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THE PLAIN FEEL DOCTRINE OF *MINNESOTA V. DICKERSON*: CREATING AN ILLUSION

I. INTRODUCTION

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹

This amendment delineates the parameters by which the government, particularly the police, and the American people interact with each other. Despite the fundamental importance of the Fourth Amendment, it provides little guidance to police or the American people. Indeed, it is "brief, vague, general and unilluminating."² Due to this ambiguity, the Fourth Amendment has not enjoyed a consistent application.³

In *Katz v. United States*,⁴ the Supreme Court announced the principle that warrantless searches and seizures are per se unreasonable except for "a few specifically established and well-delineated exceptions."⁵ The Supreme Court, however, has since deviated

1. U.S. CONST. amend. IV.

2. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 45 (1991) (providing a general history of the Fourth Amendment).

3. See Lewis R. Katz, *Automobile Searches and Diminished Expectations in the Warrant Clause*, 19 AM. CRIM. L. REV. 557, 561 (1982) (stating that the uncertainty surrounding the Fourth Amendment is due to the Court's failure to adhere to the principles announced in *Katz v. United States* that warrantless searches are per se unreasonable and that exceptions to the warrant requirement are to be carefully drawn). See generally Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984) (providing an overview of declining Fourth Amendment protections).

4. 389 U.S. 347 (1967).

5. *Id.* at 357.

from this principle announced in *Katz* and has, in fact, developed a myriad of exceptions and special circumstances that excuse the government from complying with the warrant requirement.

The Supreme Court's treatment of automobiles provides a perfect example of the erosion of the Fourth Amendment warrant requirement. The automobile exception permits an officer who has probable cause that evidence of a crime will be found in a vehicle to stop that vehicle. He or she may then conduct a warrantless search of the entire vehicle and all containers within the vehicle which may hold evidence being sought.⁶

Historically, warrantless automobile searches were condoned because the mobility of vehicles would permit occupants to drive away while police sought search warrants.⁷ In *Carroll v. United States*, federal agents stopped a vehicle suspected of containing bootleg alcohol.⁸ Because the occupants of the vehicle were not under arrest, the agents had the difficult choice of either proceeding with a warrantless search or procuring a warrant.⁹ Obviously, if the agents had chosen to secure a warrant, the occupants of the vehicle would have driven away. Thus, it was logical to excuse the agents from complying with the warrant requirement in this situation. Since *Carroll*, however, the Supreme Court has simply ignored the question of whether there exists any exigency caused by mobility.¹⁰ Instead, the Supreme Court has approved "warrantless searches of vehicles . . . in which the possibilities of [a] vehicle being removed or evidence in it destroyed were remote, if not non-existent."¹¹

*United States v. Ross*¹² epitomized the complete lack of Fourth Amendment protection for automobiles. In *Ross*, the Supreme Court noted that the warrantless search of an automobile in prior cases was not predicated upon a showing of exigent circumstances.¹³

6. See *United States v. Ross*, 456 U.S. 798, 823-24 (1982) (stating that the scope of a warrantless search is the same as the scope of a search authorized by a warrant).

7. *Carroll v. United States*, 267 U.S. 132, 150-53 (1925).

8. *Id.* at 134.

9. See *id.* at 135-36 (observing that after following for some time, the police eventually stopped and searched the vehicle).

10. See *United States v. Johns*, 469 U.S. 478, 487-88 (1985) (upholding a delayed search of a vehicle that was seized and actually stored by police for three days).

11. *Cady v. Dombrowski*, 413 U.S. 433, 441-42 (1973).

12. 456 U.S. 798 (1982).

13. *Id.* at 807 n.9 (noting the general rule that "if an individual gives the police probable cause to believe a vehicle is transporting contraband, he loses the right to proceed on his way without official interference."). Indeed, when the officers searched the vehicle,

Thus, neither the impracticability of securing a warrant nor the exigency caused by a vehicle's mobility need be demonstrated.¹⁴ All that must be shown is that the search was of an automobile.¹⁵ The automobile exception is simply one example of how the Fourth Amendment has enjoyed reduced protection in recent years.¹⁶

In *Minnesota v. Dickerson*,¹⁷ the Fourth Amendment was once again at issue. In *Dickerson*, the Supreme Court faced the issue of whether the police, pursuant to the plain feel exception, may seize nonthreatening contraband from the defendant's body during a pat-down search for weapons.¹⁸ Unlike previous decisions, which have systematically chipped away at the Fourth Amendment,¹⁹ the *Dickerson* ruling will prove to be a sensible decision that will not further erode the Fourth Amendment.

Section II of this Note provides a general history of the Fourth Amendment. Section II also focuses on two exceptions to the warrant requirement, the plain view doctrine²⁰ and the *Terry* stop-and-frisk doctrine,²¹ which were pertinent to the *Dickerson* decision.

Ross had already been arrested. *Id.* at 801. Therefore, unlike the situation in *Carroll*, there was no chance that the car containing the contraband could have been driven away.

14. *Id.* at 807 n.9.

15. *Id.*

16. See *infra* text accompanying notes 33-40 (discussing other Fourth Amendment exceptions).

17. 113 S. Ct. 2130 (1993).

18. *Id.* at 2134. For a further discussion of the inconsistent treatment of this issue, see *infra* note 93.

19. Some of the exceptions to the Fourth Amendment include: *United States v. Ross*, 456 U.S. 798, 806 (1982) (justifying the automobile exception to the warrant requirement because of the "impracticability" of securing a warrant); *New York v. Belton*, 453 U.S. 454, 460 (1981) (upholding a search of the interior compartment of the arrestee's vehicle even though the interior was not within the arrestee's reaching and grabbing distance); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (recognizing the state's power to stop vehicles for license and safety checks even without particularized suspicion); *Coolidge v. New Hampshire*, 403 U.S. 443, 464 (1971) (observing objects in "plain view" allows them to be seized); *Chimel v. California*, 395 U.S. 752, 762-63 (1969) (justifying the warrantless search of a home where threatening objects and destructible evidence were within the arrestee's reaching and grabbing distance); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (upholding police intrusion on less than probable cause); *Warden v. Hayden*, 387 U.S. 294, 298 (1967) (upholding warrantless entry into a house where police were in hot pursuit of a suspected armed robber).

20. The plain view doctrine provides that the police may seize an object without a warrant as long as (1) the police are in a lawful position to view the object and (2) the object's incriminating nature is immediately apparent. See *Horton v. California*, 496 U.S. 128, 134-42 (1990) (eliminating the inadvertency requirement); *Texas v. Brown*, 460 U.S. 730, 740-43 (1983) (describing the immediately apparent requirement); *Coolidge*, 403 U.S. at 464-71 (creating the plain view exception along with its limitations). For a more detailed discussion about the plain view doctrine, see *infra* text accompanying notes 41-52.

21. The *Terry* stop-and-frisk doctrine was established in *Terry v. Ohio*, 392 U.S. 1

Section III concentrates on the plain feel doctrine as it was applied in *Dickerson*. Section IV introduces evidence supporting the thesis that plain feel is not a further erosion of the Fourth Amendment. This evidence will pertain to the reliability of the sense of touch, the possibility of immediately recognizing an object as contraband, the possibility of perjury in plain feel cases, and the possibility of using *Terry* as a pretext to conduct broad evidentiary searches. Section V introduces certain considerations, which, if not accounted for, will permit subsequent courts to actually use *Dickerson* as a tool to frustrate the Fourth Amendment. Section VI concludes that, all factors remaining constant, the plain feel doctrine will not further erode the Fourth Amendment and will prove to be a mere recognition that officers may use the sense of touch while carrying out their duties.

II. THE FOURTH AMENDMENT

A. *The General Rule*

The Fourth Amendment is made applicable to the states through the Fourteenth Amendment because the protection against unreasonable searches and seizures is viewed as fundamental to the concept of American jurisprudence.²² The primary goal of the framers in enacting the Fourth Amendment was to prevent the use of general warrants which had given the government unchecked authority to search people's homes and property.²³

Though the Fourth Amendment seeks to limit the scope of the government's intrusions, the government is not without power. Indeed, one cannot categorically claim the protection of the Fourth Amendment. Instead, as the Supreme Court established in *Katz v.*

(1968). The *Terry* stop-and-frisk doctrine provides that an officer who has a reasonable suspicion that a crime has been, will be, or is in the process of being committed may stop an individual. *Id.* at 38. If, after this stop, the officer has a reasonable fear for his safety or others nearby, he may pat down, or frisk, that individual for weapons. *Id.* at 29-30. For a more detailed discussion about the *Terry* stop-and-frisk doctrine, see *infra* text accompanying notes 54-67.

22. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643 (1961) ("The security of one's privacy against arbitrary intrusion by the police . . . is . . . implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause.").

23. See generally DRESSLER, *supra* note 2, at 46 (discussing the historical purposes of the Fourth Amendment). The Fourth Amendment is supposed to impose substantive limits on the scope of police conduct. *Id.*

United States,²⁴ one must have a subjective expectation of privacy that is recognized as reasonable and legitimate by society in general in order to assert a Fourth Amendment privacy interest.²⁵ As a result of this *Katz* privacy test, there are many police activities which do not meet its threshold definition and, as such, do not constitute an invasion of privacy under the Fourth Amendment.²⁶ Thus, those police activities which fail to meet the *Katz* privacy formula are not subject to any Fourth Amendment restrictions.

