The Future of the Fourth Amendment after Minnesota v. Dickerson - A "Reasonable" Proposal

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THE FUTURE OF THE FOURTH AMENDMENT AFTER MINNESOTA v. DICKERSON — A “REASONABLE” PROPOSAL

INTRODUCTION

With the recent decision in Minnesota v. Dickerson, the Supreme Court rendered constitutional the “plain feel” doctrine, yet another exception to the Warrant Clause of the Fourth Amendment to the Constitution. Most liberally applied, the plain feel doctrine allows police officers, while in the process of a lawful pat search of a suspect, to seize any contraband that they detect based on their sense of touch. Until its constitutional endorsement, the state and federal courts were split over the propriety of such an extension under the Fourth Amendment. While the Dickerson decision endorsed the constitutionality of this exception, it simultaneously limited the exception’s application by mandating that any such search remain within strictly delineated boundaries.

This Note begins by providing a brief historical survey of recent Fourth Amendment jurisprudence to enable the reader to clearly understand the constitutional underpinnings that allowed the plain feel doctrine to evolve. This survey initially presents the general foundations of the Supreme Court’s Fourth Amendment jurisprudence, and then moves into a more detailed discussion of the “stop and frisk” and plain view doctrines. Next, this Note discusses how the convergence of those doctrines led to the gradual acceptance of the plain feel doctrine, addressing several cases decided prior to

1. 113 S. Ct. 2130 (1993).
2. Id. at 2137.
3. Id.
4. See infra note 242 (listing jurisdictions and cases which have considered the plain feel test).
6. See infra notes 15-34 and accompanying text (discussing several seminal Supreme Court Fourth Amendment decisions).
7. See infra notes 35-133 and accompanying text (discussing the background of the “stop and frisk” and plain view doctrines).
8. See infra notes 134-55 and accompanying text (discussing the confluence of the “stop and frisk” and plain view doctrines).
Dickerson. Examining the Dickerson case, this Note focuses on both the lower court opinions and the Supreme Court opinion, as well as two lower court cases decided subsequent to Dickerson. Next, this note analyzes the plain feel doctrine and evaluates its propriety and applicability both practically and jurisprudentially, carefully presenting the methodologies used in Dickerson and its impact on lower court cases decided subsequently. Finally, this Note proposes a unique methodology for the lower courts to follow in applying the plain feel doctrine.

I. BACKGROUND

The Fourth Amendment to the United States Constitution provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The amendment utilizes the words "search" and "seizure" as limiting principles, requiring police officers to be reasonable only if they are conducting either "searches" or "seizures." What constitutes a search is an elusive question, and one the Supreme Court attempted to answer in a variety of ways over the past century. This section provides a historical overview of the Court's Fourth Amendment jurisprudence that will be useful in analyzing the development of the plain feel exception.

A. Prior to Recognition of Fourth Amendment Privacy

Prior to the seminal case of Katz v. United States in 1967, the Supreme Court interpreted the word "searches," as it is used in the Fourth Amendment, rather narrowly. The Court would only find

9. See infra notes 156-234 and accompanying text (discussing cases that considered the plain feel test prior to Dickerson).

10. See infra notes 235-70 and accompanying text (discussing Dickerson).

11. See infra notes 271-304 and accompanying text (examining lower courts application of the plain feel doctrine in the wake of Dickerson).

12. See infra notes 305-79 and accompanying text (analyzing the plain feel doctrine).

13. See infra notes 380-407 and accompanying text (examining the impact of Dickerson).

14. See infra notes 408-22 and accompanying text (proposing a "reasonable" methodology for the analysis of "plain feel" cases).

15. U.S. CONST. amend. IV.


17. See infra notes 27-232 and accompanying text (providing a brief, limited history of Fourth Amendment jurisprudence relevant to the plain feel exception).


19. In Olmstead v. United States, 277 U.S. 438 (1928), the Court unequivocally held that the
that a search had actually occurred if the police had physically intruded into a "constitutionally protected area."20 Protected areas were those specified by the Constitution itself: "persons, houses, papers, and effects."21 This was the state of the law until the landmark decision in Katz v. United States22 marked "a watershed in [F]ourth [A]mendment jurisprudence."23 It was with Katz that the Court attempted to move "toward a redefinition of the scope of the Fourth Amendment."24

B. Katz v. United States and the Foundations of Fourth Amendment Privacy

In Katz, the trial court convicted the defendant for violating a federal statute which prohibited the transmission of wagering information by telephone over state lines.26 At trial, the court permitted the government to introduce evidence of the defendant's portion of telephone conversations that FBI agents overheard by attaching an electronic listening and recording device to the phone booth from which he made his calls.28 The Supreme Court held that this evidence was inadmissible because the electronic eavesdropping involved, undertaken without a search warrant, was an unconstitutional search.27

wiretapping of a defendant's telephone was not a search for the reason that the telephone wires "searched" were not part of his home. Id. at 466. Similarly, in United States v. Lee, 274 U.S. 559 (1927), the Court held that there was no search where a Coast Guard patrolman shined a searchlight onto the deck of a motorboat and discovered cases of liquor. Id. at 563. The Court reasoned that the use of a searchlight was comparable to the use of a field glass and therefore consistent with the Constitution. Id.


21. U.S. CONST. amend. IV. One commentator has characterized the Court's standard as it existed prior to 1967 as a "property-based" standard, as the Court was only concerned with whether the particular property involved was one of those "areas" enumerated in the Fourth Amendment. Kevin A. Lantz, Case Note, Search and Seizure: "The Princess and the 'Rock'"—Minnesota Declines to Extend "Plain View" to "Plain Feel"—State v. Dickerson, 18 U. DAYTON L. REV. 539, 542 (1993).


26. Id.

27. Id. at 358. In so holding, the Court expressly overruled Olmstead, stating that "the underpinnings of Olmstead . . . have been so eroded by our subsequent decisions that the . . . doctrine
In arriving at this holding, the Court reasoned that because "the Fourth Amendment protects people — and not simply 'areas' -- against unreasonable searches and seizures, it [is] clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." The Court went on to stress the importance of adherence to judicial processes in the arena of the Fourth Amendment and to state that "searches conducted outside the judicial process . . . are per se unreasonable under the Fourth Amendment — subject only to a few . . . well-delineated exceptions." Because electronic surveillance did not fall into one of the "well-delineated" exceptions, the search, executed without a warrant, was necessarily unconstitutional.

Writing for the majority, Justice Stewart rejected the property-based approach previously embraced by the Court and instead adopted a Fourth Amendment analysis based on privacy — essentially redefining when a search or seizure takes place. In his concurrence, Justice Harlan infused some substance into this privacy standard, stating that "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Justice Harlan’s statement emphasized the importance of judicial adherence to judicial processes, specifically stating that "searches conducted outside the judicial process . . . are per se unreasonable under the Fourth Amendment — subject only to a few . . . well-delineated exceptions." Because electronic surveillance did not fall into one of the "well-delineated" exceptions, the search, executed without a warrant, was necessarily unconstitutional.

31. Katz, 389 U.S. at 358. The Court opined that authorizing such a search in the absence of a warrant would "[bypass] the safeguards provided by an objective predetermination of probable cause, and [substitute] instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." Id. (quoting Beck v. Ohio, 379 U.S. 89, 96 (1964)).

32. Id. at 351-52. One commentator has noted that the decision in Katz did not only extend Fourth Amendment protection to electronic surveillance, but potentially altered all future applications of the Fourth Amendment to searches and seizures. Richard L. Aynes, Katz and the Fourth Amendment: A Reasonable Expectation of Privacy or, A Man's Home is His Fort, 23 CLEV. ST. L. REV. 63, 66 (1974).

33. Katz, 389 U.S. at 361. Although a number of subsequent Supreme Court cases, such as United States v. Dionisio, 410 U.S. 1, 8, 14-15 (1973), Alderman v. United States, 394 U.S. 165, 179 n.11 (1969) and Terry v. Ohio, 392 U.S. 1, 9 (1968), have cited this formulation with approval, one commentator has pointed out that such a subjective expectation of privacy has no
the Court's newfound focus on privacy, a focus which has since been central to the Court's Fourth Amendment jurisprudence.\textsuperscript{34}


The Court in \textit{Katz} stated that only a few "well-delineated exceptions" would be sufficient to escape the \textit{per se} warrant requirement.\textsuperscript{35} Indeed, prior to \textit{Terry v. Ohio},\textsuperscript{36} the Court had been reluctant to expand the category of acceptable exceptions.\textsuperscript{37} \textit{Terry}, however, not only created a "new" exception to the Warrant Clause by sanctioning the "stop and frisk" doctrine,\textsuperscript{38} but through its methodology, lessened the standard by which courts would evaluate future exceptions,\textsuperscript{39} marking the first time that the Court clearly separated the Warrant Clause of the Fourth Amendment from the clause proscribing unreasonable searches and seizures.\textsuperscript{40} Additionally, two companion cases decided with \textit{Terry, Sibron v. New York}\textsuperscript{41} and \textit{Peters v. New York},\textsuperscript{42} helped to define the boundaries of the place in the interests protected by the Fourth Amendment because it neither adds to, nor would its absence detract from, one's claim to Fourth Amendment protections. Amsterdam, \textit{supra} note 16, at 384.

Another commentator opines that the Court designed this privacy language to force law enforcement agencies to comply with Fourth Amendment requirements in areas where they would previously have been unconstrained, hence broadening judicial control over police practices in all cases which implicated a reasonable privacy expectation. Gerald G. Ashdown, \textit{The Fourth Amendment and the Legitimate Expectation of Privacy}, 34 \textit{VAND. L. REV.} 1289, 1310-11 (1981).

34. To the ends of privacy, Justice Harlan also stated that "a man's home is . . . a place where he expects privacy," and that "reasonable expectations of privacy may be defeated by electronic as well as physical invasion." \textit{Katz}, 389 U.S. at 361-62. With respect to the emphasis that has since been placed on the privacy aspects of \textit{Katz}, Professor Amsterdam pointed out that "\textit{Katz} protects . . . privacy interests, but . . . those interests are [not] the only interests which the fourth amendment protects." Amsterdam, \textit{supra} note 16, at 385. He pointed to language in \textit{Katz} which stated that "[the Fourth Amendment's] protections go further, and often have nothing to do with privacy at all." \textit{Id.} (quoting \textit{Katz}, 389 U.S. at 350).

35. \textit{Katz}, 389 U.S. at 357.
37. \textit{Cf. Ashdown, supra,} note 33, at 1296-97 (stating that while before \textit{Terry} the Court held the full extent of the Fourth Amendment to be applicable subject to a few exceptions, after \textit{Terry} the Court began to look at the Fourth Amendment as a more flexible provision and began to limit search and seizure protection in a multitude of situations).
39. \textit{See id.} at 20 (stating that warrantless searches may be permitted in certain situations if they are reasonable).
40. Ashdown, \textit{supra} note 33, at 1297 n.36 (citing \textit{Terry}, 392 U.S. at 20-27).
42. \textit{Id.} Although the Court decided \textit{Peters} and \textit{Sibron} together, these cases presented quite different factual situations and will be discussed as separate cases for the purposes of this article.
Court's newly established "stop and frisk" exception by showing its application in different factual situations. After a detailed examination of the seminal decision in Terry, this section discusses these cases briefly.

In Terry, a police officer observed the defendant and another man suspiciously walking back and forth in front of a store window in downtown Cleveland in mid-afternoon. After a third man joined in the suspicious activities, the officer made the judgment, based on his experience, that the group might be planning a robbery and might be armed. The officer approached the trio, identified himself, and asked their names. When he did not receive a satisfactory response, he grabbed the defendant and patted down the outside of his clothing. Upon feeling a pistol in the defendant's jacket, the officer removed the jacket and retrieved the pistol. Consequently, the trial court convicted the defendant for carrying a concealed weapon.

