that authorized by *Terry*. *Id.* at 2141 (Rehnquist, C.J., concurring in part and dissenting in part).

¹⁷⁷ *Id.* at 2139.

¹⁷⁸ *State v. Dickerson*, 469 N.W.2d 462, 463-64 (Minn. Ct. App. 1991) [hereinafter *Dickerson I*], *aff'd*, *Dickerson II*, 481 N.W.2d 840 (Minn. 1992), *aff'd*, *Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993).

¹⁷⁹ *Id.* at 464. For a description of a "crack house," see Scott Minerbrook, *A Night in a Crack House*, U.S. NEWS & WORLD REP., Apr. 10, 1989, at 29 ("[T]he term crack house can mean different things—a place to use [crack cocaine], a place to sell [crack cocaine] or a place to do both, and the location may be an apartment, bungalow or abandoned building. If the focus is on sales, the crack house often has iron bars on the windows, steel plating on the door and lookouts prowling nearby. The [crack cocaine] is passed through slots in windows or doors. Efficient operations clear \$10,000 a day. Customers without cash try to barter televisions, jewelry or guns for one more rock [of crack cocaine]. Women frequently 'work a twist'—trade sex for crack.").

¹⁸⁰ *Dickerson I*, 469 N.W.2d at 464.

¹⁸¹ *Id.*

The officers ordered Dickerson to submit to a patdown search.¹⁸² Although the search revealed no weapons, Officer Rose felt a small lump through Dickerson's nylon jacket.¹⁸³ Officer Rose later testified: "[A]s I pat-searched the front of his body, I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane."¹⁸⁴ Officer Rose then reached into Dickerson's pocket and retrieved a small plastic bag containing one-fifth of one gram of crack cocaine.¹⁸⁵ The officers arrested Dickerson and charged him with possession of a controlled substance.¹⁸⁶

The Minnesota trial court denied Dickerson's motion to suppress the cocaine.¹⁸⁷ First, the court concluded that *Terry* justified the officers in stopping Dickerson and frisking him to ensure that he was not carrying a weapon.¹⁸⁸ Next, the court, analogizing to the plain view doctrine, determined that seizure of the cocaine did not violate the Fourth Amendment.¹⁸⁹ The court reasoned that the sense of touch, to an experienced officer, is as reliable as perceptions drawn from other senses.¹⁹⁰ The court thus admitted the cocaine and found Dickerson guilty of possession of a controlled substance.¹⁹¹

The Court of Appeals of Minnesota reversed.¹⁹² Although the court agreed with the trial court that *Terry* authorized the investigative stop and protective patdown search of Dickerson, it concluded that the officers overstepped the bounds allowed by *Terry* in seizing the cocaine.¹⁹³ In addition, the appeals court specifically refused to adopt the plain feel exception to the warrant requirement.¹⁹⁴

The Minnesota Supreme Court rejected the plain feel exception and agreed with the court of appeals, holding that the officer was not privileged to manipulate the object to determine its identity.¹⁹⁵ First,

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Dickerson*, 113 S. Ct. at 2133.

¹⁸⁵ *Id.* at 2133-34.

¹⁸⁶ *Id.* at 2134.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Dickerson*, 113 S. Ct. at 2134.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Dickerson I*, 469 N.W.2d at 467.

¹⁹³ *Id.* at 465.

¹⁹⁴ *Id.* at 466.

¹⁹⁵ *Dickerson II*, 481 N.W.2d 840, 843-44, 846 (Minn. 1992).

the court held the stop valid, reasoning that Dickerson's evasive conduct, combined with his departure from a building with a history of drug activity, justified police in reasonably suspecting criminal activity.¹⁹⁶ In addition, the court held that the officers were justified in performing the patdown search, based on Dickerson's suspicious behavior and Officer Rose's personal experience in seizing guns from the building that Dickerson just left.¹⁹⁷

The Minnesota Supreme Court held, however, that the officer exceeded the scope of a *Terry* search by continuing to feel the lump in Dickerson's jacket after ascertaining that it was not a weapon.¹⁹⁸ In addition, the court refused to recognize a plain feel exception to the warrant requirement, noting that neither the Minnesota Supreme Court nor the United States Supreme Court had ever acknowledged such an exception.¹⁹⁹ In rejecting the analogy to the plain view doctrine, the court reasoned that the senses of sight and touch are not equivalent.²⁰⁰ First, the court observed that the sense of touch is inherently less immediate and less reliable than the sense of sight.²⁰¹ Second, and more importantly, the court reasoned that the sense of touch is far more intrusive into the personal privacy that is at the core of the Fourth Amendment, because it involves physical touching.²⁰² In addition, the court stated that even if it did recognize a plain feel exception, the search in this case would not qualify, because the officers conducting the patdown search never gained probable cause to justify the more extensive search they performed.²⁰³ Thus, the majority held in favor of the defendant, affirming the reversal of Dickerson's conviction.²⁰⁴

The United States Supreme Court granted certiorari to resolve the conflict among the state and federal courts concerning the existence of the plain feel exception.²⁰⁵ The Court held that contraband detected through the sense of touch during a patdown search may be admitted into evidence, so long as the search was within the bounds marked by *Terry*.²⁰⁶ Under the facts of the case, however, the Court determined

¹⁹⁶ *Id.* at 843.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 846.

¹⁹⁹ *Id.* at 843-44.

²⁰⁰ *Dickerson II*, 481 N.W.2d at 845.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 844 n.1, 846.

²⁰⁴ *Id.* at 846.

²⁰⁵ *Dickerson*, 113 S. Ct. at 2134.

