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I Want to Stop This Guy - Some Touchy Issues Arising from Minnesota v. Dickerson

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"I WANT TO STOP THIS GUY!"* SOME "TOUCHY" ISSUES ARISING FROM *MINNESOTA V. DICKERSON***

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I. INTRODUCTION

You have recently moved into a twelve-unit apartment building located in a low-income urban community. Although you and your neighbors are law-abiding citizens, the community is rife with crime. In the past, the police have executed warrants to search for narcotics and weapons in your building and in other buildings nearby. One evening, you decide to visit a friend who lives a few blocks away. After descending the front staircase of your building, you suddenly realize that a faster route to your friend's house is to cut through an alley located behind the building. As you abruptly change course, you notice a police car approaching your building. A few moments later, you see the police car again, in the alley, this time with lights flashing. Your heart begins pounding and you feel yourself sweating with apprehension as the officers exit their car and approach you. They order you to place your hands on the car and immediately frisk you. The frisking officer proceeds by feeling his way along your body, moving his hands from your neck and collar to your arms, your chest, and eventually to your most private areas. His hand stops atop your thin jacket pocket, which contains a small gum-ball wrapped in cellophane and a wad of folded dollar bills. The officer reaches into your pocket and seizes these items. The officer then handcuffs you, recites your "Miranda" rights, and shoves you into the car. After waiting endless hours in the "lockup"

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* *See* Transcript of Proceedings at 16, 23, 25, and 35, State v. Dickerson, No. 89067687 (Feb. 20, 1990) [hereinafter transcript]. The police report of one officer investigating the *Dickerson* case indicated "'I told my partner that I wanted to stop this party'" after the officers saw Timothy Dickerson walk into an alley. Transcript at 25 (defense attorney Mary Moriarty quoting from paragraph three of Officer Bruce Johnson's report). Throughout the proceedings, the prosecution and defense attorneys paraphrased the officer's statement alternatively as "I want to stop this guy," Transcript at 23, or "I want to stop that guy." Transcript at 16, 35.

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

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section of the station house, the police release you. The gum-ball had tested "negative" for evidence of narcotics.

Amazingly, both the Minnesota Court of Appeals and the Minnesota Supreme Court approved of such police conduct in nearly identical circumstances.[1] However, the Minnesota Supreme Court also held that the officer's conduct in manipulating and then seizing a nonthreatening object in the suspect's pocket exceeded the scope of a weapons frisk.[2] Justice Byron White, writing for seven justices of the United States Supreme Court, agreed.[3] In a unanimous portion of the opinion, however, the Court also recognized an officer's right to seize nonthreatening objects during a weapons frisk if the objects' incriminating nature is "immediately apparent."[4] Thus, *Minnesota v. Dickerson*[5] extended the plain-view doctrine[6] to include "plain touch," effectively authorizing police officers to seize nonthreatening objects discovered during a weapons frisk.

Before a trial court reaches a plain-touch issue, it must first determine whether the investigating officers properly stopped[7] and frisked the suspect. After examining the *Dickerson* record,[8] the thought that *two* reviewing courts would so readily accept trial court findings that the police properly stopped and frisked the suspect in circumstances such as those described above is chilling indeed. There is no question, it seems, that police officers may forcibly stop a pedestrian merely because he[9] looked toward them and abruptly changed direction. A twelve-unit apartment building where police officers had at one time or another seized guns and narcotics is classified, in its *entirety*, as a "crack house."[10] Everyone leaving the building is regarded with suspicion.

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1. State v. Dickerson, 469 N.W.2d 462, 465 (Minn. Ct. App. 1991) [hereinafter *Dickerson I*]; State v. Dickerson, 481 N.W.2d 840, 843 (Minn. 1992) [hereinafter *Dickerson II*].

2. *Dickerson II*, 481 N.W.2d at 846. For an explanation of the limited weapons frisk permitted under Terry v. Ohio, 392 U.S. 1 (1968), see *infra* text accompanying notes 97-139.

3. Minnesota v. Dickerson, 113 S. Ct. 2130, 2138-39 (1993) [hereinafter *Dickerson III*].

4. *Dickerson III*, 113 S. Ct. at 2137.

5. 113 S. Ct. 2130 (1993).

6. For an explanation of the plain-view doctrine, see *infra* text accompanying notes 35-80.

7. For an explanation of an investigative stop, see *infra* text accompanying notes 140-76.

8. For an extensive analysis of the *Dickerson* record, see *infra* text accompanying notes 140-76; and Part IV *infra*.

9. As Prosser and Keeton note in their renowned treatise, I use the pronouns "he," "his," and "him" at various points in this article "to avoid the awkward grammatical situations which would likely occur due to the limitations of the English language." W. PAGE KEETON, ET. AL., PROSSER AND KEETON ON TORTS xvii (5th ed. 1984). The reader should also note that I based my opening hypothetical on the *Dickerson* scenario, which involved men only.

10. *See* Memorandum and Order of the Fourth Judicial Circuit, *reprinted in* the Petition for a Writ of Certiorari, Appendix C, at C-4, Minnesota v. Dickerson, 113 S. Ct. 2130 (1993) (No. 91-2019) (describing the apartment building as "a known crack house" and "a notorious 'crack house'"); *Dickerson*, 469 N.W.2d at 464 ("[Officer Vernon D.] Rose described the 12-unit apartment building at 1030 Morgan Avenue as a 'known crack house'") [hereinafter Trial Court Findings]; *Dickerson II*,

After *Dickerson*, one wonders whether our courts now regard poverty-stricken urban neighborhoods as "authoritarian twilight zones"[11] where the police may seize and search people on sight.

The factual scenario presented in *Minnesota v. Dickerson* underscores the need for a trial court to thoroughly examine the record to determine whether a police officer was properly justified in stopping a suspect and then frisking him for weapons. At trial and on appeal, Timothy Dickerson challenged the state's assertion that the investigating officers properly stopped him upon a reasonable suspicion that he was engaged in criminal activity, and that they feared he was armed and dangerous when they frisked him.[12] On the state's appeal to the United States Supreme Court, however, Dickerson did not challenge the lower courts' findings that the police officers had properly conducted the stop and the frisk.[13] Justice White, therefore, accepted the lower court findings on these issues, and limited the Court's discussion first to whether a plain-touch doctrine exists,[14] and then to whether Officer Vernon D. Rose frisked Dickerson within the lawful bounds of *Terry v. Ohio*[15] and the new plain-touch doctrine.[16] In defining the plain-touch doctrine, however, the Court failed to explain what "lawful right of access" will permit a police officer to reach into a suspect's clothing and seize a nonthreatening object discovered during a frisk.

The purpose of this article is to examine some issues arising from both the narrow facts of *Dickerson* and the theoretical underpinnings of the plain-touch doctrine. Because the plain-touch doctrine applies the plain-view doctrine to an officer's sensory perceptions during a weapons frisk, Part II sketches the fundamentals of the plain-view doctrine and the

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481 N.W.2d at 842 ("the officer said the apartment building was known as a 24-hour-a-day crack house"); *Dickerson III*, 113 S. Ct. at 2133 ("[t]he officer . . . considered the building to be a notorious 'crack house'").

11. *See* United States v. Montoya de Hernandez, 473 U.S. 531, 564 (1985) (Brennan, J., dissenting) (using the phrase "authoritarian twilight zone" to describe those areas of the nation's border where the government detains travelers based upon suspicions lower than probable cause to believe that the travelers are engaged in criminal activity).

12. Transcript at 33-46, State v. Dickerson (No. 89067687) (Feb. 20, 1990); *Dickerson II*, 481 N.W.2d at 842-43; *Dickerson I*, 469 N.W.2d at 464-65. *See* Defendant's Notice of Motion and Motion to Dismiss for Lack of Probable Cause, State v. Dickerson (No. 89067687) (Jan. 31, 1990); State's Memorandum in Opposition to Defendant's Motion to Dismiss, State v. Dickerson (No. 89067687) (Feb. 1, 1990); State's Supplementary Memorandum Opposing Defendant's Motion to Dismiss, State v. Dickerson (No. 89067687) (March 1, 1990); Defendant's Supplemental Memorandum in Support of the Motion to Dismiss, State v. Dickerson (No. 89067687) (March 2, 1990). These items are reprinted in the Joint Appendix at 10, 18, 24, and 27, Minnesota v. Dickerson, 113 S. Ct. 2130 (1993) (No. 91-2019).

13. *Dickerson III*, 113 S. Ct. at 2138.

14. *Id.* at 2136-38.

15. 392 U.S. 1 (1968). For a discussion of *Terry*, see *infra* text accompanying notes 99-117.

16. *Dickerson III*, 113 S. Ct. at 2138-39.

weapons frisk exception. Part III explores *Dickerson*, the plain-touch doctrine, and related issues. Part III, A, describes the history of *Dickerson*, illustrating the facts primarily from Officer Rose's sworn testimony, which trial Judge Robert H. Lynn credited as the accurate description of the events of November 9, 1989—the evening when Officer Rose discovered crack cocaine during his weapons frisk of Dickerson. Part III, B, completes the definitional framework of the plain-touch doctrine by explaining that the search-incident-to-arrest exception to the Warrant Requirement will permit a police officer to reach into a suspect's clothing and seize nonthreatening contraband detected during a weapons frisk.

Part III, C, briefly examines a theoretical question left unresolved by the case: whether an officer's tactile sensations during a weapons frisk are sufficiently quick and reliable to provide the officer with probable cause, as the plain-touch doctrine requires.[17] Indeed, is it truly possible for *anyone* to "immediately" identify an object sandwiched between layers of clothing and a human body? Although Justice White discussed the issue generally,[18] he prudently avoided a definitive conclusion. Unfortunately, the available data are also insufficient to resolve the issue. For this reason, Part III, C, concludes that experts on sensory perception, rather than lawyers or the courts, are the appropriate authorities to make such conclusions once they have performed the necessary research. For the present, a trial court must scrutinize its record to determine whether an object's incriminating nature was "immediately apparent" to the frisking officer.

Part IV examines whether Dickerson's behavior justified his stop and the frisk that Officer Rose immediately performed upon stopping him. I conclude first that the circumstances described in the record did not support a forcible stop. When analyzing the frisk, I conclude that neither Dickerson's behavior nor the crime that the officers may have suspected entitled them to immediately frisk him. In light of the weak record, which a total of three courts found to justify the initial "stop and frisk," it appears that these issues no longer present serious obstacles to warrantless searches for *contraband* conducted by over-zealous police officers.

II. OVERVIEW OF THE FOURTH AMENDMENT

A discussion of Fourth Amendment law necessarily begins with the text of the amendment itself:

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17. *See infra* text accompanying notes 239, 316-21.
18. *Dickerson III*, 113 S. Ct. at 2137-38 & n.4.

> 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.[19]

In the landmark case *Katz v. United States*,[20] Justice Harlan explained the "twofold requirement" for Fourth Amendment protection:

> [F]irst that a person ha[s] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited.[21]

The Supreme Court has applied these criteria to determine whether warrantless police conduct constitutes a Fourth Amendment "search."[22] The amendment applies to both federal and state officials,[23] and consists of two clauses. The first clause requires that searches and seizures be "reasonable," while the second requires probable cause[24] to support warrants for searches and seizures, including arrests.[25]

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19. U.S. CONST. amend. IV.

20. 389 U.S. 347 (1967).

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

22. *See* Florida v. Riley, 488 U.S. 445, 449-51 (1989) (opinion of White, J.) (finding that although suspect exhibited an actual expectation of privacy by concealing the contents of his greenhouse from street-level observation, his expectation of privacy was not reasonable because the marijuana in his greenhouse could be observed through open ceiling panels from a helicopter hovering 400 feet above; police, therefore, required no warrant to observe the greenhouse from a vantage point where the general public was likewise free to observe the contraband); Arizona v. Hicks, 480 U.S. 321, 325 (1987), discussed *infra* at text accompanying notes 59-69 (finding that police officer's act of lifting stereo equipment to record serial numbers constituted an invasion of the suspect's privacy that amounted to a search); California v. Ciraolo, 476 U.S. 207, 211-15 (1986) (finding that although suspect exhibited an actual expectation of privacy by surrounding his yard with a ten-foot fence, it was unreasonable for the suspect to expect that his marijuana garden could not be observed by police flying an airplane 1,000 feet above his yard; no warrant was, therefore, required to do so); Texas v. Brown, 460 U.S. 730, 740 (1983) (opinion of Rehnquist, J.) ("[t]here is no legitimate expectation of privacy shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers;" police officer, therefore, conducted no search under the Fourth Amendment when he looked through the car's windows and saw contraband located inside).

23. Mapp v. Ohio, 367 U.S. 643, 643 (1961) (holding "that all evidence obtained by searches and seizures in violation of the Federal Constitution is inadmissible in a criminal trial in a state court").

24. For an explanation of probable cause, see *infra* text accompanying notes 318-19.

25. Fourth Amendment "seizures" include arrests, which Justice Stevens appropriately described as "seizures of persons" in Payton v. New York, 445 U.S. 573, 585 (1980). Since the Framers connected the two clauses with the conjunctive "and," a strict grammarian could interpret the amendment as requiring government authorities to always obtain a warrant in order to validate a

Fourth Amendment case law also expresses a preference for the police to obtain a warrant from an impartial judicial officer[26] before conducting searches and seizures.[27] However, given the myriad situations that law enforcement officials must face every day, the split-second decision-making these situations frequently demand, and the exigencies that often make obtaining a search warrant impractical,[28] "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures."[29]

Warrantless searches and seizures, however, "are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[30] For example, the police may search for and seize evidence without a warrant if exigent circumstances, such as the imminent destruction or removal of evidence, require

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search. Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42. U. CHI. L. REV. 47, 47 (1974). Such a strict grammatical construction, of course, would unduly constrain law enforcement activities, such as the removal of weapons from arrestees, which usually takes place without a warrant. *Id.*

26. *E.g.*, Aguilar v. Texas, 378 U.S. 108, 110-11 (1964). Additionally, in Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Court invalidated a search warrant signed and issued by the state Attorney General, who simultaneously acted as both the chief coordinator of police activities relating to the murder investigation at issue and as justice of the peace. 403 U.S. at 447, 453. The Attorney General also later acted as the chief prosecutor at trial. *Id.* at 447. Under these circumstances, Justice Stewart held that "[s]ince he was not the neutral and detached magistrate required by the Constitution, the search stands on no firmer ground than if there had been no warrant at all." *Id.* at 453.

27. *E.g.*, Texas v. Brown, 460 U.S. 730, 735 (1983) ("Our cases hold that procedure by way of warrant is preferred) (plurality opinion of Rehnquist, J.); Payton v. New York, 445 U.S. 573 (1980) (invalidating the warrantless arrests of two suspects in their homes where the police had ample time to obtain arrest warrants); Arkansas v. Sanders, 442 U.S. 753, 758 (1979) ("In the ordinary case, . . . a search of private property must be both reasonable and pursuant to a properly issued search warrant"); Terry v. Ohio, 392 U.S. 1, 20 (1968) ("the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure").

State and federal courts enforce the Fourth Amendment's protection through the exclusionary rule, which holds that evidence seized by law enforcement officials in violation of the Fourth Amendment is inadmissible at trial against the defendant. Terry v. Ohio, 392 U.S. 1, 12-13 (1968); Mapp v. Ohio, 367 U.S. 643, 655 (1961); Elkins v. United States, 364 U.S. 206, 222 (1960); Weeks v. United States, 232 U.S. 383, 391-93 (1914).

28. *E.g.*, *Terry*, 392 U.S. at 12.

29. *Elkins*, 364 U.S. at 222.

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

swift action.[31] Another exception allows the police to conduct a full search of an arrestee incident to a lawful arrest.[32] In *Minnesota v. Dickerson*, the Supreme Court applied both the plain-view doctrine and the weapons frisk exception of *Terry v. Ohio*[33] in holding that the Constitution permits a police officer to seize contraband discovered through "plain touch."[34] A more extensive discussion of the plain-view doctrine and the stop-and-frisk cases is, therefore, in order.