In affirming the conviction, the Supreme Court began by clarifying that the stop and search in this case clearly fell within the ambit of the Fourth Amendment. The Court went on to redefine Fourth Amendment analysis as a balancing test, eschewing the automatic application of the Warrant Clause's requirement of probable cause, and stating that "the conduct ... must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." The Court defined this test as a balance

43. Terry, 392 U.S. at 5-6.
44. Id. at 6.
45. Id.
46. Id. at 6-7.
47. Id. at 7. The defendant only "mumbled something" in response to the officer's inquiries. Id.
48. Id. at 6-7.
49. Id.
50. Id. at 8.
51. Id. at 16. Some courts had previously avoided the constitutional issue presented by such a case by finding that a stop and frisk did not rise to the level of a search and seizure. John A. Mackintosh, Note, 47 Tex. L. Rev. 138, 140 (1968) (citing United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960)); see also People v. Rivera, 201 N.E.2d 32, 35 (N.Y. 1964) (holding that a "frisk" is not a "search" within the meaning of the Fourth Amendment), cert. denied, 379 U.S. 978 (1965). Contra People v. Taggart, 229 N.E.2d 581, 585-86 (N.Y. 1967) (holding that a "frisk" was a "search" that was justified by less than probable cause), appeal dismissed, 392 U.S. 667 (1968).
52. With regard to the warrant requirement, the Court stated that "we deal here with an entire rubric of police conduct — necessarily swift action predicated upon the on-the-spot observations of the officer on the beat — which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." Terry, 392 U.S. at 20.
53. Id. Professor LaFave suggests that this approach assumes that a lesser degree of evidence
between, on one hand, "the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," and, on the other hand, "the invasion which the search [or seizure] entails." Therefore, the critical question was whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"

Applying this test, the Court first identified the "legitimate" governmental interest of effective crime prevention, detection and investigation. The Court also recognized the police officer's "more immediate interest" in verifying that the person he is confronting is not carrying a weapon that could be used against him. The Court balanced these interests against the "severe, though brief, intrusion upon cherished personal security" engendered by the frisk, and came to the conclusion that regardless of whether the officer had probable cause to make an arrest, "there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual."

Justice Harlan concurred in this case, as he did in Katz, to clarify two corollaries to the holding that would "serve as initial guidelines for law enforcement authorities and courts throughout the land." First, he stated that to justify a frisk for the purposes of

will be sufficient when an officer acts without a warrant "because he is so acting and thus has escaped the reach of the probable cause half of the amendment." Wayne R. LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 MICH. L. REV. 39, 53 (1968).

54. Terry, 392 U.S. at 21 (quoting Camara v. Municipal Court, 387 U.S. 523, 534-35 (1966)).
55. Id. (quoting Camara, 387 U.S. at 537).
56. Id. at 21-22. (citing Beck v. Ohio, 379 U.S. 89, 96-97 (1964); Carroll v. United States, 267 U.S. 132 (1925)).
57. Id. at 22. The Court stated that "it is [crime prevention and detection] which [underlie] the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." Id.
58. Id. at 23. To substantiate this justification, the Court pointed to a recent study which indicated that 55 of 57 police officers killed in 1966 died from gunshot wounds. Moreover, 41 of those were inflicted by easily concealed handguns. Id. at 24 n.21 (citing FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 45-48, 152, table 51 (1966)).
59. Id. at 24-25.
60. Id. at 27. The Court also stated that, in determining whether an officer acted reasonably, while weight would not be given to the officer's "hunches," his reasonable inferences based on his experience were appropriate for consideration. Id.
62. Terry, 392 U.S. at 31 (Harlan, J., concurring).
protecting the police officer in an encounter with a citizen, the officer must have had constitutional grounds to forcibly stop the person in the first place. Moreover, where such a stop is reasonable, "the right to frisk must be immediate and automatic if the reason for the stop is . . . an articulable suspicion of a crime of violence." Therefore, with the Terry decision, the Court expressed a willingness to look at the Fourth Amendment as a more flexible provision that could be applied on a graduated basis.

In Sibron v. New York, the Court faced a similar police action under somewhat different circumstances. In Sibron, a Brooklyn police officer observed Sibron talking to several known drug addicts between the hours of four p.m. and midnight. The officer also saw Sibron enter a restaurant and converse with three more known addicts. The officer then confronted Sibron, ordered him outside, and said, "[y]ou know what I am after." When Sibron only mumbled something and reached into his pocket, the officer simultaneously reached into Sibron's pocket and pulled out several packets of heroin. Chief Justice Warren, writing for the Court, held that the search in this case was unlawful because the officer was searching for narcotics rather than acting out of fear for his own safety. Significantly, in a concurring opinion Justice Harlan pointed out that the need for immediate action must be taken into account when determining whether there are reasonable grounds for a forcible intrusion. In Sibron, he noted, there was no such exigency.

63. Id. at 32.
64. Id. at 33.
65. Ashdown, supra note 33, at 1296. Professor Ashdown also notes that since Terry, the Court has relied on the reasonableness clause provision of the Fourth Amendment to reduce search and seizure protection in cases of traffic arrests. Ashdown, supra note 33, at 1297 n.37 (citing Pennsylvania v. Mimms, 434 U.S. 106 (1977) (authorizing police officer to order traffic violator out of vehicle with no basis for suspicion), and in cases of border patrol searches; United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (authorizing border patrol's routine stopping of vehicles with no individualized suspicion)).
67. Id. at 45.
68. Id.
69. Id.
70. Id.
71. Id. at 65-66.
72. Id. at 73 (Harlan, J., concurring).
73. Id. Professor LaFave points out that the Court was undoubtedly influenced by the nature of the crimes in Terry and Sibron. LaFave, supra note 53, at 58-59. In Terry, the observation period was short (about twelve minutes) and the crime suspected was robbery. Id. The Court concluded that it would have been poor police work for the officer to have failed to investigate. Id. Conversely, in Sibron, the suspect was monitored continuously for an eight hour period in an area
In *Peters v. New York,* the Court addressed a case involving a New York City police officer who heard a noise outside his door while at home one afternoon. He went to his peephole to see what was happening and saw two strangers moving suspiciously toward the stairway. After calling the police, he looked out again, and saw the suspects headed for the stairway. Believing that they were in the building to commit a burglary, the officer entered the hallway, at which point the two men ran down the stairs. The officer chased them and seized Peters who could not give an adequate explanation as to why he was in the building. The officer then patted him down and felt what seemed to be a knife in his pocket. The officer removed the object, which turned out to be a plastic envelope containing burglary tools.

Chief Justice Warren, writing for the Court, held that it was not necessary to reach the stop and frisk issue in this case, as the officer's search of Peters was incident to a lawful arrest. Justice Harlan concurred and wrote separately because he maintained that the officer, under the circumstances, lacked probable cause to arrest Peters. Instead, Justice Harlan preferred affirming Peters's conviction on the grounds that the officer had reasonable cause to make a forced stop. Justice Harlan stated that once this stop was made, the frisk was only done for the purpose of turning up weapons, and that if the frisk is lawful, the State is entitled to use any contraband that appears. Thus, because the officer was looking for a knife when he found the burglary tools, the tools were admissible fruits of that legal stop and frisk.

...
When viewed together, one may draw certain conclusions from the above three cases. First, a police officer may forcibly stop a citizen and briefly detain him for the purpose of investigating criminal behavior without any showing of probable cause. Second, only a reasonable suspicion will give rise to a legitimate "stop." Third, in the course of such a stop, the officer may frisk the citizen when he has a reasonable suspicion that the suspect is armed and is in a position to harm the officer or others. Fourth, an unparticularized suspicion or hunch may not be the foundation for a stop and frisk; it must be based upon reasonable inferences which the officer may draw from the facts in light of his experience. Fifth, the search must be circumscribed appropriately; it may not be a search for contraband or any other items besides weapons that a suspect might use to harm the officer or others. Sixth, courts will consider the immediacy of the situation in evaluating the propriety of a stop and frisk. Finally, even though the police officer finds something other than a weapon as a result of the frisk, the government may use that item against the suspect if the stop and frisk were lawful and appropriately circumscribed. The plain view exception to the warrant requirement is frequently used in conjunction with the stop and frisk exception to justify a search. This concept is discussed below.

**D. The Plain View Doctrine**

The plain view doctrine, another exception to the Warrant Clause, allows a police officer to seize an object if he is where he has a lawful right to be and has lawful access to an object that is in plain view and whose incriminating nature is immediately apparent. This section discusses the Court's acceptance and subsequent


88. *Peters*, 392 U.S. at 77-78 (Harlan, J., concurring); Wilson, *supra* note 87, at 79.

89. *Terry*, 392 U.S. at 27; Wilson, *supra* note 87, at 79.


91. *Terry*, 392 U.S. at 27; see also *Ybarra v. Illinois*, 444 U.S. 85 (1979) (holding that *Terry* does not allow a search for anything but weapons); Wilson, *supra* note 87, at 79 (noting the Court's approval of the frisks in *Terry* and *Peters*, in which the officers were looking for weapons, and the search in *Sibron*, where the focus was narcotics).


modification of this doctrine.

A plurality of the Court first recognized the existence of the plain view exception to the warrant requirement in *Coolidge v. New Hampshire*. Although the holding in *Coolidge* did not apply the plain view exception in that case, the Court articulated the standard and its requirements as follows. First, the initial intrusion by the officer must be lawful; the plain view justification by itself would never be sufficient to justify a warrantless seizure. Second, it must be immediately apparent to the police that they have evidence of a crime before them. Third, the discovery of the evidence must be inadvertent.

In the next case addressing this doctrine, *Texas v. Brown*, a plurality of the Court upheld a police officer's seizure of contraband as justified under the plain view exception. In *Brown*, a police officer stopped the defendant's automobile pursuant to a routine driver's license check. While waiting for the defendant to produce his license, the officer shined his flashlight into the defendant's car and saw an opaque green party balloon in the defendant's hand. Because of his previous experience in drug arrests, the officer recognized the balloon as a common method for packaging narcotics. Upon seeing the balloon, the officer moved to better see the interior of the defendant's car. From his new vantage point, he was able to see several small plastic vials, quantities of loose white powder, and a bag of balloons. The officer then ordered the defendant out of the car, arrested him, and seized the balloon, which turned out to

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95. 403 U.S. 443 (1971).
96. *Id.* at 472.
97. *Id.* at 467-68. Therefore, the plain view exception must always operate in conjunction with some other justification for a search — either a warrant or a valid exception to the warrant requirement. *Id.*
98. *Id.* at 466.
99. *Id.* at 469. Although this requirement retained vitality for almost two decades, Justice Stewart's initial discussion regarding it was only joined by three other members of the Court. Therefore, that portion of the opinion is not binding precedent, and courts need not require inadvertence in evaluating plain view seizures. Joel Schwartz, Note, *The Inadvertence Requirement of the Plain View Doctrine in Horton v. California: A Foreseeable End?*, 21 SW. U. L. REV. 225, 227 (1992). The Court eventually abandoned this requirement. *Id.* at 225.
101. *Id.* at 743.
102. *Id.* at 733.
103. *Id.*
104. *Id.* at 734.
105. *Id.*
106. *Id.*
contain heroin, and the other evidence.\textsuperscript{107}

Applying the three part plain view test articulated in \textit{Coolidge},\textsuperscript{108} the Court first stated that the officer was lawfully where he had a right to be, as the initial stop of the defendant's vehicle was justified as a license check.\textsuperscript{109} Second, the Court found that the incriminating nature of the balloon was immediately apparent to the officer.\textsuperscript{110} The Court clarified that this prong of the test did not mandate that the officer "know" that the item in question was contraband.\textsuperscript{111} Instead, the Court stated that the seizure of property in plain view was presumptively reasonable provided that there was probable cause to associate the property with criminality.\textsuperscript{112} The Court then held that the record before them indicated that the officer had probable cause to believe that the balloon in the defendant's hand contained contraband.\textsuperscript{113} Finally, the Court held that the officer's discovery of the contraband was inadvertent, as the officer did not know in advance that the defendant's car would contain contraband.\textsuperscript{114} As all three of the requirements for invocation of the plain view doctrine were met, the Court held that the seizure was justified.\textsuperscript{115}

The Court further developed this doctrine in \textit{Arizona v. Hicks},\textsuperscript{116} by unequivocally stating that an officer must have probable cause that the object in question is evidence of criminality before he can

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 735.
\item \textsuperscript{108} \textit{Id.} at 740 U.S. 443, 465-70 (1971).
\item \textsuperscript{109} \textsuperscript{111} While the Court agreed that invocation of the test was appropriate here, it pointed out that the \textit{Coolidge} opinion had only garnered a plurality of the Court, and as such, was not binding precedent. \textit{Brown}, 460 U.S. at 737. The Court clarified that the plain view doctrine was not an independent exception to the warrant clause, but an extension of whatever was the original justification for the officer's access to the object. \textit{Id.} at 739.
\item \textit{Id.} at 739.
\item \textit{Id.} at 741-42.
\item \textit{Id.}
\item \textit{Id.} at 742. The Court here was expressing its disagreement with the lower court it reversed, which held that the "immediately apparent" prong of the plain view test required that the officer have a near certainty that the objects in question were seizable. \textit{Id.}
\item \textit{Id.} at 742. In arriving at this determination, the Court pointed to the officer's testimony which indicated that through his previous experience and his discussions with others, he was aware that balloons tied in the manner of the one carried by the defendant were commonly used to carry narcotics. \textit{Id.} at 742-43.
\item \textit{Id.} at 743. The Court acknowledged that the police may have had a generalized expectation that some of the cars that they stopped in this area may have contained narcotics, but stated that this generalized suspicion was not sufficient to defeat the inadvertency requirement. \textit{Id.} at 743-44.
\item \textit{Id.} at 743.
\item \textit{Id.} at 740 U.S. 321 (1987).
\end{enumerate}
\end{footnotesize}
further search that object.\textsuperscript{117} In \textit{Hicks}, the Court held that the seizure of stereo equipment from the defendant's apartment was invalid because it was seized pursuant to an illegal search.\textsuperscript{118} In that case, the officers were in the defendant's apartment in response to gunfire from that apartment.\textsuperscript{119} While there, one of the officers noticed two sets of expensive stereo equipment which seemed out of place in the small squalid apartment.\textsuperscript{120} Suspecting that the equipment was stolen, the officer recorded the serial numbers, moving a turntable to do so.\textsuperscript{121} On being advised that the turntable was stolen, the officer seized it.\textsuperscript{122}