²⁰⁶ *Id.* at 2136.

that the search of Dickerson's jacket exceeded the lawful bounds marked by *Terry*, and therefore held in favor of Dickerson.²⁰⁷

The Court began its opinion by reasoning that *Terry* opened the door for adoption of the plain feel doctrine.²⁰⁸ Under *Terry*, an officer may conduct a patdown search and seize a suspected weapon if perceived through the officer's sense of touch.²⁰⁹ The Court reasoned that an officer should not be required to ignore any contraband discovered while conducting a legitimate *Terry* search.²¹⁰

The Court then analogized to the plain view doctrine, reasoning that the warrantless seizure of contraband detected through an officer's sense of touch is justified by the realization that resort to a neutral magistrate in order to obtain a warrant would often be impracticable and would do little to promote the objectives of the Fourth Amendment.²¹¹ According to the Court, because items in open view are observed by an officer from a lawful vantage point, there is no invasion of a legitimate expectation of privacy.²¹² Thus, no "search" within the meaning of the Fourth Amendment has occurred when an officer makes a plain view seizure.²¹³ Similarly, the Court reasoned that if an officer lawfully pats down a suspect's outer clothing and feels an object whose contour makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons.²¹⁴

In rejecting the position of the Minnesota Supreme Court that the sense of touch is inherently less immediate and less reliable than the sense of sight, the Court noted that the *Terry* decision itself demonstrates that the sense of touch is capable of revealing the nature of an object with sufficient reliability to support its seizure.²¹⁵ The Court further stated that any argument that the sense of touch was less reliable than the sense of sight would only suggest that the officers would less often be able to justify seizures of unseen contraband.²¹⁶ The Court reasoned that the Fourth Amendment's requirement that the officer have probable cause to believe that an item is contraband before

²⁰⁷ *Id.* at 2139.

²⁰⁸ *See id.* at 2136.

²⁰⁹ *See id.* See *supra* notes 50-66 and accompanying text for a more detailed discussion of the Supreme Court's holding in *Terry*.

²¹⁰ *See Dickerson*, 113 S. Ct. at 2136.

²¹¹ *Id.* at 2137.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Dickerson*, 113 S. Ct. at 2137.

²¹⁶ *Id.*

seizing it would protect against excessively speculative seizures.²¹⁷ The Court also rejected the Minnesota Supreme Court's concern that touch intrudes more into privacy than sight.²¹⁸ The Court reasoned that this feared intrusion had already been authorized by the lawful search for weapons, and that the seizure of an item whose identity is already known does not constitute a further invasion of privacy.²¹⁹

In applying these principles to the facts, the *Dickerson* Court relied on the conclusion of the Minnesota District Court that Officer Rose "never thought the lump was a weapon," and determined the lump to be contraband only after "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket."²²⁰ The Court noted that the Minnesota trial court never made precise findings as to whether Officer Rose acted within the lawful bounds marked by *Terry* at the time he gained probable cause to believe that Dickerson's jacket contained contraband.²²¹ The Court nevertheless held that the officer overstepped the bounds of the strictly circumscribed search for weapons allowed under *Terry*.²²² The Court reasoned that the officer's continued exploration of Dickerson's pocket, after he concluded that it contained no weapon, was unrelated to the sole justification of the search under *Terry*—the protection of the police officer and others nearby.²²³ The Court analogized to *Arizona v. Hicks*, in which the police, while lawfully searching the defendant's apartment for weapons, obtained probable cause to believe that stereo equipment, in plain view, was contraband, only after moving the equipment in order to read its serial numbers.²²⁴ Because probable cause to believe that the equipment was stolen arose only as a result of a further search, the Court in that case held the evidence properly inadmissible.²²⁵ Similarly, the Court reasoned that although Officer Rose was lawfully in a position to feel the lump in Dickerson's pocket, the incriminating character of the object was not immediately apparent to him.²²⁶ Thus, the Court concluded, although *Terry* entitled Officer Rose to place his hands upon Dickerson's jacket, neither *Terry* nor any other exception to the war-

²¹⁷ *Id.*

²¹⁸ *Id.* at 2137-38.

²¹⁹ *Id.* at 2138.

²²⁰ *Dickerson*, 113 S. Ct. at 2138.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 2138-39.

²²⁴ *Id.* at 2139; *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987).

²²⁵ *Hicks*, 480 U.S. at 326, 329.

²²⁶ *Dickerson*, 113 S. Ct. at 2139.

rant requirement authorized the search.²²⁷ Accordingly, the Court held in favor of *Dickerson*.²²⁸

In sum, the majority in *Dickerson* unanimously held that when a law enforcement officer, while conducting a lawful frisk, detects by feel something other than a weapon, the officer may seize the object without a warrant if the officer's sense of touch makes it immediately apparent that the felt object is contraband.²²⁹ The Court held, however, that the frisk must remain within the bounds of the weapons frisk permitted by *Terry*.²³⁰ Accordingly, the object must be immediately identifiable as contraband in order to be subject to seizure.²³¹ Because the case at issue did not meet this standard, the Court held the search and seizure unlawful.²³²

III. POST-DICKERSON DECISIONS

Since *Dickerson*, a number of courts have had the opportunity to consider the plain feel doctrine.²³³ Several of these cases have helped

²²⁷ *Id.* Justice Scalia, in a separate concurring opinion, questioned whether the physical search—the “frisk” portion of the *Terry* “stop-and-frisk”—is a proper interpretation of the Fourth Amendment. *Id.* (Scalia, J., concurring). Noting that there is no precedent in common law for searching persons who are not yet under arrest, Justice Scalia doubted whether the Framers of the Constitution would have allowed themselves to be subjected, on mere suspicion of being armed and dangerous, to the indignity of such a search. *Id.* at 2140 (Scalia, J., concurring). Recognizing that constitutionality of the “frisk” in the present case was neither challenged nor argued, however, Justice Scalia agreed with the Court’s premise that any evidence incidentally discovered in the course of the search would be admissible. *Id.* at 2141 (Scalia, J., concurring).