Assuming that a challenged police activity does infringe on a protected privacy interest, the Fourth Amendment's two distinct requirements then become applicable.²⁷ First, a search or seizure must be supported by probable cause.²⁸ Second, a search or seizure must be authorized by a neutral and independent magistrate.²⁹ It must be stressed that probable cause alone is never sufficient to support a warrantless search or seizure. Probable cause is not an exception to the warrant requirement.³⁰

As a general rule, the Supreme Court has interpreted the Fourth Amendment to mean that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable."³¹ Despite this seemingly straightforward mandate, a

24. 389 U.S. 347 (1967).

25. *Id.* at 352 (holding that without a warrant electronic eavesdropping on a conversation over a public telephone violates the Fourth Amendment). *Katz* did not discuss which party had the burden of proof in this type of situation. However, in *Florida v. Riley*, 488 U.S. 445, 455 (1989) (O'Connor, J., concurring), Justice O'Connor expressly stated that the burden is on the person claiming the Fourth Amendment violation.

26. *Riley*, 488 U.S. at 451-52 (finding no reasonable expectation of privacy from aerial surveillance of partially covered greenhouse); *California v. Greenwood*, 486 U.S. 35, 37 (1988) (finding no reasonable expectation of privacy in the trash that is left outside for the garbage collectors); *Oliver v. United States*, 466 U.S. 170, 177 (1984) (finding no reasonable expectation of privacy in open fields); *United States v. Place*, 462 U.S. 696, 707 (1983) (finding no expectation of privacy to restrict dog sniffing luggage at airport); *United States v. Knotts*, 460 U.S. 276, 282-85 (1983) (finding the use of a beeper attached to the bumper of a vehicle to help track defendant's route did not constitute a search); *Smith v. Maryland*, 442 U.S. 735, 742 (1979) (finding that there is no expectation of privacy in telephone numbers dialed). Of course, if the challenged activity is undertaken by a private person the Fourth Amendment is simply inapplicable. See LEWIS R. KATZ & JAY SHAPIRO, *NEW YORK SUPPRESSION MANUAL* 5-2 (1994) (comparing arrest, search, and seizure requirements of federal and New York state law).

27. KATZ & SHAPIRO, *supra* note 26, at 5-2.

28. See *id.* at 5-2; see also Lewis R. Katz, *The Automobile Exception Transformed: The Rise of a Public Place Exemption to the Warrant Requirement*, 36 CASE W. RES. L. REV. 375, 383-97 (1986) (analyzing the automobile exception to the warrant requirement and explaining that the Fourth Amendment has enjoyed less protection).

29. Katz, *supra* note 28, at 383.

30. KATZ & SHAPIRO, *supra* note 26, at 5-3.

31. *Katz v. United States*, 389 U.S. 347, 357 (1967) (holding that electronic eavesdrop-

great majority of government intrusions are actually made without warrants.³²

B. *The Exceptions*

Historically, warrantless intrusions were justified by exigent circumstances.³³ The police were allowed to bypass prior judicial approval, assuming they had probable cause, on the grounds that the delay in obtaining a warrant would (1) endanger their safety or that of others, or (2) result in the destruction of evidence.³⁴ Unless such an exigency existed, the police were required to obtain a warrant.³⁵ Nevertheless, the Supreme Court has deviated from the historical use of exigent circumstances and has accepted a balancing test.

This balancing test weighs the interests of the people in being free from unreasonable searches and seizures against the interests of the police in being able to effectively carry out their duties.³⁶ The Supreme Court has used this balancing test to carve out exceptions to the Fourth Amendment requirements. For example, passengers travelling into America across the borders are subject to warrantless searches and seizures.³⁷ Although the passenger has, of course, a legitimate interest in being left alone, border searches are exempted from the warrant requirement.³⁸ The interest of the passenger in being left alone is outweighed by the government's interest in protecting its borders.³⁹ Thus, the warrant requirement is seen as placing too great of a burden on custom officials in carrying out their duties.⁴⁰ Two further exceptions, which are pertinent

ping of conversation over public telephone without a warrant violates the Fourth Amendment).

32. See *supra* note 19 (providing examples of permissible government intrusions without a warrant).

33. DRESSLER, *supra* note 2, at 125.

34. *Id.* at 125.

35. Recall, probable cause alone is never sufficient for a warrantless intrusion. There is no such thing as a probable cause exception to the warrant requirement. See *supra* note 30 and accompanying text.

36. See Katz, *supra* note 28, at 378 (discussing the conflict between Fourth Amendment privacy interest and the goal of law enforcement).

37. *United States v. Ramsey*, 431 U.S. 606, 619 (1977) (stating that border searches are considered reasonable because of "the single fact that the person or item in question [has] entered into our country from outside").

38. *Id.* at 621.

39. *Id.* at 619.

40. *Id.* at 621; see also *supra* note 19 (providing a list of exceptions to the Fourth Amendment to allow officials to carry out their duties).

to the *Dickerson* case and are also based on such balancing, are the plain view doctrine and the *Terry* stop-and-frisk doctrine.

1. The Plain View Exception

The plain view exception allows an officer to seize an object without a warrant as long as (1) the officer is in a lawful position to view the object,⁴¹ and (2) the object's incriminating nature is immediately apparent.⁴² The lawful position requirement may be satisfied when an officer's presence is authorized by (1) a search warrant,⁴³ (2) an in-home arrest pursuant to an arrest warrant,⁴⁴ or (3) one of the exceptions to the warrant requirement.⁴⁵ If there is no intrusion upon a justifiable expectation of privacy, the plain view doctrine, like the entire Fourth Amendment, is simply not at

41. The lawful position requirement needs to be satisfied at the time of both the initial intrusion and the subsequent seizure. KATZ & SHAPIRO, *supra* note 26, at 15-5. For example, if an officer sees marijuana plants from the street, he may not enter the premises to seize the plants without a warrant. Surely, his observation established probable cause. However, probable cause is not an exception to the warrant requirement. *See supra* note 30 and accompanying text. Although the observation of the plants was lawful, it is not enough to enter the premises to effect a seizure without a warrant or exigent circumstances. KATZ & SHAPIRO, *supra* note 26, at 15-5 (discussing the warrant requirement in the context of this marijuana hypothetical).

42. *See supra* note 20. Originally, the Supreme Court in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), required three criteria for the plain view doctrine to be applicable. These were: 1) the police had to be in a lawful position when observing the object, 2) the object's incriminating nature had to be immediately apparent, and 3) the discovery of the object had to be inadvertent. *Id.* at 466. The goal of the inadvertency requirement is to make police officers specify in their affidavits the objects that are sought to be searched and seized. *Id.* at 469-71. With inadvertency, it will prevent the police from entering a location and engaging in widespread general searches until something incriminating is found. *Id.* The inadvertency requirement has since been eliminated. *Horton v. California*, 496 U.S. 128, 138 (1990). The *Horton* court argued that the inadvertency requirement was not necessary to prevent general searches. *Id.* at 139. Instead, the Court reasoned that the interest against general searches was already protected by the Fourth Amendment itself which prohibits the issuance of a warrant that does not particularly describe the place to be searched. *Id.* at 140. The Court also expressed great faith in police officers' integrity, commenting that "we see no reason why [the police] would deliberately omit a particular description of the item to be seized from the application for a search warrant." *Id.* at 138. Police integrity, however, should not be viewed as a constant. *See infra* notes 147-48 and accompanying text.

43. For example, when police officers have a warrant to search for specific objects but discover evidence or other contraband not mentioned in the warrant, no new warrant is needed and the police may seize those items. KATZ & SHAPIRO, *supra* note 26, at 15-6. However, once officers find the objects that the search warrant specifically described, the search is over and the plain view exception terminates. Officers cannot continue to look around for contraband. *Id.* at 15-7.

44. *Id.* at 15-6.

45. *Horton*, 496 U.S. at 135.

issue.⁴⁶

The immediately apparent requirement is satisfied if the officer has probable cause to seize the article seen in plain view.⁴⁷ The rationale for requiring the incriminating nature to be immediately apparent is that warrantless searches are to be discouraged or, at least, closely monitored.⁴⁸ If the incriminating nature of an object is not immediately apparent, the police would have to further probe the object to determine its nature. Such a further probing, no matter how slight, would constitute a search, and would need to be supported by independent probable cause.⁴⁹ Without this requirement, the police could enter a residence and engage in a fishing expedition, turning over and manipulating objects, until something of incriminating nature was discovered.⁵⁰ Such a general search was one of the primary evils the Fourth Amendment sought to eliminate.⁵¹

Even if officers are lawfully present and have immediately recognized an object as contraband, they may only seize that item.⁵² It must be stressed that plain view does not permit the authorities to search the item.⁵³ Once the object is seized, there can be no further concern that the evidence will be destroyed. Therefore, there is no further need to excuse the warrant requirement before a full-blown search is conducted.