A. THE PLAIN-VIEW DOCTRINE

Justice Stewart's plurality opinion in *Coolidge v. New Hampshire*[35] represented the Supreme Court's first attempt to fully explain the plain-view doctrine, although the Court was well aware of it prior to *Coolidge*.[36] The Court has refined the doctrine so that it now encom-

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31. United States v. Jeffers, 342 U.S. 48, 51-52 (1951) (warrantless search of hotel room *held* unconstitutional because there was no threat of "imminent destruction, removal, or concealment of the property intended to be seized"); McDonald v. United States, 335 U.S. 451, 455 (1948) (invalidating a warrantless search of the defendant's boarding room where the police had no grounds to believe that the property was "in the process of destruction []or as likely to be destroyed"); Johnson v. United States, 333 U.S. 10, 14-15 (1948) (warrantless search of hotel room where "[n]o evidence or contraband was threatened with removal or destruction" *held* unconstitutional). In Vale v. Louisiana, 399 U.S. 30 (1970), Justice Stewart listed the fact that the evidence was "not in the process of destruction" among the reasons for striking down the warrantless search and seizure at issue in that case. 399 U.S. at 35. Professor LaFave, however, has suggested that the "exigent circumstances" necessary to dispense with the Warrant Requirement are broader than this statement would imply. *See* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE §6.5 (b) (2d ed. 1987 & Supp. 1994). Justice Douglas' broad language in *McDonald* supports Professor LaFave's position. As noted above, in *McDonald*, Justice Douglas remarked that there was no evidence to support a warrantless search and seizure because nothing in the case suggested that the evidence was "*in the process of* destruction, [or] *likely* to be destroyed." 335 U.S. at 455 (emphasis added).

Other "exigent circumstances" include danger to the police or others, Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (upholding the warrantless search of a private residence for an armed robber and his weapons where delay would "gravely endanger" the police or "the lives of others"), and the imminent destruction of evidence discovered on a suspect's person, Cupp v. Murphy, 412 U.S. 291, 296 (1973) (permitting the police to take scrapings from a murder suspect's fingernails where the suspect attempted to clean his nails after the police noticed what they thought was dried blood beneath his nails).

32. United States v. Robinson, 414 U.S. 218, 224, 235 (1973). For a further discussion of the search-incident-to-arrest exception, see *infra* notes 246-48 and accompanying text.

33. 392 U.S. 1 (1968).

34. *Dickerson III*, 113 S. Ct. 2130, 2137-38 (1993).

35. 403 U.S. 443 (1971).

36. In *Coolidge*, Justice Stewart attempted to articulate a plain-view doctrine which had actually developed in numerous cases over the previous 50 years, dating back to Prohibition-Era liquor possession cases. *See* Steele v. United States, 267 U.S. 498, 504 (1925) (upholding the seizure of whiskey barrels and bottling equipment discovered in plain view where the search warrant only authorized the officers to search for and seize "cases of whiskey"); Harris v. United States, 390 U.S. 234, 236 (1968) ("It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (noting that "objects, activities, or statements that . . . [one] exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited"). *See also supra* text accompanying notes 20-21.

passes three requirements. First, a law enforcement officer must observe the object in question from a position where he has a lawful right to be.[37] Thus, a police officer may not walk across a homeowner's lawn in order to look into the house windows, but a city police officer walking his "beat" may glance into the open window of a street-level apartment and observe exposed objects located inside.[38] Second, the object's incriminating character must be immediately apparent,[39] giving the officer probable cause to believe that it is contraband or evidence of a crime.[40] The officer's examination of the suspicious object is "a truly cursory

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37. *Dickerson III*, 113 S. Ct. 2130, 2136 (1993); Horton v. California, 496 U.S. 128, 136 (1990).

38. State v. Taylor, 401 N.E.2d 459 (Ohio Ct. App. 1978). *Taylor* involved an apartment complex that had a walkway connected to a public sidewalk. The walkway ran along the building, providing residents and visitors with access to various apartments. *Id.* at 460. No "No Trespass" signs were posted, and the walkway "was freely accessible" to the public. *Id.* at 461. The suspects' apartment, which was visible from the walkway, had a large bay window "with no curtains or other obstructions other than a hanging plant." *Id.* at 460. A police officer standing on the walkway looked into the bay window and observed the two suspects handling a substance that he recognized as marijuana. *Id.* He approached the front door, knocked twice, received no response, and returned to the walkway after hearing noises within the apartment. *Id.* at 461. He then saw one suspect walking toward the rear of the apartment, carrying the suspected marijuana and looking backward toward the front. *Id.* Another officer arrested this suspect as he left through the back door. *Id.* Both officers eventually seized the contraband and arrested the other suspect. *Id.*

The Ohio Court of Appeals concluded that the first officer acted properly in viewing the contraband and suspicious activity from the walkway, noting that the suspects' activities were equally visible to other apartment residents and visitors. *Id.* at 461-62. The court, therefore, reasoned that the officer "was a licensee who had a right to be on the sidewalk within the premises, even though the purpose was to observe potentially illegal activity." *Id.* at 462. "[W]hatever was observed by the officer was usable in determining probable cause for arrest." *Id.* The seizure of the evidence, therefore, "was a proper incident to the lawful arrests." *Id.*

The court also distinguished *Taylor* from an unreported case, State v. DeShong, No. 43347 (Franklin County, Ohio, Court of Common Pleas, Oct. 21, 1966), *cited in Taylor*, 401 N.E.2d at 462, where police officers left a public sidewalk and approached a suspect's house, "pushing aside shrubbery in front of a bedroom window and then peering through a small gap under the venetian blind to observe illegal activity." 401 N.E.2d at 462. In that case, the officers violated the Constitution by invading the home's curtilage. *Id. DeShong* was also distinguishable because the suspects had demonstrated an intention to preserve their privacy by shielding "their activities from other members of the public," in contrast to the suspects in *Taylor*. *Id.*

For similar reasoning applied to observations made through the unobstructed window of an automobile on a public street, see Texas v. Brown, 460 U.S. 730 (1983) (opinion of Rehnquist, J.):

> The general public could peer into the interior of [the defendant's] automobile from any number of angles; there is no reason [Tom] Maples should be precluded from observing as an officer what would be entirely visible to him as a private citizen. There is no legitimate expectation of privacy shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers.

Id. at 740 (citations omitted).

39. *Dickerson III*, 113 S. Ct. at 2136-37; *Horton*, 496 U.S. at 136; Arizona v. Hicks, 480 U.S. 320, at 326-27 (1987); *Coolidge*, 403 U.S. at 466.

40. *Hicks*, 480 U.S. at 326 (holding that law enforcement officials must have probable cause in order to invoke the plain-view doctrine). *See also Dickerson III*, 113 S. Ct. at 2137 ("If . . . the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object—*i.e.*, if 'its incriminating character [is not] "immediately apparent,"'—the plain view doctrine cannot justify its seizure" (brackets in original) (citing *Horton*, 496 U.S. at 2308)).

inspection—one that involves *merely looking* at what is already exposed to view, without disturbing it."[41] Third, if an officer immediately recognizes an object in plain sight[42] as contraband or evidence of a crime, he must have *a lawful right of access to the object before seizing it*.[43] At the moment the officer develops probable cause to suspect that the object is contraband, he has grounds to apply for a search warrant. Absent a warrant, the officer may not take further intrusive action to seize the object *unless* an exception to the Warrant Requirement applies that would give him a "lawful right of access" to the object.[44] As Justice Stewart said in *Coolidge*:

> [P]lain view *alone* is never enough to justify the warrantless seizure of evidence. . . . Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.[45]

In *Horton v. California*,[46] the Supreme Court explicitly stated that these three requirements must be satisfied in order to support a seizure under the plain-view doctrine.[47] In *Horton*, two masked men armed

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41. *Arizona v. Hicks*, 480 U.S. at 328 (emphasis added).

42. It is important to distinguish "plain view," as used in *Coolidge* to justify *seizure* of an object, from an officer's mere observation of an item left in plain view. Whereas the latter generally involves no Fourth Amendment search, the former generally does implicate the Amendment's limitations upon seizures of personal property. The information obtained as a result of observation of an object in plain sight may be the basis for probable cause or reasonable suspicion of illegal activity. In turn, these levels of suspicion may, in some cases, justify police conduct affording them access to a particular item.

Texas v. Brown, 460 U.S. 730, 738 n.4 (1983) (opinion of Rehnquist, J.) (citations omitted).

43. *Dickerson III*, 113 S. Ct. at 2137; *Horton*, 496 U.S. at 137.

44. *See* People v. Pakula, 411 N.E.2d 1385, 1390 (Ill. App. Ct. 1980) (explaining that a seizure under the plain-view doctrine must be supported by an applicable exception to the warrant requirement).

45. 403 U.S. at 468.

46. 496 U.S. 128 (1990).

47. Justice Stevens stated the three requirements for a constitutional seizure under the plain-view doctrine as follows:

> It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. There are, moreover, two additional conditions that must be satisfied to justify the warrantless seizure. First, not only must the item be in plain view; its incriminating character must also be "immediately apparent.". . . Second, not only must the officer be lawfully located in a place from which the object can be plainly seen, . . . he or she must also have a lawful right of access to the object itself.

Horton, 496 U.S. at 136-37. These three requirements for seizures under the plain-view doctrine are

with a machine gun and an electric stun gun disabled, handcuffed, and robbed the treasurer of the San Jose Coin Club upon his return home from the club's annual show.[48] The investigating police officer developed probable cause to believe that evidence of the armed robbery was located in the suspect Horton's home.[49] Although the magistrate issued a warrant specifically authorizing a search for the *proceeds* of the robbery, the officer later admitted that during his search he was also interested in obtaining other evidence not specified in the warrant.[50] During his search, he discovered and seized an Uzi machine gun, a .38 caliber revolver, two stun guns, a handcuff key, a San Jose Coin Club advertising brochure, and a few articles of the victim's clothing—items that were in plain view during the search.[51] It is important to note that the officer saw other handguns and rifles in plain view, but he did not seize them because he lacked probable cause to believe that they were also evidence of crime.[52]

Justice Stevens found that the plain-view doctrine authorized the officer to seize the evidence in question.[53] *First*, the officer observed the evidence from a location where he had a lawful right to be—he was present in Horton's home under the authority of a validly issued search warrant.[54] He also limited his search to those areas where he would logically find the items described in the warrant.[55] *Second*, the objects'

also listed in *Dickerson III*, 113 S. Ct. 2130, 2136-37 (1993); United States v. Legg, 18 F.3d 240, 242 (4th Cir. 1994); Clark v. Commonwealth, 868 S.W.2d 101, 106 (Ky. Ct. App. 1994).

48. *Horton*, 496 U.S. at 130.

49. *Id.* at 130-31.

50. *Id.* at 131. The officer's affidavit for the search warrant had described *both* the weapons and the proceeds, but for unknown reasons the magistrate declined to issue a warrant to search for the weapons. *Id.*

51. *Id.* at 131.

52. *Id.* at 131, n.1.

53. *Horton*, 496 U.S. at 142.

54. *Id.*

55. *Id.* at 131. Justice Stewart's plurality opinion in *Coolidge* described a requirement that searches and seizures of objects in plain view be "inadvertent," 403 U.S. at 469-71, but a majority of the court never accepted this reasoning. *See* Texas v. Brown, 460 U.S. 730, 737 (1983). In upholding the seizure in *Horton*, the Court rejected this requirement. Justice Stevens reasoned first that courts should apply "objective standards of conduct," rather than probing the officer's subjective intentions, to determine whether the search and/or seizure violated the Fourth Amendment. 496 U.S. at 138-39. Second, he continued, judging the officer's objective conduct rather than his subjective intentions is consistent with the Fourth Amendment's requirement that warrants particularly describe "'the place to be searched, and the persons or things to be seized'" because the officer will search only those areas described in the warrant. *Id.* at 139 (citation omitted). In other words, an improper motive will not necessarily invalidate a search or a seizure.

Under *Horton*, therefore, as long as an officer confines his lawful search to those areas where he is likely to find the objects described in the warrant, he may seize other incriminating evidence that appears in those same areas regardless of whether he expected to find other evidence. *Id.* at 138-41. He may not expand his search to areas where he is unlikely to find the things described in the warrant. As Justice White said in his *Coolidge* concurring opinion, "[p]olice with a warrant for a rifle may search only places where rifles might be and must terminate the search once the rifle is found; the inadvertence rule will in no way reduce the number of places into which they may lawfully look." *Coolidge*, 403 U.S. at 517 (White, J., concurring) (quoted with approval in *Horton*, 496 U.S. at 141).

incriminating nature was immediately apparent to him.[56] The officer knew that the suspects had used a machine gun, a stun gun, and handcuffs during the robbery. The connection between the San Jose Coin Club advertising brochure and the victim's position as that organization's treasurer was obvious. These factors created probable cause to believe that the objects constituted evidence of the crime.[57] Finally, the officer had a lawful right of access to the items because the search warrant authorized him to be in a position where he could seize them. Requiring the officer to obtain an additional warrant would simply have wasted time. In sum, wrote Justice Stevens, the warrant authorized the search; the plain-view doctrine authorized the seizure.[58]

The plain-view doctrine's three criteria may also be applied to *Arizona v. Hicks*,[59] although *Hicks* was decided before *Horton* explicitly adopted the three criteria. In *Hicks*, police officers entered an apartment in response to a reported gunshot and conducted a warrantless search for the suspected shooter, his weapons, and possible victims.[60] During the search, one officer suspected that two sets of expensive stereo equipment were stolen,[61] and moved some of the components in order to record their serial numbers, which he reported to headquarters.[62] When the serial number check revealed that a turntable was stolen in an armed robbery, the officer seized it immediately.[63] The authorities later determined that the other components were stolen in the same armed robbery, obtained a warrant, and seized that equipment as well.[64] Under these circumstances, Justice Scalia held that moving the equipment in order to

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In *Horton*, Justice Stevens similarly remarked that "if the three rings and other items named in the warrant had been found at the outset — or if petitioner had them in his possession and had responded to the warrant by producing them immediately — no search for weapons could have taken place." 496 U.S. at 141.

The same limitation holds true, of course, for items discovered in plain view during legitimate warrantless searches. 496 U.S. at 139-40 (a warrantless search is "circumscribed by the exigencies which justify its initiation"). Justice Stevens therefore concluded that the interest in preventing the police from conducting general searches, "or from converting specific warrants into general warrants . . . is already served by the requirements that no warrant issue unless it 'particularly describ[es] the place to be searched and the persons or things to be seized,' and that a warrantless search be circumscribed by the exigencies which justify its initiation." 496 U.S. at 139-40. For an example of an officer improperly expanding a search, see Arizona v. Hicks, 480 U.S. 321 (1987), discussed *infra* at text accompanying notes 59-69.

56. 496 U.S. at 142.
57. *Id.*
58. *Id.*
59. 480 U.S. 321 (1987).
60. *Id.* at 323-24.
61. *Id.* at 323.
62. *Id.*
63. *Id.* at 323-24.
64. *Hicks*, 480 U.S. at 323-24.

expose the serial numbers constituted a search separate from the initial lawful search for the shooter, his weapons, and possible victims.[65]

> Merely inspecting those parts of the turntable that came into view during the latter search would not have constituted an independent search, because it would have produced no additional invasion of respondent's privacy interest. But taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the Fourth Amendment. It matters not that the search uncovered nothing of any great personal value to respondent—serial numbers rather than (what might conceivably have been hidden behind or under the equipment) letters or photographs. *A search is a search, even if it happens to disclose nothing but the bottom of a turntable.*[66]

The exigent circumstances of the shooting justified the initial warrantless search for the shooter, victims, and weapons, and the seizure of three weapons.[67] Exigent circumstances also placed the police officers in a position where they could lawfully observe other potentially incriminating evidence. After concluding that moving the stereo equipment constituted a separate search, however, Justice Scalia found no similar justification for this second search. Because simply viewing the exterior of the stereo equipment was insufficient to provide the officers with probable cause to believe that the equipment was stolen, the second search violated the Warrant Requirement.[68] Since the officer did not have probable cause to believe the equipment was stolen until *after* this unconstitutional second search,[69] it logically follows that the equipment's incriminating nature was not "immediately apparent."