²²⁸ *Id.* at 2139. Chief Justice Rehnquist, joined by Justices Blackmun and Thomas, concurred in part and dissented in part. *Id.* at 2141 (Rehnquist, C.J., concurring in part and dissenting in part). The Chief Justice agreed on the adoption of a plain feel doctrine, but would have vacated the judgment of the Minnesota Supreme Court and remanded the case to that court for further proceedings. *Id.* (Rehnquist, C.J., concurring in part and dissenting in part). The Chief Justice noted that the state trial court made no precise findings as to the dispositive issue of whether the officer who conducted the search was acting within the lawful bounds marked by *Terry*. *Id.* (Rehnquist, C.J., concurring in part and dissenting in part). Thus, because the state supreme court employed a Fourth Amendment analysis differing significantly from that adopted by the Court, the Chief Justice would vacate its judgment and remand the case for further proceedings on the question as to when, during the course of the search, Officer Rose developed probable cause to believe that the lump constituted contraband. *Id.* (Rehnquist, C.J., concurring in part and dissenting in part).

²²⁹ *Id.* at 2137.

²³⁰ *Id.* at 2139.

²³¹ *Dickerson*, 113 S. Ct. at 2139.

²³² *Id.*

²³³ Many of these courts have concluded that the seizure of contraband did not meet the “immediately apparent” requirement of the plain feel doctrine, or that the arresting officer overstepped the bounds of *Terry* while performing the patdown search. See *United States v. Schiavo*, 29 F.3d 6, 9 (1st Cir. 1994); *United States v. Gibson*, 19 F.3d 1449, 1451 (D.C. Cir. 1994); *United States v. Ponce*, 8 F.3d 989, 999 (1st Cir. 1993); *United States v. Taylor*, 997 F.2d 1551,

define the "immediately apparent" requirement of the plain feel doctrine in situations where the felt object was not itself contraband.²³⁴ For example, in 1993, in *United States v. Ross*, the United States District Court for the Southern District of Alabama held that seizure of a matchbox containing cocaine during a patdown search was illegal, because the matchbox itself could not be immediately recognizable as contraband.²³⁵ While performing a patdown search of the defendant, the officer felt a small box tucked in the defendant's groin, which the officer immediately identified as a hollow matchbox.²³⁶ Based on the location of the matchbox in the groin area, the officer immediately suspected that the box contained hidden contraband.²³⁷ The government argued that the officer's informed "suspicion" met the "immediately apparent" requirement of *Dickerson*.²³⁸ The court reasoned that such a construction would contort the holding of *Dickerson*.²³⁹ Because the officer believed only that the box *contained* contraband, and not that the box *was itself* contraband, the court reasoned that its illegal

1554 (D.C. Cir. 1993); *United States v. Mitchell*, 832 F. Supp. 1073, 1079 (N.D. Miss. 1993); *United States v. Ross*, 827 F. Supp. 711, 719 (S.D. Ala. 1993), *aff'd*, 19 F.3d 1446 (11th Cir. 1994); *United States v. Winter*, 826 F. Supp. 33, 37-38 (D. Mass. 1993), *aff'd on other grounds*, 22 F.3d 15 (1st Cir. 1994); *People v. Dickey*, 27 Cal. Rptr. 2d 44, 46 (Cal. Ct. App. 1994); *People v. Corpany*, 859 P.2d 865, 871 (Colo. 1993); *Hicks v. State*, 631 A.2d 6, 11 (Del. 1993); *Howard v. State*, 623 So. 2d 1240, 1242 (Fla. Dist. Ct. App. 1993); *State v. Slan*, 624 So. 2d 451, 452 (La. Ct. App. 1993), *rev'd on other grounds*, 632 So. 2d 749 (La. 1994); *State v. Parker*, 622 So. 2d 791, 795 (La. Ct. App. 1993); *People v. Champion*, 518 N.W.2d 518, 521 (Mich. Ct. App. 1994); *State v. Beveridge*, 436 S.E.2d 912, 916 (N.C. Ct. App. 1993), *aff'd*, 444 S.E.2d 223 (N.C. 1994) (per curiam); *State v. Cloud*, 632 N.E.2d 932, 935 (Ohio Ct. App. 1993); *In re S.D.*, 633 A.2d 172, 176-77 (Pa. Super. Ct. 1993); *Campbell v. State*, 864 S.W.2d 223, 226 (Tex. Ct. App. 1993); *State v. Tzintzun-Jimenez*, 866 P.2d 667, 670 (Wash. 1994). A number of courts, however, have concluded that the patdown search and ultimate seizure of contraband were proper under the plain feel doctrine recognized in *Dickerson*. See *United States v. Hughes*, 15 F.3d 798, 802 (8th Cir. 1994); *United States v. Brown*, No. 93-378(HL), 1994 WL 380695, at *6 (D.P.R. May 20, 1994); *Harris v. State*, No. 92-1325, 1994 WL 267926, at *1 (Fla. Dist. Ct. App. June 20, 1994); *People v. Mitchell*, 630 N.E.2d 451, 453 (Ill. App. Ct. 1993); *State v. Wilson*, 437 S.E.2d 387, 390 (N.C. Ct. App. 1993); *State v. Sandford*, No. 66275, 1994 WL 463846, at *4 (Ohio Ct. App. Aug. 25, 1994); *Commonwealth v. Johnson*, 631 A.2d 1335, 1340-41 (Pa. Super. Ct. 1993); *State v. Kersh*, No. 94-1351-CR, 1994 WL 425196, at *2 (Wis. Ct. App. Aug. 16, 1994); *State v. Buchanan*, 504 N.W.2d 400, 404 (Wis. Ct. App. 1993).

²³⁴ See *Ross*, 827 F. Supp. at 719 (matchbox containing crack cocaine was not immediately apparent); *Parker*, 622 So. 2d at 795 (matchbox containing rocks of cocaine was not immediately apparent); *Champion*, 518 N.W.2d at 521 (pill bottle containing cocaine was not immediately apparent); *Campbell*, 864 S.W.2d at 226 (film canister and vial containing cocaine were not immediately apparent).

²³⁵ *Ross*, 827 F. Supp. at 719; see also *Champion*, 518 N.W.2d at 521 (impossible for officer to conclude that the incriminating nature of a pill bottle was immediately apparent).

²³⁶ *Ross*, 827 F. Supp. at 713.

²³⁷ *Id.* at 714.

