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Search and Seizure: "The Princess and the 'Rock'": Minnesota Declines to Extend "Plain View" to "Plain Feel"

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SEARCH AND SEIZURE: "THE PRINCESS AND THE 'ROCK' ": MINNESOTA DECLINES TO EXTEND "PLAIN VIEW" TO "PLAIN FEEL" — *State v. Dickerson*, 481 N.W.2d 840 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

I. INTRODUCTION

A delicate balance between individual and societal or governmental interests fashions the core of a line of United States Supreme Court decisions[1] interpreting the Fourth Amendment's search and seizure provisions.[2] Justice Harlan outlined a process for balancing these interests to determine the reasonableness of governmental intrusion in *Katz v. United States*.[3] The Court premised its decision in *Terry v. Ohio*[4] on this balancing process.[5]

Terry validated one of the essential tools of modern police investigation: the warrantless stop and frisk.[6] As the concepts enunciated in *Terry* evolved and its progeny grew,[7] the Court founded new exceptions to the Warrant Clause of the Fourth Amendment[8] based upon the reasonableness of the intrusion to the individual's privacy and possessory interests.

In *State v. Dickerson*,[9] the Minnesota Supreme Court examined one of the more recent extensions of the *Terry* regime: the plain feel or plain touch doctrine. Adopted by some courts as a derivative of the

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1. *See, e.g.*, United States v. Sokolow, 490 U.S. 1 (1991); Cupp v. Murphy, 412 U.S. 291 (1973); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chimel v. California, 395 U.S. 752 (1969); Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967); See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967); Warden v. Hayden, 387 U.S. 294 (1967); Brinegar v. United States, 338 U.S. 160 (1949); Johnson v. United States, 333 U.S. 10 (1948); Carroll v. United States, 267 U.S. 132 (1925).

2. U.S. CONST. amend. IV. The Fourth Amendment to the Constitution of the United States 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.

Id.

3. 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

4. 392 U.S. 1 (1968).

5. *Id.* at 24-25.

6. *Id.* at 10. See *infra* note 49 for further discussion of the warrantless stop and frisk.

7. For a discussion of the Court's post-*Terry* Warrant Clause exceptions, see *infra* note 75.

8. See *supra* note 2 for text of Fourth Amendment.

9. 481 N.W.2d 840 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

plain view doctrine,[10] plain feel broadens the scope of *Terry* to allow police officers to seize contraband, as well as weapons, tactilely discovered during a valid frisk.[11] The *Dickerson* court's reluctance to recognize a plain feel exception to the warrant requirement signals a reversal in the trend extending *Terry's* boundaries.[12]

Section II of this Casenote addresses the background of the relevant doctrines implicated in the development of search and seizure jurisprudence,[13] especially as reflected by *Terry*,[14] and plain view[15] and plain feel[16] as sensory-based extensions of *Terry*. This foundational discussion will show that *Terry* cannot support a plain feel seizure such as that attempted in *Dickerson*.[17] Section III of this Casenote describes the pertinent facts of *Dickerson* and the relevant law that the Minnesota Supreme Court applied to those facts.[18] Section IV analyzes the *Dickerson* majority's and dissent's application of the law to the facts each side viewed as essential to their positions.[19] Section IV will also posit alternative procedures to provide guidance to officers who confront circumstances analogous to those in *Dickerson*.[20]

Section V of this Casenote concludes that the Minnesota Supreme Court in *Dickerson* properly rejected plain feel based on the lack of immediacy and reliability of touch and the intrusiveness of tactile manipulation.[21] The court's holding is imperative to prevent further erosion of Fourth Amendment protections against unreasonable searches and seizures.

II. BACKGROUND

The Fourth Amendment[22] preserves inviolate the right of United States citizens[23] to be free from unreasonable or warrantless govern-

10. United States v. Williams, 822 F.2d 1174, 1182 (D.C. Cir. 1987); United States v. Ocampo, 650 F.2d 421, 429 (2d Cir. 1981). For a discussion of the plain view and plain feel doctrines, see *infra* notes 97-133 and accompanying text.

11. *See Williams*, 822 F.2d at 1184.

12. *See* plain feel cases cited *infra* at note 75.

13. *See infra* notes 31-133 and accompanying text.

14. *See infra* notes 49-96 and accompanying text.

15. *See infra* notes 97-112 and accompanying text.

16. *See infra* notes 113-33 and accompanying text.

17. *See infra* notes 84-96 and accompanying text.

18. *See infra* notes 134-83 and accompanying text.

19. *See infra* notes 196-417 and accompanying text.

20. *See infra* notes 422-37, and 452-84 and accompanying text.

21. *See infra* text accompanying notes 241-45 and 497-511 and accompanying text.

22. *See supra* note 2 (language of the Fourth Amendment).

23. *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). The Fourth Amendment phrase " 'the people'. . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 265. Thus, Fourth Amendment protections do not cover nonresident aliens and

mental[24] searches and seizures of their persons or property.[25] As Fourth Amendment jurisprudence evolved, reasonableness[26] remained the determinative cornerstone of the government's activity.[27] Still, the courts have hewn several exceptions to the Warrant Clause.[28] The quantity of judicial exceptions and caveats regarding the nature and extent of Fourth Amendment protection prompted one commentator to label the Fourth Amendment "the Supreme Court's tarbaby."[29] While an ex-

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aliens temporarily or involuntarily in the United States. The Supreme Court, however, has not spoken regarding illegal aliens in the United States, nor to non-resident aliens "whose involuntary presence in the country is prolonged . . . ." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 21 (1991).

24. The search and seizure protections of the Fourth Amendment do not apply to unreasonable *private* actions. Walter v. United States, 447 U.S. 649, 656 (1980); Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

25. The "exclusionary rule," established in Weeks v. United States, 232 U.S. 383, 398 (1914) animates these protections. The exclusionary rule bars the admission of evidence improperly seized by federal authorities. *Id.* Subsequently, the United States Supreme Court extended the rule, and thus the protections, to the states in Mapp v. Ohio, 367 U.S. 643, 655 (1961).

26. Denise M. Cloutier, Arizona v. Hicks: *The Failure to Recognize Limited Inspections as Reasonable in Fourth Amendment Jurisprudence*, 24 COLUM. J.L. & SOC. PROBS. 351, 367 (1991).

> Although the fourth amendment to the United States Constitution unequivocally states that warrants may be issued only upon probable cause, that amendment only requires that searches and seizures not be 'unreasonable.' The traditional interpretation of the fourth amendment nonetheless connects the warrant clause with the reasonableness requirement, requiring probable cause and a warrant before a search or seizure meets the constitutional level of reasonableness. Despite this interpretation, the Supreme Court has repeatedly upheld governmental searches and seizures absent either a warrant or probable cause.

Id. (footnotes omitted).

27. Illinois v. Rodriguez, 497 U.S. 177, 183-89 (1990); California v. Greenwood, 486 U.S. 35, 39 (1988); Anderson v. Creighton, 483 U.S. 635, 643-44 (1987); United States v. Chadwick, 433 U.S. 1, 12 (1977); Chimel v. California, 395 U.S. 752, 772-73 (1969).

28. Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985).

> There are over twenty exceptions to the probable cause or the warrant requirement or both. They include searches incident to arrest (exceptions to both); automobile searches (exception to warrant requirement); border searches (both); searches near the border (warrant and sometimes both); administrative searches (probable cause exception); administrative searches of regulated businesses (warrant); stop and frisk (both); plain view, open field searches and prison 'shakedowns' (both, because they are not covered by the fourth amendment at all); exigent circumstances (warrant); search of a person in custody (both); search incident to nonarrest when there is probable cause to arrest (both); fire investigations (warrant); warrantless entry following arrest elsewhere (warrant); boat boarding for document checks (both); consent searches (both); welfare searches (both, because not a 'search'); inventory searches (both); driver's license and vehicle registration checks (both); airport searches (both); searches at courthouse doors (both); the new 'school search' (both); and finally the standing doctrine which, while not strictly an exception to fourth amendment requirements, has that effect by causing the courts to ignore fourth amendment violations.

Id. (footnotes omitted).

29. *Id.* at 1468. "The fourth amendment is the Supreme Court's tarbaby: a mass of contradictions and obscurities that has ensnared the 'Brethren' in such a way that every effort to extract themselves only finds them more profoundly stuck." *Id.*

haustive recapitulation of Fourth Amendment jurisprudence is beyond the scope of this Casenote,[30] a synopsis of the current view of Fourth Amendment protections is in order.

A. Fourth Amendment Jurisprudence

The United States Supreme Court historically approached the Fourth Amendment from two foundational perspectives: (1) a property rights-based standard;[31] and (2) a personal rights-based standard, which the United States Supreme Court initially articulated in *Katz v. United States*.[32] Justice Stewart's majority opinion in *Katz* moved the Court one hundred eighty degrees from its previous position.[33] In the Court's analysis, not only did electronic surveillance fall within the Fourth Amendment's scope, but also the absence of prior judicial approval by warrant of any search or seizure rendered the activity "per se unreasonable."[34]

Although *Katz* is a linchpin of modern Fourth Amendment analysis, Justice Stewart's opinion failed to define what constituted a "search" in Fourth Amendment terms.[35] Justice Harlan's concurrence in *Katz*, as in *Terry*,[36] "fill[ed] in a few gaps."[37] In his *Katz* concurrence, Justice Harlan promulgated what has become the time-tested, two-pronged review of a search: first, the subjective "requirement . . . that a person have exhibited an actual . . . expectation of privacy and,

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30. For an encyclopedic treatment of the body of Fourth Amendment law, see WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (2d ed. 1987).

31. Olmstead v. United States, 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967). *Olmstead* reflected the quintessential property rights-based view of Fourth Amendment protections. The Court held that unwarranted government wiretaps of telephone conversations did not violate the Fourth (or Fifth) Amendment. *Olmstead*, 277 U.S. at 466. Moreover, writing for the 5-4 majority, Chief Justice William Howard Taft remarked that the wiretapping did not fall within the Amendment's purview:

> The United States takes no such care of telegraph or telephone messages as of mailed sealed letters. The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants . . . . The language of the Amendment can not be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched.

Id. at 464-65.

32. 389 U.S. 347 (1967). The *Katz* Court overturned *Olmstead*. Florida v. Riley, 488 U.S. 445, 459 n.3 (1989) (Brennan, J., dissenting) (the Court's first official recognition of the precedential effect of *Katz* on *Olmstead*).

33. *Katz*, 389 U.S. at 351. "[T]he Fourth Amendment protects people, not places." *Id.* *Katz* held that an unwarranted listening device attached to a public telephone booth constituted an unreasonable search. *Id.* at 359.

34. *Id.* at 357.

35. DRESSLER, *supra* note 23, § 30[C].

36. Terry v. Ohio, 392 U.S. 1, 31 (1968) (Harlan, J., concurring).

37. *Id.* (Harlan, J., concurring).

second, that the expectation be one that society is [objectively] prepared to recognize as 'reasonable.' "[38] Justice Harlan's analysis clarified and furthered the Court's move from a property rights-based standard to one of a personal rights standard. Although property concepts played a role in Justice Harlan's examination,[39] the conclusive focus became personal and societal privacy expectations.[40]

To judge between these competing interests, a court must weigh the relative merits of both interests. Earlier in 1967, in *Camara v. Municipal Court*,[41] the Court stated that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."[42] In both *Camara* and *See v. City of Seattle*,[43] the Court held that an individual may deny access to administrative agency representatives who attempt to conduct warrantless searches.[44] The Court used a balancing test to determine reasonableness.[45] The Court concluded that an individual's expectation of privacy outweighed the public's interest in gaining access without a warrant to inspect the property.[46]

Applying this balancing test in *Katz*, the Court recognized that the warrant requirement was not, nor could it be, absolute. Rather, the warrant requirement was "subject to . . . a few specifically established and well-delineated exceptions";[47] occasions would arise when objective governmental or societal interests would outweigh the subjective concerns of the individual. The Court would view certain warrantless searches conducted on those occasions as reasonable.[48]

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38. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

39. *Id.* (Harlan, J., concurring). "Thus a man's home is, for most purposes, a place where he expects privacy . . . ." *Id.* (Harlan, J., concurring).

40. *Id.* (Harlan, J., concurring).

41. 387 U.S. 523 (1967).

42. *Id.* at 536-37.

43. 387 U.S. 541 (1967).

44. *Camara*, 387 U.S. at 534; *see also* 387 U.S. at 546.

45. *Camara*, 387 U.S. at 536-37; *see also* 387 U.S. at 545.

46. *Camara*, 387 U.S. at 540. "[E]ven the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority . . . ." *Id.* at 530-31. To the public's interest in gaining access, the Court stated, "The question is not . . . whether these inspections may be made, but whether they may be made without a warrant." *Id.* at 533. The Court used the same criteria to determine whether probable cause existed to sustain the issuance of a search warrant. *Id.* at 539.

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

48. The exceptions to the Warrant Clause in place at the time of the *Terry* decision included: "hot pursuit," Warden v. Hayden, 387 U.S. 294, 310 (1967); probable cause based on hearsay evidence, Brinegar v. United States, 338 U.S. 160, 172-73 (1949); exigent circumstances, Johnson v. United States, 333 U.S. 10, 14-15 (1948); and the automobile stop, Carroll v. United States, 267 U.S. 132, 153 (1925).

Just one year later, the balancing test scales would tip to the side of governmental authority.[49] In *Terry v. Ohio*,[50] the Court "transported" the *Camara* test into "the realm of criminal investigations."[51] The facts of *Terry* are well-rehearsed: at mid-afternoon on Halloween, 1963,[52] a Cleveland police detective observed two men alternately walk past several stores, peer in a particular store window, continue to walk past the store, return to look in the same store window, then rejoin their companion.[53] This pattern continued, cumulatively, nearly a dozen times, interrupted once by the presence of a third man with whom the other two conversed.[54] After the third man left, the other two resumed their activity. The pair continued this pattern for ten to twelve minutes and then walked off in the direction the third man had taken.[55]

Suspecting that the men were planning a robbery,[56] the officer followed them until they stopped and rejoined the third man.[57] The detective approached the trio, identified himself as a police officer, and requested identification.[58] When the men "mumbled something" in response,[59] the officer grabbed Terry, spun him around, and "patted down the outside of his clothing."[60] The officer felt, and ultimately recovered, a pistol from inside Terry's coat.[61]

The United States Supreme Court, while rejecting the State of Ohio's contention that the officer's stop and frisk of Terry fell outside

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49. Undoubtedly, *Terry* was a seminal case in the development of the investigative detention, which is now better known as "stop and frisk." *Terry*, however, lent a judicial imprimatur to a method that law enforcement authorities were already using:

> The police long exercised the power to conduct "field interrogation" or "investigative detention," later called "stop and frisk." Courts justified it variously as a common law police power ["right to inquire"] or police conduct not proscribed by the Fourth Amendment if no formal or actual arrest occurred. Such stops were justified under the theory that some criminal activity was probably afoot, and the police should be allowed to inquire. This preventive law enforcement was seen as necessary in effective police work.

1 JOHN W. HALL, JR., SEARCH AND SEIZURE § 15:3 (2d ed. 1991).

50. 392 U.S. 1 (1968).

51. DRESSLER, *supra* note 23, § 93. The Court also "used [the test] to determine the reasonableness of a warrantless search and seizure, rather than merely to define 'probable cause.'" *Id.*

52. *Terry*, 392 U.S. at 5.

53. *Id.* at 6.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 6-7.

59. *Id.* at 7.

60. *Id.*

61. *Id.* The officer also recovered a pistol from another of the men. *Id.*

the scope of Fourth Amendment protection,[62] applied the *Camara* balancing test to validate the warrantless search and seizure.[63] Thus, officers could detain an individual on grounds which are less stringent than probable cause.[64] To allow this expansion of warrantless searches and seizures, the Court fashioned a "narrowly drawn" exception.[65] An "officer must be able to point to specific and articulable facts which, [when] taken together with rational inferences from those facts, reasonably warrant that intrusion."[66] Furthermore, the "sole justification"[67] for the stop and frisk must be the recovery of weapons that could harm the officer or other persons nearby — not the preservation

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62. *Id.* at 16-17. Chief Justice Earl Warren vehemently rejected the state's contention, stating:

> We emphatically reject this notion [that a stop and frisk is outside the bounds of the Fourth Amendment] . . . . It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

Id.

The intrusion may not be as serious as the Court asserted. Chief Justice Warren offered this "apt description" of a frisk, " '[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.' " *Terry*, 392 U.S. at 17 n.13 (quoting L.L. Priar & T.F. Martin, *Searching and Disarming Criminals*, 45 J. CRIM. L.C. & P.S 481, 481 (1954)).

One commentator took issue with the Court's description. "[T]he Court . . . failed to note that the [frisk] procedures being described are those used after *arrest* and before the arrested person is taken to the station, a situation in which the need is quite different than that where no custodial arrest has been made." 3 LAFAVE, *supra* note 30, § 9.4(b).

63. *Terry*, 392 U.S at 8-9, 23. The Court weighed the "inestimable right of personal security," *Id.* at 8-9, against the governmental interests of "crime prevention and detection" and "the more immediate interest" of police officer safety. *Id.* at 22-23.

64. LEWIS R. KATZ, OHIO ARREST, SEARCH AND SEIZURE § 13.02(A) (1992). "[P]robable cause must exist before [a] warrant may be issued." *Id.* "Almost a quarter of a century later, it is difficult to imagine the revolutionary character of the *Terry* decision. *Terry* recognized police authority to forcibly stop a person without the probable cause necessary for arrest. It involved recognition of radically expanded police authority." *Id.* § 14.02(A).

65. *Terry*, 392 U.S. at 27.

66. *Id.* at 21. The combination of factors needed to justify a *Terry*-stop is known as the reasonable suspicion standard. *Id.* at 21-22. The scope of a stop supported by reasonable suspicion is not as broad, however, as a warrant-based stop. *See* United States v. Sokolow, 490 U.S. 1, 12 (1989) (Marshall, J., dissenting) (reasonable suspicion standard applies to "brief detentions which fall short of being full-scale searches . . . .").

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

of evidence.[68] Thus, *Terry* established reasonableness[69] as the criteria for both the stop and the frisk.[70]

B. *Warrantless Stop*

The Court's *Terry* analysis is clear: when an officer detains an individual and restricts the individual's freedom of movement, the officer has "seized" the person and the officer's activities must comport with Fourth Amendment guarantees.[71] Generally, such authoritative action requires a warrant,[72] but when certain exigencies arise, the officer may seize the detainee based on reasonable suspicion.[73]

While the officer's own observations gave rise to "reasonable suspicion" in *Terry*,[74] the Court subsequently upheld other catalysts as sufficient to produce reasonable suspicion.[75] The fundamental element of

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68. *Id.*

69. *Terry*, 392 U.S. at 21-22. The Court both implicitly and explicitly used reasonableness as the foundation for a warrantless stop and frisk.