People v. Pakula,[70] decided prior to *Hicks* and *Horton*, is also instructive. In *Pakula*, police officers investigating a tip stood on a public sidewalk one block away from the suspects' property and observed cannabis plants growing in the suspects' back yard, which was surrounded by a chain link fence.[71] The officers verified their observation by entering a neighboring property, where they saw large, cultivated

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65. *Id.* at 324-25.
66. *Id.* at 325 (emphasis added) (citation omitted).
67. *Id.* at 323, 325.
68. *Id.* at 326, 328.
69. *Hicks*, 480 U.S. at 323, 326 (the state conceded that, prior to moving the equipment and reporting the serial numbers, the officer "had only 'reasonable suspicion,' by which it means something less than probable cause") (citation omitted).
70. 411 N.E.2d 1385 (Ill. App. Ct. 1980).
71. *Id.* at 1387.

cannabis plants tied to stakes in the suspects' yard.[72] The officers then left and returned approximately thirty minutes later with uniformed officers to assist in seizing the cannabis, but *did not* obtain a warrant.[73] When one suspect refused to consent to the officers' warrantless entry, the officers simply opened the fence gate,[74] entered the back yard, seized the cannabis plants, and *then* arrested the suspect.[75] The police offered no reason to explain why they failed to obtain a warrant, and the facts indicated that they had ample opportunity to do so.[76] The trial court found that the police made their initial observations "from a location where they had a right to be,"[77] but suppressed the cannabis because the police failed to obtain a warrant and because no exigent circumstances existed to excuse the police from obtaining a warrant.[78] The Illinois Appellate Court agreed, concluding that "the warrantless intrusion into the defendants' privacy is not justifiable merely by a pre-intrusion plain view observation."[79]

Applying the three criteria of the plain-view doctrine, *Pakula* can be re-stated as follows: (1) the police observed incriminating evidence from a position where they had a lawful right to be; (2) the incriminating nature of the cannabis was immediately apparent, giving the officers probable cause to believe that the plants were contraband; *but* (3) the officers did *not* have a lawful right of access to the cannabis because they did not obtain a warrant and because no exception to the warrant requirement applied to justify their warrantless entry. As the Appellate Court observed,

> The doctrine of plain view is not an exception itself to the requirement that a search or seizure must be supported by a warrant issued by a judge upon a finding of probable cause. Plain view serves only to provide a means of satisfying the requirement of probable cause. *Without the simultaneous existence of one of the true exceptions to the warrant requirement*, plain view cannot substitute probable cause, rightly thought to exist by a police officer[,] for the impartial decision of a neutral and detached magistrate capable of fairly determining whether probable cause truly exists.[80]

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72. *Id.*
73. *Id.* at 1387, 1389.
74. *Id.* at 1389.
75. *Pakula*, 411 N.E.2d at 1387. The other suspect was arrested several days later. *Id.*
76. *Id.* at 1387, 1389.
77. *Id.* at 1386.
78. *Id.* at 1386-87.
79. *Pakula*, 411 N.E.2d at 1389-90.
80. *Id.* at 1390 (emphasis added). *See also* Texas v. Brown, 460 U.S. 730, 738-39 (1983)

Courts have historically applied reasoning analogous to that of the plain-view doctrine in situations where other sensory perceptions, such as hearing and smell, give the officer probable cause to believe that a crime has been committed. Cases in which government agents employed their sense of hearing date back at least to the nineteenth century. For example, in the 1890 case *State v. McAfee*,[81] a local justice of the peace overheard an argument between the defendant and his wife.

> [H]e heard a blow given as with a stick, and a woman's voice cried out very loud, as if in distress. In a few minutes thereafter, the defendant and his wife came along the road, and the defendant had a stick in his hand and was cursing and talking violently, and his wife was crying in a loud voice.[82]

Based upon this evidence, the North Carolina Supreme Court held that a breach of the peace had occurred in the officer's presence, which entitled him to arrest the defendant without a warrant.[83] In other words, the officer's auditory observations enabled him to make a warrantless seizure of the person.[84] Likewise, modern-day courts deciding "plain-hearing" cases have held that law enforcement officials do not violate the Fourth Amendment when they overhear conversations or other incriminating noises with their *unaided* ears.[85]

(explaining that "'[p]lain view' is perhaps better understood . . . not as an independent 'exception' to the Warrant Clause, but simply as an extension of whatever the prior justification for an officer's 'access to an object' may be"). Steele v. United States, 267 U.S. 498 (1925), also illustrates the parameters of the plain-view doctrine. In *Steele*, two Prohibition agents observed the suspects loading cases marked "whiskey" into a garage which was ostensibly part of an auto truck service. *Id.* at 500, 502. Upon making this observation, one agent left the scene, applied for a warrant, and returned one hour later, *after* a U.S. Commissioner had issued the search warrant. *Id.* at 502. The important point to note here is that the agents entered and searched the premises only *after* one agent obtained a valid search warrant, rather than searching the premises immediately upon observing the incriminating evidence. *See id.* at 502-03. Once the agents gained entrance to the premises via the search warrant, they observed other incriminating evidence of illicit liquor operations, including a corking machine, 33 cases of gin, and other items, which they seized in addition to the "cases of whiskey" specified in the warrant. *Id.* at 503. The Court upheld the seizure of these items on the ground that the warrant was "quite specific enough." *Id.* at 504.

81. 12 S.E. 435 (N.C. 1890).

82. *Id.* at 436.

83. *Id.* at 437.

84. As noted *supra* at note 25, an arrest is a "seizure of the person." Payton v. New York, 445 U.S. 573, 585 (1980) (opinion of Stevens, J.).

85. United States v. Pace, 709 F. Supp. 948, 954 (C.D. Cal. 1989) ("The 'plain hearing' exception has been recognized as a legitimate analogue to the plain view doctrine . . . . Under the 'plain hearing' exception, if police officers overhear statements without the benefit of listening devices while they are stationed at a lawful vantage point, then those statements are admissible at trial.") (citations omitted). *See also* United States v. Fisch, 474 F.2d 1071, 1076-78 (9th Cir.), *cert. denied*, 412 U.S. 921 (1973) (incriminating statements overheard by officer using his unaided ear while lying next to the crack of a door adjoining suspects' hotel room *held* admissible because officer conducted no "search"). Professor LaFave also uses *Fisch* to illustrate a permissible plain-hearing situation. 1 LAFAVE, *supra* note 31, §2.2(a) at 326-27. *But see* Katz v. United States, 389 U.S. 347, 353 (1967) (holding that the warrantless electronic surveillance of a suspect's telephone conversations constituted a search and seizure of evidence in violation of the Fourth Amendment).

Cases involving the sense of smell date back to Prohibition-era episodes in which law enforcement officials detected the presence or use of illicit liquor through its distinctive odor.[86] The unique aroma of opium also gave government agents probable cause to suspect illegal activity. In the 1948 case *Johnson v. United States*,[87] experienced narcotics agents conducting an investigation at a hotel immediately recognized "a strong odor of burning opium," which led them to a room in the hotel.[88] When the room's occupant denied the existence of any such odor, the agents arrested her and searched the room without a warrant.[89] The search revealed opium and opium smoking equipment.[90] In reversing the conviction, Justice Jackson wrote that when the police officers smelled the aroma of opium emanating from the suspect's apartment, this fact gave the officers probable cause to apply for a warrant.[91] Probable cause did *not* entitle them to forcibly enter the premises without a warrant and search for contraband.[92] The trial court, therefore, should have suppressed the evidence of opium and opium smoking apparatus. Justice Jackson also suggested that the officers may have performed a warrantless search and seizure to avoid such exigencies as the suspect's possible flight, or the destruction of evidence.[93] He found, however, that such exigencies did not exist.[94] In another case involving the sense of smell, the Ninth Circuit Court of Appeals applied reasoning very similar to that of Justice Scalia in *Hicks* to conclude that an officer's squeezing or manipulation of a container in order to pro-

86. *See* United States v. McBride, 284 F. 416 (5th Cir. 1922). In *McBride*, the Court of Appeals upheld the admission into evidence of testimony that two federal Prohibition agents had seized an illicit liquor still from the premises of the defendant. *Id.* at 417. The agents had discovered the still when they smelled the fumes of whiskey in the process of manufacture as they passed the stable that housed the still. *Id.* at 416. The court reasoned that the smell caused the officers to detect a crime being committed in their "presence," which entitled them to enter the premises, arrest the suspects and seize the still without a warrant. *Id.* at 419. This reasoning is, of course, questionable under modern case law, especially in light of Johnson v. United States, 333 U.S. 10 (1948), discussed *infra* at text accompanying notes 87-94. *See also* State v. McDaniel, 237 P. 373 (Or. 1925) (upholding the seizure of a flask of whiskey that investigating officers discovered during their warrantless search of the suspect). The court held that the investigating officers justifiably believed that the suspect had committed a crime in their presence by detecting the odor of liquor on his breath. *Id.* at 375-76. In comparing the reliability of sight with smell, the court pointedly remarked: "Sense of smell is often more unerring than that of sight. Lipton's tea might look ever so much like Scotch whiskey and fool many people dependent solely upon sight, but few would be misled through the sense of smell." *Id.* at 375.

87. 333 U.S. 10 (1948).

88. Johnson v. United States, 333 U.S. 10, 12 (1948).

89. *Id.*

90. *Id.*

91. *Id.* at 13-15.

92. *Id.*

93. *Johnson*, 333 U.S. at 14-15.

94. *Id.* at 15.

duce an incriminating odor constituted a search under the Fourth Amendment.[95]

Given the historical application of plain-view reasoning to observations made with other senses, it is not surprising that the Court has finally applied plain-view reasoning to the sense of touch. Because the situation that will most often place an officer lawfully in a position to invoke the plain-touch doctrine will involve a weapons frisk,[96] a brief overview of the weapons-frisk precedents follows.

B. THE WEAPONS FRISK

In *Minnesota v. Dickerson*,[97] a police officer detected contraband while conducting a weapons frisk,[98] a procedure first recognized as

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95. Hernandez v. United States, 353 F.2d 624, 626 (9th Cir. 1966). In *Hernandez*, an officer at the Los Angeles Airport, responding to reports of a traveler suspected of smuggling marijuana in two suitcases, went to the storage area where the bags waited to be loaded onto the suspect's flight. *Id.* The officer lifted the bags to feel their weight, and squeezed them to force air from their interior. *Id.* The officer smelled the distinct odor of marijuana, as did two narcotics officers who subsequently arrived and repeated the same procedure. *Id.* The officers then located the suspect, arrested him, and opened the bags after the arrest. *Id.* Applying reasoning very similar to that used by Justice Scalia in finding that the movement of stereo equipment in *Hicks* constituted a "search," the Ninth Circuit Court of Appeals held that the manipulation of the suspect's bags constituted a warrantless search:

> The government argues that the bags were not searched until they were opened. We cannot agree. The manipulation of appellant's bags by Sergeant Butler prior to appellant's arrest constituted a "search" within the meaning of the Fourth Amendment. The contents of the bags were not exposed to Sergeant Butler's sight or smell before the bags were squeezed. He detected the odor of marihuana as the result of an "exploratory investigation," an "invasion or quest," a "prying into hidden places for that which was concealed"—conduct which has been repeatedly said to characterize a "search."

Hernandez, 353 F. Supp. at 626. The court went on to conclude, however, that this warrantless search was necessitated by exigent circumstances because the suspect's night flight was due to depart in two hours and the officers could not obtain a warrant before the following morning. *Id.* at 627.

Professor LaFave cites *Hernandez* for the proposition that "if the officer has to force air out of the effects in order to detect the odor, that conduct may be found to constitute a search." 1 LAFAVE, *supra* note 31, §2.2(a) at 327-28. LaFave also suggests, however, that such a result "is not beyond dispute" because "it might be contended that [the officer's] squeezing of the bags did not intrude upon appellant's justified expectation of privacy in that Hernandez could not have reasonably expected that suitcases placed with an airline for loading, shipment and unloading would be handled more delicately." *Id.* at 328. *See also* Guidi v. Superior Court, 513 P.2d 908 (Cal. 1973) (upholding the search and seizure of a closed shopping bag containing hashish where the police had noticed an obvious odor of hashish emitted from the bag).

96. For a description of a weapons frisk, see *infra* note 98.

97. 113 S. Ct. 2130 (1993).

98. In *Dickerson*, Justice Scalia provided an excellent illustration of a weapons frisk when he quoted an instructive police manual:

> Check the subject's neck and collar. A check should be made under the subject's arm. Next a check should be made of the upper back. The lower back should also be checked.
>
> A check should be made of the upper part of the man's chest and the lower region around the stomach. The belt, a favorite concealment spot, should be checked. The inside thigh and crotch area also should be searched. The legs should be checked for possible weapons. The last items to be checked are the shoes and cuffs of the subject.

permissible under the Fourth Amendment in *Terry v. Ohio*.[99] In *Terry*, the Court held that:

> where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.[100]

Terry was a fact-sensitive case in which the Court responded to the everyday, on-the-street needs of police officers executing their duties.[101] In *Terry*, the suspicious behavior of two (later three) individuals in front of a store in downtown Cleveland drew the attention of plain clothes police detective Martin McFadden, a thirty-nine-year veteran of the force who had patrolled this particular area for thirty years.[102] Detective McFadden's considerable experience enabled him to swiftly determine whether an individual's behavior warranted further investigation,[103] which he conducted in this case by continuing to observe the men for approximately twelve minutes from a store entrance approximately 300 to 400 feet away.[104] After his observations confirmed his suspicion that the men were planning an armed robbery, Officer McFadden approached them, identified himself as a police officer, and asked for their names.[105] "When the men 'mumbled something' in response to his inquiries,

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Dickerson III, 113 S. Ct. at 2140 (Scalia, J., concurring) (quoting J. MOYNAHAN, POLICE SEARCHING PROCEDURES 7 (1963)).

99. 392 U.S. 1 (1968).

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

101. *See id.* at 20 ("we deal here with an entire rubric of police conduct — necessarily swift action predicated upon the on-the-spot observations of the officer on the beat — which historically has not been, and as a practical matter could not be, subjected to the warrant procedure").

102. *Id.* at 5.

103. *Id.*

104. *Id.* at 5-6.

105. *Terry*, 392 U.S. at 6-7.

Officer McFadden grabbed petitioner Terry, spun him around . . . and patted down the outside of his clothing."[106] This frisk revealed a gun.[107] Officer McFadden recovered another gun when he frisked the second man, but ceased his search of the three when his frisk of the third suspect uncovered no weapons.[108] As the Court noted, the crux of the case was not the propriety of Officer McFadden's initial investigation, but whether the Fourth Amendment permitted him to extend his investigation to physically search the suspects for weapons.[109]

The Court held this warrantless search "reasonable" under the Fourth Amendment, reasoning that an officer must "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" his invasion of an individual's constitutionally protected personal security.[110] The Court, therefore, noted Officer McFadden's detailed observations of the three men, which heightened his suspicion until he believed that the men were preparing for an armed robbery, and ultimately led him to confront and disarm them.[111] The Court also factored the officer's experience into its analysis, explaining that "in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."[112]

The Court's primary concern was unquestionably for the safety of officers and bystanders. Thus, the two key observations that Officer McFadden made prior to his pat-down frisk were (1) that he suspected the men of casing a "stick-up"[113]—a "crime of violence"[114] in Justice Harlan's words, and (2) "that he feared 'they may have a gun.'"[115] The

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106. *Id.* at 7.