²³⁸ *Id.* at 719.

²³⁹ *Id.*

nature could not be immediately apparent.²⁴⁰ The court emphasized that the only way the officer could have verified his suspicions concerning the contents of the box was by removing the box and looking inside.²⁴¹ According to the court, *Dickerson* does not allow such action.²⁴² Thus, the court concluded that the officer illegally seized the cocaine.²⁴³

Even in situations where an officer feels contraband *itself*, and claims that its illegal nature was immediately apparent, a court still may discredit the officer's testimony and invalidate the seizure.²⁴⁴ For example, in 1993, in *United States v. Mitchell*, the United States District Court for the Northern District of Mississippi held that the plain feel doctrine did not justify a warrantless seizure of a bag in the defendant's pocket, despite testimony that crack cocaine was immediately apparent to the officers upon patting the defendant.²⁴⁵ The crack cocaine removed from the defendant was contained in six plastic bags, which were wrapped in a sock.²⁴⁶ The sock was in a brown paper bag, which the defendant carried in the pocket of a dense, heavy grade, leather jacket with lined pockets.²⁴⁷ Based on this information, the court was not convinced that an immediately apparent determination of contraband was "within the realm of human capability with a single pass of one's hand over the outer clothing."²⁴⁸ The court concluded that, under the facts of this case, the police exceeded the limits of a *Terry* search.²⁴⁹

In many cases, however, courts have upheld seizures of contraband detected during patdown searches, relying on the officer's testimony.²⁵⁰

²⁴⁰ *Id.* The court noted that the holding might have been different if the defendant had been carrying the cocaine simply in a plastic bag in his pelvic area, through which the contours or mass of contraband could be sensed. *Id.* at 719 n.15.

²⁴¹ *Ross*, 827 F. Supp. at 719.

²⁴² *Id.*

²⁴³ *Id.* In a factually similar case, the Court of Appeals of Texas, although holding that a film canister containing cocaine was not immediately apparent, suggested that seizure may be appropriate under certain circumstances. See *Campbell v. State*, 864 S.W.2d 223, 226 (Tex. Ct. App. 1993) (seizure may have been appropriate if officer had viewed drug paraphernalia, which might have given the officer probable cause to believe that the defendant was concealing contraband).

²⁴⁴ See *United States v. Mitchell*, 832 F. Supp. 1073, 1079 (N.D. Miss. 1993).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Mitchell*, 832 F. Supp. at 1078.

²⁵⁰ See *United States v. Hughes*, 15 F.3d 798, 802 (8th Cir. 1994); *United States v. Brown*, No. 93-378(HL), 1994 WL 380695, at *6 (D.P.R. May 20, 1994); *Harris v. State*, No. 92-1325, 1994 WL 267926, at *1 (Fla. Dist. Ct. App. June 20, 1994); *People v. Mitchell*, 630 N.E.2d 451, 453 (Ill. App. Ct. 1993); *State v. Wilson*, 437 S.E.2d 387, 390 (N.C. Ct. App. 1993); *State v. Sandford*, No. 66275, 1994 WL 463846, at *4 (Ohio Ct. App. Aug. 25, 1994); *Commonwealth v. Johnson*, 631

In 1993, in *State v. Wilson*, the Court of Appeals of North Carolina held that the officer's search of the defendant was no more intrusive than necessary, because the incriminating character of the lump in the defendant's jacket pocket was immediately apparent to the officer.²⁵¹ While performing a protective frisk, a police officer felt a lump in the breast pocket of the defendant's jacket, which he immediately determined to be crack cocaine.²⁵² Distinguishing this case from *Dickerson*, the court noted the absence of any testimony that the officer in this case manipulated the contents of the defendant's pocket, or that he performed a search impermissible under *Terry*.²⁵³ The court concluded that the officer, upon using his tactile senses, had the requisite probable cause to believe that the lump in the defendant's pocket was cocaine.²⁵⁴ Thus, the court held that the cocaine was admissible.²⁵⁵

Unconditional reliance on an officer's testimony, however, can lead to absurd results.²⁵⁶ For example, in 1994, in *United States v. Brown*, the United States District Court for the District of Puerto Rico upheld the seizure of two packages containing cocaine.²⁵⁷ The packages were wrapped in black tape and hidden under the defendant's clothing.²⁵⁸ The officer who conducted the patdown search testified that the illegal nature of the contraband was immediately apparent to him when he touched the defendant's midsection.²⁵⁹ Despite the fact that the packages were wrapped in tape, the court accepted the officer's testimony that their illegal nature was immediately apparent.²⁶⁰ Thus, the court concluded that the seizure was justified.²⁶¹

IV. *DICKERSON*: ITS FLAWS AND POTENTIAL FOR ABUSE

The *Wilson* case, and the introductory hypothetical regarding an officer's search of a paranoid schizophrenic, illustrate the ambiguous

A.2d 1335, 1340-41 (Pa. Super. Ct. 1993); *State v. Kersh*, No. 94-1351-CR, 1994 WL 425196, at *2 (Wis. Ct. App. Aug. 16, 1994); *State v. Buchanan*, 504 N.W.2d 400, 404 (Wis. Ct. App. 1993).

²⁵¹ 437 S.E.2d at 390.

²⁵² *Id.* at 387.

²⁵³ *Id.* at 389.

²⁵⁴ *Id.* at 390. The court's conclusion was based on the officer's experience in making drug arrests during his seven years of service, and on the fact that the officer was called to the scene to investigate alleged drug dealings. *Id.*

²⁵⁵ *Id.*

²⁵⁶ See *United States v. Brown*, No. 93-378(HL), 1994 WL 380695, at *6 (D.P.R. May 20, 1994).

²⁵⁷ *Id.*

²⁵⁸ *Id.* at *1.

²⁵⁹ *Id.* at *6.