> [I]n making [an] assessment [of the circumstances creating reasonable suspicion for a stop] it is imperative that the facts be judged against an objective standard: would 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?

Id.

In regard to the frisk, Justice Harlan noted that, to assess the admissibility of evidence recovered in a patdown, "the problem is to determine what makes a frisk reasonable." *Id.* at 31 (Harlan, J., concurring).

70. "A 'stop' and a 'frisk' are separate Constitutional events." HALL, *supra* note 49, § 15:1.

71. *Terry*, 392 U.S. at 16.

72. Katz v. United States, 389 U.S. 347, 357 (1967). Warrantless searches are per se unreasonable unless they are granted "prior approval by a judge or magistrate . . . subject only to a few specifically established and well-delineated exceptions." *Id.*

73. *Terry*, 392 U.S. at 20. *Cf. supra* note 66 (scope of stop based on reasonable suspicion not as expansive as stop based on warrant).

74. *Terry*, 392 U.S. at 28.

75. In addition to those exceptions to the warrant requirement and probable cause which pre-dated *Terry*, *see supra* note 48, the Court created several subsequent exceptions, including: the "drug courier" profile, United States v. Sokolow, 490 U.S. 1, 10 (1991); a "limited" search incident based on probable cause prior to arrest, Cupp v. Murphy, 412 U.S. 291, 296 (1973); plain view, Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971); search incident to a formal arrest, Chimel v. California, 395 U.S. 752, 763 (1969). For a more extensive listing, see Bradley *supra* note 28, at 1473-74.

Further, several lower courts crafted other exceptions that justify warrantless intrusions including: (1) otherwise innocuous activity performed in a high-crime area, United States v. McNeal, 955 F.2d 1067, 1071 (6th Cir.) (presence with permission in third-party's apartment), *cert. denied*, 112 S. Ct. 3039 (interim ed. 1992); United States v. Briggman, 931 F.2d 705, 709 (11th Cir.) (sitting in parked car), *cert. denied*, 112 S. Ct. 370 (interim ed. 1991); United States v. Paulino, 850 F.2d 93, 97 (2d Cir. 1988) (same), *cert. denied*, 490 U.S. 1052 (1989); United States v. Harley, 682 F.2d 398, 399-400 (2d Cir. 1982) (exchange of item); United States v. Orozco, 590 F.2d 789, 792 (9th Cir. 1979) (throwing object), *cert. denied*, 439 U.S. 1049 (1978), *and cert. denied*, 442 U.S. 920 (1979); Stokes v. City of Chicago, No. 86-C-4759, 1989 U.S. Dist. LEXIS 6141, at *15 (N.D. Ill. Apr. 28, 1989) ("lurking"); Dixon v. State, 588 So. 2d 903, 905 (Ala. 1991) (standing on street corner), *cert. denied*, 112 S. Ct. 904 (interim ed. 1992); State v.

these warrant exceptions is the officer's ability to articulate specific facts[76] or "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity."[77] In other words, the detainee's actions must produce suspicion sufficient to shift the balance toward the objective societal and governmental interest in preventing crime.[78] Courts will look to the totality of the circumstances to determine if the intrusion was reasonable.[79]

Not only must the intrusion be reasonable at inception, the scope of the seizure must also be limited to the circumstances which justified its initiation.[80] The Fourth Amendment explicitly limits searches based on probable cause to those "particularly describing the place to be searched, and the persons or things to be seized."[81] The criterion is not diluted under a warrantless search based on reasonable suspicion.[82] Thus, when a stop or frisk exceeds the scope of its initial justification, any evidence seized as a result of the intrusion is tainted and is, therefore, inadmissible.[83]

Wade, 390 So. 2d 1309, 1311 (La. 1980) (running), *cert. denied*, 451 U.S. 989 (1981); Commonwealth v. Almeida, 366 N.E.2d 756, 760 (Mass. 1977) (sitting in automobile); State v. Purnell, 621 S.W.2d 277, 284 (Mo. 1981) (walking and "looking into businesses"); State v. Donald, 256 N.W.2d 107, 110 (Neb. 1977) (loading car trunk); People v. Denti, 353 N.Y.S.2d 10, 13 (N.Y. App. Div. 1974) (driving in circular pattern); State v. Freeman, 414 N.E.2d 1044, 1047 (Ohio 1980) (sitting in parked car), *cert. denied*, 454 U.S. 822 (1981); State v. Miller, 451 A.2d 1115, 1117 (Vt. 1982) (entering a third-party's house undergoing a warranted search); and (2) the plain feel or plain touch doctrine, United States v. Coleman, 969 F.2d 126, 132 (5th Cir. 1992) (container); United States v. Salazar, 945 F.2d 47, 51 (2d Cir. 1991) (frisk of person), *cert. denied*, 112 S. Ct. 1975 (interim ed. 1992); United States v. Buchannon, 878 F.2d 1065, 1067 (8th Cir. 1989) (same); United States v. Williams, 822 F.2d 1174, 1182 (D.C. Cir 1987) (container); United States v. Ocampo, 650 F.2d 421, 429 (2d Cir. 1981) (same); United States v. Ceballos, 719 F. Supp. 119, 128 (E.D.N.Y. 1989) (frisk of person); United States v. Pace, 709 F. Supp. 948, 953-54 (C.D. Ca. 1989) (same), *aff'd*, 893 F.2d 1103 (9th Cir. 1990); People v. Chavers, 658 P.2d 96, 102 (Cal. 1983) (container); Walker v. State, 610 A.2d 728 (Del. 1992) (frisk of person); State v. Vasquez, 815 P.2d 659, 664 (N.M. Ct. App.) (container), *cert. denied*, 815 P.2d 1178 (N.M. 1991); *In re* Marrhonda G., 575 N.Y.S.2d 425, 427 (N.Y. Fam. Ct. 1991) (same); State v. Washington, 396 N.W.2d 156, 161 (Wis. 1986) (frisk of person).

76. *Terry*, 392 U.S. at 21.

77. United States v. Cortez, 449 U.S. 411, 417 (1981).

78. KATZ, *supra* note 64, § 14.03(B).

79. *Cortez*, 449 U.S. at 417-18; Rawlings v. Kentucky, 448 U.S. 98, 110 (1980); Wanger v. Bonner, 621 F.2d 675, 680 (5th Cir. 1980); Jones v. Latexo Indep. Sch. Dist., 499 F. Supp. 223, 233 (E.D. Tex. 1980).

80. Florida v. Royer, 460 U.S. 491, 500 (1983).

81. U.S. CONST. amend. IV.

82. *Royer*, 460 U.S. at 500. "Defining and applying these limitations is often a difficult task; as the Supreme Court has acknowledged, its decisions 'may in some instances create difficult line-drawing problems in distinguishing an investigative stop from a de facto arrest.' " 3 LAFAVE, *supra* note 30, § 9.2(f), at 374 (quoting United States v. Sharpe, 470 U.S. 675, 685 (1985)).

83. Dunaway v. New York, 442 U.S. 200, 221 (1979) (Stevens, J., concurring); Davis v. Mississippi, 394 U.S. 721, 724 (1969); Mapp v. Ohio, 367 U.S. 643, 655 (1961); Weeks v. United States, 232 U.S. 383, 398 (1914); Boyd v. United States, 116 U.S. 616, 635 (1886) (compulsory

C. *Warrantless Search*

The balancing test propounded in *Camara* is again implicated when the *Terry*-stop proceeds to its next permissible, but not automatic,[84] intrusion: the frisk.[85] The detainee's subjective interest in maintaining his privacy is again weighed, but this time, against the "more immediate interest" of the officer's protection.[86] The common thread running between warrantless seizure and a warrantless search is reasonableness.[87]

Comparable to the initial seizure of the individual, the officer must articulate a reasonable "belie[f] that the individual . . . is armed and presently dangerous to the officer or to others . . . ."[88] to justify the search. The officer need not be in fear for his life; a reasonable belief based on the facts at hand will suffice to support the warrantless search.[89] Therefore, under *Terry*, there is a consistent standard: to justify either a seizure or a search, an officer must establish facts that will tip the balance toward society's interest in detecting criminal activity or protecting officers.[90]

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production of evidence violative of Fourth and Fifth Amendments); WILLIAM E. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 13.5 (2d ed. 1991). *See supra* note 25 (development of exclusionary rule).

84. *See infra* note 219 (*Terry* may be read to require some interrogation prior to frisk).

85. A *Terry*-frisk permits "a limited search of the [detainee's] outer clothing for weapons . . . ." Terry v. Ohio, 392 U.S. 1, 24 (1968).

The distinctions between the detainee's interests implicated in a stop and frisk are worth noting. "Seizure" actually supports two definitions: seizure of the person and seizure of property. DRESSLER, *supra* note 23, § 38. Whereas a stop (seizure of the person) and frisk (search of the person) impinge the individual's subjective expectation of privacy, seizure of property (evidence) "implicate[s] possessory interests." HALL, *supra* note 49, at § 9:7.

> These contrasts assume a key function in a court's determination regarding reasonableness: Upon a defendant's claim that his or her expectation of privacy has been infringed, a court focuses its inquiry on the reasonableness of the individual's expectation to determine if a search has occurred, rather than focusing on the degree of official infringement upon the asserted privacy interest. By contrast, when a defendant claims that the police have interfered with his or her possessory interest in an object, a court first determines whether the governmental interference was meaningful. The focus of the seizure inquiry is thus not on the individual's interest, but on the degree of interference with that interest. Courts must therefore candidly consider the intrusiveness of the governmental action as a threshold question when determining whether a seizure has occurred.

Cloutier, *supra* note 26, at 371 (citations omitted).

86. *Terry*, 392 U.S. at 23.

87. *Id.* at 21-22. *See supra* note 69.

88. *Terry*, 392 U.S. at 24. To determine the reasonableness of the frisk, a court must weigh the officer's "specific reasonable inferences he is entitled to draw from the facts in light of his experience," not an "inchoate and unparticularized suspicion or 'hunch' . . . ." *Id.* at 27.

89. *Id.* at 27. "[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.*; *see also* HALL, *supra* note 49, § 15:27.

90. 3 LAFAVE, *supra* note 30, § 9.4, at 498.

The *Terry* stop and frisk must either build upon itself, or collapse from within. An officer may believe that an individual is armed and dangerous, but that belief is insufficient to justify a frisk if the initial stop is invalid.[91] Conversely, the validity of a stop alone is insufficient to secure the admissibility of evidence seized in a frisk not motivated by the officer's reasonable belief that the detainee was armed and dangerous.[92]

The limited scope of the frisk exemplifies another parallel between the *Terry*-stop and the *Terry*-frisk. Just as the stop must be confined to the circumstances which justified its inception,[93] also, the frisk must be confined to its justification. Thus, the search must be exclusively for weapons.[94] Since the basis for this exception to the Warrant Clause is the protection of police officers and those nearby, the intrusion must be "narrowly drawn."[95] Thus, the search must be confined to a patdown for instruments that pose a potential threat to those whom *Terry* seeks to protect. To require less would risk degeneration of the *Terry* search into a generalized search.[96]

D. *Plain View*

Just as exceptions to the Warrant Clause find their rationale in Justice Harlan's analysis of personal and societal interests in *Katz*,[97] so, also, does the plain view doctrine.[98] First, though, it is important to define what does not constitute plain view. Not everything that comes within a police officer's eyesight implicates the Fourth Amendment. "Plain view is to be distinguished from 'open view,' when a police officer not engaged in a search or other intrusion upon privacy spots evi-

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> It is apparent then, that existing rules concerning other types of searches do not govern here. A protective search must be judged somewhat differently in making the two critical determinations required by *Terry*: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."

Id. (quoting *Terry*, 392 U.S. at 20).

91. HALL, *supra* note 49, § 15:1.

92. HALL, supra note 49, § 15:1.

93. Florida v. Royer, 460 U.S. 491, 500 (1983).

94. *Terry*, 392 U.S. at 25-26. "Suffice it to note that such a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime." *Id.* at 29 (citing Preston v. United States, 376 U.S. 364, 367 (1964)).

95. *Id.* at 27.

96. Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979). "Nothing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or, indeed, any search whatever for anything but weapons." *Id.*

97. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

98. HALL, *supra* note 49, § 9:2.

dence of a crime."[99] Before a court may uphold a plain view seizure, a search or seizure already in accord with Fourth Amendment guidelines must be in progress when plain view arises.[100] Hence, "plain view *alone* is never enough to justify the warrantless seizure of evidence."[101]

In *Coolidge v. New Hampshire*,[102] the Court applied the axiom of an in-progress intrusion, weighed the relative subjective and objective interests,[103] and developed three criteria necessary to sustain a plain view seizure. The criteria include: (1) a warrant or one of the warrant exceptions must justify the officer's initial intrusion;[104] (2) the evidentiary discovery must be inadvertent;[105] and (3) the item's evidentiary value must be "immediately apparent."[106]

Two of these measures survive today.[107] *Coolidge* was only a plurality decision and, hence, the circumscription of plain view was "not a binding precedent."[108] Nineteen years later, in *Horton v. California*,[109]

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99. KATZ, *supra* note 64, § 13.01, at 211. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Court set forth a narrower distinction:

> [I]t is important to keep in mind that, in the vast majority of cases, *any* evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the 'plain view' doctrine has been to identify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal.

Id. at 465.

100. *Coolidge*, 403 U.S. at 466. "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion . . . ." *Id.*

101. *Id.* at 468.

102. 403 U.S. 443 (1971).

103. David L. Haselkorn, Comment, *The Case Against a Plain Feel Exception to the Warrant Requirement*, 54 U. CHI. L. REV. 683, 693 (1987). "[T]he plain view exception is premised on a balancing of the intrusiveness of a particular category of search or seizure on an individual's privacy or possessory interests, against the strength of the government interest in effecting that intrusion." *Id.*

104. *Coolidge*, 403 U.S. at 467-68.

> The lawfulness of an officer's presence at the time evidence is viewed or seized must be considered in three contexts: whether the presence is authorized by a warrant, whether the presence falls within an exception to the warrant requirement, and whether the situation is one where the warrant requirement is inapplicable.

KATZ, *supra* note 64, § 13.02(A), at 213.

105. *Coolidge*, 403 U.S. at 469.

106. *Id.* at 466.

107. *See* Horton v. California, 496 U.S. 128, 139 (1990) (inadvertency requirement abandoned).

108. Texas v. Brown, 460 U.S. 730, 737 (1983). Most lower courts, however, adopted the three-tier formulation. *See, e.g.*, United States v. Garner, 907 F.2d 60, 62 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 787 (1991); United States v. Baranek, 903 F.2d 1068, 1071 (6th Cir. 1990); United States v. Caggiano, 899 F.2d 99, 103 (1st Cir. 1990); United States v. Carmany, 901 F.2d 76, 77 (7th Cir. 1990); United States v. Jenkins, 876 F.2d 1085, 1088 (2d Cir. 1989), *cert. denied*, 112 S. Ct. 659 (interim ed. 1991); United States v. Holzman, 871 F.2d 1496, 1512 (9th Cir. 1989); United States v. Jimenez, 864 F.2d 686, 689 (10th Cir. 1988); United States v. Meyer, 827 F.2d 943, 945 (3d Cir. 1987); United States v. Fawole, 785 F.2d 1141, 1145 (4th Cir. 1986); United States v. Ladson, 774 F.2d 436, 439 (11th Cir. 1985); United States v. Heldt, 668 F.2d 1238, 1267 (D.C. Cir. 1981), *cert. denied sub nom.* Hubbard v. United States, 456 U.S 926

the Court abandoned the inadvertency requirement,[110] but retained the other two.[111] Thus, like *Terry*, the plain view doctrine rests on the twin spires of reasonableness of the initial intrusion and probable cause to seize the item produced, based upon the officer's "immediate apparent" recognition of the object's evidentiary value.[112]

(1982); State v. Calhoun, 502 So. 2d 808, 814 (Ala. 1986); Deal v. State, 626 P.2d 1073, 1078-79 (Alaska 1980); State v. Ault, 724 P.2d 545, 550 (Ariz. 1986); Johnson v. State, 724 S.W.2d 160, 162 (Ark.), *cert. denied*, 484 U.S. 830 (1987); People v. Cummings, 706 P.2d 766, 771 (Colo. 1985); State v. Gwinn, 301 A.2d 291, 293 (Del. 1973); State v. Rickard, 420 So. 2d 303, 305 (Fla. 1982); Shaw v. State, 320 S.E.2d 371, 372 (Ga. 1984) (dissenting opinion), *cert. denied*, 469 U.S. 1212 (1985); State v. Powell, 603 P.2d 143, 150 (Haw. 1979); People v. Madison, 520 N.E.2d 374, 380-81 (Ill.), *cert. denied*, 488 U.S. 907 (1988); Bigler v. State, 540 N.E.2d 32, 34 (Ind. 1989); State v. Emerson, 375 N.W.2d 256, 259 (Iowa 1985); State v. Galloway, 652 P.2d 673, 676 (Kan. 1982), *rev'd on other grounds*, 680 P.2d 268, *cert. denied*, 475 U.S. 1052 (1986); Commonwealth v. Johnson, 777 S.W.2d 876, 879 (Ky. 1989), *cert. denied*, 494 U.S. 1046, *and cert. denied*, 494 U.S. 1085 (1990); State v. Fearn, 345 So. 2d 468, 470 (La. 1977); Livingston v. State, 564 A.2d 414, 416-17 (Md. 1989); Commonwealth v. Cefalo, 409 N.E.2d 719, 727 (Mass. 1980); People v. Houze, 387 N.W.2d 807, 810 (Mich. 1986); State v. Buschkopf, 373 N.W.2d 756, 768-69 (Minn. 1985); Smith v. State, 419 So. 2d 563, 571 (Miss. 1982), *cert. denied*, 460 U.S. 1047 (1983); State v. Clark, 592 S.W.2d 709, 713 (Mo. 1979), *cert. denied*, 449 U.S. 847 (1980); State v. Hembd, 767 P.2d 864, 869 (Mont. 1989); State v. Hansen, 375 N.W.2d 605, 609 (Neb. 1985); State v. Cote, 493 A.2d 1170, 1178 (N.H. 1985); State v. Bruzzese, 463 A.2d 320, 334 (N.J. 1983), *cert. denied*, 465 U.S. 1030 (1984); State v. Luna, 606 P.2d 183, 189 (N.M. 1980); People v. Di Stefano, 345 N.E.2d 548, 553 (N.Y. 1976); State v. Williams, 338 S.E.2d 75, 80 (N.C. 1986); State v. Riedinger, 374 N.W.2d 866, 874 (N.D. 1985); State v. Benner, 533 N.E.2d 701, 709 (Ohio 1988), *cert. denied*, 494 U.S. 1090 (1990); State v. Keller, 510 P.2d 568, 569 (Or. 1973); State v. Eiseman, 461 A.2d 369, 379 (R.I. 1983); State v. Brown, 347 S.E.2d 882, 886 (S.C. 1986); State v. Albright, 418 N.W.2d 292, 295 (S.D. 1988); State v. Byerley, 635 S.W.2d 511, 513 (Tenn. 1982); *In re* Bates, 555 S.W.2d 420, 435 (Tex. 1977); State v. Dorn, 496 A.2d 451, 459 (Vt. 1985); State v. Bell, 737 P.2d 254, 257 (Wash. 1987); State v. Cook, 332 S.E.2d 147, 154 (W. Va. 1985); State v. Washington, 396 N.W.2d 156, 161 (Wis. 1986); King v. State, 780 P.2d 943, 960 (Wyo. 1989). *Cf.* Thims v. Commonwealth, 235 S.E.2d 443, 445 (Va. 1977) (inadvertency required unless officer views item while he is outside protected area). *Contra* North v. Superior Court, 502 P.2d 1305, 1308 (Cal. 1972) (*Coolidge* plurality holding on inadvertence not binding on states); State v. Ruscoe, 563 A.2d 267, 276 n.8 (Conn. 1989) (same), *cert. denied*, 493 U.S. 1084 (1990); State v. Pontier, 518 P.2d 969, 974 (Idaho 1974) (same); State v. Johnson, 413 A.2d 931, 934 (Me. 1980) (same); Johnson v. State, 637 P.2d 1209, 1211 (Nev. 1981) ("immediately apparent" standard not included as one of the elements); State v. Romero, 660 P.2d 715, 718 (Utah 1983) (*Coolidge* plurality holding on inadvertence not binding on states).