107. *Id.*

108. *Id.*

109. *Id.* at 23.

110. *Terry*, 392 U.S. at 21. The Court noted that the Fourth Amendment's "right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Id.* at 9-10.

111. *Id.* at 5-7, 22-23.

112. *Id.* at 27.

113. *Id.* at 6.

114. *Id.* at 33 (Harlan, J., concurring).

115. *Terry*, 392 U.S. at 6. The Court also emphasized its concern about violence as the cornerstone for its decision by employing words commonly associated with physical violence (or a fear thereof) 94 times in the main body of the opinion. In calculating this figure, I counted the words 'weapon(s),' 'armed,' 'danger(ous),' 'harm,' 'gun(s),' and other names for guns (e.g. 'pistol,' 'revolver'), 'safety,' 'protect(ive), (ion),' 'fear,' 'assault,' 'threat,' 'knives,' 'clubs,' and 'bullet(s).' Words such as 'danger' or 'protection' were not counted in circumstances in which the Court used them in a context other than that commonly associated with a threat of physical violence. For example, the statement, "The *danger* in the logic which proceeds upon distinctions between a 'stop' and an 'arrest,'" 392 U.S. at 17 (emphasis added), would not be counted in the those terms commonly

Court described the scope of a permissible frisk as "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a 'full' search, even though it remains a serious intrusion."[116] The Fourth Amendment, therefore, permits a limited frisk for weapons where an officer's investigation of suspected criminal activity leads him to suspect that the individual before him may be armed and presently dangerous. Chief Justice Earl Warren left no question that an investigating officer *must* fear for his own or others' safety before conducting a weapons frisk.[117] A reasonable, articulable suspicion that a suspect is engaged in criminal activity, standing alone, is not enough.

In *Sibron v. New York*,[118] decided the same day as *Terry*, the Court began to develop limits on the weapons frisk. *Sibron* re-emphasized *Terry*'s general requirement that a reasonable fear of physical danger must precede a frisk. "In the case of the self-protective search for weapons, . . . [the officer] must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous."[119] In *Sibron*, therefore, the Court reversed a conviction for possession of narcotics where the investigating officer suggested neither that he feared bodily harm to himself or others, nor that he searched the suspect for self-protection to locate weapons. [120] The officer had observed the suspect conversing with known narcotics addicts over an eight-hour period one evening.[121] At the end of the evening, he confronted the suspect and told him "'you know what I'm after,'"[122] to which the suspect responded by reaching into his pocket.[123] The officer simultaneously thrust his hand into the suspect's pocket and retrieved several glassine envelopes containing heroin.[124] The Court found the record insufficient to determine whether the officer's initial confronta-

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associated with physical violence.

116. *Id.* at 26.

117. *Id.* at 30-31.

118. 392 U.S. 40 (1968). The other companion case decided with *Sibron*, Peters v. New York, never reached the issue of whether the investigating officer had properly conducted a weapons frisk because the Court determined that the investigating officer had actually conducted a search incident to a lawful warrantless arrest. Sibron v. New York, 392 U.S. 40, 66 (1968).

119. *Id.* at 64.

120. *Id.* at 66.

121. *Id.* at 45.

122. *Id.*

123. *Sibron*, 392 U.S. at 45.

124. *Id.*

tion with the suspect constituted a Fourth Amendment "seizure,"[125] but held the officer's frisk unconstitutional.[126] Chief Justice Warren wrote: "The suspect's mere act of talking with a number of known narcotics addicts over an eight-hour period no more gives rise to reasonable fear of life or limb on the part of the police officer than it justifies an arrest for committing a crime."[127]

Comparing the Court's approval of Officer McFadden's frisk after approximately twelve minutes of observation in *Terry* with Patrolman Anthony Martin's seizure of narcotics after eight hours of surveillance in *Sibron*, Professor Wayne LaFave has suggested that the Court is reluctant to extend "*Terry* to include such lesser offenses as possession of narcotics."[128] The factual difference between the two cases certainly seems to support such a theory. *Terry* involved the suspected plot of a potentially violent and deadly armed robbery, whereas *Sibron* involved the passive crime of possessing narcotics. Justice Harlan's comment that he saw no need for "immediate action" in the latter case also supports this position.[129] Since *Terry* requires the investigating officer to determine whether "the individual . . . is armed and *presently* dangerous to the officer or to others"[130] before conducting a frisk, it logically follows that an officer may not frisk someone when he suspects a passive crime that poses no present threat of violence. Professor LaFave further recommends that the Court expressly limit the *Terry* frisk exception to "investigation of serious offenses."[131] It is doubtful that the Court will adopt such a limitation, given the "plain-touch" holding in *Dickerson*.[132]

Supreme Court frisk cases decided during the decade following *Terry* continued to emphasize the Court's concern for safety, while expanding the doctrine's scope to include new scenarios. In 1971, Justice Rehnquist's *Adams v. Williams*[133] opinion extended the *Terry* rationale to include a situation where an informant's tip, rather than the officer's personal observation, provides the reasonable fear of danger necessary to conduct a weapons frisk.[134] Justice Rehnquist illustrated the scene—a lone police officer patrolling an urban "high crime area" at

125. *Id.* at 63. For a discussion of what police conduct constitutes a "seizure" under the Fourth Amendment, see *infra* text accompanying notes 144-75.

126. *See Sibron*, 392 U.S. at 65-66.

127. *Id.* at 64.

128. 3 LAFAVE, *supra* note 31, §9.2(c) at 358.

129. *Sibron*, 392 U.S. at 73 (Harlan, J., concurring).

130. *Terry*, 392 U.S. at 24 (emphasis added).

131. 3 LAFAVE, *supra* note 31, §9.2(c) at 360-61.

132. 113 S. Ct. 2130, 2137 (1993).

133. 407 U.S. 143 (1972).

134. Adams v. Williams, 407 U.S. 143, 148-49 (1972).

2:15 a.m.—to accent the officer's sense of impending danger upon receiving a reliable informant's tip that a shadowy figure seated in a car parked nearby held a gun and narcotics.[135] In this situation, the Court concluded:

> [the officer] had ample reason to fear for his safety. When Williams rolled down his window rather than complying with the policeman's request to step out of the car so that his movements could more easily be seen, the revolver allegedly at Williams' waist became an even greater threat. Under these circumstances the policeman's action in reaching to the spot where the gun was thought to be hidden constituted a limited intrusion designed to insure his safety, and we conclude that it was reasonable. The loaded gun seized as a result of this intrusion was therefore admissible at Williams' trial.[136]

Furthermore, Justice Rehnquist continued to stress the limited nature of a weapons frisk. "The purpose of this limited search," he said, "is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence."[137] The Court's subsequent opinion in *Pennsylvania v. Mimms*[138] again emphasized the Court's concern for safety as the cornerstone for its decision to include frisks made during stops for routine traffic violations within the permissible parameters of *Terry*. Under *Mimms*, if an automobile driver exits his vehicle in response to an officer's request and the officer notices a bulge under his clothing and fears that the bulge may be a weapon, the officer may conduct a weapons frisk.[139] Thus, although *Adams* and *Mimms*

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135. *Id.* at 144-45, 147-48.

136. *Id.* at 148 (footnote omitted). Two other considerations factored into Justice Rehnquist's conclusion. First, the information given to the officer "carried enough indicia of reliability to justify the officer's forcible stop of Williams." *Id.* at 147. The officer knew the informant, the informant conveyed the information to him *personally*, and the informant had provided him with information in the past. *Id.* at 146. Justice Rehnquist cited a second point in a footnote—the high incidence of police shootings (30%) that occur when a police officer approaches a suspect seated in an automobile. *Id.* at 148 n.3 (citing Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 J. CRIM. L.C. & P.S. 93 (1963)). *See also* Alabama v. White, 496 U.S. 325 (1990) (applying similar reasoning to uphold the investigative search and seizure of narcotics disclosed in an informant's tip).

137. *Adams*, 407 U.S. at 146. Justice White also quoted this language in *Dickerson III*, 113 S. Ct. 2130, 2136 (1993).

138. 434 U.S. 106 (1977).

139. Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977). In *Mimms*, two Philadelphia police officers stopped the suspects' automobile upon noticing that their license plate had expired. *Id.* at 107. Following routine practice, one officer approached the car and requested the driver to step out and produce his driver's license and registration. *Id.* When Mimms exited from the vehicle, the officer noticed a large bulge under his jacket. *Id.* Fearing that the bulge might be a weapon, he frisked Mimms and discovered a revolver and ammunition. *Id.* at 107, 109-10. Under these circumstances, the Court emphasized officer safety as the "legitimate and weighty" concern that outweighed the invasion of Mimms' personal safety, *id.* at 110, 111, and used Justice Rehnquist's earlier citation to Adams v. Williams regarding the incidence of traffic stop shootings as further justification for its

expanded the scope of situations that justify an officer's pat-down frisk, both cases continued to emphasize potential violence to justify the officers' search.

C. THE COURT DEFINES "SEIZURE"

Terry,[140] *Sibron*,[141] *Adams*,[142] and *Mimms*[143] addressed the rapidly unfolding events of spontaneous street encounters between police officers and individuals engaged in suspicious activity, emphasizing potential violence as the principal justification for the officers' weapons frisks in those cases. The *Terry* Court also noted that a *forcible* stop constitutes a seizure under the Fourth Amendment.[144] Thus, there was no question that Officer McFadden "seized" John Terry when he grabbed him and spun him around immediately prior to the frisk.[145] The Court did not, however, address the question of whether Officer McFadden's initial confrontation with the suspects constituted a Fourth Amendment "seizure."[146] Justice Harlan, concurring in *Terry* and *Sibron*, however, clarified that a *valid stop* is a prerequisite to a valid frisk.[147] "[T]he officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop."[148] Moreover, not every stop justifies a frisk. "If the nature of the suspected offense creates no reasonable apprehension for the officer's safety, I would not permit him to frisk,"[149] wrote Justice Harlan.

Because a valid stop must precede a frisk, it was obviously important for the court to clearly define what circumstances would constitute a "seizure." In *Terry*, Chief Justice Warren provided fertile ground for Justice Stewart to later develop the concept of a seizure in his "free-to-leave" doctrine when Warren remarked:

> Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a

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decision under *Terry* guidelines. *Id.* at 110.

140. 392 U.S. 1 (1968).
141. 392 U.S. 40 (1968).
142. 407 U.S. 143 (1972).
143. 434 U.S. 106 (1977).
144. 392 U.S. at 17.
145. *Id.* at 7.
146. 392 U.S. 1.
147. *Id.* at 32.
148. *Terry*, 392 U.S. at 32 (Harlan, J., concurring).
149. *Sibron*, 392 U.S. at 74 (Harlan, J., concurring).

> "seizure" has occurred. We cannot tell with any certainty upon this record whether any such "seizure" took place here prior to Officer McFadden's initiation of physical contact for the purpose of searching Terry for weapons, and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred.[150]

In *Sibron*, the Court similarly noted that it required evidence about "whether Sibron accompanied Patrolman Martin outside in submission to a show of force or authority which left him no choice, or whether he went voluntarily in a spirit of apparent cooperation with the officer's investigation" in order to decide whether the initial confrontation constituted a seizure.[151] Justice Powell's majority opinion in *United States v. Brignoni-Ponce*[152] subsequently clarified that government agents may briefly detain a suspect upon a reasonable suspicion of criminal activity in order to "investigate the circumstances that provoke suspicion."[153] Drug smuggling cases beginning with *United States v. Mendenhall*[154] later provided the Court with its opportunity to address the boundary between a permissible warrantless investigative stop, and the restraint or intimidation that would amount to a seizure.

In *Mendenhall*, Drug Enforcement Administration (DEA) agents stationed in the Detroit Metropolitan Airport stopped Sylvia Mendenhall after she exhibited behavior that conformed with a "drug courier profile," a compilation of characteristics that law enforcement officials found to personify drug smugglers.[155] Mendenhall accompanied the agents, at their request, to the airport DEA office located up one flight of stairs approximately fifty feet away from where they had stopped her.[156] In the DEA office, the agents asked her for permission to search her person and handbag, which she consented to after the officers informed her that she had a right to refuse.[157] Mendenhall repeated her consent to the female police officer who arrived to conduct the search, but when the officer informed her that the search required her to remove her clothing, Mendenhall "stated that she had a plane to catch."[158] The officer then "assured" her that if the search revealed no narcotics, "there would be

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150. *Terry*, 392 U.S. at 19 n.16.

151. *Sibron*, 392 U.S. at 63.

152. 422 U.S. 873 (1975).

153. United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975). Justice Powell further commented that "any further detention or search must be based on probable cause." *Id.* at 882.

154. 446 U.S. 544 (1980).

155. United States v. Mendenhall, 446 U.S. 544, 547 n.1 (1980). *See also, e.g.*, Reid v. Georgia, 448 U.S. 438, 440-41 (1980) (outlining the characteristics of the drug courier profile).

156. *Mendenhall*, 446 U.S. at 548.

157. *Id.*

158. *Id.* at 549.

no problem."[159] The search then revealed narcotics and the DEA agents arrested her.[160]

All five justices in the majority found the search conducted at the DEA office was a constitutional "consent" search, as determined in light of "the totality of the circumstances" surrounding Mendenhall's interaction with the agents.[161] Three of the five justices in the majority did not reach the question of whether the initial questioning on the airport concourse constituted a "seizure" under the Fourth Amendment because the lower courts never addressed the issue.[162] They therefore assumed that the officers had seized Mendenhall prior to the search,[163] but held that the seizure constituted a lawful investigative stop based upon the officers' reasonable suspicion that the suspect was engaged in criminal activity.[164]

Concluding that the initial encounter between the agents and Mendenhall did not constitute a "seizure," Justice Stewart articulated the "free-to-leave" doctrine in a section of the opinion joined only by Justice Rehnquist. The doctrine, which the entire court has now accepted,[165] states: "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[166] (The Court subsequently defined a "reasonable person" within the free-to-leave context as a reasonable *innocent* person.)[167] Factors that the Court will consider in determining whether government agents have seized an individual include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might

159. *Id.*

160. *Id.*

161. *Mendenhall*, 446 U.S. at 557-58 (citing Schneckloth v. Bustamonte, 412 U.S. 218, at 226-27). Under *Schneckloth*, courts are to determine whether a person consented to provide information to authorities, either by way of answering questions or consenting to a search, by assessing "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." 412 U.S. at 226. Courts may consider such factors as the suspect's age, intelligence, education, and ethnic or social background, among others, to determine whether the suspect in fact voluntarily consented to the search. *Mendenhall*, 446 U.S. at 557-58 (opinion of Stewart, J.).

162. 446 U.S. at 560 (Powell, J. concurring).

163. *Id.*

164. *Id.* at 565-66 (Powell, J., concurring). *See also Brignoni-Ponce*, 422 U.S. at 881-82 (holding that border patrol officers may lawfully detain a vehicle to question its occupants about their citizenship status where the officer reasonably suspects that the vehicle may contain illegal aliens).

165. *See* Florida v. Bostick, 111 S. Ct. 2382, 2386 (1991); *Bostick*, 111 S. Ct. at 2391 (Marshall, J., dissenting); Michigan v. Chesternut, 486 U.S. 567, 573 (1988); Immigration and Naturalization Service v. DelGado, 466 U.S. 210, 216-17 (1984); Florida v. Royer, 460 U.S. 491, 503 (1983) (plurality opinion of White, J.).

166. *Mendenhall*, 446 U.S. at 554.