The Court held that this search was an improper exercise of the plain view doctrine, stating for the first time that an officer must have probable cause to believe that the property in question is contraband before an officer may legally seize it.\textsuperscript{123} Here, the Court held, the officer only had a reasonable suspicion that the equipment was stolen, a quantum of suspicion something less than probable cause.\textsuperscript{124} Because of the lack of probable cause, the officer's additional search — the moving of the turntable to determine its serial number — was improper, thereby rendering seizure of the turntable unlawful.\textsuperscript{125} Justice White concurred in \textit{Hicks}, criticizing the inadvertency requirement and clarifying that inadvertency had not been addressed in the case.\textsuperscript{126} The criticism turned out to be prescient, as only three years later the Court rejected that requirement in \textit{Horton}.

\begin{itemize}
\item \textsuperscript{117} \textit{Id.} at 326.
\item \textsuperscript{118} \textit{Id.} at 326-29.
\item \textsuperscript{119} \textit{Id.} at 323.
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} \textit{Id.} at 326. Justice Scalia stated that to use any other standard than probable cause would "cut the 'plain view' doctrine loose from its theoretical and practical moorings." \textit{Id.} This was because there was no reason why an object should routinely be seizable on lesser grounds, during an unrelated search and seizure, than would have been necessary to obtain a warrant for that same object had the officers known it was on the premises. \textit{Id.} at 327.
\item \textsuperscript{124} \textit{Id.} at 326. The Court stated that the State had conceded that the officer only possessed a reasonable suspicion that the turntable was stolen. \textit{Id.} (citing Brief for Petitioner at 18-19).
\item \textsuperscript{125} \textit{Id.} at 327. Justice O'Connor dissented, differentiating between a "full-blown search," which she agreed necessitates probable cause, and a "cursory inspection of an item in plain view," which should be allowed on reasonable suspicion that the item is evidence of a crime. \textit{Id.} at 333 (O'Connor, J., dissenting). The search at bar, she stated, was clearly of the latter type. \textit{Id.} at 339.
\item \textsuperscript{126} \textit{Id.} at 329-30 (White, J., concurring). Justice White stated that the inadvertent discovery "requirement" of the plain view doctrine had never been accepted by a judgment supported by a majority of the Court, and that he therefore did not accept the assertion that evidence seized in plain view must have been inadvertently discovered in order to satisfy the dictates of the Fourth Amendment. \textit{Id.}
\end{itemize}
v. California.\textsuperscript{127}

In \textit{Horton}, the Court finally abandoned the inadvertency requirement as contrary to the objective nature of the plain view exception,\textsuperscript{128} and unnecessary in light of already existing rules circumscribing the original search.\textsuperscript{129} The Court clarified the requirements for a plain view search; these requirements represent the current state of the law.\textsuperscript{130} First, the officer must have comported with the Fourth Amendment in arriving at the place from which he could plainly view the evidence.\textsuperscript{131} Second, the incriminating nature of the evidence must have been immediately apparent.\textsuperscript{132} Third, the officer must have had a lawful right of access to the object itself.\textsuperscript{133}

\textbf{E. The Confluence of Stop and Frisk and Plain View}

The preceding discussion of the plain view doctrine explained that the doctrine must be discussed in conjunction with a lawful justification for the original search.\textsuperscript{134} This section discusses cases in which a lawful search and seizure based on the stop and frisk exception was extended by the plain view doctrine. An understanding of how the stop and frisk exception was extended by the plain view doctrine provides a foundation for explaining how courts have extended this confluence to create the plain feel doctrine.\textsuperscript{135}

In \textit{Michigan v. Long},\textsuperscript{136} the Court sanctioned a stop and frisk pro-

\textsuperscript{127} 496 U.S. 128 (1990).

\textsuperscript{128} Id. at 138.

\textsuperscript{129} In the case of a warrant — the requirement that a warrant be set out with particularity, \textit{id.} at 139 (citing Maryland v. Garrison, 480 U.S. 79, 84 (1987)), and in the case of a warrantless search — the requirement that such a search be limited by the exigencies which justified its initiation, \textit{id.} at 139-40 (citing Maryland v. Bue, 494 U.S. 325, 332-34 (1990)).

\textsuperscript{130} Id. at 136-37.

\textsuperscript{131} Id. at 136.

\textsuperscript{132} Id.

\textsuperscript{133} Id. at 137. Justice Stevens pointed out that this requirement is simply a corollary to the principle that "no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'" \textit{Id.} at 137 n.7. One commentator noted that the \textit{Horton} Court's dismissal of the inadvertence requirement could encourage planned warrantless searches or pretextual seizures. This could occur when an officer wished to seize a certain article but lacked probable cause to gain a search warrant. The officer could obtain a warrant for an item in the same house that he does have probable cause to search for. Once inside the house the officer could make a plain view seizure of the object he was really seeking. Schwartz, \textit{supra} note 99, at 239.

\textsuperscript{134} See \textit{supra} note 97 and accompanying text (explaining that the plain view justification alone is never sufficient to justify a warrantless seizure).

\textsuperscript{135} See \textit{infra} notes 156-234 and accompanying text (discussing the plain feel exception).

\textsuperscript{136} 463 U.S. 1032 (1983).
tective examination of an automobile.\textsuperscript{137} While conducting a protective search of the suspect and the passenger compartment of his automobile, the officer found contraband in plain view and seized it.\textsuperscript{138} In this case, officers stopped Long after they saw him drive into a ditch.\textsuperscript{139} By the time the officers got to him, Long was out of the car and appeared intoxicated.\textsuperscript{140} One of the officers shined a light inside the car and saw a hunting knife.\textsuperscript{141} Upon seeing this knife, the officers conducted a protective search of Long's person and of the car's passenger compartment.\textsuperscript{142} The officers found a bag of marijuana in the car and seized it.\textsuperscript{143}

The Court subjected the officers' conduct to the reasonableness analysis articulated in \textit{Terry},\textsuperscript{144} and concluded that "[i]n this case, the officers did not act unreasonably in taking preventive measures to ensure that there were no other weapons within Long's immediate grasp before permitting him to re-enter his automobile."\textsuperscript{145} Thus, the Court held that a search of the passenger compartment for weapons is permissible under \textit{Terry}, as long as the officers possess an articulable and reasonable belief that the suspect is potentially dangerous.\textsuperscript{146} Additionally, and most important for the purposes of this analysis, the Court implicitly sanctioned the use of the plain

\begin{itemize}
\item \textsuperscript{137} Id. at 1034-35.
\item \textsuperscript{138} Id. at 1036.
\item \textsuperscript{139} Id. at 1035.
\item \textsuperscript{140} Id. at 1036.
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Id.
\item \textsuperscript{143} Id.
\item \textsuperscript{144} 392 U.S. 1, 20-22 (1968).
\item \textsuperscript{145} \textit{Long}, 463 U.S. at 1051. One commentator has criticized this holding as one that "stretches doctrine to justify what is to be considered reasonable behavior by the police," even though such conduct may have been inconsistent with prior holdings. Craig M. Bradley, \textit{Two Models of the Fourth Amendment}, 83 MICH. L. REV. 1468, 1484 n.83 (1985). He further notes that while this police behavior was not unreasonable given all the circumstances, it is difficult to see how this decision follows from \textit{Terry}. Id. While \textit{Terry} only sanctioned a limited frisk for weapons, \textit{Long} approved a full search of a car's passenger compartment based on a combination of reasonable suspicion and exigent circumstances even though the suspect was not in the car. \textit{Id}. Another commentator notes that based on the facts on the record in \textit{Long}, it is not ever clear that the officers feared for their safety. Paula C. Tredeau, Casenote, 15 ST. MARY's L.J. 443, 455-56 (1984). Indeed, the knife involved was legal, the suspect was cooperative, and furthermore, had no weapons on his person. \textit{Id}.
\item \textsuperscript{146} \textit{Long}, 463 U.S. at 1051. A commentator notes that although the Court in \textit{Long} purported to follow \textit{Terry}, the limitations on the vehicle search in \textit{Long} are not as clearly defined as were the standards in \textit{Terry}. Furthermore, as \textit{Terry} has expanded past its original guidelines, the Court should expect that \textit{Long} also will, and this failure to set definitive limitations on the scope of a vehicle frisk makes the \textit{Long} decision more vulnerable to unintended extensions. Tredeau, supra note 145, at 453-55.
\end{itemize}
view doctrine as an extension of the *Terry* stop and frisk exception to the Warrant Clause.\footnote{147}

Again, in *United States v. Hensley*,\footnote{148} the Court held that the seizure of evidence in plain view was legitimate during the course of a *Terry* frisk of an automobile passenger compartment.\footnote{149} In *Hensley*, officers stopped the defendant's car because they believed, based on a "wanted flyer," that there might be a warrant out for his arrest.\footnote{150} Upon approaching the car, one of the officers noticed a gun protruding from under a seat.\footnote{151} A subsequent search of the car produced two more guns.\footnote{152} The Court first stated that the "wanted flyer" provided sufficient justification for the officers to stop the defendant.\footnote{153} The Court went on to state that once the officers stopped the defendant, they were entitled to search the passenger compartment for weapons, as the suspects were reported to be "armed and dangerous."\footnote{154} Finally, the Court held that, in the course of such a search, the officers were entitled to seize evidence discovered in plain view during the course of such stop.\footnote{155}

The above two cases demonstrate the way in which the plain view doctrine is used to "extend" a lawful *Terry* search. The following section demonstrates how the plain feel exception is derived from this extension.

\subsection*{F. The Plain Feel Exception}

This exception to the warrant requirement is derived by analogy from the confluence of the stop and frisk and the plain view excep-
It allows a police officer, while conducting a Terry frisk, to seize evidence that she “plainly feels” through the individual’s clothing if it is immediately apparent to the officer that what she feels is contraband. Some commentators have described this exception as an inappropriate broadening of the Terry stop and frisk doctrine, while others accept it as a “common sense” analogue to the plain view doctrine.

Several state and federal courts had ruled on the legitimacy of such an exception to the Warrant Clause prior to the landmark Supreme Court case which is the subject of this article. This section first discusses cases accepting the plain feel exception, and then cases declining to find such an exception.

1. Cases Recognizing a Plain Feel Exception

In United States v. Williams, the United States Court of Appeals for the District of Columbia Circuit held that when an officer “plainly felt” that a bag contained cocaine while in the course of a Terry search, he was justified in searching the bag. In this case, Williams was sitting in the drivers seat of a parked car in Washington, D.C., when four police officers driving an unmarked van drove up alongside the car and stopped. The officers noticed that Williams and the front seat passenger were bent over and concentrating on something in their laps. On the basis of their experience in that neighborhood, the officers suspected that a drug transaction was transpiring. As the officers approached the car to request that

156. See Minnesota v. Dickerson, 113 S. Ct. 2130, 2136-37 (1993) (discussing plain view seizures in the context of Terry stops and stating that “this doctrine has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search”).
157. Id. at 2137.
158. See, e.g., Lantz, supra note 21, at 558 (“Terry cannot be used to justify a stop that leads to a frisk which exceeds Terry’s limited purpose of protecting the officer and bystanders.”).
159. See, e.g., Katherine W. Iverson, Comment, “Plain Feel”: A Common Sense Proposal Following State v. Dickerson, 16 Hamline L. Rev. 247, 280 (1992) (noting that without such an exception, police may seize objects they see from a lawful vantage point, but must disregard those which they feel from a lawful vantage point).
160. See infra notes 162-232 and accompanying text.
161. The courts and literature have used the terms “plain touch” and “plain feel” interchangeably. This Note refers to the doctrine as the plain feel doctrine.
162. 822 F.2d 1174 (D.C. Cir. 1987).
163. Id. at 1185-86.
164. Id. at 1176.
165. Id.
166. Id.
Williams display his driver's license and registration, they saw Williams shove a paper bag under his leg. One officer then had Williams step out of the car, believing that the paper bag might contain a weapon. When Williams exited the car he attempted to flip the bag into the back seat, but he failed and it landed in front. At this point, one of the officers picked the bag up and felt it with both hands. He later testified that on the basis of his touching the bag and his experience and training in narcotics detection that he believed that there were several pouches of heroin inside the bag. The officer opened the bag, found several pouches of heroin, and then arrested Williams.