²⁶⁰ *Id.*

²⁶¹ *Brown*, No. 93-378(HL), 1994 WL 380695, at *6.

nature of the plain feel doctrine.²⁶² The principal difference between the two fact patterns is that the defendant was guilty in the former, and innocent in the latter. Though society's concern for the rights of *guilty* defendants is low, the Court must recognize that the *Dickerson* decision could mean far more intrusive searches of *innocent* individuals. The Court's decision in *Dickerson* can be criticized on three grounds. First, the Court's reasoning is flawed based on existing Fourth Amendment jurisprudence. Second, the Court did not consider the practical implications of the *Dickerson* decision, and thus has turned its back on reality. Finally, the existing Fourth Amendment jurisprudence, upon which *Dickerson* relies, is itself in need of repair.

A. *Internal Weaknesses*

The Court's reasoning in *Dickerson* is internally flawed based on existing Fourth Amendment jurisprudence. First, the Court ignores the dominant objective of the *Terry* stop—protection of police officers and the surrounding community. Because weapons are the only proper objects of a protective search, only weapons should be admissible into evidence. The exclusionary rule should be employed vigorously to achieve the Fourth Amendment's regulatory objective by reducing undesirable incentives to perform unconstitutional searches and seizures.²⁶³ The risk is great that the plain feel doctrine will lead to far more intrusive, if not pretextual, searches. In order to reduce this risk of police misconduct, the exclusionary rule should apply to prevent police from introducing contraband other than weapons.

The rationale underlying the plain view doctrine is inapplicable in the context of plain feel. The primary justification for allowing the seizure of items in plain view is that the defendant has no legitimate expectation of privacy in those items that he or she left open to view.²⁶⁴ Thus, the governmental interest in law enforcement outweighs the intrusion on the individual's Fourth Amendment interests.²⁶⁵

In contrast, an individual has a heightened expectation of privacy in concealed items. This increased privacy interest is evidenced by the further steps taken by the individual in order to hide the item from view. Thus, unlike items in plain view, the individual's Fourth Amendment interests in items detected through plain feel may outweigh the

²⁶² See *State v. Wilson*, 437 S.E.2d 387, 390 (N.C. Ct. App. 1993).

²⁶³ See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 437-38 (1974).

²⁶⁴ See *Dickerson*, 113 S. Ct. at 2137.

²⁶⁵ See *United States v. Place*, 462 U.S. 696, 703 (1983).

government's interest in effective law enforcement. In adopting the plain feel doctrine, however, the *Dickerson* Court never performed an independent balancing test.²⁶⁶ Rather, the Court merely applied by analogy the plain view rationale to plain feel.²⁶⁷ Such an analysis improperly equates the differing privacy expectations inherent in objects left open to view and objects concealed from view.

Finally, the warrantless seizure of objects in plain feel may be unnecessary to protect the government's interest in preserving evidence. At least one commentator has suggested that a suspect will less likely destroy evidence detected by *touch* while a warrant is being procured than evidence detected by *sight*.²⁶⁸ One premise underlying the need for an officer to make a warrantless seizure of an item in plain view is that without such a seizure, the evidence may be destroyed.²⁶⁹ Obviously, a suspect who knows that a law enforcement officer has seen incriminating evidence will more likely destroy that evidence. A suspect who has been subject to a patdown search, however, may not even realize that the officer discovered incriminating evidence through his or her sense of touch.²⁷⁰ Thus, one of the justifications for the plain view doctrine may be inapplicable in the context of plain feel.

B. Practical Weaknesses

Ignoring the internal weaknesses of *Dickerson* discussed above, the decision also is lacking from a practical standpoint. Pragmatically, the *Dickerson* decision constitutes a double dilution of the warrant requirement. *Terry* already allows for warrantless searches based on less than probable cause. Because protective searches are not supported by probable cause, the *Terry* Court carefully limited the scope of the search to that which is necessary for the discovery of weapons. By not requiring the officer to specifically identify the felt object, the *Terry* Court intended to minimize the intrusion.²⁷¹ Thus, the decision was based on the premise that the feel of a weapon, which is usually very hard and somewhat sizable, would undoubtedly be apparent to an officer who merely patted down a suspect.

²⁶⁶ Generally, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

²⁶⁷ See *Dickerson*, 113 S. Ct. at 2137.

²⁶⁸ See Haselkorn, *supra* note 124, at 697.

²⁶⁹ See *Arizona v. Hicks*, 480 U.S. 321, 327 (1987).

²⁷⁰ See Haselkorn, *supra* note 124, at 697.

²⁷¹ Rather than specifically identifying the felt object, the officer merely must determine whether the object is, or is not, a weapon. See *Terry v. Ohio*, 392 U.S. 1, 29 (1968).

This fundamental premise fails for most items of contraband. The varying physical characteristics of contraband make it virtually impossible for an officer to immediately ascertain the criminal nature of the substance, given the more cursory treatment of a patdown search.²⁷² Thus, in theory, *Dickerson* protects the individual because the Court requires an officer to have probable cause before seizing an object or conducting a more extensive search. In practice, however, an officer could not possibly gain probable cause from the mere touching of an object through clothing. Indeed, the *viewing* of an object of contraband will very often be insufficient to give rise to probable cause, because the illegal nature of the object may not be immediately apparent.²⁷³ Touching in the context of a protective search is inherently less reliable than viewing. While a law enforcement officer normally would view the contraband itself, he or she could only touch it through clothing. In addition, the identification of an object detected through the sense of touch is open to a wider range of interpretation than if detected through the sense of sight. Thus, as illustrated in the introductory hypothetical, the plain feel doctrine in the context of a cursory patdown search has great potential for error.

This potential for misinterpretation, along with a zealous police officer's desire to establish probable cause to justify a seizure, will inevitably lead to more intrusive searches than permitted by *Terry*. Moreover, to approve the use of evidence of some offense unrelated to weapons would be to invite the use of weapon searches as a pretext for unwarranted searches, and thus to severely erode the protection of the Fourth Amendment.²⁷⁴ Police officers will likely succeed in convincing a court—which has incriminating evidence in front of it—that their sense of touch made it immediately apparent to them that the felt object was contraband.²⁷⁵ If this occurs, the plain feel doctrine will

²⁷² See *State v. Wilson*, 437 S.E.2d 387, 389 (N.C. Ct. App. 1993).