109. 496 U.S. 128 (1990).

110. *Id.* at 139.

> [I]f [the officer] has a valid warrant to search for one item and merely a suspicion concerning the second, whether or not it amounts to probable cause, we fail to see why that suspicion should immunize the second item from seizure if it is found during a lawful search for the first.

Id.

111. *Id.* at 136.

112. *Horton*, 496 U.S. at 135, 136 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971)). Once again, the Court voiced its concern that a warrantless search be limited in scope. "[T]he 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Id.* at 136 (quoting *Coolidge*, 403 U.S. at 466).

E. *Plain Feel*

The plain feel or plain touch exception to the warrant requirement developed as a corollary to the plain view doctrine.[113] Court decisions indicate a trend toward extending plain view to plain feel, but this trend is not widespread.[114]

The leading plain feel case is *United States v. Williams*.[115] In *Williams*, as officers suspecting a drug deal[116] approached Williams' parked car, they observed him hide a bag under his leg.[117] Thinking the bag might contain a weapon, one of the officers asked Williams to exit the car.[118] Williams then attempted to "flip" the bag into the back seat, but instead, the bag hit the driver's seat and fell back into the front passenger compartment.[119] The officer retrieved the bag, touched it,[120] and testified that "he could 'feel that inside were numerous small rolled-up objects that felt like plastic baggies.' "[121] Based on his tactile sense and his "experience and training in narcotics detection,"[122] the officer believed that the bag contained heroin. The officer confirmed this belief when he opened the bag.[123] The officer then arrested Williams.[124]

The D.C. Circuit upheld the search's validity.[125] The panel established a tripartite test to determine if a plain feel search is reasonable.[126] First, the officer must be in a lawful vantage point from which to touch.[127] Second, the touch must be limited to that which is "justified by the initial contact."[128] Third, the touch must give rise to "a reasona-

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113. Larry E. Holtz, *The "Plain Touch" Corollary: A Natural and Foreseeable Consequence of the Plain View Doctrine*, 95 DICK. L. REV. 521, 529 (1991). For a definition of the plain view doctrine, see *supra* text accompanying notes 10-11.

114. See plain feel cases cited *supra* note 75. *Contra* State v. Collins, 679 P.2d 80, 84 (Ariz. Ct. App. 1983); State v. Dickerson, 481 N.W.2d 840, 843-44 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992); State v. Rhodes, 788 P.2d 1380, 1381 (Okla. Crim. App. 1990); Commonwealth v. Marconi, 597 A.2d 616, 624 (Pa. Super. Ct. 1991), *appeal denied*, 611 A.2d 711 (Pa. 1992); State v. Broadnax, 654 P.2d 96, 103 (Wash. 1982).

115. 822 F.2d 1174 (D.C. Cir. 1987).

116. *See id.* at 1176.

117. *Id.*

118. *Id.* at 1177.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1185-86.

126. *Id.* at 1184.

127. *Id.*

128. *Id.*

ble certainty"[129] in the officer's mind that what he is touching is, in fact, "contraband or evidence of a crime."[130]

While the elements in *Williams* appear analogous to those established by the United States Supreme Court in *Coolidge* and modified by the Court in *Horton*, the D.C. Circuit distinguished the last element.[131] Plain view permits the warrantless seizure of items with evidentiary value that is "immediately apparent;"[132] the item must instantly give rise to probable cause. In *Williams*, however, the court imposed a higher standard — reasonable certainty — based on a distinction between the two senses.[133]

III. Facts and Holding

On the evening of November 9, 1989,[134] two Minneapolis police officers, Vernon D. Rose and Bruce S. Johnson,[135] were on patrol in North Minneapolis.[136] Around 8:15 p.m.,[137] they observed a man, later identified as the defendant, Timothy Eugene Dickerson, leaving an apartment complex that "was known as a 24-hour-a-day crack house . . . ."[138] The officers were familiar with the building: one officer testified that he previously answered complaints of drug sales in the com-

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129. *Id.*

130. *Id.*

131. *Id.*

132. Horton v. California, 496 U.S. 128, 136 (1990).

133. *Williams*, 822 F.2d at 1184-85.

> [T]he 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. This situation is clearly distinguishable from one involving a plain view seizure. Probable cause - a predictive judgment that further investigation will yield particular results - suffices to exempt the seizure from Fourth Amendment warrant requirements. In the present type of situation the information in 'plain view' must be good enough to eliminate all need for additional search activity. This can only occur when sensory information acquired by the officer rises to a state of certitude, rather than mere prediction, in regard to the object of the investigation.

Id.

In an earlier case, United States v. Ocampo, 650 F.2d 421 (2d Cir. 1981), the Second Circuit adopted a probable cause standard to support plain feel. In *Ocampo*, officers felt the outside of a sealed paper bag and determined that it contained "bundles" of United States currency. *Id.* at 424. The court followed the "immediately apparent" standard of *Coolidge* to uphold the search. *Id.* at 427.

134. State v. Dickerson, 481 N.W.2d 840, 842 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

135. State v. Dickerson, 469 N.W.2d 462, 464 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992). "Rose is a 14-year police veteran and has participated in approximately 75 drug search warrant executions and 50-75 drug related arrests." *Id.* at 464.

136. *Dickerson*, 481 N.W.2d at 842.

137. *Dickerson*, 469 N.W.2d at 463.

138. *Dickerson*, 481 N.W.2d at 842.

plex and executed search warrants there that led to the discovery of drugs and weapons.[139]

As the officers drove by the apartments, they observed the defendant descend the steps toward the sidewalk.[140] The officers testified that when Dickerson saw them, he abruptly turned around and walked toward a side alley.[141] Although Dickerson denied he saw the officers or altered his course,[142] the trial court accepted the officers' account of the events.[143]

The officers were suspicious of the Dickerson's actions[144] and followed him into the alley so Rose could " 'check [Dickerson] for weapons *and contraband*.' "[145] Once the officers confronted and stopped the defendant, Rose performed a *Terry*-frisk[146] for weapons. Officer Rose testified that he initiated the frisk for two reasons: (1) Rose previously found weapons in the building; and (2) Rose suspected that Dickerson carried a weapon.[147]

As Rose frisked Dickerson, he felt a small lump in the defendant's front jacket pocket.[148] Rose touched it through the jacket, " 'and slid it and felt it to be a lump of crack cocaine in cellophane.' "[149] Rose stated that he "knew immediately" he felt crack,[150] but he "*never thought the lump was a weapon.*"[151] The officer then placed his hand into Dickerson's jacket pocket and retrieved a two-tenths gram rock of crack cocaine.[152] The crack was "the size of a pea . . . ."[153]

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139. *Id.* In addition, a local alderman complained about the drug-related activity in the complex. *See id.*

140. *Dickerson*, 469 N.W.2d at 464.

141. *Id.*

142. *Dickerson*, 481 N.W.2d at 842.

143. *Id.*

144. *Id.*

145. *Id.* (emphasis added).

146. Terry v. Ohio, 392 U.S. 1, 30 (1968). *See supra* notes 49-70 and accompanying text.

147. *See Dickerson*, 469 N.W.2d at 464. "[I]n his experience, [Rose found that] drug traffickers often possess weapons." *Id.* The officer also testified that "Dickerson made no evasive movements [after the stop] and did not attempt to conceal anything. Rose did not notice any suspicious bulges in Dickerson's clothing." *Id.*

148. *Dickerson*, 481 N.W.2d at 842-43.

149. *Id.* at 843.

150. *Dickerson*, 469 N.W.2d at 464.

151. *Id.* (emphasis added).

152. *Dickerson*, 481 N.W.2d at 843.

153. *Id.* The cocaine weighed the same as "[a]n ordinary 200-[milligram] household aspirin" tablet. Respondent's Brief on the Merits at 22 n.13, State v. Dickinson, 481 N.W.2d 840 (Minn. 1992) (No. 91-2019) (on file with the *University of Dayton Law Review*).

In Hennepin County [154] District Court, Dickerson was tried and convicted[155] on a charge of fifth-degree possession of a controlled substance.[156] The trial court upheld the validity of the *Terry*-stop based upon the reasonable suspicion generated by the character of the apartment building and Dickerson's "evasive conduct."[157] The district court held that Dickerson's evasive actions and Rose's prior seizure of weapons at the apartments justified the *Terry*-frisk.[158] Finally, the court upheld the seizure of the contraband by recognizing a "plain feel" exception to the Fourth Amendment's warrant requirement.[159]

Dickerson appealed his conviction to the Minnesota Court of Appeals,[160] alleging that because the search went beyond the parameters of *Terry*,[161] the trial court erred to admit the contraband into evidence.[162] A unanimous court of appeals ruled that, while the stop and limited frisk for weapons was valid,[163] the expanded search beyond the outer layers of Dickerson's clothing was not justified.[164] Thus, the court

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154. Petition for a Writ of Certiorari at 1, State v. Dickerson, 481 N.W.2d 840 (Minn. 1992) (No. 91-2019) [hereinafter Petition for Writ of Certiorari].

155. *Dickerson*, 481 N.W.2d at 842. Although Dickerson was convicted of violating § 152.025 of the Minnesota Code, *see infra* note 156, the trial court deferred the judgment of guilt and placed the defendant on probation for two years in accordance with § 152.18 of the Code. *See* Petition for a Writ of Certiorari, *supra* note 154, at 6 n.3. Under this provision, if the defendant successfully completes probation (which may include attendance at drug-abuse education programs), the court will dismiss the case. MINN. STAT. ANN. § 152.18, subd. 1 (West 1989 & Supp. 1993). The defendant may move to have his record expunged, but the court maintains a nonpublic record of the proceedings for use in any future action against the defendant. *Id.*

156. *Dickerson*, 481 N.W.2d at 842. Section 152.025 of the Minnesota Code states that "[a] person is guilty of controlled substance crime in the fifth degree if: (1) the person unlawfully possesses one or more mixtures containing a controlled substance classified in schedule I, II, III or IV, except a small amount of marijuana . . . ." MINN. STAT. ANN. § 152.025, subd. 2(1) (West Supp. 1993).

Section 152.02 of the Minnesota Code establishes "five schedules of controlled substances," *Id.* § 152.02, subd. 1 (West 1989), and in subd. 3(1)(d) includes "[c]oca leaves and any salt, compound, derivative, or preparation of coca leaves, including cocaine . . ." as a Schedule II controlled substance. *Id.* at subd. 3(1).

157. *Dickerson*, 469 N.W.2d at 464.

158. *Id.*

159. *Id.*

160. State v. Dickerson, 469 N.W.2d 462 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn. 1992), *cert. denied*, 113 S. Ct. 53 (interim ed. 1992).

161. *Id.* at 464; see *supra* notes 80-83 and accompanying text for a discussion of the permissible scope of a *Terry* search.

162. *See supra* note 25 ("exclusionary rule" prohibits admission of improperly seized evidence).

163. *Dickerson*, 469 N.W.2d at 465. The court upheld the stop based upon Dickerson's conduct and Officer Rose's "personal knowledge of significant drug activity in the hallways of the Morgan Avenue apartment complex." *Id.* The court held that the limited frisk for weapons authorized by *Terry* was valid when predicated upon "Dickerson's departure from a 'known crack house,' his evasive conduct, and Rose's experience with weapon-carrying drug traffickers . . . ." *Id.*

164. *Id.* at 466.

of appeals declined to recognize a plain feel exception, and reversed Dickerson's conviction.[165] The state appealed the decision, and Dickerson cross-appealed on the issue of the validity of the stop.[166]

In a 4-3 decision,[167] the Minnesota Supreme Court affirmed the court of appeals' decision and rejected a plain feel exception.[168] Writing for the majority, Justice Tomljanovich held that the stop and the frisk for weapons were justified under guidelines prescribed by the United States Supreme Court in *Terry v. Ohio*.[169] The court noted, however, that once Officer Rose found no weapon, his continued search was illegitimate.[170]

The court refused to extend the plain view doctrine to include plain feel, distinguishing between the two senses involved.[171] The majority held that the senses of sight and touch are sufficiently dissimilar to merit a two-pronged distinction.[172] The court noted that: (1) the sense of touch is "less immediate and less reliable"[173] than that of

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165. *Id.* at 466-67. "We hold that the scope of a pat search must be strictly limited to a search for weapons. Absent probable cause for further intrusion, an officer performing a proper *Terry* frisk may not seize an object unless it reasonably resembles a weapon." *Id.* at 466.

166. State v. Dickerson, 481 N.W.2d 840, 842 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992). It appears, however, that the court was incorrect on this point. The State, in its Petition for a Writ of Certiorari to the Minnesota Supreme Court, takes issue with this portion of the court's procedural recapitulation. The State claims Dickerson did not file a cross-appeal. Petition for a Writ of Certiorari, *supra* note 154, at 6 n.5. While the Respondent, in his Brief in Opposition to the Petition for a Writ of Certiorari, does not address this inconsistency, counsel stated he did not file a cross-appeal. Letter from Peter W. Gorman, Assistant Public Defender, Hennepin County Office of the Public Defenders, to Kevin A. Lantz, Staff Writer, *University of Dayton Law Review* 1-2 (Jan. 6, 1993) (on file with the *University of Dayton Law Review*).

167. Associate Justice Esther M. Tomljanovich wrote the court's opinion in which Associate Justices Sandra S. Gardebring, Rosalie E. Wahl and Lawrence R. Yetka joined. *Dickerson*, 481 N.W.2d at 842-46. Associate Justice M. Jeanne Coyne authored a partial concurrence (on the validity of the stop and the limited frisk for weapons) and a dissent (recognizing the plain feel doctrine), in which Chief Justice Alexander M. Keith and Associate Justice John E. Simonette joined. *Id.* at 846-51 (Coyne, J., concurring and dissenting opinion). Telephone Interview with Lori Buck, Court Information Officer, Minnesota Supreme Court (Dec. 30, 1992).

168. *Dickerson*, 481 N.W.2d at 845.

169. *Id.* at 843.

170. *Id.* at 846. "Once it was apparent that the defendant had no weapon, *Terry* ceased to legitimize the officer's conduct. Any further intrusion into the defendant's privacy required a warrant or probable cause to arrest, and the officer had neither." *Id.*

171. *Id.* at 845.

172. *Id.* "[W]e do not believe the senses of sight and touch are equivalent . . . ." *Id.*

173. *Id.* Justice Tomljanovich questioned Officer Rose's testimony that his tactile abilities gave him immediate knowledge that he was feeling cocaine. *Dickerson*, 469 N.W.2d at 464. Justice Tomljanovich wrote:

> 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. [Reference to HANS CHRISTIAN ANDERSON, THE PRINCESS AND THE PEA (Harper & Row 1959) (1836)]. But a close examination of the

sight; and (2) that touch is "far more intrusive" into areas of privacy than sight.[174]

The remaining three justices dissented.[175] Justice Coyne concurred on the issues of the *Terry*-stop and pat-down for weapons,[176] but dissented from the majority's rejection of plain feel.[177] Justice Coyne based her argument in favor of plain feel on two propositions: (1) *Terry*[178] and other United States Supreme Court decisions[179] indicated an approval of the doctrine; and (2) the Minnesota Supreme Court opened the door to plain feel in *State v. Ludtke*.[180] Justice Coyne also implicitly equated the relative intrusiveness of the senses.[181]

On June 17, 1992, the State of Minnesota filed a petition for a writ of certiorari.[182] The United States Supreme Court granted review on October 5, 1992.[183]

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record reveals that like the precocious princess, the officer's "immediate" discovery in this case is fiction, not fact.

Dickerson, 481 N.W.2d at 844. The dissent labeled Justice Tomljanovich's skepticism as a cavalier questioning of Officer Rose's credibility. *Id.* at 846 (Coyne, J., dissenting).

174. *Dickerson*, 481 N.W.2d at 845.

175. *See supra* note 167.

176. *Dickerson*, 481 N.W.2d at 847 (Coyne, J., dissenting).

177. *Id.* at 851 (Coyne, J., dissenting).

178. *Id.* at 849 (Coyne, J., dissenting).

This simple act of feeling the outline and shape of the lump was permissible under *Terry*, and it appears from Rose's testimony that, because of his extensive experience in discovering crack cocaine while patting down previous suspects, he was 'absolutely sure' that the substance was crack cocaine 'before' he reached into the pocket and removed it.

Id. (Coyne, J., dissenting).

179. Horton v. California, 496 U.S. 128 (1990) (plain view doctrine); Michigan v. Long, 463 U.S. 1032 (1983) (officer conducting automobile search not required to overlook discovered contraband); Texas v. Brown, 460 U.S. 730 (1983) (plain view seizure does not require warrant).

180. 306 N.W.2d 111 (Minn. 1981). Justice Coyne also relied on the decisions rendered in State v. Gobely, 366 N.W.2d 600, 603 (Minn.) (officers were justified in frisking defendant who arrived at robbery suspects' apartment based on discovery of stolen items in apartment, information that suspects were armed during at least one robbery and that "individuals other than the apartment's residents had participated in the robberies"), *cert. denied*, 474 U.S. 922 (1985); State v. Alesso, 328 N.W.2d 685 (Minn. 1982) (defendant's furtive movements justified search); and State v. Cavegn, 294 N.W.2d 717 (Minn.) (officer was justified in asking defendant to unzip jacket from which paper bag then fell and in seizing and opening bag where officer possessed probable cause to believe bag contained marijuana), *cert. denied*, 449 U.S. 1017 (1980).