46. For example, if an individual is on a street corner holding a bag of cocaine out in the open, visible to any passerby, the plain view analysis is inapplicable. The individual has no justifiable expectation of privacy under *Katz*, and there is no need to justify the police observations of that bag. Compare this situation with the following. Suppose a police officer, standing on a street corner observes marijuana plants sitting in a window sill. Although the officer's observation would be lawful, he could not enter the house to seize the plants without a warrant or exigent circumstances. Otherwise, his intrusion would be unlawful. *Id.* at 15-5.

47. See *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971) (noting that evidence which is immediately apparent may be seized without a warrant under the plain view doctrine).

48. See *id.* (asserting that the plain view requirement is designed to prevent warrantless searches where they are not imperative).

49. See *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987) (holding that the movement of a stereo even a few inches to obtain its serial number constituted an invalid search because the serial number was not in plain view and, as such, the incriminating nature of the stereo was not immediately apparent).

50. *Coolidge*, 403 U.S. at 466.

51. See *supra* text accompanying note 21.

52. See *Texas v. Brown*, 460 U.S. 730, 738-39 (1983) (stating that once an object is seen in plain view, the owner loses privacy interest but retains possessory and ownership interests).

53. See *KATZ & SHAPIRO*, *supra* note 26, at 15-27.

2. The *Terry* Stop-and-Frisk Doctrine

The second exception to the warrant requirement that is pertinent to *Dickerson* is the *Terry* stop-and-frisk doctrine. In *Terry v. Ohio*,⁵⁴ a Cleveland plain clothes detective became suspicious of three men whom he thought were "casing" a storefront.⁵⁵ The officer confronted the three men, identified himself, and asked the suspects for their names.⁵⁶ The men replied incoherently.⁵⁷ The officer spun Terry around and patted his breast pocket.⁵⁸ During this pat-down, the officer felt a pistol which he removed.⁵⁹

The issues in *Terry* were whether the Fourth Amendment permitted (1) the initial stop and (2) the subsequent frisk.⁶⁰ The Supreme Court upheld the stop, holding that an officer may stop an individual if the officer has a reasonable suspicion that the individual is engaged in criminal activity.⁶¹ This reasonable suspicion requirement is a lower standard than probable cause, but the court recognized that some lesser intrusions were needed to allow the police to effectively carry out their work.⁶² Indeed, "[i]t would have been poor police work . . . to have failed to investigate this behavior further."⁶³

The second aspect of *Terry* involved the actual touching, the frisk, of the defendant after he was stopped. The frisk is not an automatic byproduct of the stop. Only if the officer has a reasonable fear for his safety or the safety of others nearby may he conduct a pat-down search for weapons.⁶⁴ If the frisk reveals an object that feels like a weapon, the officer can then retrieve the object.⁶⁵ If the object retrieved is not a weapon, but some other contraband, the seizure of the object would still be lawful if a reasonable officer would have believed that the object was a weapon

54. 392 U.S. 1 (1968).

55. *Id.* at 6.

56. *Id.* at 6-7.

57. *Id.* at 7.

58. *Id.*

59. *Terry v. Ohio*, 392 U.S. 1, 7 (1968).

60. *Id.* at 12.

61. *Id.* at 30.

62. *Id.* at 20 (stating that since the police activity involved "swift action" based upon "on-the-spot" observations, the challenged activity would not be tested against the warrant requirement but against the general prohibition on unreasonable searches and seizures).

63. *Id.* at 23.

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

65. *Id.* at 30.

when it was first touched.⁶⁶ The purpose of the frisk is only to discover possible threatening objects.⁶⁷ Thus, a *Terry* stop-and-frisk is not a traditional search and seizure because it relies on reasonable suspicion and reasonable fear rather than probable cause.

C. *The Remedy*

If a challenged police activity does encroach on a privacy interest, as defined in *Katz v. United States*,⁶⁸ and does not fall under one of the enumerated exceptions, the search or seizure is illegal and any evidence seized will be excluded pursuant to the exclusionary rule.⁶⁹ The exclusionary rule provides that evidence seized in violation of the Fourth Amendment may not be used in a trial and must be suppressed.⁷⁰

66. See *People v. Perry*, 133 A.D.2d 380, 382 (N.Y. App. Div. 1987) (holding an arrest lawful where an officer removed what he thought to be a weapon and discovered it was jewelry), *aff'd*, 71 N.Y.2d 871 (1988). This scenario is different from *Dickerson* because when the officer in *Dickerson* first touched the object, he knew it was not a weapon. *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2138-39 (1993).

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

68. 389 U.S. 347 (1967).

69. See generally KATZ & SHAPIRO, *supra* note 26, at 5-2 (discussing the history, application, limitations, and exceptions of the exclusionary rule).

70. See, e.g., *Wolf v. Colorado*, 338 U.S. 25, 28 (1949), *overruled on other grounds* by *Mapp v. Ohio*, 367 U.S. 643 (1961). *Wolf*, however, did not make this rule applicable to the states. *Id.* at 33. Instead, it was not until *Mapp* that the exclusionary rule was made applicable to the states. *Mapp*, 367 U.S. at 655. It should be noted that the exclusionary rule has often come under fire. See DRESSLER, *supra* note 2, at 241-46 (providing an overview of criticisms of the exclusionary rule). It has been criticized as only protecting the guilty. *Id.* at 244. Arguably, this criticism helped ignite the incentive for the court to adopt the good faith exception to the exclusionary rule. See *United States v. Leon*, 468 U.S. 897, 913, 926 (1984) (concluding that the cost of suppressing evidence seized in good faith outweighs the benefits). The good faith exception to the exclusionary rule allows the use of illegally obtained evidence if it was obtained pursuant to a search warrant upon which the police reasonably relied in good faith, but which is also later deemed invalid. The exclusionary rule has generated massive debate. See generally Craig M. Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises in Futility*, 60 IND. L.J. 287 (1985) (discussing whether the good faith exception to the exclusionary rule is an effective way of dealing with Fourth Amendment problems); Gary S. Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 HASTINGS L.J. 1065 (1982) (reassessing the benefits of the exclusionary rule and suggesting a good faith exception as a possible alternative); William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981) (arguing that a good faith exception would have a devastating effect on the Fourth Amendment); Malcolm R. Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?* 62 JUDICATURE 214 (1978) (discussing the enormous societal cost of the exclusionary rule and positing possible alternatives).

III. MINNESOTA v. DICKERSON

A. *The Facts and Procedural History*

On November 9, 1989, two Minneapolis police officers were on patrol in their squad car when they observed Dickerson leaving a notorious crack house.⁷¹ Dickerson began walking in the direction of the police car; however, once he spotted the car and made eye contact with one of the officers, he abruptly halted and began walking in the opposite direction into an alley on the other side of the crack house.⁷²

The officers followed Dickerson into the alley with their car and ordered him to stop and to submit to a pat-down search.⁷³ Although no weapons were revealed during this search, the officer felt a small lump in Dickerson's jacket.⁷⁴ 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."⁷⁵ After this search, the officer reached into the jacket pocket and retrieved a small plastic bag which contained crack cocaine.⁷⁶

The trial court found that the officers were justified in performing both the stop and frisk of Dickerson.⁷⁷ The trial court then analogized the officer's "plain feel" to the plain view doctrine and concluded that the officer's sense of touch provided the probable cause necessary to seize the cocaine.⁷⁸ According to the trial court, there was "no distinction as to which sensory perception the officer use[d] to conclude that the material [was] contraband."⁷⁹

The Minnesota Court of Appeals, however, reversed.⁸⁰ The court of appeals upheld the trial court's determination that the officers were justified in stopping and frisking the defendant.⁸¹ How-

71. *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2133 (1993).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2133-34 (1993).

77. *Id.* at 2134.

78. *Id.*

79. *Id.*

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

81. *Id.* at 465.

ever, the court concluded that the officer overstepped the bounds of *Terry*.⁸² According to the court, the scope of a *Terry* frisk is strictly limited to a search for weapons.⁸³ Since the officer testified that he knew the object he touched was not a weapon, the court concluded that the officer overstepped the bounds marked by *Terry* by reaching for the non-weapon.⁸⁴ In so holding, the court rejected the plain feel exception, reasoning that the only purpose for a pat-down search is to uncover weapons and not "soft objects" like drugs.⁸⁵

The Minnesota Supreme Court affirmed.⁸⁶ Again, the stop and frisk were both deemed to be valid under *Terry*.⁸⁷ However, the Minnesota Supreme Court echoed the court of appeals decision in holding that the officer exceeded the permissible scope of intrusion allowed by *Terry*.⁸⁸ The court concluded that once it was obvious that Dickerson did not have a weapon, the officer was further precluded from reaching into the defendant's pocket.⁸⁹ Any further intrusion required a warrant or probable cause to arrest and since the officer had neither, the search of defendant's pocket was unjustified.⁹⁰ The court rejected the trial court's reasoning and concluded that the sense of touch was not capable of providing probable cause for arrest.⁹¹ The court's disapproval of plain feel was clear:

The officer's 'immediate' perception is especially remarkable because this lump weighed 0.2 grams and was no bigger than a marble. We are led to surmise that the officer's sense of touch must compare with that of the fabled princess who couldn't sleep when a pea was hidden beneath her pile of mattresses. But a close examination of the record reveals that like the precocious princess, the officer's

82. *Id.* at 465-66.