The court, in evaluating this case, set out a three part test for determining the legitimacy of a plain feel search. First, the officer must be legally authorized to touch the container at the outset. Second, the doctrine does not sanction the use of the sense of touch beyond that justified by the original contact with the container (i.e. the officer is not permitted to continue to manipulate the container in an effort to discern its contents). Third, the contents of a package cannot be deemed in plain view unless a lawful touching convinces the officer to a reasonable certainty that the container holds contraband or evidence of a crime. Applying this test to the facts in the instant case, the court held that the seizure was valid under the plain feel exception.

Similarly, in State v. Washington, the Supreme Court of Wisconsin upheld a plain feel search in which an officer found the fruits

167. Id.
168. Id. at 1177.
169. Id.
170. Id.
171. Id.
172. Id.
173. Id. at 1184.
174. Id.
175. Id.
176. The court here refers to the object discovered pursuant to the plain feel search as having been in plain view. Id.
177. Id. at 1184-85. One commentator notes that this final requirement represents a higher standard than the probable cause required for traditional plain view seizure. Judith E. Baylinson, Recent Decision, Pennsylvania Circumvents the Plain View Doctrine in a Warrantless Search - Commonwealth v. Smith, 64 TEMP. L. REV. 251, 259 n.85 (1991). Another commentator suggests that the standard has been elevated to "protect against the inherently less immediate perception gained through the sense of touch." Iverson, supra note 159, at 271.
178. Williams, 822 F.2d at 1185-86.
179. 396 N.W.2d 156 (Wis. 1986).
FOURTH AMENDMENT

of a burglary on defendant Washington's person in the course of a Terry stop.\textsuperscript{180} In this case, Washington was a passenger in a car that was stopped by the police pursuant to the burglary of a nearby jewelry store.\textsuperscript{181} The officer then ordered Washington out of the car, and because he suspected Washington of a felony, the officer Terry frisked him to see if he was carrying any weapons.\textsuperscript{182} During the course of the frisk, the officer felt three watches in Washington's pocket and placed him under arrest.\textsuperscript{183}

The court first determined that the officer was justified in stopping Washington.\textsuperscript{184} This established, the court stated that the best analysis of the facts was under the plain view exception to the warrant requirement,\textsuperscript{185} and then clarified that the requirement that the evidence be in plain view would be "fulfilled by the fact that the watches were exposed to the officer's sense of touch or view."\textsuperscript{186} The court went on to say that "[e]vidence in plain view is not restricted to items which can only be seen, but rather includes . . . all of the human senses, smell, sight, touch, hearing and taste."\textsuperscript{187} In this case, the officer was able to feel the three watches and determine their identity using his sense of touch. Therefore, according to the court, they were seiizable pursuant to the plain view doctrine.\textsuperscript{188} Al-

\begin{enumerate}
  \item \textsuperscript{180} Id. at 163.
  \item \textsuperscript{181} Id. at 158.
  \item \textsuperscript{182} Id.
  \item \textsuperscript{183} Id.
  \item \textsuperscript{184} Id. at 161.
  \item \textsuperscript{185} Id. The court then set out the criteria for plain view seizure of evidence in Wisconsin as follows:
    \begin{enumerate}
      \item The officer must have a prior justification for being in the position from which the 'plain view' discovery was made;
      \item The evidence must be in plain view of the discovering officer;
      \item The discovery of the evidence must be inadvertent; and
      \item The item seized, in itself or in itself with facts known to the officer at the time of the seizure, provides probable cause to believe there is a connection between the evidence and criminal activity.
    \end{enumerate}
  \item \textsuperscript{186} Id.
  \item \textsuperscript{187} Id. at 161-62.
  \item \textsuperscript{188} Id. at 162. The plain feel exception has been criticized on the ground that it allows the inherent opportunity for an officer to alter his testimony at suppression hearings. See, e.g., Lantz, supra note 21, at 577-79 (pointing to the fact that the officer's testimony differed at two different suppression hearings in Washington, causing one concurring justice to characterize the case as replete with confusion). In justification of the plain feel exception, Professor LaFave states:
    Assuming the object discovered in the pat-down does not feel like a weapon, this only means that a further search may not be justified under a Terry analysis. There remains the possibility that the feel of the object, together with other suspicious circumstances, will amount to probable cause that the object is contraband or some other items subject to seizure, in which case there may be a further search based upon that
though the court did not expressly use the language, "plain feel" search, the court’s statement that plain view encompasses what is “exposed to the officer’s sense of touch or view” clarifies that they were extending the plain view doctrine to include its plain feel analogue.\textsuperscript{189}

Finally, in \textit{State v. Guy},\textsuperscript{190} a police officer was conducting a lawful \textit{Terry} search of a defendant when she felt a lump in the defendant’s pocket that she identified as feeling “soft,” like cocaine or marijuana.\textsuperscript{191} The Supreme Court of Wisconsin held that the officer’s seizure of the object, which turned out to be cocaine, was lawful because there can be “no reasonable expectation of privacy in an item that is in plain view.”\textsuperscript{192} Therefore, the court stated, “no search occurs when an officer views or feels evidence that is in plain view.”\textsuperscript{193}

2. \textit{Cases Declining to Find a Plain Feel Exception}

The highest court of New York refused to find a plain feel exception to the warrant requirement in \textit{People v. Diaz}.\textsuperscript{194} The New York Court of Appeals held that an officer’s removal of 18 vials of crack cocaine from the defendant’s pocket based on a plain feel extension of a \textit{Terry} frisk was impermissible.\textsuperscript{195} The court stated that the analogy of plain view to plain feel did not withstand analysis under either the New York or Federal Constitutions.\textsuperscript{196}

The court first reasoned that “[u]nlike the item in plain view in which the owner has no privacy expectation, the owner of an item concealed by clothing . . . retains a legitimate expectation that the item’s existence . . . will remain private.”\textsuperscript{197} Moreover, the court pointed out that the basic premise of the plain view exception, that the items in plain view may be seized with no additional intrusion,
could not support the plain feel exception. This was so because even if the initial touching that discovered the contraband was completely justified, the discovery and seizure of the items would necessitate an additional intrusion that entailed reaching into the suspect's clothing to remove the object. Finally, the court pointed to pragmatic considerations as well, noting that "[t]he identity and criminal nature of a concealed object are not likely to be discernable upon a mere touch or pat within the scope of the intrusion authorized by Terry."

Similarly, in *State v. Broadnax*, the Supreme Court of Washington, sitting en banc, reversed the defendant's conviction for illegal possession of narcotics, holding that the plain touch search that led to the seizure of the narcotics in that case was unconstitutional. In *Broadnax*, defendant Thompson was a guest in the home of defendant Broadnax when police officers entered the residence to search it pursuant to a search warrant. While inside the home, one of the officers conducted a pat-down search of Thompson. During this initial cursory search, the officer felt a small bulge in Thompson's shirt pocket, reached into Thompson's pocket and removed a balloon containing heroin. Thompson was subsequently arrested and convicted of illegal possession of heroin and his conviction was affirmed by the Washington Court of Appeals.

The Supreme Court of Washington overturned Thompson's conviction, holding that the officer's pat search of Thompson, and subsequent seizure of heroin violated Thompson's Fourth Amendment right to be free from unreasonable searches and seizures. In so holding, the court noted that the lower court relied on a plain view

198. *Id.* at 302.
199. *Id.*
200. *Id.* The court went so far as to state that "the very concept of 'plain touch' is a contradiction in terms: the idea of plainness cannot logically be associated with information concerning a concealed item which is available only through the sensory perceptions of someone who touches it." *Id.*
201. 654 P.2d 96 (Wash. 1982) (en banc).
202. *Id.* at 99.
203. *Id.* at 98-99.
204. *Id.* at 99.
205. *Id.*
206. *Id.*
207. *Id.* at 98.
208. *Id.* at 105.
doctrine analogue in holding the search constitutional.\textsuperscript{209} The court went on to say that the "immediate knowledge" prong of the plain view test could never be met if "the sense of touch is relied upon exclusively for the recognition of contraband."\textsuperscript{210} This was because the tactile sense would usually not result in the immediate knowledge of the nature of an item.\textsuperscript{211} The court also pointed out that the officer who conducted the search testified at trial that he did not believe the object in Thompson's pocket was a weapon.\textsuperscript{212} Because the tactile sense could not provide the requisite "immediate knowledge" to justify the search and seizure, the court held that the search was unconstitutional and consequently vacated Thompson's conviction.\textsuperscript{213}

Finally, in \textit{Commonwealth v. Marconi},\textsuperscript{214} the Superior Court of Pennsylvania held unconstitutional the seizure of methamphetamine,\textsuperscript{215} discovered during a pat search of the defendant for weapons.\textsuperscript{216} In \textit{Marconi}, the police officer's suspicions were aroused upon seeing the defendant exit his car and vomit.\textsuperscript{217} After observing the defendant for several more minutes, the officer drove over to investigate.\textsuperscript{218} The officer recognized the defendant as someone who had previously been charged with drugs and weapons offenses, and observed the defendant conceal something in the rear of his pants.\textsuperscript{219} Fearing for his safety, the officer performed a frisk of the defendant to determine if he was carrying weapons.\textsuperscript{220} Although he felt no weapon, the officer felt an object in the defendant's rear pants pocket.\textsuperscript{221} He then reached into that pocket and retrieved two plastic bags containing methamphetamine,\textsuperscript{222} and then arrested the

\textsuperscript{209} \textit{Id.} at 102. The court identified the three requirements of the plain view test as follows: (1) a prior justification for the intrusion; (2) an inadvertent discovery of incriminating evidence; and (3) immediate knowledge by police that they have evidence before them. \textit{Id; see also supra} notes 94-133 and accompanying text (discussing the plain view doctrine at length).

\textsuperscript{210} \textit{Broadnax}, 654 P.2d at 102.

\textsuperscript{211} \textit{Id}.

\textsuperscript{212} \textit{Id.} at 101. The officer testified that he felt "a small bulge that . . . gives." \textit{Id}.

\textsuperscript{213} \textit{Id.} at 105.


\textsuperscript{215} Methamphetamine is a synthetic drug that produces prominent central stimulant reactions. \textsc{William Statisky, Legal Thesaurus/Dictionary} 490 (1985).

\textsuperscript{216} \textit{Marconi}, 597 A.2d at 624.

\textsuperscript{217} \textit{Id.} at 617.

\textsuperscript{218} \textit{Id}.

\textsuperscript{219} \textit{Id.} at 618 n.4.

\textsuperscript{220} \textit{Id}.

\textsuperscript{221} \textit{Id}.

\textsuperscript{222} \textit{Id}. 
defendant.\textsuperscript{223} Upon defendant's subsequent motion, the trial court suppressed the seized methamphetamine.\textsuperscript{224}

On appeal, the Superior Court held the search unconstitutional because it exceeded the limits set forth by the Supreme Court in \textit{Terry v. Ohio}.\textsuperscript{225} The Superior Court held that the facts of the instant case did not comport with \textit{Terry}'s strict requirement that a frisk based upon reasonable suspicion be narrowly confined to a search for weapons and nothing else.\textsuperscript{226} The court expressly declined to adopt, under the facts of the present case, a plain feel exception to the warrant requirement.\textsuperscript{227} The court reasoned that any additional search of the defendant in this case, above and beyond the frisk, required probable cause.\textsuperscript{228} The court further stated that it would be inconsistent to apply a "plain touch" exception to individuals because in such a situation probable cause could never exist.\textsuperscript{229} The court went on to state that sanctioning a search under the facts of this case would be tantamount to allowing police officers to assume that all small objects in a person's pocket were drugs.\textsuperscript{230} The court refused to open such a door.\textsuperscript{231} Thus, the court upheld the trial court's suppression of the methamphetamine.\textsuperscript{232}

As the preceding cases illustrate, up to this point, there had been a significant split in both the state and federal courts as to the appropriateness and treatment under the Fourth Amendment of a plain feel exception to the Warrant Clause.\textsuperscript{233} The Supreme Court

\begin{thebibliography}{99}
\bibitem{223} Id.
\bibitem{224} Id. at 617.
\bibitem{225} 392 U.S. 1 (1968).
\bibitem{226} \textit{Marconi}, 597 A.2d at 620 (citing Ybarra v. Illinois, 444 U.S. 85 (1979)). The court also clarified that the officer testified at trial that he did not feel anything on the defendant's body that felt remotely like a weapon. \textit{Id.} at 622.
\bibitem{227} \textit{Id.} The court here stated that the items seized by the officer could have been anything at all, including a button or an aspirin. \textit{Id.} at 623.
\bibitem{228} \textit{Id.} The court here clarified that "[p]robable cause is the probability of criminal conduct, not the possibility of criminal conduct." \textit{Id.} (citing Commonwealth v. Gray, 503 A.2d 921 (Pa. 1985)).
\bibitem{229} \textit{Id.} at 623 nn.16-17.
\bibitem{230} \textit{Id.} at 623.
\bibitem{231} \textit{Id.}
\bibitem{232} \textit{Id.} at 624.
addressed and resolved this split in the landmark case of *Minnesota v. Dickerson.* The next section discusses this holding and subsequent lower court decisions applying *Dickerson.*

II. **SUBJECT OPINION — MINNESOTA V. DICKERSON**

A. **Facts**

In November of 1989, two Minneapolis police officers observed the defendant leaving what they knew from past experience to be a "crack house." The defendant walked toward the patrol car, and upon spotting it, halted and began walking in the opposite direction. Based upon these actions, the officers stopped the defendant for further investigation and forced him to submit to a patdown search. Although the search yielded no weapons, the officer conducting the search felt a lump in the defendant's pocket that he believed, after manipulating the object extensively with his fingers, to be crack cocaine. He then reached into the defendant's pocket and retrieved what did indeed turn out to be a plastic bag containing crack cocaine. The defendant was then arrested and charged with the possession of a controlled substance.