181. *Dickerson*, 481 N.W.2d at 851 (Coyne, J., dissenting). "Certainly, evidence obtained as the result of any unreasonable search or seizure should be excluded. But 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.* (Coyne, J., dissenting).

182. State v. Dickerson, 481 N.W.2d 840 (Minn. 1992), petition for cert. filed, 60 U.S.L.W. 3881 (U.S. June 17, 1992) (No. 91-2019).

183. 113 S. Ct. 53 (interim ed. 1992).

Dickerson also raised the issue of mootness in the Respondent's Brief in Opposition to the Petition for a Writ of Certiorari. On April 28, 1992, the Hennepin County Probation Department prepared an order certifying that Dickerson fulfilled his probationary obligations under § 152.18

IV. ANALYSIS

The United States Supreme Court based the development of exceptions to the Warrant Clause[184] by balancing the competing interests of the individuals and the state.[185] Analysis of these interests resulted in the proper restriction of warrantless stop-and-frisks in *Terry v. Ohio*.[186] A *Terry*-frisk may not be used to search for any other contraband but weapons.[187] Thus, *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.[188]

Further, the plain feel doctrine, as explained by the *Dickerson* dissent, rests on the flawed premise that all senses are alike.[189] First, touch is less reliable than the other sensory exceptions to the warrant requirement of sight, smell and hearing.[190] Second, sight, smell, and hearing are passive — the defendant's action triggers the officer's sense. Touch, however, is an active sense — the officer chooses to make the intrusion.[191]

While *Terry* does not support plain feel, and touch is generally an insufficient independent basis for the intrusion, police officers do have several viable options when they are confronted with a *Dickerson*-like scenario. Officers may request the detainee's consent to an expanded search,[192] they may ask further questions to satisfy their suspicions,[193] they may conduct a "canine sniff" or use a drug-sniffing device,[194] or, if the frisk has produced probable cause of non-weapon contraband, they may request a radio or telephone warrant in federal and some state jurisdictions.[195]

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of the Minnesota Code. *See supra* note 155. The district court filed the order on May 6, 1992. Respondent's Brief in Opposition to the Petition for a Writ of Certiorari at 5-6.

Dickerson argued that since the trial court's deferral of guilt was overturned by the Minnesota Supreme Court, his record would be expunged after he successfully completed the probation. Further, since the Minnesota Supreme Court's ruling did not prevent the State from future adverse collateral use of the non-public record of the case, that the action was moot. *See* Respondent's Brief in Opposition to the Petition for a Writ of Certiorari at 13-19, State v. Dickerson, 481 N.W.2d 840 (Minn. 1992) (No. 91-2019).

184. *See* U.S. CONST. amend. IV.

185. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

186. 392 U.S. 1 (1968).

187. *Id.* at 29.

188. Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979).

189. State v. Dickerson, 481 N.W.2d 840, 851 (Minn.) (Coyne, J., dissenting), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

190. *See infra* notes 251-95 and accompanying text.

191. *See infra* notes 296-312 and accompanying text.

192. *See infra* notes 421-26 and accompanying text.

193. *See infra* notes 427-36 and accompanying text.

194. *See infra* notes 451-66 and accompanying text.

195. *See infra* notes 467-83 and accompanying text.

A. *The Warrantless Stop of Dickerson*

In *State v. Dickerson*,[196] the Minnesota Supreme Court based its validation of the stop on two elements that it previously found to give rise to the requisite reasonable suspicion to satisfy *Terry*: (1) evasive conduct; and (2) a high-crime area.[197] The court cited *State v. Johnson*,[198] where it held that evasive action alone is sufficient to produce the basis needed to suspect an individual of wrongdoing.[199] Nonetheless, the court was not clear in its characterization of Dickerson's evasive conduct. Dickerson's actions could have been "furtive gestures"[200] or measures designed solely to avoid the officers.[201]

When the court assessed the impact that a high-crime area may have on an officer's development of reasonable suspicion, it cited the standard from *Brown v. Texas*[202] which states that "merely being in a

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196. 481 N.W.2d 840 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

197. *Dickerson*, 481 N.W.2d at 843.

198. 444 N.W.2d 824 (Minn. 1989).

199. *Id.* at 827. In *Johnson*, the defendant turned his truck off a main highway and onto a side road at the sight of a state trooper. *Id.* at 825. Shortly thereafter, the trooper saw the defendant reenter the highway. *Id.* "Inferring that the defendant had turned off Highway 65 for the purpose of avoiding him, the trooper motioned defendant to stop. Defendant did so, identified himself and told the trooper his license had been revoked. After verifying this information, the trooper arrested defendant for driving after revocation." *Id.*

200. "The courts are not consistent in defining what comprises a 'furtive gesture,' other than any conduct which a police officer finds suspicious in light of his experience." RINGEL, *supra* note 83, § 13.4(b)(2), at 13-33 & 34.

Furtive gestures may produce reasonable suspicion, Sibron v. New York, 392 U.S. 40, 66 (1968) (furtive gestures or flight are "strong indicia of *mens rea*"), but that is by no means clear.

> [S]ome actions which may be fairly said to be in response to an awareness that police are in the vicinity are not [indicia of *mens rea*]; persons on the street watch police and engage in similar activities out of interest in what the police are doing and out of a desire to avoid some minor misstep, such as a minor traffic violation, which would involve them unnecessarily with the police. Thus, it has been properly held that the "hesitancy of a car to pass a police cruiser and a glance at the officer by a passenger," a "startled look at the sight of a police officer," appearing nervous when a police car passed, looking away from police activity in the vicinity, pointing toward police, or quickening one's pace upon seeing the police are not, standing alone, sufficient bases for an investigative stop.

3 LAFAVE, *supra* note 30, § 9.3(c), at 450-51 (citations omitted) (quoted in *Johnson*, 444 N.W.2d at 826).

201. "An attempt to avoid a uniformed police officer may be the determinative factor in giving an officer reasonable suspicion to stop a suspect when other factors are present arousing the suspicions of the officer." RINGEL, *supra* note 83, at
§ 13.4(b)(3).

While furtive gestures or flight may be more indicative of criminal activity, some courts have said that standing alone they are insufficient to produce reasonable suspicion. United States v. Thompson, 712 F.2d 1356, 1361 (11th Cir. 1983) (furtive gesture); United States v. Jones, 619 F.2d 494, 498 (5th Cir. 1980) (flight). *Contra* United States v. Pope, 561 F.2d 663, 669 (6th Cir. 1977).

202. 443 U.S. 47 (1979).

high-crime area will not justify a stop."[203] The *Dickerson* court applied a totality of the circumstances[204] rationale to the facts at hand and determined that the "defendant's evasive conduct after eye contact with police, *combined with* his departure from a building with a history of drug activity, justified the police in reasonably suspecting criminal activity."[205]

Moreover, the court could have explicitly considered the officers' interpretation of the exigent circumstances.[206] In *United States v. Cortez*,[207] the United States Supreme Court enunciated a two-step procedure to grant weight to the "inferences and deductions" of the officers on the scene.[208] First, the officers must base their analysis upon the totality of the circumstances.[209] Second, when that analysis raises reasonable suspicion, the suspicion must be that the individual is "engaged

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203. State v. Dickerson, 481 N.W.2d 840, 843 (Minn.) (citing *Brown*, 443 U.S. at 52), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

Courts are split on the consequences that a high-crime area adds to behavior that would, or could, otherwise be innocuous. These cases stand for the position that potentially inoffensive conduct, when performed in a high-crime area, may give rise to reasonable suspicion: United States v. Rickus, 737 F.2d 360, 365 (3d Cir. 1984) (driving in a slow and aimless course for several minutes); United States v. Magda, 547 F.2d 756, 757 (2d Cir. 1976) (exchange of item in a park), *cert. denied*, 434 U.S. 878 (1977); State v. Andrews, 565 N.E.2d 1271, 1274 (Ohio) (running), *cert. denied*, 111 S. Ct. 2833 (1991); State v. Freeman, 414 N.E.2d 1044, 1047 (Ohio 1980) (sitting alone in parked car), *cert. denied*, 454 U.S. 822 (1981). *See also supra* note 75 (high-crime area cases).

Other courts emphasized the nature of the otherwise innocuous conduct in holding that a high-crime area did not contribute sufficient suspicion to justify a warrantless stop. *In re* T.M.M., 560 So. 2d 805, 807 (Fla. Dist. Ct. App. 1990) (flight); People v. Bronston, 497 N.Y.S.2d 8, 10 (N.Y. App. Div.) (smoking a cigarette), *aff'd*, 501 N.E.2d 579 (N.Y. 1986).

204. United States v. Cortez, 449 U.S. 411, 417 (1981).

> Terms like 'articulable reasons' and 'founded suspicion' are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances — the whole picture — must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

Id. at 417-18.

205. *Dickerson*, 481 N.W.2d at 843 (emphasis added).

206. While the majority opinion did not mention the officers' interpretation of events during its stop examination, the court did rely, *inter alia*, on Officer Rose's prior encounter with drug activity in the apartment building in its decision to uphold the frisk of the defendant. *Id.* Of course, implicit in the court's affirmance of the court of appeals' decision, was its approval of the lower court's consideration of the officer's inferences and deductions. *See* State v. Dickerson, 469 N.W.2d 462, 465 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn. 1992), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

207. 449 U.S. 411 (1981).

208. *Id.* at 418. These "inferences and deductions . . . might well elude an untrained person." *Id.*

209. *Id.*

in wrongdoing."[210] The court of appeals considered this additional element in its decision to uphold the stop.[211]

The court determined that the officers executed a proper *Terry*-stop. As the court noted, the officer saw the defendant leaving a known crack house which the police were monitoring.[212] A man leaving an apartment building, whether a high-crime area or not, would be an insufficient basis upon which to countenance a *Terry*-stop.[213] Given Dickerson's "evasive conduct"[214] at the sight of police and Officer Rose's prior experience in the complex,[215] however, a trained police officer would arguably be shirking his duties if he was not suspicious and did not investigate.[216]

B. The Initial Warrantless Search of Dickerson

Once the court determined that *Terry* authorized the warrantless stop of the defendant, it turned its examination to the reasonableness of the frisk for weapons.[217] This separate analysis is proper, not only because the two actions are "separate Constitutional events,"[218] but also because a valid stop does not automatically encompass a valid frisk.[219] A court must separately determine the relative reasonableness of each,

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210. *Id.*

211. *Dickerson*, 469 N.W.2d 462, 465 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992) "Further, [Officer] Rose had personal knowledge of significant drug activity in the hallways of the Morgan Avenue apartment complex." *Id.*

212. *Dickerson*, 481 N.W.2d at 842.

213. In Terry v. Ohio, 392 U.S. 1, 22-23 (1968), the Court noted that, alone, the suspects' actions were insufficient to support a detention. "There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in." *Id.*

214. *Dickerson*, 481 N.W.2d at 843.

215. *Id.* at 842.

216. *See Terry*, 392 U.S. at 23 (to allow suspicious activity to go unchecked would have been "poor police work indeed").

217. *Dickerson*, 481 N.W.2d at 843.

218. HALL, *supra* note 49, § 15:1; *see also supra* note 85 (the stop and the frisk involve distinct privacy interests).

219. *Terry* indicates that some form of investigation must proceed after the stop before an officer may undertake a frisk, even when the officer perceives that the individual may be armed and dangerous *before* the stop. *Terry*, 392 U.S. at 30.

The better view, however, is that the right to frisk "must be immediate and automatic" if there has been a valid stop of a detainee on reasonable suspicion of participation in violent crime. *Id.* at 33 (Harlan, J., concurring). "There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet." *Id.* (Harlan, J., concurring); *see* Adams v. Williams, 407 U.S. 143, 148 (1972) (officer relying on a informant's tip that detainee had gun in waistband, could seize gun when detainee refused to comply with order to get out of his car, but instead rolled down window).

although it will weigh many of the same factors implicated in a stop to determine the soundness of a frisk.[220]

The components considered by the court indicate that the frisk was justified. For the protection of officers and those nearby, the *Terry* standard allows a reasonable search for weapons when an officer has "reason to believe that he is dealing with an armed and dangerous individual."[221] Much like the stop, the officer may base his decision to frisk on his interpretation of the circumstances, judged in the light of his experience.[222] The *Dickerson* court cited the following considerations as the factors which authorized the initial frisk for weapons: (1) the prior seizure of weapons in the building;[223] (2) the reasonable suspicion that Dickerson was a drug user;[224] (3) the activity was in a high-crime area;[225] (4) the defendant's furtive actions;[226] and (5) the location of the stop.[227]

The underpinning for a *Terry*-frisk is society's objective concern for the safety of the officer and surrounding individuals.[228] During the development of *Terry's* progeny, courts debated the degree to which they should extend an officer's right to frisk.[229] Much of the debate centered on possessory offenses.[230] Nevertheless, *Terry* made no such

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220. RINGEL, *supra* note 83, § 13.6(b).

221. *Terry*, 392 U.S. at 27.

222. *Id.*

223. State v. Dickerson, 481 N.W.2d 840, 843 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

224. *Id.* at 848 (Coyne, J., dissenting).

225. *Id.* (Coyne, J., dissenting).

226. *Id.* (Coyne, J., dissenting).

227. *Id.* (Coyne, J., dissenting). "[T]he stop occurred in a dark alley . . . ." *Id.* (Coyne, J., dissenting).

228. Terry v. Ohio, 392 U.S. 1, 24 (1968).

> [W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence . . . it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Id.

229. *See* United States v. Sharpe, 470 U.S. 675, 689 n.1 (1985) (Marshall, J., concurring) (individual interests may outweigh government objectives where possessory offense alone is suspected); Florida v. Royer, 460 U.S. 491, 498-99 (1982) (plurality opinion) (reasonable suspicion of possessory offense sufficient to justify temporary detention); 3 LAFAVE, *supra* note 30, § 9.2(c).

230. Sibron v. New York, 392 U.S. 40, 74 (1968) (Harlan, J., concurring). "[A]lthough . . . the right to frisk is automatic when an officer lawfully stops a person suspected of a crime whose nature creates a substantial likelihood that he is armed, it is not clear that suspected possession of narcotics falls into this category." *Id.* (Harlan, J., dissenting); *see also* Williams v. Adams, 436 F.2d 30 (2d Cir. 1970), *rev'd*, 407 U.S. 143 (1972). "I have the gravest hesitancy in extending *Terry* to crimes like the possession of narcotics . . . . There is too much danger that, instead of the stop being the object and the protective frisk incident thereto, the reverse will be true." *Id.* at 38 (Friendly, J., dissenting).

distinction.[231] To allow an officer to make a stop based upon an articulable, reasonable suspicion of a possessory offense, then to deny the officer the ability to act upon a reasonable belief that the detainee is "armed and presently dangerous"[232] begs a potentially deadly question.[233] The harsh realities of today's society indicate that the Court was correct in its reluctance to distinguish between possessory and other types of crimes in determining the validity of a frisk.[234]

C. *The Expanded Warrantless Search of Dickerson*

In *Terry v. Ohio*,[235] the United States Supreme Court provided the guidelines for what is commonly known as the "stop and frisk."[236] Because the Court viewed concern for an officer's safety as an important interest worthy of protection,[237] it permitted a patdown on less than probable cause.[238] Since, however, the Court perceived a frisk as a "serious intrusion"[239] upon an individual's privacy interests, it prescribed narrow rules that an officer must follow in conducting a frisk. The Court stated:

Adherence to this position would require additional circumstances other than mere reasonable suspicion of a possessory offense:

> Illustrative of the circumstances which the court have deemed sufficient are: a characteristic bulge in the suspect's clothing; observation of an object in the pocket which might be a weapon; an otherwise inexplicable sudden movement toward a pocket or other place where a weapon could be concealed; awareness that the suspect had previously been engaged in serious criminal conduct; awareness that the suspect had previously been armed; discovery of a weapon in the suspect's possession; and awareness of circumstances which might prompt the suspect to take defensive action because of a misunderstanding of the officer's authority or purpose.

3 LAFAVE, *supra* note 30, § 9.4(a).

231. *Terry*, 392 U.S. at 24.

232. *Id.*

233. In State v. Dickerson, 481 N.W.2d 840 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992), not only did the Minnesota Supreme Court defer to Officer Rose's experience to validate the stop, *see supra* text accompanying notes 212-16, it also cited his experience as one of the factors that justified the frisk. *See supra* text accompanying notes 222-27.

234. The increase in weapons availability has resulted in escalated drug-related violence against citizens and police officers. *See* Laura M. Litvan, *127th Killing in County Ties 1989's Record*, WASH. TIMES, Nov. 14, 1991, at B1; Richard L. Burke, *A Record 14 Officers Killed in '88 In Drug Incidents, a Study Shows*, N.Y. TIMES, Sept. 2, 1989, § 1, at 22.

In the context of an arrest, the Supreme Court ended the debate in the years shortly following *Terry*. In United States v. Robinson, 414 U.S. 218 (1973), the Court noted, "the danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest." *Id.* at 234 n.5.

235. 392 U.S. 1 (1968).

236. *See id.* at 21, 24.

237. *Id.* at 23-24.

238. *Id.* at 24.

239. *Id.* at 24-25. *See supra* note 62.

> Suffice it to note that such a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. The sole justification of the search in the present situation is the protection of the police officers and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.[240]

Thus, the Court intended the *Terry*-frisk to recover only weapons — not contraband.

In its application of this standard to the facts in *Dickerson*, the Minnesota Supreme Court refused the invitation to recognize a plain feel extension of the plain view doctrine.[241] Instead, the panel ruled that the continued search of the defendant, after the officer knew what he felt was not a weapon,[242] was illegitimate.[243] The factors influencing the majority included: (1) the want of immediacy and reliability inherent in the sense of touch as compared with sight;[244] and (2) the greater intrusiveness of touch than that of sight.[245]

The dissent, while concurring on the issues of the *Terry*-stop and pat-down for weapons,[246] advocated a plain feel extension based on: (1) perceived support of the doctrine in *Terry*[247] and other United States Supreme Court decisions;[248] and (2) the court's purported previous recognition of plain feel in *State v. Ludtke*.[249] Further, in the dissent's view, there is no difference in the relative intrusiveness of the senses.[250]

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240. *Terry*, 392 U.S. at 29. (citation omitted).

241. State v. Dickerson, 481 N.W.2d 840, 843-44 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

242. State v. Dickerson, 469 N.W.2d 462, 464 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

243. *Dickerson*, 481 N.W.2d at 846.

244. *Id.* at 845.

245. *Id.*

246. *Id.* at 847 (Coyne, J., dissenting).

247. *Id.* at 849 (Coyne, J., dissenting). *See supra* note 178.

248. *Id.* at 849, 851 (Coyne, J., dissenting). *See* cases cited *supra* note 179.

249. 306 N.W.2d 111 (Minn. 1981). For other decisions relied upon by the dissent, see cases cited *supra* note 180.