83. *Id.* at 466.

84. *Id.* at 465-66.

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

86. *State v. Dickerson*, 481 N.W.2d 840 (Minn. 1992), *aff'd sub nom.* *Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993).

87. *Id.* at 844.

88. *Id.* at 843-44.

89. *Id.* at 846.

90. *Id.*

91. *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992), *aff'd sub nom.* *Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993).

'immediate' discovery in this case is fiction, not fact.⁹²

The Supreme Court of the United States decided to grant certiorari to resolve the conflict among the state and federal courts over this issue.⁹³

B. The Plain Feel Doctrine

The plain feel doctrine allows the police to use their sense of touch in carrying out their duties. It must be stressed that plain feel is not a separate exception to the Fourth Amendment, but rather only becomes applicable in the context of plain view. Thus, in upholding the plain feel doctrine, the Supreme Court analogized it to plain view,⁹⁴ and determined the validity of the seizure of the crack cocaine in *Dickerson* by analyzing whether the requirements of plain view were met. Specifically, (1) was the officer in a lawful position to view the object, and (2) was the object's incriminating nature was immediately apparent.⁹⁵

The first issue to consider is whether the officer in *Dickerson* was in a lawful position when he placed his hands on Dickerson's outer clothing. This requires the application of the principles announced in *Terry v. Ohio*.⁹⁶ Since Dickerson was leaving a notorious crack house and behaved nervously when he spotted the police,⁹⁷ a reasonable police officer would have believed that Dickerson was involved in criminal activity. Therefore, the police

92. *Id.* at 844.

93. *Minnesota v. Dickerson*, 113 S. Ct. 53 (1992). Various state and federal courts have faced this issue. For states accepting plain feel, see *People v. Chavers*, 658 P.2d 96 (Cal. 1983); *State v. Guy*, 492 N.W.2d 311, 317 (Wis. 1992), *cert. denied*, 113 S. Ct. 3020 (1993). For states rejecting plain feel, see *State v. Collins*, 679 P.2d 80, 82 (Ariz. Ct. App. 1983); *People v. McCarty*, 296 N.E.2d 862, 863 (Ill. App. Ct. 1973); *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992), *aff'd*, 113 S. Ct. 2130 (1993); *People v. Diaz*, 612 N.E.2d 298, 300 (N.Y. 1993); *State v. Rhodes*, 788 P.2d 1380, 1381 (Okla. Crim. App. 1990); *Commonwealth v. Marconi*, 597 A.2d 616, 619 (Pa. Super. Ct. 1991); *State v. Broadnax*, 654 P.2d 96, 101 (Wash. 1982). For federal circuits accepting the plain feel doctrine before *Minnesota v. Dickerson* was handed down, see *United States v. Coleman*, 969 F.2d 126, 132 (5th Cir. 1992); *United States v. Salazar*, 945 F.2d 47, 51 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1975 (1992); *United States v. Buchannon*, 878 F.2d 1065, 1067 (8th Cir. 1989); *United States v. Norman*, 701 F.2d 295, 297 (4th Cir. 1983); *United States v. Portillo*, 633 F.2d 1313, 1320 (9th Cir. 1980), *cert. denied*, 450 U.S. 1043 (1981).

94. *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2137 (1993).

95. See *supra* note 20.

96. For a complete explanation of *Terry*, see *supra* text accompanying notes 54-67.

97. See *supra* notes 71-72 and accompanying text.

were justified in stopping Dickerson.⁹⁸ Given the nature of the drug business and the propensity of drug dealers to carry weapons,⁹⁹ the police were further justified in being concerned with their safety. Thus, the officer was justified in conducting a pat-down search for weapons.¹⁰⁰ Since the requirements of *Terry* were satisfied, the officer's hands were in a lawful position when he touched the nonthreatening contraband.¹⁰¹ Thus, the first requirement of plain view was satisfied. Indeed, the issue of whether or not *Terry* was applicable to *Dickerson* was not a critical issue in the case, as defense counsel did not even challenge the officer's stop and frisk of Dickerson.¹⁰² The critical issue was whether or not an officer could immediately recognize an object's criminality through his sense of touch.¹⁰³

In a technical sense, the object's incriminating nature could not have been immediately apparent given that the officer did not see the object.¹⁰⁴ However, for the incriminating nature of an object to be immediately apparent, it has never been required that an object has to be seen by the eyes.¹⁰⁵ The Court's view that an object's incriminating nature can be immediately apparent through the sense of touch is consistent with the view that "[e]vidence in plain view is not restricted to items which can only be seen, but rather includes the realization of items or events to all of the human senses, smell, sight, touch, hearing and taste."¹⁰⁶ Thus, as-

98. *Dickerson*, 113 S. Ct. at 2134 (referring to the trial court's findings).

99. See *Terry v. Ohio*, 392 U.S. 1, 23 (1968) (noting that "American criminals have a long tradition of armed violence"); *United States v. Salazar*, 945 F.2d 47, 51 (2d Cir. 1991) (commenting that officers know that narcotics dealers frequently carry weapons); *United States v. Crespo*, 834 F.2d 267, 271 (2d Cir. 1987) (commenting that to dealers in narcotics, firearms are the tools of the trade); *United States v. Wiener*, 534 F.2d 15, 18 (2d Cir. 1976) (noting that dealers in narcotics keep firearms almost to the same extent they keep scales, baggies, and cutting equipment), *cert. denied*, 429 U.S. 820 (1976); *State v. Guy*, 492 N.W.2d 311, 314 (Wis. 1992) (stating the belief that weapons are tools of the drug trade), *cert. denied*, 113 S. Ct. 3020 (1993).

100. *Dickerson*, 113 S. Ct. at 2134 (referring to the trial court's findings).

101. *Id.*

102. *Id.* at 2138.

103. See *id.* at 2136-37 (noting that police may seize an object if its incriminating character is immediately apparent through touch).

104. See, e.g., *People v. Diaz*, 612 N.E.2d 298, 302 (N.Y. 1993) ("[T]he identity and nature of the concealed item cannot be confirmed until seen . . .").

105. See *United States v. Sifuentes*, 504 F.2d 845, 848 (4th Cir. 1974) (noting that the overwhelming odor of marijuana placed the contraband in "plain view"); see *infra* text accompanying notes 119-23.

106. *State v. Washington*, 396 N.W.2d 156, 161-62 (Wis. 1986).

suming the validity of the Supreme Court's argument that the sense of touch is reliable, the second prong of plain view was satisfied and the seizure of the object was justified.

However, since the officer had testified that he had to squeeze, slide, and manipulate the object, the officer could not have immediately recognized the object as contraband.¹⁰⁷ As a result, his actions amounted to a general evidentiary search which *Terry* does not allow.¹⁰⁸ Although *Terry* permitted the officer to place his hands on Dickerson's outer clothing and feel the lump in Dickerson's jacket, nothing justified his further manipulation of the object after assuring himself that the object was not a weapon.¹⁰⁹ Thus, because the officer failed to immediately identify the object as contraband the instant he touched it, he was not entitled to further probe Dickerson's jacket.¹¹⁰ Therefore, the seizure of cocaine was unlawful.¹¹¹

The limited nature of the plain feel doctrine must be stressed. Its scope is limited to what the police may do pursuant to the underlying lawful intrusion. Thus, in the *Terry* context, plain feel must first be preceded by a lawful stop and a lawful frisk. If those elements are not satisfied, the plain feel doctrine does not come into play. Although the plain feel doctrine allows an officer to seize nonthreatening contraband which is immediately recognized, the purpose of the search remains the uncovering of weapons. Plain feel does not authorize a search for drugs.¹¹² Instead, it remains a search for weapons during which the officer fortuitously comes upon and recognizes contraband.

107. See *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2138-39 (1993) (concluding that since the incriminating character of the lump under defendant's jacket was not immediately apparent the search was invalid under *Terry*).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2138 (1993). The Court stated, "[h]ere, the officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to '[t]he sole justification of the search [under *Terry*]: . . . the protection of the police officer and others nearby.'" *Id.* at 2138-39 (quoting *Terry v. Ohio*, 392 U.S. 29 (1968) (alteration in original)).

IV. THE WELL-CRAFTED RULE OF THE SUPREME COURT IN *MINNESOTA V. DICKERSON*

The plain feel exception is a misnomer. Superficially, it appears to be an example of declining Fourth Amendment protections.¹¹³ However, the plain feel exception is no exception at all; it is merely a sensible application of the plain view doctrine to the sense of touch.