²⁷³ See *Texas v. Brown*, 460 U.S. 730, 742–43 (1983) (incriminating nature of balloon was immediately apparent, only because officer's training and experience made him aware that balloons tied in that manner were frequently used to carry narcotics); *United States v. Matthews*, 942 F.2d 779, 783 (10th Cir. 1991) (incriminating nature of weapons immediately apparent only because located in close proximity to illegal drugs); *United States v. Barnes*, 909 F.2d 1059, 1070 (7th Cir. 1990) (incriminating nature of spiral notebook apparent only when officers searching for cocaine saw that notebook contained notations as to grams, ounces, and whether individuals paid or owed money). For example, suppose that a federal agent, armed with a warrant to search for and seize evidence of securities fraud, finds a spiral notebook with notations of weight measurements in plain view. The agent may not be privileged to seize the notebook on a hunch that it may be evidence of drug trafficking. See *Brown*, 460 U.S. at 742–43. On the other hand, if the agent finds a scale, a mirror and a razor blade next to the notebook, then the agent may have probable cause to believe that the notebook is evidence of drug trafficking. See *id.*

²⁷⁴ See *State v. Broadnax*, 654 P.2d 96, 102 (Wash. 1982).

²⁷⁵ See, e.g., *United States v. Brown*, No. 93–378(HL), 1994 WL 380695, at *6 (D.P.R. May 20,

surely allow police to make far greater intrusions than the brief *Terry* search would otherwise allow. This potential for abuse leads one to question the *Terry* decision itself.

C. Foundational Weaknesses

The Court could have used *Dickerson* as a vehicle for clarifying *Terry*.²⁷⁶ If the problem of pretextual searches is substantial enough to call for some Fourth Amendment remedy, then the Court could have limited or clarified the authority to make *Terry* stops. There is a need for additional guidelines on exactly what criteria give rise to reasonable suspicion to stop an individual. Police officers should not be permitted to stop an individual whose only "wrong" was the individual's evasion of the police, as any given individual may have one of several legitimate reasons to avoid the police. For example, an individual's prior interaction with police may cause apprehension. Moreover, racial tensions exist in some communities which may cause citizens to avoid any unnecessary confrontations with the police.

For these reasons, the Court should devise a standard that requires more than the mere evasiveness of an individual in order to justify a stop.²⁷⁷ A rebuttable presumption that evasiveness alone fails to give rise to reasonable suspicion is one possible standard. The prosecution could then rebut the presumption by a showing of glaring evasiveness, or by establishing that the individual's evasiveness demonstrated more than his or her exercise of the right to avoid police officers.²⁷⁸

More importantly, the Court should re-examine the authority of a police officer to *frisk* an individual based on the lesser standard of reasonable suspicion. Justice Scalia, in his concurring opinion, seemed very concerned about the "frisk" portion of the *Terry* "stop-and-frisk" when he stated, "I frankly doubt . . . whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity"²⁷⁹ Justice Scalia's concern lies, no doubt, in the

1994) (plain feel doctrine justified warrantless seizure of cocaine where officer testified that illegal nature was immediately apparent, despite fact that cocaine was contained in two packages wrapped in black tape and hidden under defendant's clothing). *But see* *United States v. Mitchell*, 832 F. Supp. 1078, 1079 (N.D. Miss. 1993) (plain feel doctrine did not justify warrantless seizure of crack cocaine, where cocaine was contained in plastic bags, wrapped in athletic sock, inside paper bag which defendant carried in lined inside pocket of heavy leather jacket, and police knew that lump was not weapon).

²⁷⁶ See George E. Dix, *Stop and Frisk Using a 'Plain Feel' Test*, *LEGAL TIMES*, Jan. 25, 1993, at 37.

²⁷⁷ See *id.*

²⁷⁸ See *id.*

²⁷⁹ *Dickerson*, 113 S. Ct. at 2140 (Scalia, J., concurring).

realization that the physical touching of an individual represents an extreme invasion of privacy.

In light of the differences between *touching* and *viewing*, the Court could condition the authority to conduct a patdown *search* on the more stringent standard of probable cause, while granting the authority to *stop* an individual based on reasonable suspicion.²⁸⁰ For example, a suspect, stopped based on reasonable suspicion and then questioned by the officer, may be unable to alleviate the officer's fears. In such a situation, the temporary detention of a suspect would be elevated to a full custodial arrest based on probable cause.²⁸¹ At that point, the officer could lawfully conduct not only a protective search for weapons, but also a full physical search incident to the arrest.²⁸²

The *Dickerson* Court questioned neither the legality of the stop nor the frisk. The case provided an excellent opportunity, however, for the Court to add much needed clarification to the law of stop-and-frisk, and to impose some limits on police power. Of course, only in rare circumstances would a court decide questions not before it.²⁸³ The *Dickerson* Court, however, did not seem concerned about this policy, given its unnecessary creation of the plain feel doctrine.

V. ALTERNATIVES AND MODIFICATIONS TO PLAIN FEEL

The Court's creation of the plain feel doctrine in *Dickerson* was unnecessary in deciding the case. Instead, the Court merely could have reasoned that the search of *Dickerson* exceeded the bounds authorized by *Terry*. Other alternatives to the plain feel doctrine also are available to address society's interest in fighting crime. One alternative already is built into the Court's reasoning in *Terry*. Seizure of an object is justified under *Terry* when an officer conducts a further search based on his or her erroneous belief that a hidden object may be a weapon.²⁸⁴ If the object instead turns out to be contraband, the contraband is admissible into evidence.²⁸⁵ Second, the officer, upon sensing a suspicious bulge, can obtain a warrant based on probable cause that the object is contraband. As discussed above, because of the lack of exigency in these situations, in contrast to plain view situations, a warrant-

²⁸⁰ See *id.* (Scalia, J., concurring).