It is interesting to note that in State v. Gobely, 366 N.W.2d 600 (Minn.), *cert. denied*, 474 U.S. 922 (1985), Justice Coyne joined in a dissent attacking the validity of a *Terry*-frisk. Justice Wahl authored the dissent, in which she characterized officers' actions as a " 'mere exploratory search . . . of [the] defendant . . . [based on] an unparticularized suspicion or hunch.' " *Id.* at 604 (Wahl, J., dissenting) (quoting State v. Fox, 168 N.W.2d 260, 262 (Minn. 1969)).

250. *Dickerson*, 481 N.W.2d at 851 (Coyne, J., dissenting). *See supra* note 181.

1. The Lack of Tactile Reliability

The State of Minnesota asked the *Dickerson* court to "extend the plain view doctrine to the sense of touch."[251] The plain feel or plain touch doctrine is one of four recognized sensory-based exceptions to the Warrant Clause. The others are "plain view,"[252] "plain smell,"[253] and "plain hearing."[254] The point of embarkation for these exceptions is plain view.[255]

The analogy of plain feel to plain view, as the dissent would apply it to the facts in *Dickerson*, does not comport with the criteria for a proper plain view search and seizure as elucidated in either *Coolidge*[256] or *Horton*.[257] The third element needed to justify a plain view seizure in *Coolidge*, and the second element in *Horton*, is that the evidentiary value of the item subject to plain view seizure must be "immediately apparent."[258]

Officer Rose's description of his search of Dickerson, however, shows that his tactile recognition of the rock of crack cocaine was anything but immediate: " 'As I pat searched the front of his body, I felt a lump, a small lump in the front pocket [of the defendant's nylon jacket]. I examined it with my fingers and slid it and felt it to be a lump of crack cocaine in cellophane.' "[259] Rose testified that he "had 'felt [crack] before in clothing' — approximately 50 to 75 times — and 'was absolutely sure that's what it was, or [he] would have left it there.' "[260]

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251. *Dickerson*, 481 N.W. 2d at 845.

252. Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971). The plurality opinion in *Coolidge* was essentially accepted as modified by the majority in Horton v. California, 496 U.S. 128 (1990).

253. *E.g.*, United States v. Lueck, 678 F.2d 895, 903 (11th Cir. 1982) (probable cause arose when officer smelled marijuana in packages). *Cf.* United States v. Sharpe, 470 U.S. 675, 679, 700 (1985) (an officer smelled marijuana in rear of camper but the Court did not address "plain smell" issue).

254. United States v. Gann, 732 F.2d 714, 722-23 (9th Cir.) (officers overheard conversation between defendant and attorney while they executed a valid search warrant), *cert. denied*, 469 U.S. 1034 (1984); United States v. Jackson, 588 F.2d 1046, 1049 (5th Cir.) (officers overheard conversation in adjoining hotel room by placing their ears next to a three-quarter inch gap below the door separating the rooms), *cert. denied*, 442 U.S. 941 (1979).

255. United States v. Williams, 822 F.2d 1174, 1182 (D.C. Cir. 1987).

256. 403 U.S. at 465; *see supra* notes 104-06 and accompanying text for a discussion of the *Coolidge* plain view elements.

257. 496 U.S. at 142; *see supra* notes 109-12 and accompanying text for a discussion of the *Horton* plain view elements.

258. *Coolidge*, 403 U.S. at 466; *Horton*, 496 U.S. at 136.

259. State v. Dickerson, 481 N.W.2d 840, 842-43 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

260. *Id.* at 847 (Coyne, J., dissenting).

The dissent minimized this tactile manipulation, claiming the officer's style of search is subsumed by *Terry*:

> The majority concludes that by examining the lump in this fashion [Officer] Rose somehow exceeded the permissible scope of a lawful pat-down search for weapons. The case law, however, supports my conclusion that the limited search was not excessive in scope, or more precisely, not too intrusive. Once again, a resort to *Terry v. Ohio* . . . is in order. There Chief Justice Warren made clear the bright line dividing a limited pat-down search or frisk from a more intrusive search of the person. A pat-down search or frisk is, as the Court put it, a "*careful* exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons . . . ."[261]

Justice Coyne's emphasis on "careful exploration," misses the entire rationale underlying *Terry*.

In deciding *Terry*, the Court balanced two competing interests: (1) protecting the safety of a police officer; and (2) guarding the subjective privacy interests of the individual.[262] To achieve this equilibrium, the Court limited the scope of an allowable frisk based on less than probable cause.[263] "A search for weapons in the absence of probable cause to arrest . . . must . . . be strictly circumscribed by the exigencies which justify its initiation."[264] The Court went on to state that "such a search . . . is not justified by any need to prevent the disappearance or destruction of evidence of a crime."[265] Thus, "[a]s soon as the officer discovers that there is no dangerous instrumentality in the pocket, *he must desist from further exploration of the pocket's contents*."[266] This cessation was evident in *Terry*, when the officer, after retrieving a weapon from Terry[267] and frisking Terry's two companions, Chilton and Katz,[268] "did [not] invade Katz' person beyond the outer surfaces of his clothes, since [the officer] discovered nothing in his pat-down which might have been a weapon."[269]

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261. *Dickerson*, 481 N.W.2d at 849 (Coyne, J., dissenting) (quoting Terry v. Ohio, 392 U.S. 1, 16 (1968)) (citation omitted). Contrary to Justice Coyne's "bright line" view of *Terry*, Chief Justice Warren, in describing the difficult balance of competing interests the Court must accomplish, stated, "there is 'no ready test for determining reasonableness . . . .' " *Terry*, 392 U.S. at 21 (1968) (quoting Camara v. Municipal Court, 387 U.S. 523, 536 (1967)).

262. *Terry*, 392 U.S. at 23.

263. *Id.* at 25-26, 29.

264. *Id.*

265. *Id.* at 29.

266. RINGEL, *supra* note 83, § 13.7(a) (emphasis added).

267. *Terry*, 392 U.S. at 7.

268. *Id.*

269. *Id.* at 30.

The Court's characterization of a search as "careful"[270] more closely applies to the officer's search for weapons for his or her own and bystanders' protection. The balancing of interests that the Court undertook in *Terry* led it to deem a stop and frisk a "narrowly drawn" exception to the warrant requirement.[271] Thus, the better view of the phrase cited by Justice Coyne emphasizes the remainder of the sentence, "in an attempt to find weapons."[272] In addition, as at least one commentator observed, the Court's use of the phrase "careful exploration" was contained in a discussion of the significant intrusion of a post-arrest search — not a *Terry*-like scenario.[273]

In the recent case of *Arizona v. Hicks*,[274] the United States Supreme Court applied the plain view standard to the search for and seizure of stolen stereo components.[275] Police responded to Hicks' apartment after someone fired a shot through its floor.[276] Subsequent to their entry into the "squalid"[277] apartment, one of the officers noted some "expensive stereo components" which seemed incongruous to the dwelling.[278] Doubting Hicks' ownership, the officer recorded the components' serial numbers, moving some of the equipment to read and record the numbers.[279] The officer seized some of the equipment after the numbers matched those of stolen components.[280] Based on this evidence, the grand jury indicted Hicks for armed robbery.[281]

Writing for the majority, Justice Scalia accepted without comment that the "exigent circumstance of the shooting" justified the "initial entry and search."[282] The Court held, however, that while the recordation of the serial numbers was not a seizure,[283] it was an improper search under plain view.[284] The Court reasoned that the officer's moving of the equipment constituted a " 'search' separate and apart from the search for the shooter, victims, and weapons that was the lawful objective of his entry into the apartment."[285] Therefore, the officer's

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270. *Id.* at 16.
271. *Id.* at 27.
272. *Id.* at 16; *see supra* note 261.
273. LAFAVE, *supra* note 30, § 9.4.
274. 480 U.S. 321 (1987).
275. *Id.* at 323-24.
276. *Id.* at 323.
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. *See id.* at 323-24.
282. *Id.* at 324.
283. *Id.*
284. *Id.* at 326-27.
285. *Id.* at 324-25.

manipulation of the components took his search beyond its initial justification.[286]

An equally powerful analogous argument supports the concept that the evidentiary value of an item cannot be immediately apparent if the officer must manipulate the item to realize its significance. Thus, if a touch does not instantly give rise to the probable cause needed to support the item's seizure, plain feel as an extension of plain view cannot justify the confiscation.[287] "Indeed, to treat searches more liberally would especially erode the plurality's warning in *Coolidge* that 'the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.' "[288]

The *Dickerson* majority raised the potential degeneration of a *Terry*-frisk into a generalized search under plain feel in its analysis of the officer's manipulation of the rock of cocaine.[289] "If given long enough, most police officers, or civilians for that matter, could pinch and squeeze and twist and pull and rub and otherwise manipulate a suspect's jacket pocket and figure out what is inside."[290] The United States Supreme Court spoke to this issue in *Ybarra v. Illinois*.[291] In *Ybarra*, Justice Stevens stated, "[n]othing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or, indeed, any search whatever for anything but weapons."[292] To so blur the confined boundaries of *Terry* would cast the delicate balancing of interests out of equilibrium.

The D.C. Circuit accepted this proposition in the leading plain feel case, *United States v. Williams*.[293] The District of Columbia Court of Appeals stated that plain feel cannot propel a *Terry*-frisk beyond its narrowly-limited scope:

> [T]he doctrine would not sanction any use of the sense of touch beyond that justified by the initial contact with the container. For example, an officer who satisfies himself while conducting a *Terry* check that no

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286. *Id.* at 325. The Court also, for the first time, held that probable cause is required for a valid plain view seizure. *Id.* at 326.

287. The issue of manipulation distinguishes State v. Dickerson, 481 N.W.2d 840 (Minn.), *cert. granted*, 113 S. Ct. 53 (1992) from United States v. Williams, 822 F.2d 1174 (D.C. Cir. 1987). The *Williams* court recognized that any touching beyond the initial frisk for weapons would invalidate a plain feel seizure. *See infra* notes 292-93 and accompanying text.

288. *Hicks*, 480 U.S. at 328.

289. State v. Dickerson, 481 N.W.2d 840, 844 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

290. *Id.*

291. 444 U.S. 85 (1979).

292. *Id.* at 93-94.

293. 822 F.2d 1174 (D.C. Cir. 1987). For a synopsis of the case, see *supra* text accompanying notes 115-30.

> weapon is present in a container *is not free to continue to manipulate it* in an attempt to discern the contents.[294]

Officer Rose was satisfied that Dickerson was not carrying a weapon. Regarding Officer Rose's testimony, the court of appeals stated that "Rose never thought the lump was a weapon."[295] Implicit in this statement is the proposition that, when the precedents of *Terry*, *Ybarra*, *Coolidge*, *Hicks*, and *Williams* are applied, Officer Rose was not justified to continue his frisk after he was convinced that Dickerson did not carry a weapon.[296]

2. The Relative Intrusiveness of the Senses

The *Dickerson* majority distinguished among the senses on both reliability and intrusiveness grounds,[297] whereas the dissent gave sensory distinctions only passing notice.[298] The suggestion that a distinction exists between the degree of invasion associated with the sensory-based exceptions to the warrant requirement is logical. With all of the warrant exceptions but touch — sight, smell and hearing — the officer's activity is passive. It is the officer's senses which are invaded through some action taken by the detainee. The sense of touch, however, is active. An officer must choose to make the intrusion that triggers tactile perception.

For example, in *Horton v. California*,[299] an officer searched the defendant's home pursuant to a valid search warrant.[300] Although the magistrate issued the warrant for the recovery of stolen goods, the officer "did not find the stolen property . . . [but] discovered the weapons

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294. *Id.* at 1184 (footnote omitted).

295. State v. Dickerson, 469 N.W.2d 462, 464 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

In addition, Officer Rose testified that "he told his partner to pull the squad car [and follow Dickerson] into the alley so he could 'check [the defendant] for weapons *and contraband*.' " *Dickerson*, 481 N.W.2d at 842. While an improper motive for a lawful search does not invalidate it, *see* Horton v. California, 496 U.S. 128, 138-39 (1990), "the officer's testimony that he intended to conduct a warrantless search for drugs, combined with his testimony about squeezing, sliding and otherwise manipulating the contents of the defendant's pocket, convince[d] [the court] that he set out to flaunt the limitations of *Terry*, and he succeeded." *Dickerson*, 481 N.W.2d at 844.

296. *Dickerson*, 469 N.W.2d at 464. Officer Rose's knowledge also takes his continued frisk out of any "good faith" exception to an otherwise invalid seizure. Minnesota affirmed such an exception in State v. Bitterman, 232 N.W.2d 91 (Minn. 1975), where an officer felt and seized a "hard round object" that was not a weapon from the defendant's pocket because he was unsure whether the item was a weapon. *Id.* at 94. Moreover, Officer Rose's actions do not comport with the "reasonable certainty" standard established in *Williams*, 822 F.2d at 1184-85. *See supra* note 133.

297. *Dickerson*, 481 N.W.2d at 845.

298. *Id.* at 851 (Coyne, J., dissenting); *see supra* note 250.

299. 496 U.S. 128 (1990).

300. *Id.* at 131.

[used in the robbery] in plain view and seized them."[301] The Court reasoned that when an item is in plain view, the individual relinquishes any expectation of privacy.[302] Thus, the defendant, rather than the officer's warranted intrusion, triggered the officer's visual perception. Therefore, a valid plain view seizure represents the creation of probable cause by a person who waived his or her privacy interest.

The same analysis pertains to the "plain smell" doctrine. In *United States v. Lueck*,[303] a customs officer detected the odor of marijuana emanating from packages in an open car trunk,[304] giving rise to probable cause to arrest.[305] The defendant could not have any reasonable expectation of privacy in an odor that wafted into the nostrils of a customs officer.[306]

In *United States v. Gann*,[307] the Ninth Circuit held that the "plain hearing" doctrine gave rise to probable cause when the officer was lawfully in the "listening area."[308] In *Gann*, officers executing a valid search warrant overheard a one-sided, incriminating telephone conversation between the defendant and his attorney.[309] The court held that the conversation was not protected by attorney-client privilege, and the evidence adduced from the dialogue was admissible.[310]

The common thread uniting these cases confirms that an officer may gain probable cause through *passive* sensory perception, coupled with his or her prior valid presence in the area. When sight, smell, and

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301. *Id.*

302. *Id.* at 133.

303. 678 F.2d 895 (11th Cir. 1982).

304. *Id.* at 898. The officer testified that the three packages "reeked of marijuana." *Id.* at 903.

305. *Id.* at 903.

306. HALL, *supra* note 49, § 9:7. Hall wrote:

> No one can have a reasonable expectation of privacy in the odor of marijuana, so smelling it was not a search. Moreover, the officer may seize the package, but not because it is in plain view. Plain view alone can never justify a seizure. Instead, the seizure is proper because the officer possesses sufficient untainted information to establish probable cause that the package contained contraband.

Id. (footnote omitted). In addition to *Lueck*, several federal courts accepted the "plain smell" doctrine. See United States v. Norman, 701 F.2d 295, 297 (4th Cir.), *cert. denied*, 464 U.S. 820 (1985); United States v. Pagan, 395 F. Supp. 1052, 1061 (D. P.R. 1975), *aff'd*, 537 F.2d 554 (1st Cir. 1976); United States v. Turbyfill, 373 F. Supp. 1372, 1375 (W.D. Mo. 1974), *aff'd*, 525 F.2d 57 (8th Cir. 1975). *Contra* United States v. Johns, 707 F.2d 1093, 1096 (9th Cir. 1983) ("plain smell" may contribute, but not solely give rise, to probable cause), *rev'd on other grounds*, 469 U.S. 478 (1985). *Cf. supra* note 253 (United States Supreme Court has not addressed "plain smell" doctrine).

307. 732 F.2d 714 (9th Cir.), *cert. denied*, 469 U.S. 1034 (1984).

308. *See id.* at 723.

309. *Id.* at 722.

310. *Id.* at 723; *see, e.g.*, United States v. Jackson, 588 F.2d 1046 (5th Cir.), *cert. denied*, 442 U.S. 941 (1979).

hearing are compared to touch, however, the differences in the degree of intrusiveness are substantial. Touch is a volitional act of the officer's will, it is a "serious intrusion upon the sanctity of the person[,] . . . and [thus] it is not to be undertaken lightly."[311] An extension of plain view to plain feel under the *Dickerson* scenario thus adds an unjustified gloss to plain view — wrecking the fragile balancing of interests[312] which the Court employed in crafting the Warrant Clause exceptions.[313]

Touch is inherently more intrusive than the other senses. Moreover, application of the plain feel doctrine, as urged by the dissent and the State, would harm the individual's subjective privacy interests.[314] Justice Coyne[315] and the State[316] rely on the Court's proposition in *Michigan v. Long*[317] that if an officer, once he has commenced a valid *Terry*-frisk, discovers "contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances."[318] The *Dickerson* dissent and the State misapply the *Long* holding by their broad reading of this dictum.

To force the *Long* holding into a *Dickerson* scenario is to run roughshod over the facts and interests involved in *Long*. The officers in *Long* stopped to investigate a car in a ditch.[319] Long met the officers at the rear of the car, but after some futile questioning by the officers, he returned toward the car's open door.[320] The officers followed Long and both observed a hunting knife in the car.[321] The officers then frisked Long for weapons and found none.[322] One of the officers shone his flashlight into the interior of the car to search for other weapons.[323] The inspection revealed something protruding from the front seat arm-

311. Terry v. Ohio, 392 U.S. 1, 17 (1968).

312. *See supra* text at note 86.

313. For a review of the various warrant exceptions created by the United States Supreme Court and lower courts, see *supra* notes 28, 48, and 75.

314. *Cf.* Katz v. United States, 389 U.S. 347, 361 (Harlan, J., concurring). For a discussion of individual and societal interests, see *supra* notes 35-48 and accompanying text.

315. State v. Dickerson, 481 N.W.2d 840, 851 (Minn.) (Coyne, J., dissenting), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

316. Petition for a Writ of Certiorari, *supra* note 154, at 10-11, State v. Dickerson, 481 N.W.2d 840 (Minn. 1992) (No. 91-2019).

317. 463 U.S. 1032 (1983).

318. *Id.* at 1050.

319. *Id.* at 1035-36.

320. *Id.* at 1036.

321. *Id.*

322. *Id.*

323. *Id.*

rest.[324] The officer lifted the armrest and discovered a pouch of marijuana.[325] The officers arrested Long for possession of the substance.[326]

The United States Supreme Court held that the automobile search was reasonable.[327] Writing for the Court, Justice O'Connor, however, did not extend the right to "frisk" the interior of an automobile based on a dilution of *Terry*.[328] Rather, the Court grounded the expanded search on its *Carroll* decision which authorized warrantless automobile searches.[329] The Court, in *Long*, also noted[330] its decisions in *Pennsylvania v. Mimms*,[331] *Adams v. Williams*,[332] and in an arrest context, *Chimel v. California*[333] and *New York v. Belton*,[334] where it founded each expanded intrusion on an officer's interest in his safety as explained in *Terry*.[335]

The Court's dictum in *Long* regarding officers ignoring discovered contraband[336] then, must first be read in the context of the justification for the search. As stated by *Terry*, that justification must be the officers' safety interest.[337] In *Dickerson*, however, Officer Rose's initial frisk of the defendant alleviated any safety concerns.[338] Since Officer

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324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* at 1035.