167. *Bostick*, 111 S. Ct. at 2388.

be compelled."[168] The rule sprouted from *Terry* dictum stating that an officer "seizes" someone "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen,"[169] and from *Sibron*'s allusion to the Court's need for evidence about the officer's coercion or the suspect's cooperation in order to determine whether the initial encounter in that case constituted a "seizure."[170] It also grew from the concurring opinions of Justices White and Harlan in *Terry*, holding that police do not "seize" individuals by simply approaching them to ask questions, as all members of the public may do. "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets,"[171] wrote Justice White. "Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way."[172]

To summarize, police officers do not violate the Fourth Amendment when they approach individuals and ask routine questions, as all members of the public may lawfully do. If, however, the officers conduct themselves in a way that would lead a "reasonable person" to conclude that he is not "free to leave,"[173] then the officers have effectively seized the person for purposes of the Fourth Amendment. The officers *may* briefly detain a suspect for routine questioning when they have a reasonable, articulable suspicion that the suspect is engaged in criminal activity,[174] but "any further detention or search must be based on consent or probable cause."[175] Finally, if, during the course of their investigation,

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168. *Mendenhall*, 446 U.S. at 554 (opinion of Stewart, J.).

169. *Terry*, 392 U.S. at 19 n.16. In *Mendenhall*, Justice Stewart paraphrased this language to develop the "free-to-leave" doctrine. 446 U.S. at 553 ("a person is 'seized' only when, by means of physical force or show of authority, his freedom of movement is restrained").

170. *Sibron*, 392 U.S. at 63. *See supra* text accompanying note 151 (quoting the Court's need for more information about whether the suspect accompanied the officer "in submission to a show of force" or "in a spirit of apparent cooperation" in order to decide whether the initial confrontation constituted a seizure).

171. *Terry*, 392 U.S. at 34 (White, J., concurring).

172. *Id.* Justice Harlan added that in this situation, "ordinarily the person addressed has an equal right to ignore his interrogator and walk away." *Id.* at 32-33 (Harlan, J., concurring).

173. Florida v. Royer, 460 U.S. 491 (1983). In *Royer*, Justice White's plurality opinion found that two detectives effectively "seized" a suspect under the Fourth Amendment when they retained his airline ticket and driver's license and requested him to accompany them to a large storage closet for further interrogation. *Id.* at 503. Under such circumstances, the agents had forcibly restrained the suspect to the point where they had effectively arrested him. *Id.*

174. *Mendenhall*, 446 U.S. at 560, 561 (Powell, J., concurring); *Brignoni-Ponce*, 422 U.S. at 881-82.

175. *Brignoni-Ponce*, 422 U.S. at 882. Exactly what *length* of time would constitute a "seizure" remains a fact-sensitive question. In United States v. Place, 462 U.S. 696 (1983), the Court explicitly declined "to adopt any outside time limitation for a permissible *Terry* stop." *Id.* at 709. In any event, Justice O'Connor found the 90-minute warrantless seizure of the suspect's luggage in *Place* "unreasonable" for Fourth Amendment purposes, particularly because the police knew of the suspect's arrival in advance and could have taken steps to minimize the intrusion upon the suspect's Fourth

the officers reasonably fear that the individuals they are confronting are armed and presently dangerous, they may conduct a limited pat-down frisk of the suspects' outer clothing to discover weapons that the suspects may use against either the officers or others.[176]

III. *MINNESOTA V. DICKERSON*, THE PLAIN-TOUCH DOCTRINE AND RELATED ISSUES

Minnesota v. Dickerson[177] raises many intriguing issues, some growing from the narrow facts of the case itself, others growing from the theoretical underpinnings of the "plain-touch" concept. As noted earlier, Justice White did not address the questions of whether the investigating officers had a reasonable suspicion that Timothy Dickerson was engaged in criminal activity when they forcibly stopped him, or whether they reasonably feared he was armed and dangerous when they frisked him. In applying the plain-view doctrine to touch, the Court also failed to explain what "lawful right of access" will permit a police officer to reach into a suspect's clothing and seize a nonthreatening object discovered during a frisk.

After stating the facts of the case, I will explore these issues below. I explain what "lawful right of access" will permit a police officer to reach into a suspect's clothing and seize nonthreatening contraband during a weapons frisk. This explanation will complete the definitional framework of the plain-touch doctrine. I also briefly explore the theoretical question of whether the sense of touch is sufficiently quick and reliable to provide an officer with probable cause during a *Terry* frisk. I conclude that any definitive statement on this issue must await further scientific research. For the present, a trial court must evaluate the credibility of an officer's testimony to determine whether a nonthreatening object's incriminating nature was "immediately apparent" to the officer upon touching it. Finally, Part IV examines whether

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Amendment rights. *Id.* at 710. Cases decided since *Place* confirm the fact-sensitive nature of this issue. In United States v. Montoya de Hernandez, 473 U.S. 531 (1985), customs officials detained a traveler who arrived at Los Angeles International Airport from Bogota, Colombia, on suspicion that she was smuggling narcotics through her alimentary canal. *Id.* at 533-34. The Court upheld her detention for nearly 27 hours while the agents waited for her to either produce a bowel movement or agree to another form of inspection, such as an X-Ray examination. *Id.* at 544. Justice Rehnquist reasoned that her "long, uncomfortable, indeed, humiliating" detention had "resulted solely from the method by which she chose to smuggle illicit drugs into this country." *Id.* Justice Rehnquist analogized the case to a situation where border officials detain a suspected tuberculosis carrier: "both are detained until their bodily processes dispel the suspicion that they will introduce a harmful agent into this country." *Id.* *See also* United States v. Sharpe, 470 U.S. 675, 687-88 (1985) (holding a 20-minute detention while an officer attempted to contact other officers reasonable, because the officer acted as expeditiously as possible during his investigation).

176. *Terry*, 392 U.S. at 30-31.

177. 113 S. Ct. 2130 (1993).

Dickerson's behavior justified his stop and the frisk that Officer Rose immediately performed. I conclude that the officers were unjustified in taking either action.

A. *MINNESOTA V. DICKERSON*

At approximately 8:15 p.m. on the evening of November 9, 1989, two uniformed police officers, Vernon Rose and Bruce Johnson, were patrolling the area of Tenth Avenue and Morgan Avenue on the north side of Minneapolis, Minnesota.[178] As they proceeded southbound on Morgan Avenue in their marked squad car, they observed an individual exit building number 1030, a twelve-unit apartment house.[179] The apartment house had a front set of concrete steps connected with a sidewalk that wrapped around the building and led directly to an alley located behind the building.[180] Another sidewalk connected the first sidewalk with a third sidewalk running parallel with Morgan Avenue.[181] In order to reach Morgan Avenue, therefore, an individual descending the front staircase of 1030 Morgan Avenue would have to cross over the first sidewalk, walk along the second sidewalk, and pass through a gate leading to the public sidewalk running parallel with Morgan Avenue.[182]

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178. *Id.* at 2133.

179. *Id.*; Transcript at 7-8, *Dickerson* (No. 89067687).

180. Transcript at 12-13.

181. Telephone Interview with Beverly J. Wolfe, Esq., Assistant Hennepin County Attorney, Sept. 7, 1993.

182. I have developed this illustration of the scene primarily from Officer Rose's sworn testimony, which the Minnesota courts credited as an accurate portrayal of the events leading up to the suspect's arrest:

> [Cross-examination by Mary Moriarty, Esq., Assistant Public Defender]
> Q. Officer Rose, you said that Mr. Dickerson walked down the steps.
> A. Correct. There's front steps, concrete steps.
> Q. And you said when he got to the bottom of the steps he changed direction?
> A. No, I didn't. I said when he got to the bottom he started towards the concrete, towards the sidewalk. He was almost out the gate, saw us, turned around and went the other way.
> Q. Did you notice there was a sidewalk which goes to the side of that house into the alley?
> A. Did I notice if there's one?
> Q. Yes.
> A. Absolutely.
> Q. And how far away from the concrete steps would you say that sidewalk is?
> A. From the concrete steps, probably runs right to it, I would think.
> ....
> He was past that about probably three to five feet I'd guess before he — when he saw us and turned around and went back.

Transcript at 12-13, *Dickerson* (No. 89067687). Earlier, on direct examination, Officer Rose testified "he [Dickerson] was headed towards the sidewalk. He looked up and saw the squad coming by and turned around and changed his direction and headed along the south side of the building out towards the alley." *Id.* at 8.

Beverly Wolfe, Esq., an assistant prosecutor for Hennepin County, informed me that another sidewalk connected the public sidewalk on Morgan Avenue with the sidewalk running from the

The officers observed the individual, a black male unknown to them, exit the front door of the apartment house, descend the staircase, and begin walking toward Morgan Avenue.[183] The individual was approximately three to five feet beyond the first sidewalk,[184] near the gate leading to the Morgan Avenue sidewalk,[185] when he looked up, made eye contact with Officer Rose, and abruptly turned and walked along the south side of the building into the alley.[186] Officer Johnson, driving, circled the squad car around so that it entered the alley from a direction facing the suspect,[187] who continued to walk toward the squad car.[188] When the officers stopped the individual, they immediately ordered him to place his hands on the hood of the squad car.[189] The moment he complied with this command, Officer Rose frisked him.[190]

On direct examination by the prosecuting attorney, Officer Rose described the stop and the frisk as follows:

> A. Officer Johnson pulled the squad into the alley and we stopped the party.
> Q. Why did you stop that individual?
> A. To check him for weapons and contraband.
> Q. Now, what did you do after you made the stop?
> A. I pat-searched the party for weapons and contraband.
> Q. Why were you pat-searching for weapons?
> A. Because we've had numerous weapons in that area found.
> Q. Describe how you conducted the search then.
> A. I started down from the shoulders to the underarms. I then went across the waistband and I came back up to the chest and I hit a nylon jacket that had a pocket and the nylon jacket was very fine nylon and as I pat-searched the front of his body I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane.
> . . . .
> It was in . . . a sandwich-wrap type material with a knot tied on it. You could feel the knot through the nylon also.[191]

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apartment steps to the alley. Telephone Interview with Beverly Wolfe, Esq., *supra* note 181. I incorporated this information into my illustration of the scene. Ms. Wolfe otherwise confirmed the description that I have provided in the text. *See id.*

183. Transcript at 8, *Dickerson* (No. 89067687).
184. *Id.* at 13.
185. *Id.* at 12.
186. *Id.* at 8.
187. *Id.* at 9.
188. Transcript at 16-17, *Dickerson* (No. 89067687).
189. *Id.* at 19.
190. *Id.* at 9, 19.
191. *Id.* at 9-10.

Officer Rose then removed the .2 gram lump of crack cocaine,[192] which was approximately the size of an aspirin tablet,[193] and arrested the suspect.[194]

The above fact pattern is drawn primarily from Officer Rose's sworn testimony at the evidentiary hearing on February 20, 1990, which the trial court judge credited as a reliable account of the events on the evening of November 9, 1989.[195] Officer Rose further testified that he considered 1030 Morgan Avenue a 24-hour-a-day "crack house" where he had executed search warrants and responded to complaints of drug dealing in the hallways,[196] although he and Officer Johnson had not responded to a call on this particular occasion.[197] His previous searches had recovered weapons and narcotics, including knives, sawed-off shotguns, handguns, and crack cocaine.[198] At the time of the evidentiary hearing, Officer Rose was a veteran of fourteen years, and had patrolled the north side of Minneapolis for over eleven years.[199] He had executed approximately seventy-five crack and cocaine search warrants over the two years prior to arresting Mr. Dickerson.[200] He had also recovered crack cocaine approximately seventy-five to 100 times during arrests and searches over the previous two years.[201] He could not, however, recall how many search warrants he had executed at 1030 Morgan Avenue, or which of the twelve apartments he had executed

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192. *Id.* at 9.

193. Respondent's Brief in Opposition to Petition for a Writ of Certiorari at xii, Minnesota v. Dickerson, 113 S. Ct. 2130 (1993) (No. 91-2019). I have accepted the description of the .2 gram lump of crack cocaine as the size of an average aspirin tablet because neither the Petitioner State of Minnesota nor Justice White disputed the description. In Respondent's Brief, Dickerson suggested that the Supreme Court should take judicial notice of this fact. *Id.* (citing FED. R. EVID. 201(b)).

Justice Tomljanovich's statement that "[t]he confiscated material was described as the size of a pea or a marble," *Dickerson II*, 481 N.W.2d at 843 (Minn. 1992), is misleading because this description appeared only in the public defender's oral argument during the suppression motion. Another more serious factual inaccuracy in the Minnesota Supreme Court opinion appears where the court cites the trial court finding that Officer Rose immediately knew the lump in Dickerson's pocket was crack cocaine. *Id.* at 844. The trial court never made such a finding. Trial Judge Robert H. Lynn, rather, found Officer Rose's conduct in frisking Dickerson and seizing the crack cocaine "reasonable" under the Fourth Amendment. Trial Court Findings at C-3, C-5 to 6, *Dickerson* (No. 91-2019). Officer Rose, moreover, never testified that he "immediately" knew the object in Dickerson's pocket was crack cocaine. He merely testified that he was "absolutely certain" the object was crack after manipulating it within the thin nylon pocket of Dickerson's jacket. Transcript at 9-10, *Dickerson* (No. 89067687).

194. Transcript at 9, *Dickerson* (No. 89067687).

195. Trial Court Findings at C-3, C-4 to 5, *Dickerson* (91-2019); *Dickerson II*, 481 N.W.2d 840, 843 (Minn. App. 1992); *Dickerson I*, 469 N.W.2d 462, 465 (Minn. App. 1991).

196. Transcript at 7, 14, *Dickerson* (No. 89067687).

197. *Id.* at 15.

198. *Id.* at 7.

199. *Id.* at 4.

200. *Id.* at 5.

201. Transcript at 5, *Dickerson* (No. 89067687).

warrants in.[202] Officer Rose estimated that he had "done a couple of doubles,"[203] meaning four of the twelve apartments.

The defendant moved to dismiss the charges on the grounds that officers Rose and Johnson violated the requirements of a valid investigative stop and a weapons frisk.[204] The trial court denied the motion, concluding that Officer Rose acted reasonably in stopping Dickerson and frisking him for weapons.[205] The court equated Officer Rose's tactile discovery of the contraband with a similar discovery under the plain-view doctrine, and upheld its seizure.[206] The state appellate courts affirmed the trial court's decision to credit the officer's testimony over Dickerson's testimony.[207] The appellate courts also affirmed the trial court's conclusion that the officers had a reasonable, articulable suspicion that Dickerson was engaged in criminal activity, and that Dickerson's suspicious behavior, combined with the officers' knowledge of the surrounding area, constituted a sufficient basis for the officers' belief that he was armed and dangerous.[208] For these reasons, both the Minnesota Court of Appeals and the Minnesota Supreme Court affirmed the trial court's opinion that the officers were justified in stopping Dickerson and frisking him.[209] Respondent Dickerson did not question these findings on the state's appeal to the United States Supreme Court.[210]

The Minnesota Court of Appeals, however, reversed the trial court's denial of Dickerson's suppression motion.[211] The Minnesota Supreme Court affirmed, holding that Officer Rose exceeded the scope of *Terry* by continuing to manipulate the object in Dickerson's pocket after he had determined that Dickerson possessed no weapons.[212] Though acknowledging that an improper motive does not necessarily invalidate a search and seizure,[213] Justice Tomljanovich also found Officer Rose's

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202. *Id.* at 22.

203. *Id.*

204. Notice of Motion and Motion to Dismiss for Lack of Probable Cause, *reprinted in* Joint Appendix at 12-16, Minnesota v. Dickerson, 113 S. Ct. 2130 (1993) (No. 91-2019). Dickerson argued that the violation of his Fourth Amendment rights required the court to suppress the evidence. *Id.* Without the evidence, no probable cause would have existed to charge him. *Id.* at 13, 16.

205. Trial Court Findings at C-3, C-4 to 5, *Dickerson* (No. 91-2019). Judge Lynn believed that Dickerson's behavior and his presence in an area known for weapons seizures supported both a reasonable suspicion of criminal activity necessary to stop him and a concern for safety necessary to frisk him. *Id.* at C-4 to 5.

206. *Id.* at C-5.

207. *Dickerson II*, 481 N.W.2d at 843; *Dickerson I*, 469 N.W.2d at 464-65.