Upon close examination of the Supreme Court's ruling, it becomes apparent that what has been created is an illusion. First, the Supreme Court did not categorically accept that in all cases the sense of touch is inherently reliable. Instead, the Court made it clear that the sense of touch is *capable* of determining the identity of an object.¹¹⁴ Second, even though the Court accepted the notion that the sense of touch may be used to identify contraband, the Justices severely limited its use by requiring immediate recognition.¹¹⁵ Third, the possibility of reenacting the frisk and the opportunity for the court to actually feel the object presents a unique opportunity for a court to review whether the seizure was valid and whether an officer's possible testimony that he immediately recognized the object as contraband was credible.¹¹⁶ Fourth, the plain feel doctrine will not lead to the use of *Terry* as a pretext to con-

113. One of the criticisms of plain feel is that it will lead to complete evidentiary body searches. See *infra* text accompanying notes 170-75. However, this Note will not discuss whether the plain feel doctrine is constitutional or unconstitutional. There are numerous articles and cases supporting both views. See generally David L. Haselkorn, *The Case Against a Plain Feel Exception to the Warrant Requirement*, 54 U. CHI. L. REV. 683 (1987) (arguing that the plain feel doctrine exceeds the bounds of Fourth Amendment exceptions); Larry E. Holtz, *The "Plain Touch" Corollary: A Natural and Foreseeable Consequence of the Plain Feel Doctrine*, 95 DICK. L. REV. 521 (1991) (contending that the plain feel doctrine is not only appropriate but is also a necessary corollary to the plain view exception); Katherine W. Iverson, *"Plain Feel": A Common Sense Proposal Following State v. Dickerson*, 16 HAMLINE L. REV. 247 (1992) (concluding that the plain feel doctrine does not exceed Fourth Amendment constitutional privileges); Kevin A. Lantz, *Search and Seizure: "The Princess and the Rock": Minnesota Declines to Extend "Plain View" to "Plain Feel,"* 18 U. DAYTON L. REV. 539 (1993) (contending that plain feel is not analogous to plain view based on lack of immediacy and reliability of touch, and the intrusiveness of tactile manipulation). This Note does not attempt to revisit these arguments but, rather, attempts to predict the likely consequences of the doctrine as established by the Supreme Court. However, where necessary, certain pros and cons of the plain feel doctrine are discussed to provide the reader with necessary background information.

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

115. *Id.*

116. See *infra* text accompanying notes 147-69.

duct broad evidentiary searches.¹¹⁷

A. *The Reliability of the Sense of Touch*

In recognizing the plain feel doctrine, the *Dickerson* Court analogized plain feel to plain view.¹¹⁸ This comparison to the sense of sight is not new. For instance, previous cases have recognized other doctrines such as plain smell¹¹⁹ and plain hearing.¹²⁰ The plain view doctrine should not be interpreted to mean only that the sense of sight may be used in seizing evidence, rather, plain view should be interpreted to mean that an object is "obvious to the senses."¹²¹ Indeed, "[e]vidence in plain view is not restricted to items which can only be seen, but rather includes the realization of items or events to all of the human senses, smell, sight, touch, hearing and taste."¹²² Thus, in recognizing the sense of touch as reliable, the Supreme Court had no other choice but to analogize to the plain view doctrine. It would seem illogical to recognize the other human senses but refuse to recognize the sense of touch. Indeed, the *Terry* doctrine itself recognizes that the officer will use the sense of touch in determining whether an object is a weapon.¹²³ Nevertheless, courts have continued to reject the plain feel doctrine as inconsistent with the plain view doctrine by reasoning that the sense of touch is inherently unreliable.¹²⁴

117. See *infra* text accompanying notes 170-76.

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

119. See, e.g., *United States v. Lueck*, 678 F.2d 895, 903 (11th Cir. 1982) (noting that the odor of marijuana was one of several factors considered in determining whether probable cause existed); *United States v. Rivera*, 595 F.2d 1095, 1099 (5th Cir. 1979) (finding that the odor of marijuana established probable cause for a search); *United States v. Sifuentes*, 504 F.2d 845, 848 (4th Cir. 1974) (smelling strong odor of marijuana made the presence of marijuana obvious to the senses).

120. See, e.g., *United States v. Mankani*, 738 F.2d 538, 543 (2d Cir. 1984) (noting that what an officer overhears with his naked ear is per se lawful if he is in a lawful position); *United States v. Jackson*, 588 F.2d 1046, 1051-52 (5th Cir. 1979) (holding that the Fourth Amendment was not violated where motel room conversations were overheard by the unaided ears of police in an adjoining room), *cert. denied*, 442 U.S. 941 (1979).

121. *Sifuentes*, 504 F.2d at 848.

122. *State v. Washington*, 396 N.W.2d 156, 161-62 (Wis. 1986).

123. As the Supreme Court stated, "[t]he very premise of *Terry*, after all, is that officers will be able to detect the presence of weapons through the sense of touch." *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2137 (1993).

124. See *People v. Diaz*, 612 N.E.2d 298, 302 (N.Y. 1993) (noting that identification via touching an object is inherently less reliable than seeing an object); *State v. Broadnax*, 654 P.2d 96, 102 (Wash. 1982) (reasoning that the "tactile sense does not usually result in immediate knowledge of the nature of an item"). Also recall that the Minnesota Supreme Court rejected an analogy to plain view on the grounds that "the sense of touch is

This dispute over the reliability of the sense of touch is misplaced. Both cases which support plain feel and those which do not miss the mark. The problem with a categorical characterization of the sense of touch as inherently less reliable or inherently reliable is that it rests on pure assumptions. Not once do the respective courts support their conclusions with any factual data regarding the reliability of the sense of touch.¹²⁵ Furthermore, one must question the conspicuous absence of a concern about the reliability of other senses. Indeed, what makes one sense more reliable than the other? For instance, it is possible that one police officer is unable to smell very well while another officer may have poor hearing. It is also possible that an officer with twenty-five years of experience can identify an object through his sense of touch better than a rookie police officer with little or no experience.

Even though the Court made it clear that the sense of touch may be used to determine an object's criminality,¹²⁶ it did not establish a per se rule that in every situation the sense of touch will be reliable. Indeed, the Court stated that "[e]ven if it were true that the sense of touch is . . . less reliable . . . that only suggests that officers will less often be able to justify [the] seizures of . . . contraband."¹²⁷

inherently less immediate and less reliable than the sense of sight." *State v. Dickerson*, 481 N.W.2d 840, 845 (Minn. 1992), *aff'd*, 113 S. Ct. 2130 (1993). It is noteworthy that some courts have refused to recognize the sense of touch on the grounds that "touching" is inherently more intrusive than other senses like sight and smell. For example, the Minnesota Supreme Court stated that "the sense of touch is far more intrusive into the personal privacy that is at the core of the Fourth Amendment. It is one thing to see a bag of marijuana in a suspect's pocket . . . [i]t is quite something else to pinch, squeeze, and rub the suspect's pocket" *Id.* In *Broadnax*, the court rejected the sense of touch, in part, because the officer's touching "lacked the distinctive character of the smell of marijuana." 654 P.2d at 102 (quoting *State v. Broadnax*, 612 P.2d 391, 399 (Wash. Ct. App. 1980) (Ringold, J., dissenting)). The *Broadnax* court further stated, "[w]hereas the detection of evidence by sight or smell can be accomplished without the physical intrusion of one's person, this is not so with respect to evidence discovered by touch." *Id.* This intrusiveness concern was accounted for in *Dickerson*. By requiring an officer to immediately recognize an object as contraband and prohibiting any further manipulation, squeezing, or sliding of the object, the Supreme Court has assured that the "touching" in a plain feel situation will not be any broader or any more intrusive than that already permitted by *Terry*.

125. See *supra* note 124 (illustrating that none of the cases cited make mention of any statistical data supporting their conclusion).

126. The Supreme Court stated that "the sense of touch is capable of revealing the nature of an object." *Dickerson*, 113 S. Ct. at 2137.

127. *Id.*

B. Limiting Plain Feel by Requiring Immediate Recognition

In accepting the plain feel doctrine, the Supreme Court did not give an irrevocable license to the police to use their sense of touch. The Court's rationale only established that the sense of touch may be able to justify a seizure.¹²⁸ The Supreme Court may have approved of plain feel and the sense of touch merely to put an end to arbitrary generalizations lacking any factual support which had been pervasive in previous plain feel cases.¹²⁹ However, in recognizing the validity of the sense of touch and plain feel, the Supreme Court limited its use by prohibiting any further manipulation, squeezing, or sliding of the object.¹³⁰ Thus, plain feel should not be viewed as an endorsement for all-out evidentiary searches.

The Supreme Court ruled that an officer may seize nonthreatening contraband during a *Terry* frisk only if at that immediate touch, that instant pat-down, the incriminating nature of the object is plainly obvious.¹³¹ This will be difficult to do. Indeed, "[t]he tactile sense does not usually result in the *immediate* knowledge of the nature of the item."¹³² For example, in *Dickerson* itself, the officer testified that he had to squeeze the object before determining the object's criminality.¹³³ Justice Scalia also questioned how an officer would be able to determine whether a small object in a

128. This is consistent with general Fourth Amendment principles that the determination of Fourth Amendment issues should be fact-specific. *United States v. Mendenhall*, 446 U.S. 544, 565 n.6 (1980) (Powell, J., concurring) (stating that the drug courier profile does not necessarily establish reasonable suspicion and "[e]ach case raising a Fourth Amendment issue must be judged on its own facts").