328. *Id.* at 1049-50 n.14.

> [The] additional interest [of evidence preservation in an arrest] does not exist in the *Terry* context. A *Terry* search, "unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. . . . The sole justification of the search . . . is the protection of police officers and others nearby . . . ."

Id. (quoting Terry v. Ohio, 392 U.S. 1, 29 (1968)).

329. Carroll v. United States, 267 U.S. 132, 153 (1925). Justice O'Connor wrote:

> [R]oadside encounters . . . are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect. The principles compel our conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief . . . that the suspect is dangerous and the suspect may gain immediate control of weapons.

Long, 463 U.S. at 1049.

330. *Id.* at 1047-49.

331. 434 U.S. 106 (1977) (officers may order occupants of car in traffic stop to exit vehicle and frisk them if officers reasonably believe occupants to be armed and dangerous).

332. 407 U.S. 143 (1972) (officer may seize gun in driver's waistband even though gun not visible from outside vehicle if officer acting on informant's tip).

333. 395 U.S. 752 (1969) (search incident to a lawful arrest).

334. 453 U.S. 454 (1981) (passenger area of car within suspect's "grab area" and police may examine any containers found in that area).

335. Terry v. Ohio, 392 U.S. 1, 24 (1968).

336. Michigan v. Long, 463 U.S. 1032, 1050 (1983).

337. *Terry*, 392 U.S. at 24.

338. State v. Dickerson, 469 N.W.2d 462, 464 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

Rose knew no weapon was involved, the additional search for contraband fell outside the *Terry* rationale, and hence, was also outside the *Long* rationale.[339]

In addition, the facts in *Long* cannot be construed as endorsing plain feel. Since the officers saw the weapon, it was sight, and not touch, which justified the seizure.[340] "If, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, *as here*, discover contraband", then the officer should not be required to overlook the item.[341] The *Long* Court's comment specifically applies to situations akin to *Long*. By using the phrase "as here," the Court states that the discovery of the contraband must comport with *Terry*. That is, for any seizure to properly fall within the *Terry* regime, it must be initially justified by a legitimate *Terry*-frisk, and it may not be based on an additional intrusion.[342] The confiscation must be reasonable: the seizure must be based on concern for the officer's safety and may not degenerate into a general search for contraband.[343]

Moreover, the Court's statement in *Long* takes into account the seizure location. The officers in *Long* conducted their valid *Terry*-search in "the interior of the automobile."[344] Assuming, *arguendo*, that *Long* validates a plain feel exception to the Warrant Clause, the case should not be read so broadly as to incorporate plain feel searches of individuals within its scope. An individual cannot expect courts to give effect to his subjective privacy interest in an item he places within the "plain view" of others,[345] but where the person has made an effort to secret an item from public view, that privacy interest remains valid.[346]

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339. 3 LAFAVE, *supra* note 30, § 9.4(b).

> If during a lawful pat-down an officer feels an object which obviously is not a weapon, further "patting" of it is not permissible. . . . Moreover, once the pat-down has determined that the suspect is not armed, the police may not without probable cause once again search the suspect and confiscate the contents of his pockets.

Id.

340. *Long*, 463 U.S. at 1036.

341. *Id.* at 1050 (emphasis added).

342. *See supra* notes 296-312 and accompanying text for a discussion of passive versus active sensory perception.

343. Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979). See *supra* notes 80-83 and accompanying text for a discussion of the permissible scope of a *Terry*-frisk.

344. *Long*, 463 U.S. at 1050.

345. *C.f.* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

346. *See* Sibron v. New York, 392 U.S. 40, 65-66 (1968) (Fourth Amendment does not allow officer to seize contraband from a detainee's pocket when frisk reveals no weapons); *see also* Arizona v. Hicks, 480 U.S. 321, 324-25 (1987) (recordation of exposed serial numbers not violative of privacy expectations, but moving stereo components to read more serial numbers is a violation). *Cf.* Robbins v. California, 453 U.S. 420, 431 (1981) (Powell, J., concurring), *overruled by* United States v. Ross, 456 U.S. 798 (1982). "Immediately preceding [an] arrest, the passengers have complete control over the entire interior of the automobile, and can place weapons or contraband into pockets or other containers as the officer approaches." *Id.*

Thus, while an officer may see weapons in a car and use that as a valid rationale for a *Terry*-search, it is too great a leap to suggest that such a position stands for an officer's right, while frisking a person, to tactilely manipulate an object known not to be a weapon, until the officer concludes that it is, or is not, contraband.[347]

Terry cannot support plain feel as envisioned in the *Dickerson* dissent. Granted, *Terry* itself stands for a limited plain feel exception.[348] But to use *Terry* to initially legitimize a stop, then to rationalize a category of searches that violate the very purpose of its holding, is to employ *Terry* as a Gestalt. If the courts choose to adopt a plain feel extension, they must fashion an independent justification — *Terry* will not suffice.

D. *Other Considerations*

The *Dickerson* dissent's analysis raises two other considerations pertinent to the plain feel doctrine. These considerations include: (1) the dissent's treatment of *State v. Ludtke*;[349] and (2) the inherent opportunity for the alteration of an officer's testimony at suppression hearings to meet the plain feel standard, as shown in *State v. Washington*.[350]

1. State v. Ludtke

Justice Coyne relied on *Ludtke* to establish plain feel. She cited *Ludtke* as the state's leading plain feel case[351] and viewed its underlying facts as exemplifying "conduct similar to that of Officer Rose."[352] As the *Dickerson* majority reasoned, however, the dissent's employment of *Ludtke* is misguided.[353] Although the *Ludtke* court did not specify why it validated the search,[354] the better argument is that *Ludtke* involved a search incident to a lawful arrest.[355]

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347. Commonwealth v. Marconi, 597 A.2d 616, 623 n.17 (Pa. Super. Ct. 1991), *appeal denied*, 611 A.2d 711 (Pa. 1992). "[W]hen an individual feels an object through a pants pocket . . . the sense of touch is not . . . definitive. The structure and shape of a small packet is not unique so as to preclude other options as to what that item might be." *Id.* It is worth noting that officers recovered 1.08 grams of rock methamphetamine in *Marconi*, *Id.* at 618, more than five times the weight of the rock cocaine seized in *Dickerson*. State v. Dickerson, 481 N.W.2d 840, 843 (Minn.) (.20 grams), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

348. Terry v. Ohio, 392 U.S. 1, 29 (weapons only).

349. 306 N.W.2d 111 (Minn. 1981).

350. 396 N.W.2d 156 (Wis. 1986).

351. *Dickerson*, 481 N.W.2d at 850 (Coyne, J., dissenting).

352. *Id.* (Coyne, J., dissenting).

353. *See id.* at 846.

354. *Id.* at 846.

355. *Id.*

In *Ludtke*, the defendant was a passenger in a vehicle that a police officer stopped for speeding.[356] As the officer asked Ludtke some questions, Ludtke moved in such a way that the officer could see a plastic bag of marijuana in the defendant's shirt pocket.[357] The officer seized the marijuana and ordered Ludtke out of the vehicle. The officer frisked Ludtke and felt and seized a knife and another plastic bag, which contained eleven grams of cocaine.[358]

The Minnesota Supreme Court upheld the search.[359] The panel stated it was not necessary to reach the issue of whether probable cause justified the search, because it "was clearly justifiable as a limited protective weapons search . . . ."[360] Thus, it is not clear from the *Ludtke* holding whether probable cause existed at the time of the frisk.

The *Dickerson* majority noted that the *Ludtke* court did not elaborate on its rationale to support its finding that, once the officer saw the marijuana, he "was justified in seizing the larger bag."[361] The court concluded, however, that to constitute a reasonable search under *Katz*,[362] the search in *Ludtke* must have qualified as an exception to the warrant requirement.[363] Two such exceptions were possible in *Ludtke*: "(1) [a] protective weapons frisk . . . and (2) a search incident to arrest."[364] Since the officer previously saw the bag of marijuana in Ludtke's pocket, Justice Tomljanovich concluded the "best explanation" for *Ludtke* was not plain feel, but a search incident to a valid arrest.[365]

Although Ludtke's arrest followed the search, this would not necessarily preclude a valid search incident. Generally, an arrest must precede a search incident,[366] but an exception lies in those cases where probable cause exists but the officer has not yet made an arrest.[367] In

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356. *Ludtke*, 306 N.W.2d at 112.

357. *Id.*

358. *Id.* As the *Dickerson* court noted, this quantity of cocaine was "55 times the amount at issue in [Dickerson]." *Dickerson*, 481 N.W.2d at 845.

359. *Ludtke*, 306 N.W.2d at 113.

360. *Id.*

361. *Dickerson*, 481 N.W.2d at 845.

362. Katz v. United States, 389 U.S. 347 (1967).

363. *Dickerson*, 481 N.W.2d at 845.

364. *Id.*

365. *Id.* at 846.

366. *See* Chimel v. California, 395 U.S. 752, 763 (1969) (when an arrest is made, an officer may search for weapons or destructible evidence within area within the arrestee's "immediate control"); Sibron v. New York, 392 U.S. 40, 63 (1968) (a search incident cannot precede nor justify an arrest).

367. Cupp v. Murphy, 412 U.S. 291, 295-96 (1973). Murphy voluntarily submitted to police questioning about his wife's murder (for which he was subsequently convicted). *Id.* at 292. During the pre-arrest interrogation, over Murphy's objections and "without a warrant," officers took fingernail scrapings for analysis which were later admitted as evidence at trial. *Id.*

Ludtke, as in *Cupp v. Murphy*,[368] plain view raised the officer's suspicions to the level of probable cause: the bag of marijuana in *Ludtke*;[369] the blood-spotted fingernail in *Cupp*.[370] Further, the officer's frisk of Ludtke produced a knife, which alone would create probable cause to arrest.[371] Either way, probable cause gave the officer the power to conduct a search incident.

The *Ludtke* court's interpretation of another Minnesota case sustains the search incident position. Ludtke relied on *State v. Martin*,[372] in which the Minnesota Supreme Court upheld the suppression[373] of contraband recovered from the defendant during a search incident based on an arrest for possession of a "small amount" of marijuana.[374] The *Martin* court ruled there could be no warrantless search incident because the officer did not make a custodial arrest,[375] nor could he make such an arrest under the Minnesota Rules of Criminal Procedure.[376] But the *Ludtke* court emphasized that the *Martin* Court, "cautiously noted that the state made no claim that the police had probable cause to believe defendant had drugs on his person when the police searched him . . . ."[377] This situation is distinguishable from the facts in *Ludtke*, where the officer spotted and seized the marijuana prior to the search.[378] Therefore, the court distinguished *Ludtke* from *Martin* and implicitly laid the foundation to support a search incident.

The Court upheld the search under the principles of *Chimel*. *Id.* at 295. Justice Stewart noted that Murphy was not under arrest at the time of the search and "did not have the full warning of official suspicion that a formal arrest provides . . . ." *Id.* at 296. The Court said, however, that Murphy possessed sufficient awareness of the authorities' suspicion to "motivate him to destroy . . . evidence . . . ." *Id.* Therefore, the Court reasoned that something less than a "full *Chimel* search" could ensue. *Id.*

368. 412 U.S. 291 (1973).

369. *Dickerson*, 481 N.W.2d at 846.

370. *Cupp*, 412 U.S. at 292.

371. The Minnesota Code proscribes the "possess[ion] [of] . . . dangerous article[s] or substance[s] for the purpose of being used unlawfully as a weapon against another[.]" MINN. STAT. ANN. § 609.66 subd. 1(5) (West Supp. 1993).

372. 253 N.W.2d 404 (Minn. 1977).

373. *Id.* at 405.

374. *Id.*

375. *Id.* at 406.

376. *Id.* Rule 6.01 of the Minnesota Rules of Criminal Procedure mandates that, generally, officers must issue a citation to "persons subject to a lawful arrest for misdemeanors . . . ." MINN. R. CRIM. P. 6.01 subd. 1 (1)(a) (West Supp. 1993). The officer arrested Martin for possession of marijuana which is a misdemeanor under the Minnesota Code. *Martin*, 253 N.W.2d at 405; MINN. STAT. ANN. § 152.15 subd. 2(5) (West 1989). This section was repealed in 1987 and replaced with § 152.027, subdivision 4(a), which maintained the offense's petty misdemeanor status. *Id.* § 152.027 subd. 4(a) (West Supp. 1993).

377. State v. Ludtke, 306 N.W.2d 111, 113 (Minn. 1981).

378. *Id.*

2. Alteration of Suppression Hearing Testimony

One of the inherent problems with the current plain feel standard is the potential for the fashioning of testimony to make otherwise invalid seizures comply with a more traditional standard. This capacity for abuse is demonstrated in one case relied upon by the *Dickerson* dissent: *State v. Washington*.[379]

In *Washington*, the defendant was a passenger in a car stopped by a Milwaukee police officer on suspicion that the occupants had burglarized a jewelry store.[380] The officer ordered Washington from the car and performed a *Terry*-frisk for weapons.[381] During the search, the officer discovered three watches on the defendant.[382] Where and how the officer found the watches became the subject of two suppression hearings.[383]

At the first hearing, the officer testified that he "felt [the] three watches on the defendant's person," then arrested Washington.[384] Upon review,[385] however, the Wisconsin Supreme Court "found the testimony relating to the actual seizure ambiguous"[386] and remanded to the trial court for a second suppression hearing.[387] A different judge conducted the reopened hearing.[388]

The officer's testimony at the second hearing was markedly different from what he provided at the first proceeding. This time, the officer testified that he saw a watch on each of Washington's wrists,[389] arrested him, then recovered the third watch from his jacket pocket in a subsequent search incident.[390]

The defendant did not testify about the location of the watches until the second hearing.[391] Washington testified that he wore three

379. 396 N.W.2d 156 (Wis. 1986). The *Dickerson* dissent cited *Washington* as "holding that [the] plain view rule is not limited to seizure of items discovered in plain view but also includes items discovered through the use of other senses, including touch . . . ." State v. Dickerson, 481 N.W.2d 840, 851 (Minn.) (Coyne, J., dissenting), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

380. *Washington*, 396 N.W.2d at 157-58.

381. *Id.* at 158.

382. *Id.*

383. *Id.* at 158-59.

384. *Id.* at 159.

385. *See id.* at 158.

386. *Id.* at 158.

387. *Id.* at 158-59.

388. Judge Laurence G. Gram, Jr., conducted the second hearing. *Id.* at 159. Judge William Haese conducted the first hearing, but because of rotation schedules, was unable to hold the reopened hearing. *Id.*

389. *Id.* at 159.

390. *Id.*

391. *See id.*

watches on his wrists or forearms, but that the officers did not discover the watches until he was handcuffed.[392] Then the officers arrested him.[393] Under cross-examination, Washington stated he wore two stolen watches.[394]

Initially, Judge Gram granted defendant's motion to suppress the watches.[395] He cited the change in the officer's statements between the two hearings.[396] Later, the judge modified the suppression order to cover just the watch discovered in Washington's pocket.[397] The Wisconsin Supreme Court viewed Judge Gram's modified order as giving effect to the officer's testimony at the first hearing before Judge Haese, rather than at the reopened proceedings held in his presence.[398]

In reality, it appears that Judge Gram applied the officer's testimony from both hearings. If the court exclusively applied the officer's statements at the first hearing,[399] then the court should have admitted all of the watches under the plain feel doctrine, or it should have suppressed all of the watches because the scope of the search exceeded that prescribed by *Terry*.[400] If the court applied only the officer's second hearing testimony,[401] then the court should have admitted all three watches: the two on Washington's wrist under the plain view doctrine, and the one in the defendant's pocket under a search incident to a valid arrest.[402]

The Wisconsin Supreme Court reversed the modified order and sustained the admission of all the watches.[403] The majority stated that, applying either of the officer's two accounts, the outcome would be the same.[404] This was an ironic twist, since the court itself ordered the sec-

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392. *Id.*
393. *Id.*
394. *Id.*
395. *Id.* at 160.
396. *Id.*
397. Judge Gram's modified order that he would admit the watches on Washington's wrist " 'because that they can just see' " illustrates the confusion in this case. *Id.*
398. *Id.* at 160 n.4. Judge Gram stated:

> That's what [the officer] said this time [that he felt the watches in the defendant's pocket during a search incident]. I agree but that's not what he said the first time and in effect what I'm holding the officer to is the testimony the first time that said it was a search during temporary questioning.

Id. Also, Judge Gram stated: "I think that I have to give greater credibility to the testimony given the first time around than the second time around." *Id.*
399. The officer testified that he conducted a *Terry*-frisk and felt the watches "on the defendant's person." *Id.* at 159.
400. *See id.* at 166 (Abrahamson, J., dissenting).
401. The officer testified that he saw that the "defendant had a watch on each wrist." *Id.* at 159.
402. *See id.* at 163.
403. *Id.* at 163.
404. *Id.*

ond suppression hearing after it determined that the "officer's testimony at the first hearing was inadequate to support the admissibility of the evidence seized . . . ."[405] The court attempted to make a strong case for plain feel,[406] but to do so it accepted the officer's testimony from the first hearing which was in direct contradiction of the Court's remand order.[407]

Not only is *Washington* "replete with confusion,"[408] it also shows the hazard of altered testimony inherent in plain feel.[409] While the Wisconsin Supreme Court ultimately upheld the seizure,[410] it is apparent from the changed statements by the officer that he tried to conform his version of the search to the more traditional plain view and search incident standards and away from what might have been a tenuous plain feel scenario.[411] The case also exemplifies the willingness of the court to read more into an officer's testimony than what is there. The officer testified at the first hearing that when he frisked the defendant he " 'felt several objects' which . . . *felt like* three watches."[412] Later, the court said the officer testified to having "*specifically felt* three watches"[413] on Washington. Still later, the court claimed the officer was justified in reaching into Washington's pocket because "[the officer] *already knew* there were watches there."[414] Arguably, the Wisconsin Supreme Court progressed from reasonable suspicion,[415] to probable cause,[416] to reasonable certainty[417] on the same set of facts. Whether the problem is a witness' manipulation of testimony, or a court's selection of whatever quantum of evidence is expedient at the

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405. *Id.* at 164 (Abrahamson, J., dissenting).

406. *Id.* at 161.

407. *Id.* at 166 (Abrahamson, J., dissenting). The remand order not only found the testimony "ambiguous," it also noted that "a decision regarding the legality of the seizure of the watches and therefore the legality of the arrest cannot be reached fairly on the basis of the present record . . . ." *Id.* (Abrahamson, J., dissenting).