208. *Dickerson II*, 481 N.W.2d at 843; *Dickerson I*, 469 N.W.2d at 465.

209. *Dickerson II*, 481 N.W.2d at 843; *Dickerson I*, 469 N.W.2d at 465.

210. *Dickerson III*, 113 S. Ct. at 2138.

211. *Dickerson I*, 469 N.W.2d at 466.

212. *Dickerson II*, 481 N.W.2d at 844.

213. *Id.* (citing Horton v. California, 496 U.S. 128, 139 (1990)).

testimony that he stopped Dickerson to search him for weapons *and* contraband indicated his intention to subvert the scope of a *Terry* frisk.[214]

Both Minnesota appellate courts refused to recognize a plain-touch doctrine,[215] and, therefore, also reversed the trial court's decision recognizing it.[216] In arriving at this conclusion, the Minnesota Supreme Court first found the sense of touch "less immediate and less reliable" than sight.[217] Second, the court reasoned that discovering an object through touch is so inherently more intrusive than simply viewing an object that such action actually constitutes a search in itself, separate from anything *Terry* justifies.[218] "It is one thing to see a bag of marijuana in a suspect's pocket," wrote Justice Tomljanovich. "It is quite something else to pinch, squeeze and rub the suspect's pocket to see what might be inside. Observing something that is held out to plain view is not a search at all. Physically touching a person cannot be considered anything but a search."[219] Even if the court adopted a plain-touch doctrine, she added, the officer's behavior during the frisk exceeded its scope because he could not recognize the object as contraband without continuing to manipulate it.[220] Although both appellate courts deferred to the trial court's factual findings, Justice Tomljanovich questioned the trial court's finding that Officer Rose properly conducted the *Terry* frisk when he recognized the object in Dickerson's pocket as crack cocaine, and held that the frisk exceeded the scope of a permissible frisk for weapons.[221]

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214. *Id.*

> [T]he 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 us that he set out to flaunt the limitations of *Terry* and he succeeded. The results of such a search cannot be admitted into evidence.

Id.

215. *Dickerson II*, 481 N.W.2d at 844, 845; *Dickerson I*, 469 N.W.2d at 466.

216. *Dickerson II*, 481 N.W.2d at 843-45; *Dickerson I*, 469 N.W.2d at 466-67. In upholding Officer Rose's search of Dickerson for weapons and contraband, and his seizure of the crack cocaine, District Court Judge Robert H. Lynn wrote:

> To this Court, there is no distinction as to which sensory perception the officer uses to conclude that he material is contraband. An experienced officer may rely upon his sense of smell in DWI stops or in recognizing the smell of burning marijuana in a automobile. The sound of a shotgun being racked would clearly support certain reactions by an officer. The sense of touch, grounded in experience and training, is as reliable as perceptions drawn from other senses. "Plain feel," therefore, is no different than plain view and will equally support the seizure here.

Trial Court Findings at C-5, *Dickerson* (91-2019).

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

218. *Id.*

219. *Id.* (footnotes omitted).

220. *Id.* at 844 n.1.

221. *Id.* at 843.

> [A] close examination of the record in this case reveals that . . . the officer's 'immediate' discovery in this case is fiction, not fact.
>
> The officer testified that he was sure he had found crack cocaine only after (1) feeling a lump, (2) manipulating it with his fingers, and (3) sliding it within the defendant's pocket. That testimony belies any notion that he 'immediately' knew what he had found. And this was not a case of some clever cross-examiner putting words in the officer's mouth; this was his own testimony on direct examination.[222]

As a final justification for her holding, Justice Tomljanovich noted that "plain touch" was "not a 'well-delineated' exception to the [F]ourth [A]mendment."[223]

On appeal to the United States Supreme Court, Justice White held that the Fourth Amendment permits police officers to seize non-threatening contraband discovered through the sense of touch during a weapons frisk, so long as the officers confine their search to the limits outlined in *Terry*, and provided that the object's incriminating nature is "immediately apparent."[224] In reaching this conclusion, Justice White disagreed with the Minnesota Supreme Court's reasoning that the sense of touch is less reliable than sight, and that discovering objects through touch is more intrusive than doing so through sight.

> First, *Terry* itself demonstrates that the sense of touch is capable of revealing the nature of an object with sufficient reliability to support a seizure. The very premise of *Terry*, after all, is that officers will be able to detect the presence of weapons through the sense of touch. . . . Even if it were true that the sense of touch is generally less reliable than the sense of sight, that only suggests that officers will less often be able to justify seizures of unseen contraband.[225]

Second, the Court refuted Justice Tomljanovich's concern about the intrusiveness of discovering contraband through touch, reasoning that *Terry* already permits the police to initiate physical contact in order to

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222. *Dickerson II*, 481 N.W.2d at 844. The Minnesota Supreme Court stated that "[t]he trial court found that when the officer felt the defendant's jacket pocket, he knew immediately he was feeling a plastic bag containing a lump of crack cocaine." *Id.* Such a "finding," however, appears nowhere in either the trial court's unpublished findings of fact and law, or the trial court transcript. *See supra* note 193.

223. *Dickerson II*, 481 N.W.2d at 846.

224. *Dickerson III*, 113 S. Ct. at 2137.

225. *Id.*

search for weapons.[226] Discovering and seizing contraband during the course of a frisk, therefore, "occasions no further invasion of privacy" than that already authorized under *Terry*.[227] For these reasons, Justice White expressly disapproved of that part of the Minnesota decision which seemed to categorically bar the seizure of contraband detected through the sense of touch because such a rule would not advance the privacy interests guarded by the Fourth Amendment.[228]

Justice White limited the Court's unanimous plain-touch holding to those situations where the issue arises during a weapons frisk, as indicated in both his statement of the issue,[229] and in this synopsis of the new rule:

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context.[230]

The new plain-touch doctrine, therefore, encompasses all the requirements of the plain-view doctrine as applied to an officer's tactile impressions during a properly limited weapons frisk.

Applying the plain-view doctrine to the *Dickerson* facts, Justice White accepted the Minnesota courts' findings that the police were justified in stopping Dickerson and frisking him,[231] and restricted the Court's analysis to the issue of whether Officer Rose acted within the scope of *Terry*[232] and the plain-view doctrine[233] when he developed probable cause to believe the lump in Dickerson's pocket was crack cocaine. Affirming the judgment of the Minnesota Supreme Court, Justice White concluded that "the officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to '[t]he sole justification of the search [under *Terry*:] . . . the protection of the police officer and others nearby.'"[234] For this

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226. *Id.* at 2138.
227. *Id.*
228. *Id.*
229. *See Dickerson III*, 113 S. Ct. at 2133, 2136 ("[i]n this case, we consider whether the Fourth Amendment permits the seizure of contraband detected through a police officer's sense of touch during a protective patdown search").
230. *Id.* at 2137.
231. *Id.* at 2138.
232. *Id.*
233. *Id.* at 2139.
234. *Dickerson III*, 113 S. Ct. at 2138-39 (brackets in original) (quoting *Terry*, 392 U.S. at 26).

reason, the frisk constituted an impermissible general evidentiary search that breached the limits of a *Terry* frisk.[235] Applying the plain-touch doctrine, Justice White equated Officer Rose's conduct with that of the officer lifting the stereo equipment in *Arizona v. Hicks*.[236] As in *Hicks*, Officer Rose's act of squeezing, sliding, and otherwise manipulating the lump in Dickerson's pocket constituted "a further search, one not authorized by *Terry* or by any other exception to the Warrant Requirement. Because this further search of respondent's pocket was constitutionally invalid, the seizure of the cocaine that followed is likewise unconstitutional."[237]

As stated by Justice White, the *Minnesota v. Dickerson* plain-touch doctrine may be summarized as follows: First, a police officer must be properly justified in conducting an investigative stop and a limited weapons frisk. Second, the police officer must satisfy the three requirements of the plain-view doctrine, as applied in the context of "plain touch": (1) a reasonable, articulable fear that the suspect is armed and presently dangerous will justify a pat-down frisk, which will, in turn, place the officer *lawfully in a position where he may tactually sense the presence of contraband*; (2) if the officer feels a nonthreatening object during the frisk, the object's incriminating nature must be *immediately apparent* (the officer's initial sense impressions alone, without doing more, must create probable cause to believe that the object is contraband or incriminating evidence); and (3) if the officer has satisfied steps (1) and (2), he may seize the object if he has a lawful right of access to the object.

Unfortunately, the *Dickerson* plain-touch framework is incomplete. What is the "lawful right of access" that will allow a police officer to reach into someone's clothing and seize a nonthreatening object?

B. THE COMPLETE PLAIN-TOUCH DOCTRINE

Although Justice White correctly outlined the three requirements of the plain-view doctrine[238] in *Minnesota v. Dickerson*, he did not describe precisely what "lawful right of access" will permit a police officer to reach into a suspect's clothing and seize a nonthreatening object during a

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235. *Id.*

236. *Cf.* 480 U.S. 321 (1987). The reader should note that Timothy Dickerson's appellate counsel made this precise argument in his brief to the Court. *See* Respondent's Brief on the Merits at 32-34, Minnesota v. Dickerson, 113 S. Ct. 2130 (1993) (No. 91-2019). For a discussion of *Hicks*, see *supra* text accompanying notes 59-69.

237. *Dickerson III*, 113 S. Ct. at 2139.

238. *Id.* at 2136-37 ("[u]nder that doctrine, if the police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant").

weapons frisk. Justice White later said that the Fourth Amendment requires a police officer to "have probable cause to believe that the item is contraband before seizing it,"[239] but this statement is somewhat misleading. As Justice Stewart wrote in *Coolidge v. New Hampshire*,[240] "no amount of probable cause can justify a warrantless . . . seizure absent 'exigent circumstances.'"[241] Because "plain view *alone* is never enough to justify a warrantless seizure of evidence,"[242] it follows that plain *touch*, *alone*, is never enough to justify the seizure of a nonthreatening object concealed within the clothing of a suspect. Justice White should, therefore, have taken one last technical but important step in his analysis to explain why a police officer may seize nonthreatening contraband whose incriminating nature is immediately apparent through the sense of touch.[243]

The search-incident-to-arrest exception to the Warrant Requirement logically fills this gap in the last step of the plain-touch analysis. Courts have long held that a police officer may make a warrantless arrest when

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239. *Id.* at 2137. *See also supra* notes 59-69 and accompanying text (discussing Arizona v. Hicks, 480 U.S. 321 (1987) (holding that a police officer must have probable cause to believe that an object is contraband or evidence of a crime in order to seize it under the plain-view doctrine but referring to a situation where the officer *already* had a lawful right of access to the object because he was conducting a warrantless search, inside the suspect's apartment, justified by exigent circumstances)).

240. 403 U.S. 443 (1971).

241. Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971). *See also supra* text accompanying note 45.

242. 403 U.S. at 468. *See also supra* text accompanying note 45.

243. *See* Texas v. Brown, 460 U.S. 730 (1983) (skipping the last step in the plain view analysis by failing to explain what "lawful right of access" the investigating police officer had to seize the suspected contraband at issue in that case). In *Brown*, an investigating police officer standing outside the driver's window of an automobile observed evidence of illicit narcotics located inside during a routine driver's license check. *Id.* at 733. When the driver failed to produce his license, the officer ordered him to exit the vehicle and seized the evidence (a party balloon containing heroin) immediately after the suspect left the car. *Id.* at 733-34. Justice Rehnquist correctly stated the rule that an officer may seize evidence of a crime discovered in plain view on private premises when the "officer's access to the object has some prior justification under the Fourth Amendment." *Id.* at 738. He noted that such access would include an officer's observations made while executing a search warrant, or an officer's action taken pursuant to an exception to the Warrant Requirement. *Id.* at 738 n.4.

Despite correctly reciting this last step in the plain-view doctrine, Justice Rehnquist applied only the first two steps of the plain-view doctrine. He first found that the officer properly observed the contraband located in the suspect's car. *Id.* at 739-40. Second, he found that the nature of the evidence as illegal contraband was "immediately apparent" to the officer. *Id.* at 743. He then simply concluded that these factors gave the officer probable cause to believe that the evidence "was subject to seizure under the Fourth Amendment." *Id.* at 744. As explained *infra* at text accompanying notes 244 through 251, Justice Rehnquist should have completed his *Brown* analysis by finding (A) that the officer's observations gave him probable cause to believe that the suspect was committing a crime in his presence—possession of narcotics, and (B) that this probable cause entitled the officer to arrest the suspect and seize the evidence in a search incident to arrest. An alternative ground for upholding the seizure would have been to hold that the officer seized the evidence in search incident to arrest of the suspect for driving without a license. Justice Rehnquist noted that the precise ground for the suspect's ultimate arrest was unclear from the record before the Court. *Id.* at 738 n.4.

he has probable cause to believe that a suspect is committing a crime in his presence.[244] The officer may employ all his senses, including touch, to develop probable cause to believe that the suspect is committing a crime.[245] Finally, it is well settled that a police officer may conduct a full search of an arrestee incident to a lawful arrest.[246] As noted in *United States v. Robinson*,[247] a police officer may seize evidence discovered on the arrestee's person during the course of a full search incident to arrest.[248]

Examining a hypothetical fact pattern similar to *Dickerson* in light of these additional considerations illustrates a properly executed plain-touch seizure during a weapons frisk. Assume that the officer is lawfully justified under *Terry* in stopping the suspect and then frisking him. During the frisk, the officer discovers a nonthreatening object. Unlike Officer Rose, the police officer does not manipulate the object, but

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244. Justice Marshall concisely summarized this rule in United States v. Watson, 423 U.S. 411 (1976): "When law enforcement officers have probable cause to believe that an offense is taking place in their presence, and that the suspect is at that moment in possession of the evidence, exigent circumstances exist. Delay could cause the escape of the suspect or the destruction of the evidence." 423 U.S. at 435 (Marshall, J., dissenting). *See also* 2 LAFAVE, *supra* note 31, §§ 5.1(b) & (c) at 395-411 (discussing the parameters of lawful warrantless arrests for both felonies and misdemeanors). This rule holds true regardless of whether the crime is a felony or a misdemeanor under the jurisdiction's criminal code. 2 LAFAVE, *supra* note 31, § 5.1(b) at 395-96 & n.69 (Supp. 1994) (discussing the common law and statutory requirements regarding warrantless arrests for felonies and misdemeanors). A police officer may also make a warrantless arrest if he has probable cause to believe that a felony has been committed, and that the person before him has committed it. 2 LAFAVE, *supra* note 31, § 5.1(b) at 395. *See also, e.g.*, Johnson v. United States, 333 U.S. 10, 15 (1948) (stating, in dicta, that a warrantless arrest "could be valid only if for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe the defendant guilty").

245. 2 LAFAVE, *supra* note 31, § 5.1(c) at 405-06 ("It is generally accepted that an officer 'may utilize all of his senses' in determining whether a misdemeanor is occurring"). In State v. Washington, 396 N.W.2d 156 (Wis. 1986), a police officer stopped a station wagon whose license plates matched those of a station wagon used in a recent jewelry heist. *Id.* at 158. The officer ordered the car's two occupants to exit the vehicle and place their hands on top of the car so that he could frisk them for weapons. *Id.* While frisking one suspect, the officer felt three watches. *Id.* The court held that the police officer's suspicion that the individual was involved in a recent jewelry store robbery, combined with the fact that it is unusual for someone to have three watches, gave the officer probable cause to believe that the suspect had committed the crime. *Id.* at 162. When the officer seized the watches, he discovered that the watches still had tags identifying them as property of the jewelry store. *Id. See also* State v. Guy, 492 N.W.2d 311, 317-18 (Wis. 1992) (identifying soft bags containing cocaine during frisk of suspect); United States v. Pace, 709 F. Supp. 948, 956-57 (C.D. Cal. 1989) (finding that DEA agent acted in accordance with the plain-view doctrine and the search-incident-to-arrest exception when he immediately identified bricks of cocaine on the suspect's back during a pat-down frisk); State v. Chester, 129 A. 596, 599 (1925) (holding that the suspect committed a crime in the police officer's "view" where the officer arrested the suspect after feeling a bottle of illicit liquor in the suspect's breast pocket).