129. Mr. George E. Dix, who holds the A.W. Walker Centennial Chair in Law at the University of Texas at Austin, states:

Some "plain feel" reports appear highly reliable. Some reports of "plain feel" observations appear highly questionable. Generalizations are impossible. There is no realistic choice but to rely on trial judges to make case-by-case judgments regarding the credibility of officers' claims that their visual observations or tactile sensations were reliable enough to trigger the probable cause necessary for further action.

The Court undoubtedly granted review in *Dickerson* to disapprove the arbitrary distinction drawn by the Minnesota Court.

George E. Dix, *Court Should Place Limits on Pat-Down Searches*, N.J. L.J., Feb. 1, 1993, at 17, 19.

130. *Dickerson*, 113 S. Ct. at 2138-39.

131. *Id.* at 2138.

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

133. *Dickerson*, 113 S. Ct. at 2133.

jacket pocket was crack cocaine instead of a piece of chewing gum or some other object.¹³⁴ If this is the case, one can expect that the plain view doctrine will be applicable only in very rare cases. This limitation on the permitted scope of the search will prevent the plain feel doctrine from eroding Fourth Amendment protections.¹³⁵

The *Dickerson* rule allows the police to carry out their duties more effectively while adequately protecting Fourth Amendment interests. There should be no reason why the police should be required to obtain a search warrant if they immediately recognize an object as contraband. It would be very likely that the evidence would be destroyed. The sense of touch, however, does have its limits and a seizure would be unlawful if the police must manipulate, squeeze or slide an object.¹³⁶ This immediate recognition requirement ensures that the police may not conduct broad evidentiary searches of bodies. Thus, as long as the strict limits of plain feel are adhered to, the Fourth Amendment will not be further eroded.

The theory that plain feel will not significantly erode the Fourth Amendment can be proven by applying the plain feel doctrine, as established by *Dickerson*, to cases which have previously rejected the doctrine on the grounds that plain feel excessively intrudes into Fourth Amendment rights. The decisions that were arrived at in these cases will remain the same given the prohibition against squeezing, sliding, and manipulating.¹³⁷ In *State v. Collins*,¹³⁸ the Arizona Court of Appeals held that assuming the officers were justified in stopping and frisking the suspect for weapons, their invasion of the suspects' pockets after seizing "soft" objects, which were not weapons, violated the Fourth Amendment.¹³⁹ The officer in *Collins* testified that during his pat-down of the defendant he did not discover any weapons but did

134. *Justices Hear Arguments on Frisking For Drugs*, BOSTON GLOBE, Mar. 4, 1993, at 20.

135. The Ohio Supreme Court recently stated, "[t]his limitation [in *Dickerson*] on the 'plain feel' exception to the warrant requirement of the Fourth Amendment ensures that police will search only within the narrow parameters allowed for a *Terry*-type search." *State v. Evans*, 618 N.E.2d 162, 170 n.5 (Ohio 1993), *cert. denied*, 114 S. Ct. 1195 (1994).

136. See *supra* text accompanying note 107.

137. *Id.*

138. 679 P.2d 80 (Ariz. Ct. App. 1983).

139. *Id.* at 82-83.

discover something unusual in the defendant's pockets.¹⁴⁰ When questioned whether he had *squeezed* the object during his pat-down, the officer replied "yes."¹⁴¹ The Court of Appeals rejected the State's contention that the object was properly seized pursuant to the plain feel exception.¹⁴²

Applying the *Dickerson* rule to *Collins*, the same decision would be warranted. The officer in *Collins* is similar to the officer in *Dickerson*. Both officers failed to realize that the objects, at that immediate touch, were contraband. Because the officer in *Collins* admitted that he "squeezed" the object, he, like the officer in *Dickerson*, admitted his inability to immediately recognize the object as contraband. Thus, if the plain feel exception would have been applied by the Arizona Court of Appeals, the same conclusion in rejecting the evidence would have been reached.

In *State v. Hobart*,¹⁴³ the Washington Supreme Court held that the officer's seizure of contraband during a pat-down frisk went beyond the scope of the Fourth Amendment.¹⁴⁴ In *Hobart*, the officer did not ascertain the criminal nature of the two spongy objects until after "squeezing" them.¹⁴⁵ Again the facts of *Hobart*, if applied to the plain feel theory as established by *Dickerson*, would yield the same result: the suppression of the evidence and the protection of Fourth Amendment rights. The officer in *Hobart*, like the officer in *Dickerson*, exceeded the Fourth Amendment because he did not recognize the object, at the first touch, as contraband. The violation was the continued feeling of the suspect's pockets even after he assured himself that the object was not a weapon.

If officers are attuned to the fact that they are not allowed to further squeeze nonthreatening objects, and realize how difficult it is to immediately recognize a small objects like drugs, they will come to realize that the plain feel doctrine has not provided them with a great weapon. There is, however, the possibility that police officers will attempt to avoid the limited nature of plain feel by simply testifying that they immediately recognized an object in a suspects's clothing as drugs.¹⁴⁶

140. *Id.* at 82.

141. *Id.*

142. *Id.* at 81-82.

143. 617 P.2d 429 (Wash. 1980).

144. *Id.* at 433-34.

145. *Id.*

146. Ira Mickenberg, *Crime Docket Was Quiet*, NAT'L L.J., Aug. 23, 1993, at 6, 11.

C. Perjury and the Plain Feel Doctrine

The fact that an officer may commit perjury so as to meet the requirements of plain feel is not a phenomenon unique to the plain feel doctrine.¹⁴⁷ Unscrupulous behavior on the part of the police is not the result of the plain feel doctrine, and has, in fact, permeated Fourth Amendment jurisprudence.¹⁴⁸ Nevertheless, the effect of possible perjury must be considered.

The propensity of an officer to perjure himself regarding the recognition of an object actually may not be very high in the plain feel context. The plain feel doctrine lends itself to ready analysis

For instance, in *Ohio v. Payne*, No. 13898, 1994 WL 171215, at *3 (Ohio Ct. App. 1994), *appeal dismissed*, 639 N.E.2d 114 (Ohio 1994), the officer patted down the defendant because of a huge bulge in defendant's pocket. The officer testified, "I squeezed that large bulge Right away I know [sic] it's a large bag of marijuana" *Id.* (emphasis added). The seizure should have been ruled invalid given that the officer "squeezed" the object. Nevertheless, the court overlooked that fact, and instead, choose to focus on the officer's use of the word "immediate." The court stated, "[a]ccording to the [o]fficer . . . he immediately upon squeezing the bulge recognized that the bulge was made by marijuana. Under these circumstances, [the] [o]fficer . . . was entitled to seize the marijuana." *Id.* at *5.

This court should be criticized, not only for misapplying the law, but also for blindly accepting the officer's testimony that he immediately recognized the bulge as marijuana even though he testified that he actually squeezed the bulge. This case illustrates the important role trial courts play. In order to ensure that the plain feel exception will not further erode the Fourth Amendment, trial courts must be alert to the possibility that an officer may taint his testimony in order to comply with *Dickerson*. See *State v. McCulley*, No. 64470, 1994 WL 164013, *12 (Ohio Ct. App. 1984) (Blackmon, J., dissenting) (suggesting that the officer's statements were "probably the result of post-arrest reflections on how to rationalize an improper seizure").

147. DRESSLER, *supra* note 2, at 242 n.39 ("Police perjury disturbingly [is] a well-documented aspect of criminal justice administration.") (quoting R. VAN DUIZEND ET AL., *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES* 108 (1985)); see also *Charles v. Wade*, Section 1983 *Witness Immunity For Public Officials*, 16 GA. L. REV. 721, 740 (1982) ("Perjured testimony by police officers, offered to convict defendants they think are guilty, is commonplace and familiar . . ."). This propensity to commit perjury has not gone unnoticed by the courts. See, e.g., *Harris v. United States*, 331 U.S. 145, 172 (1947) (Frankfurter, J., dissenting) (attacking the credibility of the police); *United States v. Marshall*, 488 F.2d 1169, 1171 (9th Cir. 1973) (commenting on the willingness of narcotic agents to make false affidavits and distort facts).