408. *Id.* at 164 (Ceci, J., concurring).

409. *See id.* at 166 (Abrahamson, J., dissenting).

> The majority might be able to rely on its pat-and-feel plain-view-by-touch test if additional evidence had been presented at the second hearing to supplement that given at the first hearing. The officer's testimony of the second hearing, however, adds nothing to indicate that he discovered any of the watches by sense of feel.

Id. (Abrahamson, J., dissenting).

410. *Id.* at 163.

411. *See supra* notes 383-89 and accompanying text.

412. *Washington*, 396 N.W.2d at 158 (emphasis added).

413. *Id.* at 159 (emphasis added).

414. *Id.* at 162 (emphasis added).

415. *See* Terry v. Ohio, 392 U.S. 1, 21-22 (1968).

416. *See* Illinois v. Gates, 462 U.S. 213, 245 n.13 (1983) (a finding of probable cause requires "probability or substantial chance of criminal activity").

417. *See* United States v. Williams, 822 F.2d 1174, 1184-85 (D.C. Cir. 1987); *see also supra* note 133.

moment, it is apparent that plain feel as applied by some courts is founded on a less than firm foundation.

E. *Alternatives*

A change should be made in the approach to the plain feel doctrine. Any adaptation of the plain view doctrine must be reasonable.[418] The exception must uphold both society's objective interest in preventing crime and the individual's subjective expectation of privacy.[419] Therefore, the doctrine must be rigid enough to guard against police excesses, yet flexible enough so as not to require police to look the other way in the presence of criminal activity.

In situations similar to the one the police faced in *Dickerson*, an officer encounters five options. Once the officer performs a *Terry*-frisk and the search convinces him that the detainee is not carrying a weapon, but during the frisk feels something suspicious, the officer's decision whether to conduct a search beyond a protective weapons frisk hinges on which of these alternatives he applies. These alternatives include: (1) obtaining the detainee's consent to expand the search for contraband; (2) ignoring the suspicious item and continuing with questioning; (3) seizing the item immediately; (4) detaining the individual until a drug-sniffing dog or device is obtained; or (5) acquiring a search warrant by radio or telephone.[420] For an application of these options to the facts in *Dickerson*, this section joins the scenario at the point where Officer Rose completed his protective weapons frisk of Dickerson, but before he began to tactilely manipulate the "small lump"[421] in the defendant's jacket pocket.

1. Consent

Consent is the least problematic and the least likely option.[422] If Dickerson consented to the expanded search for contraband, the search would have been presumptively valid.[423] Since an individual's subjective privacy interest balances one side of the reasonableness scale, consent

418. *C.f.* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see also* Holtz, *supra* note 113, at 529 (plain feel emerged as corollary to plain feel doctrine).

419. *See Terry*, 392 U.S. at 23.

420. The final two alternatives raise questions regarding the permissible duration of a *Terry*-stop. *See infra* notes 484-492.

421. State v. Dickerson, 481 N.W.2d 840, 843 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

422. This alternative assumes a situation where a detainee cooperates with police in the search his person - not a likely scenario. In Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973) (plurality opinion), the United States Supreme Court stated there is a presumption against consent; the state carries the burden of proving voluntary consent.

423. *Schneckloth*, 412 U.S. at 222; Katz v. United States, 389 U.S. 347, 358 n.22 (1967); Zap v. United States, 328 U.S. 624, 628 (1946), *vacated*, 330 U.S. 800 (1947).

tips the scale toward the police because the individual can have no privacy expectation in those items which he voluntarily exposes.[424] From a positive perspective, the Court stated that society has a valid interest in promoting consent because evidence may be found which would exonerate an innocent party.[425] While the defendant may later raise questions regarding the voluntary nature of the consent,[426] once the voluntariness of the search is established, "there is nothing constitutionally suspect" about the search.[427]

2. Further Questioning

If the officer's frisk of the detainee produces no weapon, the officer may still question the individual.[428] The detainee's answers[429] to these questions may give rise to probable cause;[430] however, the detainee is not required to answer, nor may the officer compel an answer.[431] Under *Terry's* reasonableness analysis,[432] this is a proper balancing of interests.

Two potential problems[433] confront officers should they decide to continue questioning following a fruitless search: scope of the questioning[434] and duration of the stop.[435] Although it is clear that additional

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424. *See Katz*, 389 U.S. at 351, 358 n.22; Richard C. Turkington, *Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy*, 10 N. ILL. U. L. REV. 479, 489 (1990) (stating consent is a defense to invasion of privacy).

425. *Schneckloth*, 412 U.S. at 243.

426. *Id.* at 222. To overcome a challenge to the validity of the defendant's consent, the prosecution must prove voluntary consent, but need not show that the defendant knew he had a right to refuse consent before granting it. *Id.* at 248-49.

427. *Id.* at 243.

428. Berkemer v. McCarty, 468 U.S. 420, 439 (1984); Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring); *see also* Adams v. Williams, 407 U.S. 143, 145-46 (1972) ("good police work" may require further questioning).

429. Any or all of the detainee's responses may later be admitted in evidence against him. A defendant's statements, made within the "nonthreatening" confines of a pre-custodial investigative detention, are not covered by the testimonial privilege of Miranda v. Arizona, 384 U.S. 436 (1966). *Berkemer*, 486 U.S. at 439-40.

430. *See Berkemer*, 468 U.S. at 439-40. "[T]he officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. . . . [The] detainee's answers [may] provide the officer with probable cause to arrest him . . . ." *Id; see also Terry*, 392 U.S. at 34 (White, J., concurring) (further questioning may "alert the officer to the need for continued observation").

431. *Berkemer*, 468 U.S. at 439-40; *Terry*, 392 U.S. at 34 (White, J., concurring). If the officer's questioning does not produce probable cause, the detainee must be released. *Berkemer*, 468 U.S. at 439-40.

432. *See supra* notes 64-70 and accompanying text.

433. Again, as in the consent situation, *see supra* note 421, this option assumes that the detainee is willing to cooperate with the police.

434. *See Terry*, 392 U.S. at 17-18. "[A] search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Id.*

435. For a discussion of the acceptable length of a *Terry*-stop, see *infra* notes 484-92.

questioning is not the only investigatory means available to police in a *Terry*-stop,[436] once the detainee allays the officer's initial suspicions, the detention must cease.[437]

3. Immediate Seizure

The third option involves the essence of the plain feel exception.[438] As the State of Minnesota argued, and the *Dickerson* dissent[439] espoused, the officer may immediately seize the item when the officer knows it is not a weapon,[440] yet is " 'absolutely sure' "[441] that the item

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436. *See* 3 LAFAVE, *supra* note 30, § 9.2(f).

> [T]he officer may also or instead conduct a nonsearch examination of the suspect's person, car, or objects he is carrying. . . . Sometimes the officer will communicate with others, either police or private citizens, in an effort to verify the explanation tendered or to confirm the identification or determine whether a person of that identity is otherwise wanted. Or, the suspect may be detained while it is determined if in fact an offense has occurred in the area, a process which might involve checking certain premises, or vehicles, locating and examining objects abandoned by the suspect or otherwise lawfully discovered, or talking with other people. If it is known that an offense has occurred in the area, the suspect may be viewed by witnesses to the crime. There is no reason to conclude that any investigative methods of the type just listed are inherently objectionable; they might cast doubt upon the reasonableness of the detention, however, if their use makes the period of detention unduly long.

Id. (footnotes omitted).

437. *See e.g.*, United States v. Thomas, 863 F.2d 622, 629 (9th Cir. 1988) (after his initial questioning lessened suspicion an officer's further questioning regarding weapons possession was unjustified); United States v. Doe, 801 F. Supp. 1562, 1580 (E.D. Tex. 1992) (traffic stop for a minor infraction is insufficient to detain defendant so officer could await warrant report); Coleman v. United States, 337 A.2d 767, 771 (D.C. 1975) (production of identification was insufficient to warrant further questioning); Madison v. State, 357 N.E.2d 911, 913 (Ind. Ct. App. 1976) (once officers determined that car occupants were safe, the officers' initial concern for the occupants' well-being was satisfied and no further questioning was justified); Commonwealth v. Ferrara, 381 N.E.2d 141, 144 (Mass. 1978) (production of valid license and registration left officers with "no basis for further interrogation"); People v. Carrasquillo, 429 N.E.2d 775, 779-80 (N.Y. 1981) (once defendant provided a plausible explanation for items in his bag, police could not possess probable cause for arrest); State v. Chatton, 463 N.E.2d 1237, 1240 (Ohio) (where officer initially suspected improperly registered car based on temporary tags, no further questioning permitted), *cert. denied*, 469 U.S. 856 (1984); State v. Kennedy, 726 P.2d 445, 454 (Wash. 1986) (*Terry*-stop "never envisioned to be a fishing expedition for evidence"); *see also* HALL, *supra* note 49, § 15:20 (courts may construe prolonged questioning as an arrest); RINGEL, *supra* note 83, § 13.5(b) ("exploratory" questioning is unreasonable under *Terry*).

438. For a discussion of the elements of the plain feel doctrine, see *supra* notes 113-33 and accompanying text.

439. State v. Dickerson, 481 N.W.2d 840, 851 (Minn.) (Coyne, J., dissenting), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

440. State v. Dickerson, 469 N.W.2d 462, 464 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

441. *Dickerson*, 481 N.W.2d at 849 (Coyne, J., dissenting). *But see supra* notes 286-87 and accompanying text ("immediately apparent" criterion weakened by necessity of tactile manipulation).

is contraband.[442] This approach presents a distinct pair of problems.

First, *Terry v. Ohio*[443] will not support this methodology. The clear purpose of a *Terry*-frisk is to locate weapons — not to locate or prevent the destruction of evidence.[444] To construct a plain feel exception on a *Terry* foundation[445] would signal a major departure from the *Terry* rationale[446] and, thus, from reasonableness as the basis for all warrant exceptions.[447] Second, the majority of plain feel cases pertain to vehicle or container searches — not to personal searches as in *Dickerson*.[448]

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442. Although this approach seems to mirror the elements of the plain view doctrine, *see supra* notes 97-112 and accompanying text, the plain view doctrine will not sustain a plain feel extension. *See* United States v. Williams, 822 F.2d 1174, 1184-85 (D.C. Cir. 1987) (stricter "reasonable certainty" standard is required for plain feel rather than "immediately apparent" standard for plain view); *supra* text accompanying notes 256-60 and 273-95.

443. 392 U.S. 1 (1968).

444. *Id.* at 25-26, 29.

445. *See* Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979).

446. *See supra* text accompanying note 347.

447. *See* Terry, 392 U.S. at 21-22; Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see, e.g.*, cases cited *supra* note 27.

448. *See supra* note 75. For a discussion of zones of privacy, see *supra* notes 343-46 and accompanying text.

Several of the courts adopting plain feel for personal searches did so primarily based on cases clearly distinguishable from *Dickerson*. In United States v. Salazar, 945 F.2d 47 (2nd Cir. 1991), *cert. denied*, 112 S. Ct. 1975 (interim ed. 1992), the court of appeals upheld an officer's *Terry*-frisk that led to the discovery of contraband. *Id.* at 51. The detainee wore a heavy coat, and the tactile pressure required to conduct an effective weapons frisk of the defendant's pockets produced the audible "crackling" of plastic vials containing cocaine. *Id.* at 48. This search is distinguishable from the frisk in *Dickerson*, where the officer rolled and squeezed the crack cocaine between his fingers through a thin nylon jacket. State v. Dickerson, 481 N.W.2d 840, 843 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992). Arguably, *Salazar* could be considered a "plain hearing" case, for when the officer heard the "crackling" plastic, he gained probable cause to seize the item. *Salazar*, 945 F.2d at 51. Such an analysis appears to run counter to the active-passive sensory perception evaluation, *see supra* notes 296-312 and accompanying text, but the defendant encased the cocaine in containers that the officer passively heard while conducting a valid *Terry*-frisk. The defendant could not maintain a subjective privacy interest in the *noise* produced by the containers in the midst of a legitimate *Terry*-frisk. *Cf.* Horton v. California, 496 U.S. 128, 133 (1990) (individual loses privacy interest when he leaves item in plain view).

The Eighth Circuit Court of Appeals approved the plain feel doctrine in United States v. Buchannon, 878 F.2d 1065 (8th Cir. 1989). The officer frisked the defendant, and felt a "hard object" in Buchannon's pocket. *Id.* at 1066. The officer reached into the pocket to seize the object (a compact disc) and also removed two bags of cocaine from the same pocket. *Id.* While the court did not explicitly address the officer's thoughts upon feeling the "hard object," the court did say the officer undertook the frisk as a "usual safety precaution." *Id.* Under a proper application of *Terry*, the officer must be concerned for his safety when he initiates the frisk. *See* Terry v. Ohio, 392 U.S. 1, 23 (1968). If the officer's frisk convinces him there is no weapon, then the frisk must cease. *See* Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979). The correct view, then, is that when an officer remains unsure whether the item was a weapon, then he may proceed to allay his concerns. People v. Allen, 123 Cal. Rptr. 80, 83 (Cal. Ct. App. 1975); *see* 3 LAFAVE, *supra* note 30, § 9.4(c).

Therefore, if the courts desire to justify an additional intrusion following a legitimate *Terry*-frisk, *Terry* is an insufficient basis for such an encroachment.[449] Further, whatever the foundation, the nature of the intrusion must comport with the reasonableness balancing requirement.[450] Because of its inherent intrusiveness and lack of reliability,[451] plain feel fails as a justifiable exception to the warrant requirement. This premise is the basis for the following two scenarios.

4. "Canine Sniff"

In terms of the mere intrusiveness of a search, this alternative is the most favorable.[452] The best option open to the officer is one which does not implicate a search.[453] A "canine sniff" is not a search.[454]

In *United States v. Place*,[455] the United States Supreme Court invalidated a "canine sniff" of the respondent's luggage at Kennedy Airport.[456] While the Court did not approve the search based on the length of detention involved,[457] it nevertheless determined that a "canine

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In United States v. Pace, 709 F. Supp. 948 (C.D. Ca. 1989), *aff'd*, 893 F.2d 1103 (9th Cir. 1990), the court upheld an officer's search of the defendant's undergarment. *Id.* at 955. It is important to note that consent, rather than *Terry*, formed the basis for the initial stop. *Id.* at 951. When the court held that plain feel justified the search, the panel did not include *Terry* in its rationale. In addition, *Pace* diverges from *Dickerson* in that the officer did not attempt to manipulate the cocaine "bricks" discovered taped to the defendant's back, but rather the officer "immediately identified" the cocaine from its distinctive size and shape. *Id.*

449. For a discussion of the limitations to a *Terry*-frisk, see *supra* notes 84-96 and accompanying text.

450. *See Terry*, 392 U.S. at 8-9, 23.

451. *See supra* notes 251-312 and accompanying text for a discussion of the inherent unreliability and intrusiveness of the sense of touch.

452. Both the "canine sniff" and telephone warrant options raise questions regarding the proper length of a warrantless detention. *See infra* notes 484-92 and accompanying text.

453. The least intrusive search technique is preferred since it is likely not to exceed the initial justification for the search. *See* United States v. Chadwick, 433 U.S. 1, 13 & n.8 (1977) (court invalidated warrantless search of footlocker when officers could have taken less intrusive means of impoundment and secured a warrant); United States v. Johnson, 862 F.2d 1135, 1140 (5th Cir. 1988) (officers may choose between two search techniques when neither option presents a greater intrusion), *cert. denied sub nom.* Banner v. United States, 492 U.S. 909, *and cert. denied*, 492 U.S. 909 (1989); Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1318 (7th Cir. 1988) (to justify search, government interests must be weighty and not satisfied by "less intrusive means of detection"). *See supra* notes 80-83 and accompanying text for a discussion of the permissible scope of a *Terry* search.

454. United States v. Place, 462 U.S. 696, 707 (1983).

455. 462 U.S. 696 (1983)

456. *Id.* at 698. Place arrived at La Guardia Airport where two DEA agents confronted him. *Id.* After Place declined to consent to a luggage search, the agents seized the defendant's luggage and transported it to Kennedy Airport for the "canine sniff." *Id.* at 699. The duration from seizure to sniff was about 90 minutes. *Id.*

457. *Id.* at 709-10. "Thus, although we decline to adopt any outside time limitation for a permissible *Terry* stop, we have never approved a seizure of the person for the prolonged 90-minute period involved here . . . ." *Id.*

sniff" is not a search.[458] Since the procedure falls outside of the Fourth Amendment, the "canine sniff" is an appropriate, minimally-intrusive, and reasonable option for officers faced with a *Dickerson*-like situation.[459]

Akin to the "canine sniff" is the use of drug-sniffing devices. These tools "greatly enhance the senses of the individual officer."[460] As a practical matter, these types of devices allow an officer to "see" in the dark, detect movement through seismic vibration, or to "smell" minute quantities of contraband.[461]

Early this century, the United States Supreme Court ruled that the use of a sense-enhancing device would not corrupt an otherwise valid search and seizure.[462] In *United States v. Lee*,[463] the Court upheld

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458. *Id.* at 707.

> A "canine sniff" by a well-trained narcotics detection dog . . . does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
>
> In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here - exposure of respondent's luggage, which was located in a public place, to a trained canine - did not constitute a "search" within the meaning of the Fourth Amendment.

Id. See, e.g., United States v. Jacobsen, 466 U.S. 109, 123 (1984) (*Place* dicta regarding dog sniffs "dictated" decision that dog sniff in *Jacobsen* was not a search).

459. While the Court held that a "canine sniff" of *luggage* is not a search, *Place*, 462 U.S. at 707, the Court has not determined whether a "canine sniff" of a *person* is a search. United States v. Turpin, 920 F.2d 1377, 1385 (8th Cir. 1990), *cert. denied sub nom.* Williams v. United States, 111 S. Ct. 1428 (interim ed. 1991). *But see Jacobsen*, 466 U.S. at 138 (Brennan, J., dissenting) (Court's dog sniff analysis could lead to indiscriminate dog or device sniffs of individuals); *Place*, 462 U.S. at 720 (Brennan, J., dissenting) (dog sniffs are searches). *Accord* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 479 (5th Cir. 1982) (pre-*Place* decision that dog sniff of student was a search), *cert. denied*, 463 U.S. 1207 (1983).

Where dog sniffs of individuals are involved, the dog's sense of smell is passively activated by the "molecules of contraband emanating" from the detainee's person. United States v. Beale, 674 F.2d 1327, 1333 (9th Cir. 1982), *cert. granted and judgment vacated*, 463 U.S. 1202 (1983); *see* supra notes 296-312 and accompanying text for a discussion of passive versus active sensory perception. Especially where the dog is restrained from touching the detainee, the individual may maintain no subjective privacy interest in a smell. *See* United States v. Lueck, 678 F.2d 895, 903 (11th Cir. 1982); *see supra* note 305.