235. *Id.*
236. *Id.* at 2133.
237. *Id.*
238. *Id.*
239. *Id.* At trial, the officer testified: "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." *Id.*
240. *Id.* at 2133-34. The plastic bag contained one piece of crack cocaine weighing 0.2 gram. *Id.*
241. *Id.* at 2134.
Before trial, the defendant moved to suppress the evidence of the seized cocaine. The trial court held that the stop and frisk of the defendant were proper under Terry and additionally found that the "plain feel" doctrine justified the officer's seizure of the cocaine under the Fourth Amendment. The trial court therefore denied the motion to suppress. The case then proceeded to trial and the defendant was found guilty. On appeal, the Minnesota Court of Appeals reversed. The appellate court agreed that the officer had constitutional justification under Terry to stop and frisk the defendant because the officer had reasonable grounds to believe that the defendant was engaged in criminality and that he might be armed and dangerous. The appellate court, however, declined to accept the "plain feel" exception to the Fourth Amendment, and held that the officers had overstepped the bounds of Terry in seizing the cocaine.

The Minnesota Supreme Court affirmed, agreeing with the appellate court that the stop and frisk were legitimate, but that the seizure of the cocaine was unconstitutional. The court declined to extend the plain view doctrine to the sense of touch based on the premise that sight and touch are not equivalent senses. The court justified this conclusion on two grounds. First, that "the sense of touch is inherently less immediate and less reliable than the sense of sight," and second, that "the sense of touch is far more intrusive into the personal privacy that is at the core of the Fourth Amendment." Thus, the court held that because there was no sighting of

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242. Id.
243. Id.
244. Id.
245. Id.
247. Id. at 465.
248. Id. at 466-67. The appellate court stressed that an officer may only exceed the scope of a limited frisk and reach into the suspect's clothing for the purpose of retrieving an object thought to be a weapon. Moreover, the court stated that "the better view is that a search is not permissible when the object felt is soft in nature." Id.
250. Id. at 846.
251. Id. at 845.
252. Id. The court went on to elaborate that it was much different to actually see something in someone's pocket, than to "pinch, squeeze and rub" that person's pocket to determine what is inside. Id.
any contraband, no presence of a weapon, and no effort by defendant to hide anything, the police only had a Terry-type reasonable suspicion. Thus, once it was apparent that the defendant had no weapon, the officer's additional intrusion, manipulating and removing the object, was not permissible under the Fourth Amendment. Consequently, the fruits of that impermissible search had to be suppressed.

The state then appealed to the United States Supreme Court which granted certiorari.

C. Supreme Court

After reviewing Fourth Amendment jurisprudence over the last three decades, the Court held that, under limited circumstances, contraband detected through the sense of touch during a patdown search is admissible into evidence for two reasons. First, "Terry itself demonstrates that the sense of touch is capable of revealing the nature of an object with sufficient reliability to support a seizure." The Court pointed out that the essence of Terry was that officers would be able to utilize the sense of touch in detecting weapons. That was, in fact, exactly the situation in Terry. The Court also noted that the fact that the sense of touch may be less reliable than the sense of sight only meant that seizures of contraband based on

253. Id. at 846.
254. Id.
255. Id. Justice Coyne, in a strong dissent, expressed her willingness to accept the plain feel exception. She stressed that a legitimate frisk entails a "careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons." Id. at 849 (emphasis added by Justice Coyne) (quoting Terry v. Ohio, 392 U.S. 1, 16 (1968)). She went on to state that the "simple act" of the officer in feeling the outline and shape of the lump in the instant case was permissible under Terry, and furthermore, that because of the officer's extensive experience in discovering crack cocaine during the course of such searches, the officer was "'absolutely sure' that the substance was crack cocaine 'before' he reached into the pocket and removed it." Id. at 849. Therefore, Justice Coyne would have upheld this search as legitimate under Terry. Id. at 851. Justice Coyne also stated that "[l]aw enforcement is not a game in which liberty triumphs whenever the policeman is defeated." Id. (citing Ernest L. Barrett Jr., Exclusion of Evidence Obtained by Illegal Searches — A Comment on People v. Cahan, 43 CAL. L. REV. 565, 582 (1955)). Finally, Justice Coyne opined that "a policeman should not be compelled to ignore what his senses — whether sight, sound, smell, taste, or touch — tell him in clear and unmistakable language." Id.
257. Id. at 2135-37.
258. Id. at 2137.
259. Id.
260. See supra notes 48-49 and accompanying text (describing officer's pat-down of suspect and discovery of gun in Terry).
the sense of touch would less often be justifiable. Second, the Court disagreed with the Minnesota Supreme Court that such a search was an invasion of privacy above and beyond the initial “stop and frisk.” The Court reasoned that because the lawful frisk for weapons sanctioned the initial search, the seizure of an additional item whose identity is immediately apparent to the officer creates no additional invasion of privacy. Hence, the Court held that the privacy interests of the suspect would not be advanced by a per se rule barring the seizure of contraband plainly detected through the sense of touch.

Applying these findings to the instant case, the Court held that despite its holding that the plain feel exception is within the bounds of the Fourth Amendment, the state court was correct in holding that “the police officer . . . overstepped the bounds of the ‘strictly circumscribed’ search for weapons allowed under Terry.” While a plain feel search is not per se unconstitutional, the Court stated that “[h]ere, the officer’s continued exploration of respondent’s pocket after having 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.’” Therefore, the additional search was invalid because the illegal nature of the item in the defendant’s pocket was not immediately apparent to the officer. Because the additional manipulation of the defendant’s pocket constituted an illegal search under the Fourth Amendment, the Court held that the subsequent seizure of cocaine was also un-

261. Dickerson, 113 S. Ct. at 2137. The Court was apparently satisfied that “the Fourth Amendment’s requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures.” Id.

262. Id. at 2138.

263. Id.

264. Id.

265. Id.

266. Id. at 2138-39 (quoting Terry, 392 U.S. 1, 29 (1968)). The Court compared this search to the search in Arizona v. Hicks, 480 U.S. 321 (1987), which the Court found to be invalid because the property’s incriminating nature was not immediately apparent. Dickerson, 113 S. Ct. at 2139. The Court went on to point out that Hicks held that probable cause was necessary to allow any additional search above and beyond the one in progress, even a cursory inspection. Id.; see also supra notes 116-26 and accompanying text. (providing a detailed discussion of Hicks). This analogy that the Court drew to Hicks indicated that the search in Dickerson failed the immediately apparent prong of the plain view test. Dickerson, 113 S. Ct at 2139. Moreover, it also clarified that probable cause that a “felt” item is contraband is required before an officer is able to use the plain feel exception to justify an additional search and/or seizure of that item. Id. at 2138.

267. Dickerson, 113 S. Ct. at 2138.
Therefore, while this case gave the Court the opportunity to sanction the use of the plain feel exception, it also clearly limited its application to those situations in which an officer remains within the bounds of *Terry*, and in which the incriminating nature of the object in question is so immediately apparent as to rise to the level of probable cause.

**D. Lower Courts Subsequent Application of Dickerson**

A survey of recent state and federal decisions illustrates that in the wake of *Dickerson*, the lower courts have applied the plain feel doctrine in a wide variety of ways. These varying approaches form a spectrum, with one end giving much deference to the judgment of the police officer, and the other end closely scrutinizing the actions of the officer as well as all other relevant surrounding facts. This section presents and analyzes the facts and holdings of two of these cases, one from each end of the spectrum.

In *State v. Buchanan*, the Wisconsin Court of Appeals upheld the plain feel seizure of a baggie of cocaine from the defendant's waistband as within the scope of a lawful *Terry* search, and therefore valid under the plain feel exception. In *Buchanan*, the officers

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268. *Id.* at 2139. Justice Scalia wrote a concurring opinion in which he called into question the constitutionality of the *Terry* frisk itself. *Id.* (Scalia, J., concurring). Looking to the intent of the framers at the time of ratification, Justice Scalia interpreted the purpose of the Fourth Amendment to be "to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted — even if a later, less virtuous age should become accustomed to considering all sorts of intrusions 'reasonable.'" *Id.* He then expressed doubt that the *Terry* frisk comported with such a standard, stating: "I frankly doubt, moreover, 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 . . . ." *Id.* at 2140. He concluded, however, by conceding that the result in *Terry* was correct, even if the methodology was faulty, and stated that on that basis, "any evidence incidentally discovered in the course of [such a search] would be admissible." *Id.* at 2141.

The Chief Justice, joined by Justices Blackmun and Thomas, concurred with the holdings of the Court, but dissented from the Court's reversal of the judgment. *Id.* (Rehnquist, J., concurring in part, dissenting in part). The Chief Justice was of the opinion that the judgment of the Supreme Court of Minnesota should have been vacated, and that the case should have been remanded for further proceedings in conformity with the Court's newly established plain feel methodology. *Id.*

269. 392 U.S. 1 (1968).

270. *Dickerson*, 113 S. Ct. at 2139.

271. See *infra* notes 385-87 and accompanying text (providing cases which take different approaches to the application of the *Dickerson* rule to specific factual situations).

272. See *infra* notes 385-87 and accompanying text (providing cases which take different approaches to the application of the *Dickerson* rule to specific factual situations).


274. *Id.* at 404.
 encountered the defendant outside a residence for which the officer possessed a search warrant.\textsuperscript{275} As the officer drove up, the defendant began walking across the street.\textsuperscript{276} One of the officers ordered the defendant to stop, and the other officer ordered the defendant to lie face down and proceeded to handcuff him.\textsuperscript{277} After asking the defendant if he possessed drugs or weapons, one of the officers proceeded to pat down the defendant.\textsuperscript{278} During this procedure, the officer felt what he believed to be a plastic baggie containing rice in the defendant’s waistband.\textsuperscript{279} The officer removed the baggie and found that it contained nineteen packages of what was later determined to be cocaine.\textsuperscript{280} After pleading guilty to the crime of possession of cocaine with intent to distribute, the defendant appealed, challenging the search and seizure of the cocaine.\textsuperscript{281}

After noting that the stop and frisk complied with the requirements set forth in \textit{Terry},\textsuperscript{282} the appellate court turned to the defendant’s challenge of the “plain touch” seizure of the cocaine.\textsuperscript{283} Specifically, the defendant claimed that “plain touch” seizures require that the incriminating nature of the evidence be immediately apparent, and that it was not plausible that the searching officer immediately knew that the bag of rice contained contraband.\textsuperscript{284} In refuting this contention, the court pointed to the following elements that must be present under Wisconsin law in order for a “plain touch” search to be upheld:

(1) the evidence must be in “plain view;” (2) the officer must have a prior justification for being in the position from which [he or] she discovers the evidence in “plain view;” and (3) the evidence seized, ‘in itself or in itself with facts known to the officer at the time of the seizure, [must provide] probable cause to believe there is a connection between the evidence and the criminal activity.”\textsuperscript{285}
In applying this test, the court first stated that there was no issue as to the first two elements and turned to the issue of whether the officer immediately recognized the incriminating nature of the baggie.286 The court held that the officer had probable cause to believe there was a connection between the baggie and criminal activity for the following reasons: 1) the officer testified at the suppression hearing that he immediately recognized that the bag contained contraband; 2) the officer had knowledge regarding the storage of cocaine; and 3) the defendant was standing in front of premises which the officer was about to search for cocaine.287 Therefore, the court affirmed the lower court and upheld the search.288

In State v. Beveridge,289 a North Carolina appellate court vacated a conviction because the search and seizure there did not comply with the plain feel rule set forth in Dickerson.290 Significantly, to arrive at this conclusion, the appellate court used a wholly different methodology than that utilized by the court in Buchanan.291 In Beveridge, two officers arrested the driver of an automobile for driving while impaired.292 The defendant was a passenger in the vehicle and was asked by one of the officers to exit and move to the rear of the vehicle.293 The officer advised the defendant that he was not under arrest, and then proceeded to pat him down.294 Upon doing so, the officer felt what seemed to be a rolled up plastic bag,295 and directed the defendant to remove it.296 Upon observing the plastic bag, the officer could see that it contained a white powdery substance, later determined to be cocaine.297

Based upon the evidence presented, the trial court made several detailed findings of fact including the following:

8) That Deputy John Gregory patted down the defendant and felt what seemed to him to be a rolled up plastic baggie
in the defendant's front pants pocket.
9) That Deputy John Gregory had received numerous hours of training in the enforcement of the North Carolina Controlled Substances Act and had participated in numerous arrests for violations of said act.
10) That Deputy John Gregory was familiar with the area . . . where the vehicle had been stopped and is an area in which previous arrests have been made for controlled substances violations.
11) That Deputy Gregory had observed that the defendant appeared to exhibit the effects of having consumed some impairing substance and the effects were consistent with the use of a controlled substance such as was customarily stored in a rolled up plastic bag.
12) That Deputy Gregory asked the defendant what he had in his pocket to which the defendant replied money, and the defendant pulled some money out of his pocket.
13) That Deputy Gregory told the defendant that he could still see something in the defendant's pocket and asked the defendant to pull his pocket out.