148. See Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 83 (1992) (estimating that police commit perjury between 20% and 50% of the time they testify on Fourth Amendment issues); see also Paul G. Chevigny, 4 CRIM. L. BULL. 581, 581 (1968) (commenting that police lie in suppression hearings about how they obtained the evidence); Joseph D. Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury*, 1971 U. ILL. L.F. 405, 409 (reporting that studies show that police will commit perjury to save a case).

and replication by a trial court curtailing an officer's opportunity to dishonestly claim that he immediately recognized the contraband as drugs.¹⁴⁹

In *United States v. Williams*,¹⁵⁰ two officers approached a parked car in a high crime area known for its illicit drug trade.¹⁵¹ As the officers approached, the defendant shoved a paper bag underneath his leg.¹⁵² One of the officers asked the defendant to exit the vehicle.¹⁵³ As the defendant exited, he "attempted to flip' the bag into the back of the car."¹⁵⁴ Unsuccessful, "[t]he bag hit the driver's seat, and fell back into the front of the passenger compartment."¹⁵⁵ The other officer then picked it up. When he touched the bag, he could feel numerous rolled up objects.¹⁵⁶ He opened the bag, uncovered contraband, and then arrested the defendant.¹⁵⁷ The court upheld the opening of the bag on the grounds that the sense of touch was "a necessary corollary to the plain view doctrine."¹⁵⁸ In so holding, the court noted that evidence seized under the plain feel exception allows a court to evaluate the situation in determining a motion to suppress.¹⁵⁹ The court decided that "tactile information . . . generally can be preserved for trial."¹⁶⁰ Thus, the *Williams* Court was given an opportunity to evaluate the paper bag and its contents in assessing the validity of the seizure.¹⁶¹

The ability to preserve evidence was again evident in *United States v. Pace*.¹⁶² In *Pace*, the police stopped the defendant in an airport after reasonably suspecting him of being a drug courier.¹⁶³

149. See *infra* text accompanying notes 130-49.

150. 822 F.2d 1174 (D.C. Cir. 1987).

151. *Id.* at 1176.

152. *Id.*

153. *Id.* at 1177.

154. *Id.*

155. *United State v. Williams*, 822 F.2d 1174, 1177 (D.C. Cir. 1987).

156. *Id.*

157. *Id.*

158. *Id.* at 1183.

159. See *id.* (noting that in many circumstances, it may be an unnecessary formality to require that a warrant be obtained).

160. *United States v. Williams*, 822 F.2d 1174, 1177, 1184 n.105 (D.C. Cir. 1987).

161. See *id.* at 1185 (finding sufficient evidence in the record to satisfy the requirement of the plain touch exception). Some jurisdictions have refused to accept the "plain smell" doctrine on the grounds that the "fleeting and evanescent nature of odors renders it almost impossible for a court considering a motion to suppress to evaluate them." *Id.* at 1184 n.105.

162. 709 F. Supp. 948 (C.D. Cal. 1989).

163. See *id.* at 950-51 (describing how officers approached defendant and then patted

A search of defendant's bag revealed no contraband.¹⁶⁴ However, the police then asked the defendant whether they could frisk his outer clothing.¹⁶⁵ The defendant acquiesced.¹⁶⁶ During this pat-down, the officer felt two hard objects on defendant's back and concluded that the objects were cocaine bricks.¹⁶⁷ The court applied the plain feel doctrine in upholding the seizure of the bricks and commented that "tactile information can be preserved for trial to assure courts of an opportunity to evaluate the objects the officer claims to have triggered his sense of touch."¹⁶⁸ Thus, in *Pace*, the trial judge was actually able to touch the cocaine bricks during a recreation of the pat-down search and thus, was in a position to better evaluate the officer's claim that he immediately recognized the "bricks" as cocaine.¹⁶⁹ It will be this preservation of evidence and the opportunity to recreate the scene which will counter an officer's attempt to categorically state that he "immediately" identified the objects as contraband and which will prevent further erosion of the Fourth Amendment.

D. The Pretextual Use of Terry

Another concern that the plain feel exception raises is that it provides an incentive for officers to use *Terry* as a pretext to conduct broad evidentiary searches.¹⁷⁰

him down after he voluntarily stopped and consented to the search). The court went on to say that the officer in this case did not even have to prove reasonable suspicion. According to the court, this encounter was consensual and did not implicate any Fourth Amendment issues since defendant could have reasonably believed that he was free to leave. See *id.* at 951-52 (relying on the public nature of the encounter and the decorum of the officers involved).

164. *Id.* at 951.

165. *Id.*

166. United State v. Pace, 709 F. Supp. 948, 951 (C.D. Cal. 1989).

167. *Id.*

168. *Id.* at 956.

169. *Id.*; cf. Commonwealth v. Marconi, 597 A.2d 616, 622-24 (Pa. Super. Ct. 1991) (rejecting an officer's claim that he immediately recognized an object as methamphetamine during a patdown as "mere speculation, conjecture and hindsight"). In *Marconi*, the court rejected the officer's contention that he was able to determine that the two spongy objects were contraband. *Id.* Although the court did not specifically mention the advantage of having tactile evidence preserved for trial, and in fact, rejected the plain feel doctrine, its analysis of the officer's testimony and its subsequent rejection of that testimony suggests that an officer cannot merely state that he immediately recognized the nature of the contraband.

170. For the argument that approving of a plain feel exception would be to invite the use of weapon searches as a pretext for unwarranted searches, see State v. Collins, 679 P.2d 80, 84 (Ariz. Ct. App. 1984) (noting that safety concerns provide the only justifica-

Terry permits a frisk of a suspect only when the officer, after lawfully stopping a suspect, has a reasonable fear for his safety or others nearby.¹⁷¹ However, there is a general consensus that in narcotics trafficking weapons are tools of the trade and that a person stopped for suspected drug activity is likely to have weapons nearby.¹⁷² Even though an officer actually may not have any belief that a suspect is armed and dangerous, the "drugs equals guns" theory enables the officer to assume that the person is armed.¹⁷³ In essence, *Terry* becomes greatly expanded because the officer who stops an individual suspected of drug activity essentially is granted an immediate right to frisk the suspect for weapons. Thus, the argument is that the object of the *Terry* frisk which was to reveal weapons¹⁷⁴ becomes expanded by the plain feel doctrine to include an evidentiary search for contraband. Although this pretextual issue is a major concern, it is not the result of the plain feel doctrine and was in place well before the advent of plain feel.

With or without the plain feel doctrine, there is simply nothing preventing unscrupulous officers from using *Terry* as a pretext. As Chief Justice Rehnquist stated, "[the rule] is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal."¹⁷⁵

Thus, if an officer merely wants to harass a suspect, he will do so. If he wants to scare the person, he will do so. This "unscrupulous cop" doctrine merely suggests that the police occasionally can and do break the rules of the game to achieve other goals. As a result, the extent to which *Terry* will be used as a pretext is no greater today with the acceptance of the plain feel doctrine than it was when *Terry* was first decided. Indeed, it could be argued that the pretextual use of *Terry* will have little or no success in the context of the plain feel doctrine.

tion for warrantless searches); *People v. Diaz*, 612 N.E.2d 298, 302 (N.Y. 1993) (likening the rationale behind plain touch searches to mere bootstrapping); *State v. Broadnax*, 654 P.2d 96, 102 (Wash. 1982) (quoting *State v. Hobart*, 617 P.2d 429 (Wash. 1980) (holding that the net effect would be a severe erosion of Fourth Amendment protections)).

171. *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968).

172. See *supra* note 99.

173. See *State v. Guy*, 492 N.W.2d 311, 320 (Wis. 1992) (Heffernan, J., dissenting) ("[The] logic of the majority invokes a presumption that all persons living in areas infiltrated by drug traffickers could be considered armed and dangerous.").

174. *Terry*, 392 U.S. at 30.

175. *Id.* at 13-14.

Even if an officer uses the pretext approach, his ability to actually seize an item will be limited because the sense of touch rarely immediately identifies an object's criminality and because the evidence seized pursuant to an officer's touch is more readily subject to review by a court.¹⁷⁶ Thus, if an officer truly desires to conduct a search for drugs and uses the pretextual approach, he still must satisfy the rigid requirement that he determined the object's criminality at the first touch of defendant's body. The pretextual use of Terry will be limited because an officer must satisfy the immediate recognition requirement or persuade a court, which will have the benefit of a reenactment, that the officer's fear was reasonable.

V. FACTORS THAT MAY INTERFERE WITH THE BALANCED RULING IN *DICKERSON*

The argument that the plain feel doctrine will not erode the Fourth Amendment rests on the assumption that trial courts will apply the plain feel doctrine according to the strict limits set out by the Supreme Court. Unfortunately, legal doctrines are susceptible to poor interpretation.¹⁷⁷ It is this "interpretation" that makes the plain feel doctrine the most troublesome. Thus, in assessing whether plain feel will further erode the Fourth Amendment, one must consider the possibility that trial courts will misapply the law and that judges may be openly hostile toward the Fourth Amendment.¹⁷⁸

176. See *supra* text accompanying notes 147-49.

177. This is evident by the Supreme Court itself. In *Katz v. United States*, Justice Harlan's two-prong test for determining whether a particular police action constituted a search was 1) whether the individual had a subjective expectation of privacy and 2) whether this interest was one that society recognized as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). This two-prong test has been subsequently turned on its head by the Supreme Court to actually limit Fourth Amendment protections. See, e.g., *Florida v. Riley*, 488 U.S. 445, 451-52 (1989) (holding that aerial surveillance does not constitute a search); *California v. Greenwood*, 486 U.S. 35, 37 (1988) (rummaging through a person's garbage does not constitute a search); *Oliver v. United States*, 466 U.S. 170, 177 (1984) (intruding upon open field which had been fenced in and locked to prevent trespassers held not to constitute a search); *United States v. Knotts*, 460 U.S. 276, 282-85 (1983) (finding that use of a tracking device does not constitute a search); *Smith v. Maryland*, 442 U.S. 735, 742 (1979) (obtaining telephone numbers dialed does not constitute a search).