²⁸¹ See *id.* (Scalia, J., concurring).

²⁸² See *id.* (Scalia, J., concurring).

²⁸³ See, e.g., *Taylor v. Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992); *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

²⁸⁴ See, e.g., *United States v. Oates*, 560 F.2d 45, 62 (2d Cir. 1977); *State v. Evans*, 618 N.E.2d 162, 171 (Ohio 1993), *cert. denied*, 114 S. Ct. 1195 (1994).

²⁸⁵ See, e.g., *Oates*, 560 F.2d at 62; *Evans*, 618 N.E.2d at 171.

less search would not be justified. Finally, the officer who senses a suspicious bulge may obtain the suspect's consent to conduct a further search for contraband. In this situation, because an individual has no legitimate expectation of privacy in items which the individual has allowed to be searched, a warrantless search would be justified.²⁸⁶

Recognizing the obvious advantages to law enforcement that *Dickerson* provides, some states may wish to adopt the plain feel doctrine. Many of these states, however, may wish to provide greater protection of individual rights than *Dickerson* would allow. Because the United States Constitution represents only a floor of individual rights, states, in interpreting their own constitutions, can provide greater protection than the United States Constitution requires.²⁸⁷ Thus, states can modify the plain feel doctrine, as articulated in *Dickerson*, in order to lessen its intrusion on individual rights.²⁸⁸

First, states can modify the level of justification required for an officer to seize an item. For example, although *Dickerson* requires an officer to have "probable cause" before seizing an item, a state may instead require an officer to have "reasonable certainty."²⁸⁹ In *United States v. Williams*, the D.C. Circuit described the latter standard as "good enough to eliminate all need for additional search activity."²⁹⁰ The court further explained that such a situation "can only occur when sensory information acquired by the officer rises to a state of certitude, rather than mere prediction [as with probable cause], in regard to the

²⁸⁶ See, e.g., *United States v. Ponce*, 8 F.3d 989, 998 (5th Cir. 1993) (defendant consented to search of his person which resulted in discovery of heroin in his pocket).

²⁸⁷ See, e.g., *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980); *Cooper v. California*, 386 U.S. 58, 62 (1967). For example, eight state supreme courts have rejected, on state constitutional grounds, the "good faith exception" to the exclusionary rule. See *State v. Marsala*, 579 A.2d 58, 68 (Conn. 1990); *State v. Guzman*, 842 P.2d 660, 671-72 (Idaho 1992); *State v. Novembrino*, 519 A.2d 820, 855 (N.J. 1987); *State v. Gutierrez*, 863 P.2d 1052, 1067 (N.M. 1993); *People v. Bigelow*, 488 N.E.2d 451, 458 (N.Y. 1985); *State v. Carter*, 370 S.E.2d 553, 562 (N.C. 1988); *Commonwealth v. Edmunds*, 586 A.2d 887, 901 (Pa. 1991); *State v. Oakes*, 598 A.2d 119, 127 (Vt. 1991). See generally Leigh A. Morrissey, *State Courts Reject Leon on State Constitutional Grounds: A Defense of Reactive Rulings*, 47 VAND. L. REV. 917 (1994). The good faith exception was articulated in *United States v. Leon*, where the United States Supreme Court held that the exclusionary rule should not be applied to evidence obtained by officers acting in reasonable reliance on a search warrant which was issued by a neutral and detached magistrate, but ultimately found to be invalid. 468 U.S. 897, 922 (1984).

²⁸⁸ Two state courts have already discussed state constitutional issues raised by *Dickerson*. See *People v. Mitchell*, 630 N.E.2d 451, 454 (Ill. App. Ct. 1993) (state court adopts plain feel doctrine; state constitution affords no greater rights in search and seizure cases than the United States Constitution); *In re S.D.*, 633 A.2d 172, 176, 176 n.3 (Pa. Super. Ct. 1993) (search exceeded bounds of *Terry*; court does not adopt plain feel doctrine, and suggests that state constitution may provide more protection to citizens than does the United States Constitution).

²⁸⁹ See *United States v. Williams*, 822 F.2d 1174, 1184-85 (D.C. Cir. 1987).

²⁹⁰ *Id.* at 1185.

object of the investigation."²⁹¹ This higher level of certainty would provide greater protection of individual rights, and thus could be permitted under states' interpretation of their constitutions.

Second, state courts can develop assurances that the plain feel doctrine will work properly. States should implement a "motivation" requirement to ensure that a police officer does not conduct pretextual searches or searches beyond those permitted by *Terry*. In *Dickerson*, the Court never discussed the concept of a "motivation" requirement. By neither requiring nor rejecting the requirement, the Court has left room for refinement of the plain feel doctrine. States should seriously consider this potential for refinement in their adoption of the plain feel doctrine.

Warrantless seizures of weapons during a lawful *Terry* stop are allowed in order to protect the police officer and others nearby.²⁹² Where the police officer only intends and anticipates the discovery of items other than weapons, however, the justification of protecting the police and the public loses its force. Thus, an inquiry into the intent of the officer conducting the search is necessary to determine pretext.

The proposed "motivation" requirement functions similarly to the inadvertence requirement originally articulated in *Coolidge v. New Hampshire*.²⁹³ The Court, in *Horton v. California*, eschewed the inadvertence requirement in the context of the plain view doctrine.²⁹⁴ The differing circumstances between plain view and plain feel seizures, however, demonstrate the merit of an analogous requirement for the plain feel doctrine.

In many, if not most, plain view situations, law enforcement officers procure a warrant before conducting a search.²⁹⁵ A warrant is issued by a neutral and detached magistrate, upon a showing of probable cause, and must describe with particularity the place to be searched and the items to be seized.²⁹⁶ These three requirements provide safeguards to ensure that the law enforcement officer making the plain view seizure had *some* justification for conducting a search.