. . .
15) That Defendant Gregory observed the defendant conceal something in the palm of his hand.
16) That Deputy Gregory asked the defendant what he had in his hand and then observed a plastic baggie containing a white powdery substance which appeared to Deputy Gregory to be cocaine.298

Based on the above findings of fact, the trial court held that Deputy Gregory had reasonable grounds to believe that the defendant possessed illegal drugs.299 The defendant appealed the denial of his motion to suppress the cocaine.300

The appellate court listed in its opinion and took into consideration all of the above findings of fact.301 The court then reviewed the plain feel doctrine as delineated in *Dickerson* and concluded that despite the officer's experience, the detailed facts elicited at the trial level indicated that the officer did not know that the bag contained

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298. Id. at 912-13.
299. Id. at 914.
300. Id.
301. Id. at 912-13.
contraband until he asked the defendant to turn out his pockets.\textsuperscript{302} Therefore the search failed the "immediately apparent" requirement of the plain feel test.\textsuperscript{303} Accordingly, the search was held invalid, and the lower court's decision was reversed.\textsuperscript{304}

III. ANALYSIS

This section illustrates that the Supreme Court's decision in Dickerson is analytically troublesome for three reasons. First, Dickerson condones the plain feel doctrine by accepting the tenuous premise that it is a corollary or analogue to the previously sanctioned plain view exception to the warrant requirement, particularly in situations where the plain view exception is extended to a Terry stop and frisk.\textsuperscript{305} This section considers why such an extension constitutes an improper extension of the original Terry doctrine.\textsuperscript{306}

Second, even accepting the analytical framework for the plain feel requirement outlined by the Court, any plain feel search is necessarily confined by the three prong plain view test because the plain feel doctrine is derived by analogy from the plain view doctrine.\textsuperscript{307} The third prong of this test requires that the officer feel an object whose "contour or mass makes it immediately apparent."\textsuperscript{308} This section shows that the nature of the tactile sense is such that the possibility of meeting this requirement is at best \textit{de minimis}, and at worst, nonexistent.\textsuperscript{309}

Finally, when viewed in isolation, this extension might not appear to be a major step. However, when one examines the path the Court has taken since the Terry decision in 1968 to arrive at this juncture, it becomes apparent that the Court has strayed so far from the warrant requirement by fashioning exceptions based on the reasonable-
ness clause that the "well delineated exceptions" have nearly swallowed the rule.\footnote{See California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J. concurring) ("[T]he warrant requirement ha[s] become so riddled with exceptions that it [is] basically unrecognizable."); cf. Scott Lewis, Terry Tempered or Torpedoed? The New Law of Stop and Frisk, WIS. B. Bull., August 1988, at 7 (suggesting that changes in the law of stop and frisk have diluted its process).} This section illustrates that while individual exceptions might appear analytically sound, in reality they are used in conjunction with each other — risking erroneous deprivations of personal liberties.\footnote{See infra note 365-79 and accompanying text (explaining that use of the exceptions to the warrant requirement to bootstrap each other will result in erroneous deprivations of liberty).}

A. \textit{The Plain Feel Doctrine is Based on an Improper Extension of Terry}

Although \textit{Terry} stop and frisks may result in mistaken invasions of privacy, there remains a counterbalancing, compelling governmental interest — the protection of the officer and of the community.\footnote{311 See infra notes 325-50 and accompanying text (discussing the \textit{Terry} balancing test in the plain feel context).} When this interest is removed, as in the \textit{Dickerson} context, nothing is left to counterbalance the equally compelling individual interest in personal privacy.\footnote{312 Terry v. Ohio, 392 U.S. 1, 30 (1968).} Therefore, when the \textit{Terry} balancing test is applied to the plain feel search, it is clear that the strong individual interest in privacy outweighs any residual interest in the seizure of contraband.\footnote{313 See infra notes 325-50 and accompanying text (discussing the \textit{Terry} balancing test in the plain feel context).}

The \textit{Terry} Court redefined Fourth Amendment jurisprudence by rejecting the \textit{per se} requirement of probable cause dictated by the Warrant Clause, and focusing on the reasonableness component of that amendment.\footnote{314 See infra notes 52-53 and accompanying text (discussing relevant portion of \textit{Terry}).} The Court defined its new analysis as a balance between the governmental interest which justifies the invasion into the privacy of the citizen and the intrusiveness of the search itself.\footnote{315 See supra notes 52-53 and accompanying text (discussing relevant portion of \textit{Terry}).} Applying this test in \textit{Terry}, the Court identified the governmental interest as the protection of the officer and the community.\footnote{316 See supra notes 54-56 and accompanying text (discussing relevant portion of \textit{Terry}).} Because the search is for a weapon, and is only legitimate for that purpose, \textit{Terry} allows a search on the basis of reasonable suspicion — a lesser standard than probable cause.\footnote{317 See supra note 58 and accompanying text (discussing relevant portion of \textit{Terry}).} Appropri-
ately, the corresponding search allowed by the lesser standard is much more closely circumscribed than an ordinary search.\textsuperscript{319} Whereas a search pursuant to a warrant based on probable cause may allow an extensive examination of an identified person or area, a frisk pursuant to \textit{Terry} is a narrow one that permits a reasonable search for weapons only, and then only where the officer has reason to believe that he is confronted with an armed and dangerous individual.\textsuperscript{320}

In fact, a plain feel seizure will result from virtually every \textit{Terry} stop and frisk in which a weapon is seized, as a \textit{Terry} search is actually based upon the sense of touch.\textsuperscript{321} How else do the searching officers know that the suspect has a gun or knife during a frisk, if not through "feeling" it through his clothes?\textsuperscript{322} Indeed, the Court in \textit{Dickerson} recognized that "[t]he very premise of \textit{Terry} . . . is that officers will be able to detect the presence of weapons through the sense of touch."\textsuperscript{323} This deference to the tactile sense is accepted in the \textit{Terry} context given the compelling justification of protecting the officer and the community.\textsuperscript{324}

On the other hand, the \textit{Dickerson} Court's endorsement of the plain feel exception is grounded in the preservation and seizure of evidence.\textsuperscript{325} This is clear because the plain view doctrine, upon which the Court bases its acceptance of the plain feel exception,\textsuperscript{326} is founded on evidentiary concerns.\textsuperscript{327} Although this justification is less compelling than the governmental interest in \textit{Terry},\textsuperscript{328} \textit{Dicker-
son clearly gives the police more latitude for this purpose. While the initial stop and frisk under Dickerson must be justified by a reasonable suspicion that the suspect is armed and dangerous, once the actual search has commenced, it would be specious to assume that the officer is searching only for weapons. As long as the officer's actions comport with the Terry requirements, (i.e. as long as the officer engages in a standard pat search) he now has free rein to seize virtually anything he comes across, providing he can later claim that it fell within the wide range of objects that might feel like a weapon or like contraband. Given the relative importance of the stated justifications, this result is incongruous.

The governmental interest in the seizure of contraband is even less compelling in light of the fact that there are numerous alternatives that an officer may pursue if he believes that a suspect possesses contraband. First of all, there already exist numerous exceptions to the warrant requirement that an officer may legitimately operate within. For example, if the suspect is in an automobile, or there is probable cause to arrest the suspect, or there are exigent circumstances, or the suspect consents to a search, the above considerations will be moot, as any search will already be outside the warrant requirement. Even if the situation does not fall within

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maintaining the sanctity of the fourth amendment”); cf. Terry, 392 U.S. at 23 (referring to the governmental interest in investigating crime, and the more immediate interest of the police officer in ascertaining that a suspect is not armed and dangerous).

329. Dickerson, 113 S. Ct. at 2137.

330. See State v. Collins, 679 P.2d 80, 84 (Ariz. 1983) (stating that “a ‘plain touch’ exception would invite the use of weapons searches as a pretext for unwarranted searches, and thus severely erode the protection of the Fourth Amendment”) (internal quotations omitted); People v. Diaz, 612 N.E.2d 298, 302 (N.Y. 1993) (stating that “[t]he proposed ‘plain touch’ exception could thus invite a blurring of the limits to Terry searches and the sanctioning of warrantless searches on information obtained from an initial intrusion which, itself, amounts to an unauthorized warrantless search”).

331. See infra note 356 and accompanying text (cataloguing the various objects which might feel like contraband); see also Haselkorn, supra note 328, at 700 ("[U]ndoubtedly police would occasionally be able to convince a court, after the fact, that their touch provided them with the requisite probable cause — for at that point the seized evidence will be before the judge."); Leading Cases, Constitutional Law, 107 HARV. L. REV. 144, 173 (1993) (arguing that the plain feel doctrine invites abuse because it tempts officers to conduct searches beyond the limits of a Terry weapons search and then to testify otherwise in court).

332. See supra note 328 and accompanying text (discussing the relative importance of the preservation of evidence and the protection of the officer and the community).


one of the accepted exceptions to the Warrant Clause, an officer has additional options.

A police officer also has less intrusive alternatives at his disposal that may produce the same results from a law enforcement perspective in a given situation.\(^{337}\) For example, an officer may use a dog to perform a canine sniff, which could then give rise to probable cause to arrest.\(^{338}\) A canine sniff has been deemed by the Court not to be a search, and is therefore wholly outside of Fourth Amendment analysis.\(^{339}\) Additionally, an officer has the option of obtaining a telephone or radio warrant.\(^{340}\) The procedure for obtaining such a warrant entails the officer contacting the issuing magistrate by telephone or radio.\(^{341}\) The officer must complete a duplicate warrant and read it, under oath, to the magistrate.\(^{342}\) If the magistrate deems that probable cause exists, he may proceed to issue the warrant.\(^{343}\)

Applying the *Terry* reasonableness formulation to the plain feel exception condoned in *Dickerson*, it becomes apparent that an individual's constitutionally protected privacy interest is not outweighed by the governmental interest in the seizure of contraband.\(^{344}\) While such a personal invasion is arguably acceptable when the safety of the officer and the community are involved, the balance tips the other way when the justification is simply the seizure of contraband.\(^{345}\) The basic premise upon which the Fourth Amendment is founded is that any intrusion in the way of a search or a seizure is an evil.\(^{346}\) Therefore, those searches deemed necessary should be as

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337. The Court has historically preferred less intrusive methods of searching. See United States v. Chadwick, 433 U.S. 1, 13 (1977) (invalidating search of footlocker without warrant when officers could have impounded the footlocker and then obtained a warrant).

338. See, e.g., Lantz, *supra* note 21, at 584 (suggesting canine sniff as an alternative to plain feel).


340. See Bradley, *supra* note 145, at 1471 (suggesting the use of telephone warrants to make it less difficult to obtain search warrants); Lantz, *supra* note 21, at 586-87 (suggesting such warrants as alternatives to the plain feel search).


342. *Id.*

343. *Id.*

344. See *supra* note 328 and accompanying text (explaining that concern over the destruction of evidence is a poor basis for a warrant clause exception). Moreover, the Court in *Terry* states that the police officer's interest in verifying that the suspect is unarmed is "more immediate" than the government's interest in effective crime prevention. *Terry v Ohio*, 392 U.S. 1, 22 (1968).

345. See *supra* note 328 and accompanying text (explaining that concern over the destruction of evidence is a poor basis for a warrant clause exception).

limited as possible. Dickerson's approval of the plain feel search runs counter to these notions by condoning a broad search with a weak governmental justification. Indeed, the "general, exploratory rummaging," which the plain feel exception has the practical effect of bringing about, seems closely akin to the "general warrant" abhorred by the founders of the Constitution. As personal privacy and freedom from unreasonable searches were clearly paramount to the founders in the framing of the Fourth Amendment, the reasonableness formulation in Terry should be applied with exacting scrutiny when attempts are made to create new exceptions to the warrant requirement. Where, as here, there is no compelling governmental interest to outweigh the individual's interest in privacy, prudence should prevail, and the exception should be disallowed.