The rule that an officer need not see the offense in order for a court to consider it committed in the officer's presence dates back at least 100 years. *See* State v. McAfee, 12 S.E. 435, 437 (1890) (holding that the offense was committed in the officer's "presence" in a circumstance in which he heard the sound of a blow delivered upon the victim) (discussed *supra* at text accompanying notes 81-83).

246. United States v. Robinson, 414 U.S. 218, 224, 235 (1973).

247. 414 U.S. 218 (1973).

248. United States v. Robinson, 414 U.S. 218, 224-35 (1973).

recognizes it as illicit contraband immediately upon touching it. This tactile identification gives the officer probable cause to believe that the suspect is committing a crime—possession of narcotics. Probable cause to make a warrantless arrest then replaces the reasonable suspicion that justified the investigative stop and the fear of violence that justified the limited frisk. The officer's *lawful right of access* to the object, therefore, is that which accompanies a *search incident to arrest*. The officer may then seize the object as part of a search incident to a lawful arrest.[249]

Filling in the last step of the plain-touch doctrine with the search-incident-to-arrest exception provides the following complete statement of the plain-touch doctrine applied to a weapons frisk: To initially detain a suspect for further investigation, an officer must have a reasonable, articulable suspicion that the suspect is engaged in criminal activity.[250] The officer must also reasonably fear that the suspect may be armed and presently dangerous in order to conduct a limited pat-down frisk for weapons. *Terry*, therefore, places the officer *lawfully in a position* to feel any potentially incriminating object. When the officer feels an object that he immediately recognizes as contraband, without expanding the scope of the *Terry* frisk, this sensation raises his level of suspicion to probable cause to arrest the suspect for committing a crime. The officer may then arrest the suspect and seize the contraband under the search-incident-to-arrest exception to the Warrant Requirement.[251]

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249. *E.g., id.* at 235. A search may also be incident to an arrest even if the search occurred immediately before the arrest. *Id.* Probable cause to arrest, however, must exist independently from the fruits of the search. Rawlings v. Kentucky, 448 U.S. 98, 110-11 & n.6 (1980). The rule that probable cause to arrest must exist independently from the fruits of the search is consistent with the premise that an officer may develop probable cause to arrest via a *Terry* frisk. Remember, a *Terry* frisk is less than a full search. If, during a *Terry* frisk, the officer develops probable cause to believe that the suspect is committing an offense, he may arrest the suspect and conduct a more extensive search incident to arrest. Thus, probable cause to arrest *precedes* the full search. It is the *full* search incident to arrest that enables the officer to seize contraband, *not* the limited *Terry* frisk. During a plain touch encounter, the full search will necessarily follow the *Terry* frisk. The *Rawlings* rule, therefore, does not apply to the plain-touch doctrine.

250. United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975). *See also* United States v. Mendenhall, 446 U.S. 544, 560 (1980) (Powell, J., concurring).

251. Professor LaFave briefly touches upon this concept, but takes a different approach. LaFave argues that there is no need to address a plain-touch issue if an officer develops probable cause to believe that the suspect possesses contraband because probable cause would entitle the officer to arrest the suspect and conduct an incidental search. 1 LAFAVE, *supra* note 31, § 2.2 at 65 and n.30.12 (Supp. 1994). As discussed in the text, however, the concept is necessary because the *touching* is what gave the officer probable cause in the first place. *Id.* Without touching the suspect's clothing, the officer could not have probable cause to arrest the suspect. The *Terry* frisk provides the officer with a lawful vantage point to feel incriminating evidence; the warrantless arrest and the incidental search provide the lawful right of access to the object under the plain-touch doctrine. A complete plain-touch doctrine is also important in order to provide a framework to follow when the "plain touch" occurs in a situation other than a weapons frisk, as discussed *infra* at text accompanying notes 263-64.

Although explaining precisely what exception to the Warrant Requirement will permit a police officer to seize contraband discovered through plain touch may seem like an exercise in semantics, this technical step is nevertheless important. First, *Terry* permits a frisk for *weapons only*.[252] As Justice Rehnquist said in *Adams v. Williams*,[253] "[t]he purpose of this limited search is *not* to discover *evidence of crime*, but to allow the officer to pursue his investigation without fear of violence."[254] A situation where police officers discover evidence of a crime during a *Terry* frisk is *not* like the situations presented in *Hicks*[255] and *Horton*,[256] where officers were authorized to *enter* premises to search for and seize *evidence*.[257] A situation where a police officer feels nonthreatening contraband during a *Terry* frisk is more like that of *Johnson v. United States*,[258] where officers could smell an incriminating odor coming from the suspect's hotel room.[259] If the odor supported probable cause, the officers could not simply enter the hotel room and conduct a warrantless search and seizure.[260] Rather, they needed either a warrant or an applicable exception to the Warrant Requirement authorizing them to enter the room.[261] Similarly, a police officer may not enter someone's home without a warrant simply because he heard a nonthreatening incriminating noise, or because he saw a nonthreatening incriminating object (as occurred in *People v. Pakula*).[262] In all cases—seeing, hearing, smelling, and *touching*, the officer must have a warrant or an applicable exception to the Warrant Requirement to justify further intrusive action. Clothing shields an individual's personal effects from outside scrutiny just as effectively as the walls of a house, apartment, or hotel room. Police

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

253. 407 U.S. 143 (1972).

254. *Id.* at 146 (emphasis added). Justice White quoted this language with approval in *Dickerson III*, 113 S. Ct. at 2136. *See also* Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979) (finding that "[n]othing in *Terry* can be understood to allow . . . any search whatever for anything but weapons").

255. 480 U.S. 321 (1987).

256. 496 U.S. 128 (1990).

257. *See Hicks*, 480 U.S. at 324 (finding exigent circumstances authorized officers to *enter* the suspect's apartment to search for and seize *evidence* of the shooting). Exigent circumstances also placed the officers lawfully in a position where they observed other objects, which they could have seized if they immediately developed probable cause to believe that those objects were evidence of a crime. *Id.* at 326. *See also Horton*, 496 U.S. at 130-31 (finding that a search warrant authorized the investigating officer to *enter* the suspect's home to search for and seize proceeds of the robbery). The warrant also placed the officer lawfully in a position where he could observe other incriminating objects not specified in the warrant, which he properly seized when he immediately recognized them as evidence of the crime. *Id.* at 142.

258. 333 U.S. 10 (1948).

259. Johnson v. United States, 333 U.S. 10, 12 (1948).

260. *Id.* at 13-15.

261. *Id.* at 14-15.

262. 411 N.E.2d 1385 (Ill. App. Ct. 1980). *See supra* text accompanying notes 70-80 (discussing *Pakula*).

entry into the private areas concealed on one's own body, therefore, requires, at the very least, the same justifications as for entry into someone's home.

Finally, precisely defining the plain-touch doctrine is important to provide courts and the law enforcement community with step-by-step guidelines to determine whether a seizure is authorized in *all* plain-touch situations, including those arising outside the realm of a weapons frisk. For example, if an officer feels the exterior of a sealed bag and immediately determines that it contains evidence of a crime, what lawful right of access would permit him to reach into the bag?[263] Or, if a shipping inspector must climb over certain cargo in order to reach a destination inside a ship and, in the course of doing so, feels the unmistakable outline of contraband concealed beneath a tarpaulin, what lawful right of access would allow him to seize the contraband?[264] Thus, in all plain-touch situations, the officer must (1) be lawfully in a position to feel an object concealed within an outer layer, whether the outer layer is clothing, paper, plastic, or some other material; (2) immediately recognize the object as contraband or evidence of a crime; and (3) have a lawful right of access to the object either by virtue of a warrant or an applicable exception to the Warrant Requirement. If all three conditions are satisfied, the officer may seize the object under the plain-touch doctrine.

C. IS THE SENSE OF TOUCH SUFFICIENTLY ACCURATE TO PROVIDE AN INVESTIGATING POLICE OFFICER WITH PROBABLE CAUSE?

Imagine yourself at a parking meter. The meter requires quarters. You reach into your pocket, without looking, and sort through the jumbled assortment of nickels, dimes, quarters, and pennies until you extract a quarter for the meter. This process takes a matter of seconds, and you probably do not consciously consider your actions. Given the hundreds of opportunities that experienced police officers patrolling the streets of our nation's urban high-crime areas have to feel the texture of illicit narcotics and the containers concealing these substances,[265] the

263. *See* United States v. Ocampo, 650 F.2d 421, 425, 429 (2d Cir. 1981) (holding that when an officer reached into the suspect's car after arresting the suspect, and felt the outside of a sealed paper bag that he readily determined to contain wrapped currency, the suspect could not "reasonably expect any substantial degree of privacy" in the bag's contents because the contents were "easily discernable by frisking the exterior").

264. *Cf.* United States v. Norman, 701 F.2d 295 (4th Cir. 1983). In *Norman*, a Coast Guard officer, inspecting a suspicious vessel, climbed over various bales in order to reach the ship's pilothouse and was able to see, smell, and feel the bales. 701 F.2d at 296-98. Upholding the seizure of marijuana concealed within the bales, the court wrote: "plain view encompasses more than simply seeing contraband. Rather, for an object to be in plain view, it must only be 'obvious to the senses.'" *Id.* at 297.

265. Officer Rose, for example, testified that he had recovered crack cocaine approximately 75

conclusion that an officer may readily identify illicit contraband through touch in the same way people generally identify common objects through touch seems intuitive. Courts have long recognized an officer's ability to identify contraband through touch. In the Prohibition-Era case *State v. Chester*,[266] the Rhode Island Supreme Court upheld the warrantless seizure of illicit liquor that the investigating officer discovered by feeling the suspect's breast pocket.[267] The court held that the officer had ground to arrest the suspect for committing a crime in his presence, and upheld the search as incident to arrest.[268] The Supreme Court's conclusion in *Dickerson* that an officer may accurately recognize contraband through touch becomes more compelling in light of its earlier recognition of an officer's ability to identify weapons through touch.[269] The Minnesota Supreme Court and other state courts refusing to recognize the plain-touch doctrine have taken a contrary view, holding that touch is inherently less immediate and less reliable than sight.[270] These conflicting results raise the question of whether police officers may identify objects more quickly and reliably through sight than through touch.

When analyzing this issue, a basic principle to keep in mind is that human beings do not rely exclusively upon any one sense, but upon all senses.[271] We are 'processors of information,' combining our sensory perceptions with memory to "make decisions and take actions on the information we have received."[272] Newborn babies, for example, have poorly developed vision.[273] For this reason, babies use their other fully-developed senses in conjunction with their developing sight to explore

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to 100 times during the two years he had executed crack and cocaine warrants. Transcript at 5, *Dickerson* (No. 89067687). It follows that an officer with more experience in the area would have additional opportunities to make such seizures.

266. 129 A. 596 (R.I. 1925).

267. State v. Chester, 129 A. 596, 597 (R.I. 1925). The police officers had a warrant to search for illicit liquor. *Id.* The warrant named only the saloon as the place to be searched. *Id.* During the search, however, one officer noticed what he thought was a bottle concealed within the suspect's breast pocket. *Id.* The officer confirmed this fact by placing his hand upon the protruding spot. *Id.* Under present law, courts may well have considered this action an unconstitutional second search. *See supra* notes 59-69 and accompanying text (discussing Arizona v. Hicks, 480 U.S. 320 (1987)). *See also infra* notes 421-29 (discussing Ybarra v. Illinois, 444 U.S. 85 (1979)).

268. *Chester*, 129 A. at 599.

269. *Dickerson III*, 113 S. Ct. at 2137.

270. *Dickerson II*, 481 N.W.2d at 845 (Minn. 1992); People v. Diaz, 612 N.E.2d 298, 302 (N.Y. 1993); Commonwealth v. Marconi, 597 A.2d 616, 623 n.17 (Pa. Super. Ct. 1991); State v. Broadnax, 654 P.2d 96, 102 (Wash. 1982).

271. As one researcher commented, "'The senses are never separate.'" Roberta Israeloff, *"Hello, World!"*, 65 PARENTS 110, 116 (Nov. 1990) (quoting Beatrice Beebe, Ph.D.).

272. Norman, MEMORY AND ATTENTION, AN INTRODUCTION TO HUMAN INFORMATION PROCESSING at 3 (2d ed. 1976).

273. Israeloff, *supra* note 271, at 111-12. Newborn babies are extremely near-sighted, seeing objects best at a distance of eight to twelve inches. *Id.* They also have a narrow field of vision, and must move their heads to compensate for their inability to move their eyes in a wide arc. *Id.*

the world during their first months of life.[274] This interaction between the senses continues throughout one's life. As Judge John Kelly of the Pennsylvania Superior Court wryly commented, "I cannot see how, in determining probable cause, the eyes can logically or reasonably say to the hands, 'I have no need of thee.'"[275]

"Touch is the parent of our eyes, ears, nose, and mouth," wrote another authority.[276] Touch is the first sense to become functional in all species,[277] and it is the first to develop in the human embryo.[278] We may perceive many characteristics of objects equally well through either touch or vision,[279] although one sense may be superior to another in perceiving specific qualities.[280] For example, touch is superior to sight in determining texture, hardness, and other surface variations,[281] while sight is more suited for discerning shape and color.[282]

Is it possible for a police officer to immediately recognize an object as contraband within the limited context of a weapons frisk? Studies undertaken on the human ability to identify objects through touch (also known as "haptics")[283] offer no answer to this question. Indeed, these

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274. Israeloff, *supra* note 271, at 116; MORTON A. HELLER & WILLIAM SCHIFF, THE PSYCHOLOGY OF TOUCH 7 (Laurence Erlbaum Assoc., 1991).

275. Commonwealth v. Marconi, 597 A.2d 616, 630 (Pa. Super. Ct. 1991) (Kelly, J., concurring).

276. ASHLEY MONTAGU, TOUCHING 1 (Harper & Row 1978).

277. *Id.*

278. *Id.* at 2. Montagu added that "[a]s a sensory system, the skin is much the most important organ system of the body" *Id.* at 8. As an example, Montagu cited "cutaneous alagia" (loss of the sense of touch), which could prove life-threatening due to the victim's inability to perceive pain. He compared this disorder with a human being's ability to become functional without sight or hearing, as happened with Helen Keller. *Id.*

279. HELLER & SCHIFF, *supra* note 274, at 3-4.

280. *Id.*

281. *See* Roberta L. Klatzky, et al., *There's More to Touch Than Meets the Eye: The Salience of Object Attributes for Haptics with and Without Vision*, 116 J. EXPER. PSYCHOL.: GEN. 356, 368 (1987) [hereinafter Klatzky '87 study] (concluding that texture and hardness are salient to experimental subjects exploring objects through touch when visual input is excluded); Roberta Klatzky, et al., *Haptic Integration of Object Properties: Texture, Hardness, and Planar Contour*, 15 J. EXPER. PSYCHOL.: HUM. PERCEPTION & PERF. 45, 48 (1989) [hereinafter Klatzky '89 study] (experimental subjects who were asked to classify stimuli according to shape, size, and hardness classified objects most quickly according to texture and hardness); HELLER & SCHIFF, *supra* note 274, at 4.

282. *See* Klatzky '87 Study, *supra* note 281, at 358, 367 (finding that the shape of stimuli became more easily encoded and more salient to experimental subjects when they combined vision and haptics than when they explored the stimuli exclusively through haptics). For an explanation of "haptics," see *infra* note 283.