²⁹¹ *Id.* The court held that the officer met this standard, and thus concluded that admission of the evidence was proper. *Id.* at 1186. The court based its conclusion on the officer's testimony that he "could feel" numerous small rolled-up objects, and that he "believed" that the bag contained numerous quarter bags of heroin. *Id.* at 1186 n.121. When asked to explain the basis for his conclusion, the officer stated that "from feeling [the bag, he] could tell it was a large amount, small rolled-up objects that felt like plastic baggies." *Id.*

²⁹² *Terry v. Ohio*, 392 U.S. 1, 29 (1968).

²⁹³ 403 U.S. 443, 469-70 (1971).

²⁹⁴ See 496 U.S. 128, 139-40 (1990).

²⁹⁵ See, e.g., *id.* at 131.

²⁹⁶ See, e.g., *United States v. Christine*, 687 F.2d 749, 758 (3d Cir. 1982).

In contrast, a search warrant will never precede a seizure authorized by the plain feel doctrine. The plain feel doctrine, by definition, is invoked in the context of a warrantless *Terry* stop-and-frisk. Because all three safeguards inherent in the warrant requirement are nonexistent in a *Terry* context, the likelihood is much greater that no justification existed for the initial search. Accordingly, the plain feel doctrine requires more protection against pretextual searches than necessary with the plain view doctrine. Thus, states, in adopting the plain feel doctrine, may wish to resurrect the inadvertence requirement of *Coolidge*, in order to guard against potential abuse.

States may fashion this requirement differently. For example, a court can evaluate the subjective intent of the officer by making inferences from testimony pertaining to the objective circumstances surrounding the search. This standard would provide the most protection of individual rights. Noting the difficulty of determining the officer's motive, however, the Supreme Court has suggested that the officer's subjective intent should be irrelevant.²⁹⁷ Yet, the problems inherent in determining the officer's subjective intent can be mitigated. Rather than focusing on an officer's state of mind, a court can focus on an objective evaluation of the officer's conduct and ignore the officer's underlying, personal motivations.²⁹⁸ For example, the Eleventh Circuit held that in determining whether an investigative stop is invalid as pretextual, the proper inquiry is whether a reasonable officer would have made the seizure in the absence of illegitimate motivation.²⁹⁹

²⁹⁷ See *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985) (sale of obscene material to police officer was not retrospectively transformed into warrantless seizure by virtue of officer's subjective intent to retrieve purchase money to use as evidence); *United States v. Villamonte-Marquez*, 462 U.S. 579, 583-84 (1983) (officer's boarding of defendant's vessel and subsequent seizure of marijuana was lawful, despite officer's potentially devious motivations for conducting search for narcotics); *Scott v. United States*, 436 U.S. 128, 136-37 (1978) (officer's state of mind or subjective intent during search is not relevant when judge reviews officer's conduct).

²⁹⁸ See *United States v. Smith*, 799 F.2d 704, 709 (11th Cir. 1986) (determination of pretextual search should be based on objective evaluation of officer's conduct).

²⁹⁹ See *id.* at 709. In *Smith*, the defendant drove past a police officer. *Id.* at 706. The officer had a hunch, based on a drug courier profile, that the defendant was transporting drugs. *Id.* He followed the defendant for one and one-half miles and, after observing the defendant weave six inches into the adjacent lane, he pulled over the defendant's car. *Id.* Subsequently, the officer arrested the defendant for possession of cocaine. *Id.* The court held that in determining whether an investigatory stop is unreasonably pretextual, the fact that the officer *could* have made the stop is irrelevant. *Id.* at 709. Rather, the proper inquiry is whether a reasonable officer *would* have made the stop. *Id.* Because a reasonable officer would not stop an individual who drifted a mere six inches into an adjacent lane, the court concluded that the stop was pretextual and excluded the evidence. *Id.*; see also *United States v. Causey*, 834 F.2d 1179, 1184-85 (5th Cir. 1987) (proper inquiry in determination of pretextual search is whether reasonable officer *could* have made seizure).

Although this standard may be less protective of individual rights, it would nonetheless provide defendants in extreme circumstances with some level of protection.

Under either of the above standards, state courts may place the burden of proof on either the government or the defendant.³⁰⁰ Although placing the burden of proof on the government would provide more protection of individual rights, shifting the burden to the defendant would avoid unnecessary delay in trials where pretext is clearly not at issue. If the defendant can make a showing that the officer intended to search only for items other than weapons, then the items should be subject to the exclusionary rule and inadmissible as evidence. Such conduct would constitute a deliberate attempt to circumvent the constitutional requirement of a warrant "particularly describing the place to be searched, and the persons or things to be seized," and cannot be condoned.³⁰¹

VI. CONCLUSION

In *Minnesota v. Dickerson*, the United States Supreme Court recognized a plain feel exception to the Fourth Amendment warrant requirement. The doctrine provides that where an officer feels an object in the course of a *Terry* stop, and this touching provides probable cause for a further search or seizure, the further intrusion need not be authorized by a warrant. The Court held, however, that the frisk must remain within the bounds of the weapons frisk permitted by *Terry*.

In its reasoning, the Court turned its back on reality. Because it would be virtually impossible to gain probable cause from the mere touching of an object through clothing, it is difficult to imagine a situation where a plain feel seizure would be justified. To soften the potential for abuse, state courts wishing to adopt the plain feel doctrine may interpret their own constitutions to provide greater protection than the United States Constitution requires. In order to ensure that police officers do not conduct pretextual searches or searches beyond those permitted by *Terry*, state courts should impose a motivation requirement. If mitigating the problems inherent in determining the officer's subjective intent is necessary, the burden of establishing a police officer's illegitimate motive could be placed on the defendant,

³⁰⁰ The government may have the burden of proving the absence of an illegitimate motivation. Alternatively, the defendant may have the burden of establishing that the officer conducted a pretextual search.

³⁰¹ See *Horton*, 496 U.S. at 148 (Brennan, J., dissenting).

and could be satisfied in the form of objective evidence. To authorize a plain feel seizure without allowing the defendant this opportunity would give law enforcement officers carte blanche to conduct illegal searches and seizures. This conduct must not be permitted, if the Fourth Amendment is to have any meaning at all.

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