B. The Sense of Touch is Inherently Incompatible with the Plain View Doctrine

A plain feel extension of the plain view doctrine is also inappropriate because the tactile sense is incompatible with that doctrine. This is so because of the inherent differences between the sense of touch and the sense of sight, as well as because the sense of touch cannot satisfy the immediately apparent prong of the plain view test.

1. The Questionable Reliability of Plain Feel as Compared to Plain View

There is substantial authority for the premise that the sense of touch, utilized in plain feel, is less reliable than the sense of sight,

395 U.S. 752, 765 (1969) (discussing the evils to which the framers of the Fourth Amendment were responding); Warden v. Hayden, 387 U.S. 294, 301 (1967) (stating that the intent of the Fourth Amendment was to protect against invasions of "the sanctity of a man's home and the privacies of life"); McDonald v. United States, 335 U.S. 451, 453 (1948) (stating that the right to privacy is one of the unique values of our civilization).

347. Coolidge, 403 U.S. at 467.

348. See supra notes 328 and accompanying text (explaining that concern over the destruction of evidence is a poor basis for a Warrant Clause exception).

349. Coolidge, 403 U.S. at 467.


351. See infra notes 351-64 and accompanying text (discussing problems with the tactile sense as used in plain feel doctrine).
utilized in plain view. Touch simply does not provide immediate information as does sight. Moreover, use of the sense of touch requires speculation and is more susceptible to mistake and inaccuracy than the sense of sight.

When the tactile sense is considered in relation to the sense of vision, it becomes obvious that the former simply lacks the requisite preciseness to make consistent, accurate determinations as to the identity of an object. In Dickerson's brief to the Supreme Court,

352. People v. Chavers, 658 P.2d 96, 107 (Cal. 1983) (Rose, C.J., concurring in part, dissenting in part); State v. Dickerson, 481 N.W.2d 840, 845 (Minn. 1992) aff'd, 113 S. Ct. 2130 (1993); Commonwealth v. Marconi, 597 A.2d 616, 623 n.17 (Pa. Super. 1991) appeal denied, 611 A.2d 711 (Pa. 1992); State v. Broadnax, 654 P.2d 96, 102 (Wash. 1982); Haselkorn, supra note 328, at 695; Lantz, supra note 21, at 565; Lewis, supra note 310, at 63; cf. Minnesota v. Dickerson, 113 S. Ct. 2130, 2137 (1993) ("Even if it were true that the sense of touch is generally less reliable than the sense of sight, that only suggests that officers will less often be able to justify seizures of unseen contraband."). Contra United States v. Pace, 709 F. Supp. 948, 955 (C.D. Cal. 1989) ("When objects have a distinctive and consistent feel and shape that an officer has been trained to detect and has previous experience in detecting, then touching these objects provides the officer with the same recognition his sight would have produced."). Additionally, the State's brief to the Supreme Court in Dickerson cited a study in which 100 objects were placed before 20 individuals. On the average, the 20 participants were able to identify 94 of the 100 objects within five seconds using their sense of touch. Brief for Petitioner at 16-17 n.11, Minnesota v. Dickerson, 113 S. Ct. 2130 (1993) (No. 91-2109) (citing Roberta L. Klatzky et al., Identifying Objects by Touch: An "Expert System." 37 PERCEPTION & PSYCHOPHYSICS 299, 301 (1985)). This analysis does not, however, take into account the fact that in the plain feel context, the officer has the additional impediment of having to recognize the unknown object through a person's clothing, often leather or denim.

353. See supra note 352 (citing extensive authority). The court in State v. Dickerson stated that "the sense of touch is inherently less immediate and less reliable than the sense of sight." 481 N.W.2d 840, 845 (Minn. 1992).

354. See supra note 352 (citing extensive authority). The court in Marconi stated that "when an individual feels an object through a pants pocket... the sense of touch is not so definitive...[as to] preclude other options as to what that item might be." Marconi, 597 A.2d at 623 n.17.

355. A poem included in Dickerson's brief to the Supreme Court is instructive:

It was six men of Indostan
To learning much inclined,
Who went to see the Elephant
(Though all of them were blind),
That each by observation
Might satisfy his mind...
And so these men of Indostan
Disputed loud and long,
Each in his own opinion
Exceeding stiff and strong,
Though each was partly in the right,
And all were in the wrong!
So oft in theologic wars,
The disputants, I ween,
Rail on in utter ignorance
Of what each other mean,
he pointed out that

Adoption of the State's position would mean that any number of containers carried by most people will be subject to examination: Keycases, change purses, makeup kits, wallets, matchbooks or boxes, film canisters, cigarette packs and glasses cases. Huge varieties of items . . . will [also] be . . . examined: aspirin or other pills, buttons, watch batteries, hard candy, chewing gum, marbles, cigarette lighters, combs, lipstick, thimbles, a small wad of paper, and even lint in one's pocket.366

This panoply illustrates not only the diminished reliability of the sense of touch, but also opens the imagination to the consequences of allowing the sense of touch so paramount a role in achieving law enforcement objectives.

2. Plain Feel Will Never Satisfy the Immediately Apparent Requirement

Dickerson requires that a plain feel search, in order to pass constitutional muster, must comport with the plain view requirements delineated in Arizona v. Hicks.357 It is the position of this author that given the limited capacity of the sense of touch,368 a plain feel search will almost inevitably be unable to accomplish this task.

Hicks requires that, in order for a plain view search to be constitutional, not only must it be immediately apparent that the object in question is contraband, but it must be immediately apparent so as to rise to the level of probable cause.359 Hicks clarified that a reasonable suspicion in this connection is not a sufficient quantum of proof.360 The Dickerson Court analogized to Hicks in holding that

And prate about an Elephant
Not one of them has seen!


357. 480 U.S. 321 (1987); see also supra note 266 and accompanying text (discussing the Dickerson Court's adoption of the Hicks formulation).

358. See supra notes 352-56 and accompanying text (discussing the inherent limitations of the tactile sense).

359. Hicks, 480 U.S. at 326. One of the courts that helped pioneer the plain feel doctrine went so far as to describe the requisite quantum as a reasonable certainty. United States v. Williams, 822 F.2d 1174, 1184-85 (D.C. Cir. 1987); see also State v. Vasquez, 815 P.2d 659, 664 (N.M. Ct. App. 1991) (utilizing reasonable certainty standard), cert. denied, 815 P.2d 1178 (N.M. 1991).

360. Hicks, 480 U.S. at 326.
the contraband in *Dickerson* was illegally seized,\(^{361}\) stating that the seizure of the equipment in *Hicks* could not be justified by the plain view doctrine because in that case, "the incriminating character of the stereo equipment was not immediately apparent . . . probable cause to believe that the equipment was stolen arose only as a result of a further search."\(^{362}\)

Indeed, if the sense of sight was insufficient to give rise to probable cause in *Hicks*,\(^{363}\) and the police officer's sense of touch was unable to give rise to probable cause in *Dickerson*,\(^{364}\) it is difficult to imagine a case where the tactile sense could give rise to probable cause. Therefore, to sanction such a search is not to find that the contraband was immediately apparent, but to implicitly lower the quantum of proof required to make such an additional search or seizure to something less than probable cause. Such a result is overtly inconsistent with *Hicks*.

**C. A Plain Feel Exception Will Result in Erroneous Deprivation of Liberty**

Perhaps even more than other areas of constitutional jurisprudence, the Fourth Amendment is one that cries out for bright line rules.\(^{365}\) The uniqueness of jurisprudence under this amendment is that the consequences of these decisions — the resulting law — must be executed by police officers under frequently demanding circumstances.\(^{366}\) While, for example, the First Amendment gives guidance to individuals with respect to how to conform their conduct to stay within the protection of that amendment, the Fourth Amendment ostensibly gives guidance to the police with respect to

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362. Id.
363. *Hicks*, 480 U.S. at 324. In *Hicks*, the Court held that there was no probable cause to move and record the serial numbers of expensive stereo equipment in a "squalid" apartment when police had legitimately entered the apartment to search for weapons. *Id.* at 323-24; see also supra notes 116-26 and accompanying text (discussing *Hicks* at length).
364. *Dickerson*, 113 S. Ct. at 2139.
365. See Bradley, supra note 145, at 1473 (stating that it is uniquely imperative in criminal procedure that the police be informed of simple, straightforward principles by which to guide their behavior); William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. Mich. J.L. Ref. 311, 344 (1991) (commenting that "the bright line rules carved out by the Court [in search and seizure settings] have not attracted officers' attention").
366. See Bradley, supra note 145, at 1473 (stating that "unlike other areas of law, which can be contemplated at leisure . . . Fourth Amendment law is supposed to instruct police how to act in the heat of enforcement of the criminal laws").
conforming their conduct to avoid infringing others’ individual rights.\textsuperscript{367}

Since the Court began employing its reasonableness analysis to fashion exceptions to the Warrant Clause during the Warren Court era, over twenty exceptions to the warrant or probable cause requirement or both have been condoned.\textsuperscript{368} While independently each of these justifications may be analytically appealing, to apply them in a vacuum is to ignore the realities of modern police work. Realistically, a search is made and challenged, and it is the job of the prosecutor to use the above exceptions in a “grab bag” manner to attempt to justify the search.\textsuperscript{369} When exceptions are strung together, or new exceptions are derived by analogy, it becomes increasingly difficult to justify the “new exception” under the reasonableness analysis without creating results that are inimical to the Fourth Amendment itself.\textsuperscript{370}

For example, while the plain feel exception is derived by combining two concededly reasonable exceptions (stop and frisk and plain view) and by analogizing therefrom,\textsuperscript{371} the actual end result — that police may frisk based on the governmental justification of seizure of evidence — runs counter to the reasonableness analysis in \textit{Terry} itself.\textsuperscript{372} Further exacerbating this problem is the Court’s willing-

\textsuperscript{367} See id. (stating that if the police are confused about the law and therefore perform illegal searches, not only does the prosecution suffer the loss of evidence, but society suffers violations of the civil rights of its citizens).

\textsuperscript{368} These include searches incident to arrest, automobile searches, border searches, searches near the border, administrative searches, stop and frisk, plain view, exigent circumstances, search of a person in custody, fire investigations, consent searches, inventory searches, and airport searches. \textit{Id.} at 1473-74 (footnotes omitted).

\textsuperscript{369} See Haselkorn, \textit{supra} note 328, at 700 (suggesting that police, after the fact, would be able to convince a court that their touch provided them with the requisite probable cause). One commentator noted:

“[T]he detainee’s expectation of privacy is in danger of being eroded by officers who . . . make a stop on a hunch and then ex post facto hunt through the statute books to justify their actions under the guise of objective reasonableness; or touch . . . an object on the person . . . of a detainee and conclude that they have fulfilled the necessary ‘probable cause’ criterion of the plain-view doctrine when, in fact, they are only suspicious of — or curious as to — what the object may be.”

Lewis, \textit{supra} note 310, at 63.

\textsuperscript{370} See Haselkorn, \textit{supra} note 328, at 698 (stating that exceptions to the warrant requirement are often “laid one upon another,” and that this practice has “substantial potential to disrupt the carefully crafted limits the Court has attempted to define for those exceptions”).

\textsuperscript{371} See \textit{supra} note 156-57 and accompanying text (discussing the confluence of stop and frisk and plain view to form the plain feel doctrine).

\textsuperscript{372} See \textit{supra} notes 315-20 and accompanying text (discussing the \textit{Terry} Court’s adoption of a reasonableness analysis under the Fourth Amendment).
ness to forego close scrutiny of the reasonableness of the end result of its new exception and fall back instead on the assertion that illegally seized evidence will be excluded at trial.373

The Court in Dickerson seems comfortable conceding that even if it is true that touch is less reliable than sight, such a proposition only suggests that officers will less often be able to justify seizures of unseen contraband.374 Presumably, then, the evidence would be excluded.375 While this reasoning may establish that illegally seized evidence will be excluded at trial, it does not address the initial intrusions that will take place under the new doctrine. In fact, the Court seems to be accepting the fact that more initial intrusions will take place, justifying it by the fact that the evidence will be excluded when appropriate.376

This reasoning assumes that the exclusionary rule is a wholly satisfactory remedy for a party whose rights are violated. In fact, this rule does not make a defendant whose rights were violated whole.377 Once the police subject the defendant to an illegal plain feel search, the defendant's Fourth Amendment right to privacy has been violated. Additionally, the defendant may have been arrested and imprisoned, and may also have been compulsorily subjected to numerous court proceedings.378 There truly is no way to make the defendant whole after such a significant deprivation of liberty; an increase in initial intrusions based on the justification that the exclusionary rule will "weed out" the improper ones is simply unacceptable.379

373. See Minnesota v. Dickerson, 113 S. Ct. 2130, 2137 (1993) (stating that the fact that touch might be less reliable than sight only suggests that officers will less often be able to justify seizures of unseen contraband). It follows from this proposition that if the officer is unable, after the fact, to justify the seizure, the evidence will be excluded at trial.