460. HALL, *supra* note 49, § 9:9.

461. HALL, *supra* note 49, § 9:9.

462. United States v. Lee, 274 U.S. 559, 563 (1927).

463. 274 U.S. 559 (1927).

the Coast Guard's use of a searchlight to discover cases of illegal liquor on the deck of another boat.[464] Other courts have echoed the *Lee* rationale.[465] Thus, just as a "canine sniff" presents no additional intrusion,[466] neither does a "device sniff."[467]

5. Radio or Telephone Warrant

Since *Terry* will not support an expanded search once an officer determines the detainee does not possess a weapon,[468] on those occasions when an officer feels something he or she knows to be contraband[469] and probable cause is raised,[470] an independent basis for a

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464. *Id.* at 563. The Court stated: "Such use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution." *Id; see also* United States v. Knotts, 460 U.S. 276, 282 (1983) ("Nothing in the Fourth Amendment prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afford[s] them . . . ."); Texas v. Brown, 460 U.S. 730, 740 (1983) (officer's use of flashlight to illuminate car's interior permitted).

465. *See* United States v. Ward, 703 F.2d 1058, 1061 (8th Cir. 1983) (defendant could have no reasonable expectation of privacy while standing outside even though officer spotted him through use of a "nightscope"); United States v. Brock, 667 F.2d 1311, 1321-22 (9th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983):

> It is true that the sense of sight does not allow one to see through walls, and that the beeper's sense enhancement constitutes a dramatic increase in one's surveillance capabilities. But, so also does a dog's sense of smell enhance one's senses. Yet the use of dogs is not treated as a search.

Id.

Courts have generally found the extent of the device's function dispositive — whether the instrument merely enhances an officer's senses (nightscope or flashlight), or produces information not discoverable by the officer's senses (ultraviolet or laser detectors). *See* HALL, *supra* note 49, § 9:9.

> In most cases, [courts] have used a simple rule of thumb: what would be observable through the use of the officer's unaided senses is not put out of reach because the officer used a sense-enhancing device. Thus, observation of the defendant outside his residence through a nightscope is valid because it did not reveal anything more than what a properly positioned bystander could have seen.

Id.

466. For a discussion of the Fourth Amendment implications of a "canine sniff," see *supra* notes 451-58 and accompanying text.

467. *See Ward*, 703 F.2d at 1061-62; *Brock*, 667 F.2d at 1321-22. One restriction facing some law enforcement agencies is the cost of drug-sniffing devices. The price for a detector which provides nearly-immediate, on-scene results (allowing officers to forego the typical off-scene laboratory analysis and, thus, reducing the length of detention), is in the $125,000 range. Telephone Interview with James Buckley, Director of Sales, Thermedics, Inc. (Dec. 30, 1992).

468. *See* Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979).

469. *See* United States v. Pace, 709 F. Supp. 948 (C.D. Cal. 1989), *aff'd*, 893 F.2d 1103 (9th Cir. 1990). Note that such a situation would not involve the officer's manipulation of the suspected contraband, as in *Dickerson*. State v. Dickerson, 481 N.W.2d 840, 843 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

470. For purposes of this scenario, it is assumed that the law enforcement officer does not have access to a drug-sniffing dog or device, or cannot acquire access to one within a reasonable period of time. *See* United States v. Place, 462 U.S. 696, 709 (1983) (brevity of detention is an "important factor" in determining if stop was reasonable).

seizure is required.[471] Because an immediate seizure would be unreasonable,[472] the officer should be permitted to obtain a search warrant[473] through use of radio or telephonic communications.[474]

The federal courts already permit officers to obtain radio or telephone warrants.[475] Federal magistrates may issue warrants by telephone "or other appropriate means" based on sworn testimony, when it is "reasonable" to do so.[476] The officer must prepare a "duplicate original warrant" and read it, verbatim and under oath to the magistrate.[477] The magistrate must record the officer's statement, either on tape or by a written account.[478] If the magistrate is satisfied that probable cause exists, the magistrate may issue the warrant.[479] Several states have enacted similar statutory or procedural provisions.[480]

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471. This situation does not qualify for a valid search incident seizure because a search incident may not precede an arrest. Sibron v. New York, 392 U.S. 40, 63 (1968). The scenario is also distinguishable from a limited search incident prior to a valid arrest established by the Court in Cupp v. Murphy, 412 U.S. 291 (1973). In *Cupp*, the officers saw the defendant's blood-spotted fingernail before they conducted the search. *Id.* at 292. In this scenario, as in *Dickerson*, the officer did not see the contraband, but merely touched it. *Dickerson*, 481 N.W.2d at 843.

472. *See supra* note 470 and notes 437-50 and accompanying text.

473. Probable cause is the mandatory prerequisite to the issuance of a search warrant. *See* U.S. CONST. amend. IV.

474. Bradley, *supra* note 28, at 1470-72. Professor Bradley offers two views of Fourth Amendment analysis. Model I suggests courts apply a reasonableness test to searches and seizures on an *ad hoc* basis. *Id.* at 1471. Professor Bradley labels Model I a "no lines" test. *Id.* Model II, a "bright line" approach, requires a warrant for every search and seizure, but would allow an officer to obtain a warrant over the radio or telephone. *Id.* Model II is a more practical alternative and provides the basis for the radio or telephone warrant evaluation.

Regarding Model II, Professor Bradley stated:

> The second model may be as shocking at first glance to "law and order" advocates as the first model is to civil libertarians. It is, basically, that the Supreme Court should actually enforce the warrant doctrine to which it has paid lip service for so many years. That is, a warrant is *always* required for *every* search and seizure when it is practicable to obtain one. However, in order that this requirement be workable and not be swallowed by its exception, the warrant need not be in writing but rather may be phoned or radioed into a magistrate (where it will be tape recorded and the recording preserved) who will authorize or forbid the search orally. By making the procedure for obtaining a warrant less difficult (while only marginally reducing the safeguards it provides), the number of cases where "emergencies" justify an exception to the warrant requirement should be very small.

Id. While it would be impractical to eliminate all of the warrant exceptions, Professor Bradley's model offers a cogent option to the plain feel doctrine.

475. FED. R. CRIM. P. 41(c)(2). For an excellent exposition of the federal rule, see United States v. Turner, 558 F.2d 46 (2d Cir. 1977) (comparing federal rule to similar California law).

476. FED. R. CRIM. P. 41(c)(2)(A).

477. FED. R. CRIM. P. 41(c)(2)(B,D).

478. FED. R. CRIM. P. 41(c)(2)(D).

479. FED. R. CRIM. P. 41(c)(2)(C).

480. *E.g.*, ALASKA STAT. § 12.35.015 (Supp. 1992); ARIZ. REV. STAT. ANN. § 13-3915(C) (1989); CAL. PENAL CODE §§ 1526(b), 1528(b) (West 1982); HAW. R. PENAL P. 41(g)-(h); IOWA CODE ANN. § 321J.10(3) (West Supp. 1992); KAN. STAT. ANN. § 22-2901(2) (1988); LA. CODE

The radio or telephone warrant is a workable solution to the plain feel doctrine. Should an officer gain probable cause to suspect non-weapon contraband through a *Terry*-frisk, rather than immediately seizing the item, the officer may detain the individual until a magistrate issues or rejects a warrant.[481] If the detainee possesses contraband and attempts to dispose of it, the item may be seized under plain view.[482] The adoption of this standard would require enactment of a nationwide procedure similar to the federal rule.[483] Such a framework is possible, as shown by the universal application of the *Miranda* doctrine.[484]

Detaining an individual until a radio or telephone warrant is received, or until a drug-sniffing dog or device is obtained, raises concerns regarding the length of the detention.[485] The United States Supreme Court declined to set a definitive time limit in *United States v. Sharpe*.[486] The Court's *Sharpe* decision[487] and other opinions,[488] how-

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CRIM. PROC. ANN. art. 162.1 (West Supp. 1992); MONT. CODE ANN. § 46-5-222 (1985); NEB. REV. STAT. § 29-814.03-.06 (1992); NEV. REV. STAT. § 179.045 (1985); N.Y. CRIM. PROC. LAW § 690.36 (McKinney 1984); OKLA. STAT. ANN. tit. 22, § 1225(B) (West Supp. 1993); OR. REV. STAT. §§ 133.545(5), 133.555(3) (1990); S.D. CODIFIED LAWS ANN. § 23A-35-6 (1988); UTAH CODE ANN. § 77-7-10 (1990); WIS. STAT. § 968.12(3) (Supp. 1992).

Other states have judicially approved the telephone or radio warrant. *See, e.g.*, State v. Andries, 297 N.W.2d 124, 125 (Minn. 1980); State v. Valencia, 459 A.2d 1149, 1154 (N.J. 1983). *See generally* John E. Theuman, Annotation, *Validity of, and Admissibility of Evidence Discovered in, Search Authorized by Judge Over Telephone*, 38 A.L.R.4TH 1145 (1985) (judicial interpretation or adoption of telephonic search warrants).

481. If an officer's experienced interpretation of tactile sensations is enough to produce probable cause, *see* State v. Dickerson, 481 N.W.2d 840, 849 (Minn.), (Coyne, J., dissenting), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992), then requiring the officer to obtain a warrant before seizing what the officer already knows to be contraband is not too much to ask.

482. For a discussion of the plain view doctrine, see *supra* notes 97-112 and accompanying text.

483. FED. R. CRIM. P. 41(c)(2).

484. Miranda v. Arizona, 384 U.S. 436 (1966). Implementation of a national radio or telephone warrant framework would arguably be less discomforting to enforcement personnel than the implementation of *Miranda*. While *Miranda* "massively moved" the testimonial privilege from the courthouse to the station house, Reynolds v. State, 594 A.2d 609, 618 (Md. Ct. Spec. App. 1991), *aff'd*, 610 A.2d 782 (Md. 1992), *cert. denied*, 61 U.S.L.W. 3478 (U.S. Jan. 11, 1993), a universal radio or telephone warrant framework would simply extend a process already in place in the federal and several state courts.

485. *See* 3 LAFAVE, *supra* note 30, § 9.2(f). "There is no general rule that the detention may continue so long as the reasonable suspicion giving rise to the stop remains, for if this were the rule some stops could be continued indefinitely." *Id.*

486. 470 U.S. 675, 685 (1985). "Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop. But our cases impose no rigid time limitation on *Terry* stops." *Id.*

487. *Id.* at 686.

488. United States v. Place, 462 U.S. 696, 709 (1983); United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975); Terry v. Ohio, 392 U.S. 1, 34 (1968) (Harlan, J., concurring).

ever, return to the same foundational discussion of *Katz v. United States*[489] and *Terry v. Ohio*:[490] reasonableness.

The Court's position is that, generally, a stop can last no longer than what is needed to allay an officer's suspicions.[491] If the officer needs additional time to conduct further investigation to satisfy the officer's suspicions, however, it may be permitted.[492] The key remains a balance between competing interests. Thus, the officers must work "diligently" to complete their investigation while detaining the individual.[493]

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489. 389 U.S. 347 (1967).

490. 392 U.S. 1 (1968).

491. *See* Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion). "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Id.*

492. *See* RINGEL, *supra* note 83, § 13.5(a).

493. *See* United States v. Sharpe, 470 U.S. 675, 685 (1985). The Court noted:

> In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.

Id. The leeway given to officers to complete their investigations has led courts to find a variety of detention times to be reasonable. *See* United States v. Hardy, 855 F.2d 753, 761 (11th Cir. 1988) (fifty minute wait for the arrival of a drug-sniffing dog), *cert. denied*, 489 U.S. 1019 (1989); State v. Nugent, 504 So. 2d 47, 48 (Fla. App. 1987) (thirty minute wait for arrival of drug-sniffing dog); State v. Chaffee, 328 S.E.2d 464, 467-68 (S.C. 1984) (five hour detention of murder suspects), *cert. denied*, 471 U.S. 1009 (1985). For a ringing testament to self-control, see United States v. Montoya de Hernandez, 473 U.S. 531 (1985). In *Montoya de Hernandez*, customs officials conducting a border search suspected the defendant of smuggling cocaine in her alimentary canal. *Id.* at 534. Officers waited sixteen hours before they sought a search warrant, during which time the women neither ate, drank, nor used the lavatory. *Id.* at 535. After they obtained the search warrant, and over the next forty-eight hours, officers recovered a total of ninety-four balloons "containing a total of 528 grams of 80% pure cocaine hydrochloride," *Id.* at 536, which the woman involuntarily surrendered. The Court upheld the detention. *Id.* at 541.

Similarly, in cases involving radio or telephone warrants, courts have been reluctant to establish a fixed duration in which to obtain the warrant. A significant number of opinions, however, reflect the fact that radio or telephone warrants markedly reduce the amount of time generally required to procure a traditional, "in-person" warrant. *See* People v. Blackwell, 195 Cal. Rptr. 298, 302 n.2 (Cal. Ct. App. 1983); *see, e.g.*, United States v. Patino, 830 F.2d 1413, 1416 (7th Cir. 1987) (telephone warrant should have been sought during thirty minutes the officer awaited back-ups), *cert. denied*, 490 U.S. 1069 (1989); United States v. Cuaron, 700 F.2d 582, 590 (10th Cir. 1983) (warrantless search would have been invalidated save exigent circumstances when officers failed to seek telephone warrant during fifty-five minute wait to search residence); People v. Orellana, 240 Cal. Rptr. 432, 437 (Cal. Ct. App. 1987) (telephonic search warrant obtained in eighty-one minutes). *Compare* State v. Lopez, 676 P.2d 393, 397 (Utah 1984) (telephonic search warrant obtained in twenty-four minutes) *with* State v. Ashe, 745 P.2d 1255, 1268 (Utah 1987) (forty-five minutes is insufficient time to remove exigent circumstances by requiring a telephone warrant). The San Diego District Attorney's Office estimated that it received ninety-five percent of its oral warrants in under forty-five minutes. Paul D. Beechen, *Oral Search Warrants: A New Standard of Warrant Availability*, 21 UCLA L. REV. 691, 694 n.23 (1973).

Some courts have viewed the relative speed with which radio or telephone warrants may be obtained as "minimiz[ing] the burdens" which otherwise would justify a warrantless search. *Pa-*

An officer's request for a warrant or drug-sniffing dog or device is part of the investigation.[494] According to the Court, as long as the detention time while waiting for a response is not unreasonable, the detention is valid.[495] Therefore, if the officer can show that he diligently completed his investigation by requesting a warrant or drug-sniffing dog or device during the detention time, the detention should be upheld. Since those requests present the detainee with no greater intrusion than that already reasonable under *Terry*,[496] these actions by an officer would be not only practical, but reasonable.

V. CONCLUSION

State v. Dickerson[497] represents a necessary return to the proper limitations of *Terry v. Ohio*,[498] and inasmuch as that revisitation reflects a proper balancing of the appropriate individual and governmental interests,[499] *Dickerson* represents a return to reasonableness as the standard for police encounters with the public. In Minnesota and other states that rejected plain feel,[500] the courts stated that while officers indeed have an obligation to protect themselves and other innocent citizens, the authorities may not use that interest to abrogate the equally consequential right of personal security.[501]

Neither *Terry*[502] nor the plain view doctrine[503] provides a sufficient basis for a plain feel exception. If the United States Supreme Court wishes to craft a recognition of tactile perception, the Court should

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tino, 830 F.2d at 1416 (citing Steagald v. United States, 451 U.S. 204, 222 (1981)); *see also Cuaron*, 700 F.2d at 590 (if circumstances were "less exigent," warrantless search would have been invalidated when sufficient time to obtain telephone warrant existed); State v. Kempton, 803 P.2d 113, 118 (Ariz. Ct. App. 1990) ("ease and importance of obtaining a search warrant undercuts the justification for warrantless searches based on exigent circumstances"), *cert. denied*, 111 S. Ct. 2815 (interim ed. 1991); *Blackwell*, 195 Cal. Rptr. at 302 (when officers encounter an "emergency where . . . there is not adequate time to seek a conventional search warrant, the telephonic search warrant is an accessible alternative" and should be encouraged above a warrantless search) (quoting People v. Morrongiello, 193 Cal. Rptr. 105, 111 (Cal. Ct. App. 1983)).

494. *See* Certain Interested Individuals v. Pulitzer Publishing Co., 895 F.2d 460, 461 (8th Cir.) (dicta), *cert. denied*, 111 S. Ct. 214 (interim ed. 1990); Nick v. Abrams, 717 F. Supp. 1053, 1054 (S.D.N.Y. 1989) (dicta).

495. *See Sharpe*, 470 U.S. at 685.

496. *See supra* notes 49-70 and accompanying text for a discussion of the Court's balancing of interests in *Terry*.

497. 481 N.W.2d 840 (Minn.), *cert. granted*, 113 S. Ct. 53 (interim ed. 1992).

498. 392 U.S. 1, 29 (1968).

499. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

500. *See* State v. Collins, 679 P.2d 80 (Ariz. Ct. App. 1983); State v. Rhodes, 788 P.2d 1380 (Okla. Crim. App. 1990); Commonwealth v. Marconi, 597 A.2d 616 (Pa. Super. Ct. 1991), *appeal denied*, 611 A.2d 711 (Pa. 1992); State v. Broadnax, 654 P.2d 96 (Wash. 1982).

501. *See* cases cited *supra* note 499.

502. *See* Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979); *Terry*, 392 U.S. at 25-26, 29; *supra* notes 84-96 and accompanying text and text accompanying note 347.

only do so with adequate safeguards to remain true to its reasonableness standard.[504] The Court should establish an interim procedure between a *Terry*-frisk and a seizure of contraband known not to be a weapon to provide the necessary balancing of individual and state interests that reasonableness requires.[505] In light of the limitations of *Terry*[506] and the inherent differences between a plain view and plain feel search,[507] this interim procedure should provide that either a search warrant is obtained or that any further action is not a search. A radio or telephone warrant[508] or a dog or device-sniff[509] would meet this standard.

The Minnesota court's strengthening of Fourth Amendment protections benefits all citizens. It is tempting in this age of increased violence — whether drug-related and otherwise — to opt for expedience at the sacrifice of liberty.[510] So it was in an earlier day. We would do well to heed the admonition from Justice Bradley: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."[511]

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503. *See* United States v. Williams, 822 F.2d 1174, 1184-85 (D.C. Cir. 1987) (stricter "reasonable certainty" standard required for plain feel rather than "immediately apparent" standard for plain view); *supra* text accompanying notes 256-60 and 273-95.

504. *See* Terry, 392 U.S. at 21-22; Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see, e.g.*, cases cited *supra* note 27.

505. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

506. 392 U.S. at 29 (frisk limited to discovery of weapons).

507. *See supra* notes 251-313 and accompanying text.

508. *See supra* notes 467-84 and accompanying text.

509. *See supra* notes 451-67 and accompanying text.

510. "[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." Arizona v. Hicks, 480 U.S. 321, 329 (1987) (Scalia, J.).

511. Boyd v. United States, 116 U.S. 616, 635 (1886).