178. See *supra* note 146 (describing situation where a court completely ignored the self-serving nature of the officer's testimony).

A. *Misapplication of Dickerson*

If courts do not deviate from the limits as established by *Dickerson*, the plain feel doctrine will not erode the Fourth Amendment. The plain feel doctrine's effect on the Fourth Amendment will depend greatly on courts following the requirements of the plain feel doctrine as established by *Dickerson* and resisting further manipulation of that standard.¹⁷⁹

For instance, in *State v. Evans*,¹⁸⁰ the dissent stated, "[s]ince the officer's intrusion into Evan's pocket was not justified under *Terry* as a pat-down search for weapons, it remains to determine whether it was justified under the 'plain feel' exception recognized by the United States Supreme Court in *Dickerson*."¹⁸¹ The dissent has misinterpreted the law. If the officer cannot satisfy the requirements of *Terry*, there can be no further analysis. Once it is determined that the initial intrusion was unlawful, plain view does not come into play and neither does plain feel. The plain feel doctrine is not a separate exception, as this dissent suggests, but an extension of the plain view exception.¹⁸²

B. *Hostilities Toward the Fourth Amendment*

The plain feel doctrine, like any other Fourth Amendment principle is subject to the hostilities of the Court. The Supreme Court has stated that "searches conducted outside the judicial process . . . are per se unreasonable,"¹⁸³ and that exceptions to the warrant requirement are to be "few"¹⁸⁴ and "jealously and carefully drawn."¹⁸⁵ Yet, the fact of the matter is that most searches today are conducted without a warrant.¹⁸⁶ Technically speaking, the Supreme Court has relied on a general reasonableness standard to balance the interest of the people in being free from unbridled

179. This concern is a real one. See, e.g., *United States v. Salazar*, 945 F.2d 47, 48 (2d Cir. 1991) (illustrating an officer testifying that he had squeezed the outside of the suspect's pocket). The court did not mention or seemingly overlooked the fact that the officer *squeezed* the object and upheld the seizure of contraband. *Id.* at 51. Under *Dickerson*, *Salazar* would be an incorrect holding.

180. 618 N.E.2d 162 (Ohio 1993).

181. *Id.* at 175 (Wright, J., dissenting).

182. See *supra* text accompanying note 94.

183. *Katz v. United States*, 389 U.S. 347, 357 (1967).

184. *Id.*

185. *Jones v. United States*, 357 U.S. 493, 499 (1958).

186. See generally *supra* note 19 (listing cases demonstrating exceptions to the Fourth Amendment).

police force against the interest of the police in effectively carrying out their duties.¹⁸⁷ Too often the Supreme Court has ruled in favor of giving the police greater leeway.¹⁸⁸ This desire to give the police greater leeway was no clearer than in *Dickerson* itself.

During the course of the trial, *Dickerson*'s counsel stated that there was a possibility that an officer could stop any number of persons in a bad neighborhood and subject them to a search for drugs.¹⁸⁹ Chief Justice Rehnquist replied, "[w]hat's wrong with that?"¹⁹⁰ This comment represents a clear indication of the hostility that is held toward the Fourth Amendment. Although Rehnquist's comment is shocking, it is educational. It alerts the practicing attorney and the Fourth Amendment advocate to the Court's hostility toward the Fourth Amendment. *Dickerson*, however, will not be able to be used like *Katz v. United States*¹⁹¹ as a vehicle through which the Fourth Amendment is given less protection.

In *Katz*, the Court established that in order for a particular police procedure to come under the strictures of the Fourth Amendment, an individual must first prove to have manifested a subjective expectation of privacy.¹⁹² Second, this subjective expectation of privacy must be recognized by society as legitimate or reasonable.¹⁹³ This definition of privacy established by *Katz* was the perfect vehicle through which a conservative wing of the court could attack the Fourth Amendment.¹⁹⁴ Since "justifiable" and "reasonably" are highly manipulatable, the Court, seeking to give greater leeway to the police, "has not found it difficult to explain why for one reason or another the defendant could not 'reasonably,' 'justifiably,' or 'legitimately' have expected that his activities would remain undisclosed. Thus . . . *Katz* has supplied . . . a handy verbal formula for exempting a variety of intrusive law

187. See *supra* text accompanying notes 33-40.

188. This is evident in the numerous police activities which do not even constitute a Fourth Amendment search, see *supra* note 26, and the numerous exceptions to the warrant requirement. See *supra* note 19.

189. James J. Kilpatrick, *Supreme Court Tests Search and Seizure: Halt! Up Against the Wall, Fella! Let's Feel What's Inside Your Pocket!*, MIAMI HERALD, May 14, 1993, at 25a.

190. *Id.* (quoting Chief Justice Rehnquist).

191. 389 U.S. 347 (1967).

192. *Id.* at 361 (Harlan, J., concurring).

193. *Id.*

194. Wasserstrom, *supra* note 3, at 270-71.

enforcement practices"¹⁹⁵

Plain feel, on the other hand, is strictly tied to the plain view requirements.¹⁹⁶ The scope of plain feel cannot be any broader than what is specifically allowed by the underlying intrusion. In *Dickerson*, the scope of plain view was tied to the purposes established in *Terry*.¹⁹⁷ Since *Terry* allows only for a pat-down search of weapons, plain feel cannot be used to justify a pat-down search for contraband.¹⁹⁸

VI. CONCLUSION

A determination of the validity of a particular police procedure, like plain feel, is arrived at by balancing the intrusion on Fourth Amendment privacy interests against the value in promoting effective and legitimate law enforcement interests.¹⁹⁹ The *Dickerson* decision struck a balance between these competing interests. The police interest in effective law enforcement was forwarded by recognizing their ability to use their sense of touch, but the privacy interests of individuals were also protected by limiting plain feel to only those situations where an officer can immediately recognize the object as contraband.

Judges must recognize the balance that needs to be maintained. Individuals must be free from unabridged police force while the police need some leeway in carrying out their duties. The Supreme Court in *Dickerson* carefully struck this balance. However, Chief

195. *Id.*

196. *See supra* text accompanying note 94.

197. *See Minnesota v. Dickerson*, 113 S. Ct. 2130, 2136 (1993) (limiting protective searches to that which is necessary to locate weapons).

198. *Id.* The early results are in, and it appears that most courts recognize the limited holding of *Dickerson*. *See, e.g.*, *People v. Dickey*, 21 Cal. App. 4th Supp. 952, 957 (Cal. App. Dep't Super. Ct. 1994) (holding the retrieval of an object invalid where the officer "squeezed" the object); *Harris v. Florida*, 641 So. 2d 126 (Fla. Dist. Ct. App. 1994) (determining the seizure of plastic baggies during a frisk was valid given that the officer did not squeeze or otherwise manipulate the object); *State v. Scott*, 518 N.W.2d 347, 349-50 (Iowa 1994) (finding the seizure of contraband from defendant's pocket valid; officer did not further manipulate the object after failing to immediately recognize it as contraband but instead asked the defendant what the object was); *People v. Champion*, 518 N.W.2d 518, 522 (Minn. Ct. App. 1994) (conducting visual inspection of pill bottle violated plain feel exception where the incriminating nature was not immediately apparent); *State v. Cloud*, 91 Ohio App. 3d 366, 370 (1994) (holding *Dickerson* analysis not applicable because officer did not know what the object was); *State v. Kersh*, 523 N.W.2d 210 (Wis. Ct. App. 1994) (upholding the seizure of contraband pursuant to the plain feel doctrine where the officer touched objects for a "second" and immediately recognized it as crack).

199. *See supra* text accompanying notes 33-36.

Justice Rehnquist's comment has opened the door to, and in fact invited, a situation where innocent individuals living in depressed areas may be subject to baseless intrusions by the police. In order for the plain feel doctrine not to become an object that destroys the Fourth Amendment, the trial courts must appreciate the important role they will play in subsequently applying *Dickerson*. Not only must these courts pay heed to the limited ruling of *Dickerson*, they must pay particular attention to the evidence to determine whether it supports an officer's testimony that he immediately recognized an object as contraband. This immediate recognition requirement should not merely be paid lip service like the principle announced in *Katz* that warrantless searches are per se unreasonable.

Success in preventing the plain feel doctrine from eroding the Fourth Amendment will depend on a variety of factors. Courts must apply the strict limits of plain feel, must curtail the use of pretexts, and must be alert for police perjury. The fact that the Supreme Court has spoken on this issue, plus the ability of a court to reenact a frisk and seizure of contraband, will help prevent this erosion.

In sum, the Fourth Amendment was not attacked in *Dickerson*. Instead, a balance was struck between the right of individuals to be free from unreasonable searches and seizures and the needs of the police in effectively discharging their law enforcement duties. Indeed, the Supreme Court has limited plain feel to such an extent that it has, in effect, created an illusion: the plain feel exception is not an exception at all. Instead, plain feel is merely a recognition that the sense of touch may be reliable in the course of police conduct.

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