374. Dickerson, 113 S. Ct. at 2137.

375. See, e.g., Bradley, supra note 145, at 1472-73 (explaining that evidentiary exclusion is the common remedy for the illegal seizure of evidence).

376. See supra note 373 and accompanying text (discussing this proposition in Dickerson).

377. Bradley, supra note 145, at 1472-73. Professor Bradley states that confusion in the area of Fourth Amendment law is particularly troublesome because the exclusionary remedy lacks the ability to make the defendant whole. Id. To exemplify this, he points out that "nothing can 'unsearch' [the defendant's] house." Id. Moreover, the exclusionary rule does nothing at all for the innocent victim of an illegal search. In this situation, there will be no evidence to exclude. Id. at 1473.

378. See id. (stating that if police receive insufficient guidance from the Court and therefore perform illegal searches, not only will the prosecution suffer loss of evidence, but society will suffer violations of the civil rights of its citizens).

379. Id.
IV. IMPACT

This section assesses the impact of *Dickerson* in the lower courts and look at the likely consequences of these new jurisprudential approaches. First, the subsequent treatment of the *Dickerson* plain feel exception in the cases of *State v. Buchanan*\(^{380}\) and *State v. Beveridge*\(^{381}\) is examined,\(^{382}\) followed by a methodology proposal for the lower courts to follow in applying the plain feel doctrine.\(^{383}\)

A. The Impact of *Dickerson* in the Lower Courts

As discussed previously, several recent decisions present contrasting treatments of the *Dickerson* holding by the lower courts.\(^{384}\) While some decisions take clear notice of the Supreme Court's admonition in *Dickerson* that the plain feel exception was to be definitively circumscribed by the limitations of the *Terry* search (i.e. no manipulation of putative contraband),\(^{385}\) other decisions distinguish or otherwise circumvent this factor.\(^{386}\) Additionally, courts differ greatly in the level to which they apply the "immediately apparent" prong of the plain feel test as discussed in *Dickerson*.\(^{387}\)

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380. 504 N.W.2d 400 (Wis. Ct. App. 1993); see also supra notes 273-88 and accompanying text (discussing case at length).
381. 436 S.E.2d 912 (N.C. Ct. App. 1993); see also supra notes 289-304 and accompanying text (discussing case at length).
382. See infra notes 384-407 and accompanying text (discussing the application of the *Dickerson* rule in *Buchanan* and *Beveridge*).
383. See infra notes 408-22 and accompanying text (proposing methodology).
384. See supra notes 271-304 and accompanying text (discussing cases in which lower courts have applied *Dickerson*).
385. Minnesota v. Dickerson, 113 S. Ct. 2130, 2138 (1993). For decisions heeding this admonition, see Howard v. State, 623 So.2d 1240, 1242 (Fla. Dist. Ct. App. 1993) (invalidating search as outside bounds of *Terry* where the officer "took and rolled the object between [his] fingertips to get a better feel"); In re S.D., 633 A.2d 172, 176 (Pa. Super. Ct. 1993) (invalidating search as outside bounds of *Terry* where officer did not indicate at hearing that he believed that the object he felt and seized was a weapon).
386. See State v. Branch, No. CX-93-135, 1993 WL 430391, at *1-*2 (Minn. Ct. App. Oct. 26, 1993) (upholding a search as within the bounds of *Terry* where the officer stated that he removed the defendant's pager from his pocket because he was "checking to see if it was a weapon or not"); State v. Evans, 618 N.E.2d 162, 171 (Ohio 1993) (upholding a search as within the bounds of *Terry* where the officer testified that he discovered a "large bulk" that felt like a "rock substance" while patting down the defendant because it was reasonable for him to believe that the object could be a weapon), cert. denied, 114 S. Ct. 1195 (1994).
387. See State v. Rahmon, No. 63913, 1993 WL 437614 at *10 (Ohio Ct. App. Oct. 28, 1993) (upholding a search where the incriminating nature of a pill vial was held to be immediately apparent); State v. Crawford, No. 64607, 1993 WL 384506 at *6 (Ohio Ct. App. Sept. 23, 1993) (upholding a search where the officer testified that, based on his experience, the incriminating nature of the object he felt in the defendant's pocket was immediately apparent). But see State v. Sanders, 435 S.E.2d 842, 846 (N.C. Ct. App. 1993) (invalidating search where officer did not
Courts have already begun to develop a variety of methodologies for application of the plain feel test. One may categorize these into a close judicial scrutiny approach and a deferential approach. When the lower courts employ the close scrutiny methodology, they tend to strictly adhere to the plain view/feel test, looking particularly closely at whether the illegal nature of the evidence was immediately apparent and whether the officer exceeded the scope of the Terry search. This entails careful examination of the officer’s experience and officer’s testimony, the physical characteristics of the object, its packaging, and the piece of clothing in which it was contained.

Other courts have developed an approach which is very deferential to the judgment of the police officer. These opinions generally tend to be very conclusory, resting on the officers’ testimony, and occasionally a recitation of the number of years a particular officer has been on the police force and how many drug cases he has handled during that time. State v. Buchanan and State v. Beveridge illustrate these different approaches.

The Court of Appeals of Wisconsin in State v. Buchanan was exceedingly deferential to the judgment of the officer, as the courts in that state consistently have been. Little attention was
paid to the actual difficulty of "feeling" cocaine through a bag full of rice. In the final analysis, the court relied almost exclusively on the officer's testimony at trial that the incriminating character of the bag was immediately apparent and the fact that the officer had knowledge regarding the packaging of cocaine.

Conversely, the North Carolina court, in *State v. Beveridge*, looked much more closely at the totality of the circumstances. The trial court made elaborate findings of fact, and the appellate court listed the most salient findings in its decision. Specifically, the court looked at: (1) the reason for the initial stop; (2) the nature of the object felt; (3) the location of the object on the defendant's person; (4) what type of clothing the object was felt through; (5) the experience of the officer in violations of the nature involved in the instant case; (6) the officer's knowledge of the nature of the area in which the defendant was stopped; (7) the personal appearance of the defendant (e.g. intoxicated, belligerent, etc.); (8) the defendant's actions during the encounter; and (9) the officer's actions during the encounter. The court went on to closely scrutinize the stop, frisk and seizure under the standards set forth in *Terry* and *Dickerson*. The court employed this scrutiny through use of the specific facts elicited from the above inquiries at the trial level. It is this type of inquiry that must take place if the core values of the Fourth Amendment are to be preserved in the wake of *Dickerson*.

**B. Living With Dickerson — A "Reasonable" Proposal**

The Supreme Court decided *Minnesota v. Dickerson* by a unanimous vote of 9-0. Only one justice wrote separately to reach the same result on different grounds. Clearly the plain feel excep-

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399. *Buchanan*, 504 N.W.2d at 404.
400. Id.
401. 436 S.E.2d 912 (N.C. Ct. App. 1993); see also supra text accompanying notes 289-304 (discussing case at length).
403. Id.
404. Id.
405. Id. at 914-16.
406. Id.
407. See Leading Cases, supra note 331, at 174 (stating that the *Dickerson* Court intended that the lower courts skeptically scrutinize the testimony of officers who claim to recognize contraband through the sense of touch).
408. 113 S. Ct. 2130 (1993).
409. Id. at 2138. Justice Scalia concurred in the judgment, and stated that he would have decided the case through a historical analysis. Id. at 2138-41.
tion to the Warrant Clause of the Fourth Amendment is the law of the land, and many jurisdictions throughout the country presently apply the doctrine. Despite the foregoing critique of *Dickerson*, this author notes the wisdom of the Court in choosing a case with which they could sanction the plain feel exception at the same time as they sharply limited its application. With consistent application of a methodology which employs some type of "close scrutiny," the plain feel doctrine may be applied with the most minimal risk of derogation of core Fourth Amendment values. The following is a proposal for such a methodology.

The nine inquiries made in *State v. Beveridge* should be treated as a guide to, but not an exhaustive list of, the inquiries necessary for a trial judge or appellate court to pass on this issue. Because plain feel searches are necessarily made in the absence of a search warrant, the prosecution will usually have the burden to establish the constitutionality of the search. This burden will be to establish constitutionality by a preponderance of the evidence. The required findings of fact delineated above should serve as a guide to determine whether the government has discharged its burden of establishing constitutionality. At the motion to suppress, the prosecu-

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410. See *supra* note 233 and accompanying text (listing jurisdictions and cases which have applied the plain feel test).
411. See *Leading Cases*, *supra* note 331, at 174 (stating that the Supreme Court clearly chose the *Dickerson* case in order to send a signal to lower courts to be extremely careful in determining when an officer has established probable cause through the sense of touch).
412. See *supra* notes 401-07 and accompanying text (discussing the close judicial scrutiny approach used by the North Carolina courts).
413. See *Leading Cases*, *supra* note 331, at 174 (stating that "the Supreme Court [in *Dickerson*] minimized [the potential to expand the warrantless search] by sending an appropriate signal to lower courts to be extremely careful, and perhaps even skeptical, in determining when an officer is able to establish probable cause through tactile sensitivity").
414. 436 S.E.2d 912, 913-14 (N.C. Ct. App. 1993); *see supra* note 404 and accompanying text (listing the inquiries).
416. *Id.* at 236 (citing United States v. Longmire, 761 F.2d 411 (7th Cir. 1985); State v. Rand, 430 A.2d 808 (Me. 1981); State v. Ball, 471 A.2d 347 (N.H. 1983); State v. Moore, 272 S.E.2d 804 (W. Va. 1980)).
tion will have the burden of producing detailed evidence with regard to each of these inquiries and of persuading the trier of fact that the plain feel search was constitutional. These findings of fact should be clearly entered into the record, and both the trial and appellate courts should make clear how these findings comprise the factual basis for their findings of law and ultimate resolution of the issue.

As a matter of law, a finding of fact that an object was not immediately apparent should invalidate a search. Moreover, a finding that an officer continued to search after satisfying himself that the suspect did not possess a weapon should also invalidate a search. Clearly, express findings on such issues will not usually be forthcoming, and therefore, findings on the other inquiries above will be particularly relevant. The type of object and the clothing it is felt through will be especially relevant, as will the officer’s specific level of experience with the type of crime, drug and drug packaging at issue. Through such an analysis as detailed above, it is the hope of this author that the courts can consistently apply the plain feel doctrine in such a way that does not further erode the Fourth Amendment, while at the same time not unduly hindering the police in fighting a concededly serious crime problem.

CONCLUSION

Although the plain feel doctrine may seem on its face to be a

417. Cf. Leading Cases, supra note 331, at 174 (stressing the importance of close scrutiny of the officer’s testimony).
418. See 1 LAFAVE, supra note 20, § 11.2, at 217 (stating that the prevailing practice is to allocate the burdens of production and persuasion jointly to one party).
419. See Minnesota v. Dickerson, 113 S. Ct. 2130, 2137 (1993) (making clear that the incriminating nature of an object must be immediately apparent before its seizure will be valid); Horton v. California, 496 U.S. 136 (1990) (stating that the incriminating nature of an object must be immediately apparent in order to justify its warrantless seizure); see also State v. Sanders, 435 S.E.2d 842, 845 (N.C. Ct. App. 1993) (invalidating search and remanding for additional findings of fact where officer did not testify as to whether it was immediately apparent to him that the item he felt was contraband).
420. Dickerson, 113 S. Ct. at 2139; see also Sibron v. New York, 392 U.S. 40, 65 (invalidating seizure where officer conducting a Terry-type frisk was searching not for a weapon, but for narcotics).
421. See supra text accompanying note 298 (listing inquiries made by the court in State v. Beveridge, 436 S.E.2d 912 (N.C. Ct. App. 1993)).
422. See Leading Cases, supra note 331, at 175 (“If lower courts heed the signals of the Supreme Court to follow the example of the Minnesota Supreme Court and apply the [plain feel] doctrine strictly, then the plain feel doctrine will have a helpful, relatively minor impact on the ability of police officers to enforce the law.”).
natural and foreseeable extension of existing Fourth Amendment jurisprudence, its acceptance does more than simply extend current doctrine. By altering the foundation on which the stop and frisk exception lies, the plain feel exception threatens to expand the definition of the warrantless seizure beyond that contemplated by the Terry reasonableness formulation. Rigid application of the plain feel exception, required by the Supreme Court in Dickerson, clearly will protect the core values of the Fourth Amendment while at the same time allowing the police the tools necessary to adequately enforce the law.

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