283. "Haptics is defined as a perceptual system that incorporates inputs from cutaneous receptors and also from kinesthetic receptors embedded in muscles, joints and tendons." Klatzky '87 Study, *supra* note 282, at 356. *See also* Klatzky ^@'89 Study, *supra* note 281, at 45 (explaining that "[h]aptics builds on a basic tactual system that incorporates information from cutaneous sensors in the skin and kinesthetic sensors in the muscles, tendons, and joints"); *See* 2 INTERNATIONAL DICTIONARY OF MEDICINE AND BIOLOGY at 1271 (Sidney I. Landau et al. eds 1986) (defining haptics as "[t]he science of touch, pertaining not only to passively perceived cutaneous sensations of touch and pressure, but including also the active component of exploration via these senses").

Cutaneous perceptions are mere surface sensations. Cutaneous nerves "provide sensory pathways for stimuli to the skin." TABER'S CYCLOPEDIC MEDICAL DICTIONARY at 441 (16th ed. 1989).

studies are inconclusive at best. As one authority aptly described the situation, "there is no 'single theory' of touch. The field has not progressed to the point where we have theoretical conformity, because too many issues remain unresolved."[284]

In their 1985 study, Roberta Klatzky, Susan Lederman, and Victoria Metzger concluded that an individual may quickly and accurately identify common objects exclusively through haptics.[285] The experimental participants identified 100 common objects, such as a comb, balloon, ash tray, muffin pan, or potato.[286] The study scored "superordinate" (overly broad) responses as errors.[287] For example, the researchers marked a broad answer such as "vegetable" for onion as an incorrect response. The study also considered "corrected-superordinate" responses as errors.[288] In other words, if a participant initially identified an object as "clothing," but then substituted the correct specific category such as "sweater," this response was nevertheless considered incorrect.[289] "Categorically-related" responses were also considered incorrect (e.g., "sock" instead of "sweater").[290] The final group of incorrect responses, obviously, involved categorically-unrelated responses, such as "rock" for "potato."[291] The participants identified the objects with an accuracy rate of 96%, which increased to 99% under a more lenient scoring system that permitted the superordinate, corrected-superordinate, and categorically-related responses previously scored as incorrect to be scored as correct.[292] Under the strict scoring system, 94% of the subjects who correctly named an object did so within five seconds of receiving it.[293] In spite of these results, the researchers carefully qualified their experimental findings, warning "we

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See also DORLAND'S ILLUSTRATED MEDICAL DICTIONARY at 414 (27th ed. 1988) (defining cutaneous as "pertaining to the skin; dermal, dermic"); 2 INTERNATIONAL DICTIONARY OF MEDICINE AND BIOLOGY, *supra*, at 1903 (explaining that a cutaneous nerve is a "nerve supplying an area of skin and its underlying fascia").

Kinesthetic sensations (or "kinesthesia") provide information about the "movement of the body or its parts." INTERNATIONAL DICTIONARY OF MEDICINE AND BIOLOGY, *supra*, at 1508. *See also* TABER'S CYCLOPEDIC MEDICAL DICTIONARY, *supra*, at 976 (defining kinesthesia as the "[a]bility to perceive extent, direction, or weight of movement"); DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, *supra*, at 880 (defining kinesthesia as "the sense by which movement, weight, position, etc., are perceived").

284. HELLER & SCHIFF, *supra* note 274, at ix.

285. Roberta L. Klatzky, et al., *Identifying Objects by Touch: An "Expert System"*, 37 PERCEPTION & PSYCHOPHYSICS 299, 301 (1985) [hereinafter Klatzky '85 Study].

286. *Id.* at 302.

287. *Id.* at 300.

288. *Id.*

289. *Id.*

290. Klatzky '85 Study, *supra* note 285, at 300.

291. *Id.*

292. *Id.* at 301.

293. *Id.*

do not mean to claim that the perception of form through touch is generally accurate and efficient."[294]

A subsequent study by Klatzky and Susan Lederman and Catherine Reed conducted in 1987 analyzed the methods that people use to explore objects through haptics.[295] The experiments employed "wafers" consisting of three sizes, shapes, and hardness values, enclosed within fabric of three different textures.[296] This study (and a subsequent study by the same authors)[297] reported that people use "lateral motion" (a rubbing action) to determine an object's surface texture, "pressure" (squeezing) to determine hardness, "static contact" to determine surface temperature, and "unsupported holding" (holding an object in one hand without the support of the other) to determine weight.[298] The experimental participants enclosed objects within their hands to determine gross contour information (the objects' general shape and size).[299] The subjects also attempted to determine an object's precise contour information through a process labelled "contour following" in which they ran their fingers and hands over the surface of an object.[300]

The experiment concluded that "haptic encoding has an inherent bias toward the way objects feel, and not toward how they may look."[301] Thus, when experimental participants explored objects strictly through haptics, texture and hardness were highly salient, while the salience of shape and size was low.[302] The salience of shape and size increased, however, with the introduction of vision or visual imagery.[303] The participants reduced their use of slow processes such as contour following when they viewed the objects, but the salience of texture and hardness also declined with visual input.[304]

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294. *Id.*

295. Klatzky '87 Study, *supra* note 281, at 359.

296. *Id.* The fact that the objects were enclosed within fabric is important since an officer performing a weapons frisk must also feel objects through an outer fabric.

297. Klatzky '89 Study, *supra* note 281.

298. Klatzky '87 Study, *supra* note 281, at 358; Klatzky '89 Study, *supra* note 281, at 45.

299. Klatzky '87 Study, *supra* note 281, at 351; Klatzky '89 Study, *supra* note 281, at 45.

300. Klatzky '87 Study, *supra* note 281, at 358; Klatzky '89 Study, *supra* note 281, at 45.

301. Klatzky '87 Study, *supra*. note 281, at 367.

302. *Id.* at 367-68.

303. *Id.* at 367. Overall, the researchers performed four experiments in which the subjects sorted objects into various bins according to size, shape, hardness, etc.. All subjects in these four experiments explored the stimuli haptically with or without visual information. Those who received visual information received two kinds of visual information. They either viewed the objects while haptically exploring them, or they were blindfolded and told to group objects together if the objects' visual images were similar (i.e., the subjects imagined what the objects would look like if they could see the objects, and grouped them together according to whether objects mentally "looked" similar). *See id.* at 359, 365 (explaining the experimental method).

304. Klatzky '87 Study, *supra* note 281, at 368. For an explanation of the visual input that the experimental subjects received during the experiments, *see supra* note 303.

Another study performed by Professors Bill Jones and Sandra O'Neil in 1985 found that people make visual and haptic judgments of surface roughness with comparable accuracy, although their experimental subjects made visual judgments more quickly and efficiently.[305] Jones and O'Neil underscored the commonsensical nature of this result by saying: "In the nature of things, it will take longer to run one's fingers over an object than it will to scan the object visually."[306] Professor Klatzky's 1985 study, however, suggested that practice may play a role in the differences between haptic and visual identification.[307] Obviously, if someone has repeatedly viewed an object, and then feels it for the first time without seeing it, haptically identifying the object will be more difficult and less efficient than visually identifying it. It logically follows that haptic performance will improve with practice.[308]

Both the empirical data and common experience reinforce the principle that human beings combine *all* senses when perceiving the world. Vision is not, as the Minnesota Supreme Court suggested, more "reliable" than other senses. Vision, moreover, is relatively easy to fool.[309] A partially submerged oar appears crooked, but an individual may verify that the oar is, in fact, straight by running a hand along the length of the oar, above and below the water.[310] People may determine whether a flower is artificial through touch more easily than they can through vision alone.[311] Comparing the reliability of vision with the sense of smell, the Supreme Court of Oregon offered this Prohibition-Era example: "Lipton's tea might look ever so much like Scotch Whiskey and fool many people dependent solely upon sight, but few would be misled through the sense of smell."[312]

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305. Bill Jones & Sandra O'Neil, *Combining Vision and Touch in Texture Perception*, 37 PERCEPTION & PSYCHOPHYSICS 66, 71 (1985).

306. *Id.* at 71.

307. Klatzky '85 Study, *supra* note 281, at 300. It is important to remember that the 1985 Klatzky Study examined object *identification*, while the Jones & O'Neil study examined *judgment* of surface textures.

308. *See* Klatzky '85 Study, *supra* note 281, at 300 (stating that "practice . . . has been found to improve haptic discrimination performance").

309. HELLER & SCHIFF, *supra* note 274, at 11.

310. *Id.* at 9 (citing "John Locke's classic example").

311. *Id.* at 11.

312. State v. McDaniel, 237 P. 373, 375 (Or. 1925). Studies in the field of cognitive psychology have also demonstrated that visual identification and recall can prove deceptive, particularly with familiar objects. ARNOLD LEWIS GLASS & KEITH JAMES HOLYOAK, COGNITION at 194-97 (2d ed. 1986). When people identify a familiar object, they frequently match critical features with the object's category in memory, rather than viewing the object in detail. *Id.* at 194-96. This process can render someone's memory of the object incomplete when attempting to recall it. In one experiment, researchers discovered that people had considerable difficulty selecting the correct version of the head side of a penny when the researchers placed it among 14 distractors that either omitted or modified certain features. *Id.* at 194-95. The subjects experienced greater difficulty when they attempted to draw the penny from memory. *Id.* at 195. Many people will discover a similar result if

Because neither experimental data nor common experience suggests a hierarchy of senses, the courts should not take rigid positions indicating that one sense is somehow more reliable than another in identifying illicit contraband. Initially, the Minnesota Supreme Court's conclusion that plain touch is "less immediate"[313] than sight seems correct in light of the data showing that people must "pinch, squeeze, and rub"[314] an object in order to determine its properties, but it is equally possible that repeated encounters with the same object may make its nature "immediately apparent" to a police officer who touches it during a frisk.[315] The data also do not support Justice Tomljanovich's second conclusion that touch is "less reliable"[316] than sight. As mentioned above, people *can* accurately identify objects through touch.

Positive identification, however, is unnecessary under the new plain-touch doctrine. A police officer need only develop probable cause to believe that an object is contraband in order to activate the plain-touch doctrine. As Judge Weinstein of the Eastern District of New York remarked, "[a]ny of the five senses, alone or in combination, may provide reliable evidence" for an officer to develop probable cause.[317]

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they attempt to draw the face of a telephone dial, placing all numbers and letters in their correct places. *Id.* at 194. The striking point about these examples is that people were unable to accurately reproduce from memory objects that they see and use every day.

313. *Dickerson II*, 481 N.W.2d 840 at 845.

314. *Id.*

315. Familiarity with an object and repeated exposure to it increase the speed with which someone recognizes an object. *See* GLASS & HOLYOAK, *supra* note 312, at 323 (stating that "as an input is repeated, the analysis and comparison procedure for it becomes increasingly automatized, so the time required to find a match in memory is reduced"). *See also* Klatzky '85 Study, *supra* note 281, at 300 ("practice . . . has been found to improve haptic discrimination performance").

316. *Dickerson II*, 481 N.W.2d at 845. In a recent telephone interview, Arnold Lewis Glass, Professor of Psychology at Rutgers University in New Brunswick, NJ, said that the Minnesota Supreme Court chose an awkward phrase when it characterized touch as "less immediate and less reliable than the sense of sight." "What they meant to say," Professor Glass said, "is that touch is more limited for purposes of identifying contraband. There is a big distinction between identifying weapons and identifying contraband through touch." As an example, Professor Glass compared the rigid outline of a gun with the numerous shapes and textures associated with drug packaging. Professor Glass doubted that a limited weapons frisk could provide the same amount of information as a plain view, especially since the Supreme Court in *Dickerson* forbade officers to manipulate nonthreatening objects detected during a frisk. "Of course," he continued, "there may be a shock of recognition that something is contraband during the course of a weapons search" for an officer who has had hundreds of opportunities to feel certain types of drug packaging. Professor Glass also expressed concern that permitting officers to seize nonthreatening objects during a *Terry* frisk will create an intrusion upon personal privacy beyond that which the Supreme Court had originally intended. For example, he explained, *Dickerson* now seems to permit police officers to reach into a suspect's pocket and seize tissues, handkerchiefs, or other personal items that people carry in their pockets. Telephone Interview with Arnold Lewis Glass, Ph.D., Professor of Psychology, Rutgers University—New Brunswick (Sept. 10, 1993).

317. United States v. Ceballos, 719 F. Supp. 119, 128 (E.D.N.Y. 1989). *See also* Guidi v. Superior Court, 513 P.2d 908, 921-22 (Cal. 1973) (Mosk, J., concurring) (finding that "all the senses[] may be employed, not merely in confirmation of what is already visible, but in equal weight with the sense of sight in the determination of probable cause").

Probable cause, moreover, "does not deal with hard certainties, but with probabilities."[318] It is

> a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief" . . . that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.[319]

Thus, when Justice White wrote that the identity of an object felt during a *Terry* frisk must be "immediately apparent,"[320] he referred to a lower standard than the positive identification required for "correct" scores in the 1985 Klatzky Study.[321] Indeed, probable cause suggests a standard akin to the lenient grading system that would have supported a 99% accuracy rate for haptic identification in the experiments. Problematic, however, is the fact that the haptic experiments permitted subjects to manipulate objects in order to identify them. Under *Dickerson*, such manipulation would constitute an impermissible separate search.

Is the sense of touch sufficiently accurate to provide a police officer with probable cause? Given the conflicting conclusions that one may draw from the available data and common experience, this question remains open for further exploration. It is inappropriate to apply the available scientific data to draw definitive conclusions about the reliability of touch in the context of search-and-seizure law because the psychologists who performed the haptic studies outlined above did not conduct

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318. United States v. Cortez, 449 U.S. 411, 418 (1981).

319. Texas v. Brown, 460 U.S. 730, 742 (1983) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925); Brinegar v. United States, 338 U.S. 160, 176 (1949)).

320. *Dickerson III*, 113 S. Ct. at 2137.

321. For a breakdown of the scoring system in the 1985 Klatzky haptic identification experiments, see *supra* notes 287-93 and accompanying text. *Cf.* Texas v. Brown, 460 U.S. 730 (1983) (clarifying the "immediately apparent" requirement which Justice Stewart had originally pronounced in Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971)):

> the phrase "immediately apparent" was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the "plain view" doctrine.
>
> . . . .
>
> Plainly, the Court did not view the "immediately apparent" language of *Coolidge* as establishing any requirement that a police officer "know" that certain items are contraband or evidence of a crime. Indeed, . . . the rule [is] . . . that "the seizure of property in plain view involves no invasion of privacy and *is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.*

Id. at 741-42 (quoting Payton v. New York, 445 U.S. 573, 587 (1980)). For a critique of Justice Rehnquist's opinion in Texas v. Brown, see *supra* note 243.

their experiments for this purpose. The 1985 Klatzky study, for example, noted that the researchers performed their work with the goal of developing tangible graphics for the visually handicapped.[322] Nevertheless, two briefs submitted in *Dickerson* cited the above studies on haptics to support arguments on *both* sides of the issue.[323]

Before the courts, law enforcement officials, or other members of the legal community draw conclusions about tactile identification, experts on sensory perception must perform experiments that closely approximate the tactile observations made during weapons frisks. Haptic experiments that duplicate *Terry* frisks could answer the questions of whether tactile information is sufficiently reliable to support probable cause, and whether information discovered during a frisk is less "immediate" than that which officers see in plain-view circumstances. Such studies will no doubt prove most interesting for the legal and scientific communities alike. For the present, a trial court's determination about whether the incriminating nature of a nonthreatening object is "immediately apparent" to a police officer during a pat-down frisk will depend entirely upon weighing the credibility of the officer's testimony. More important, however, is whether the officer was justified in stopping and frisking the suspect in the first place. The trial court must, therefore, meticulously scrutinize the stop and the frisk before it even reaches the plain-touch issue.

IV. THE FORCIBLE STOP AND FRISK OF DICKERSON

On December 19, 1989, Timothy Dickerson was charged with fifth-degree possession of a controlled substance under Minnesota law.[324] After the trial court denied his suppression motion, the defendant and the prosecution submitted a fact stipulation with a waiver of a jury trial, which the trial court accepted.[325] The trial court found that the prosecution had met its burden of proving that Dickerson committed the offense charged, but deferred any finding of guilt under a Minnesota sentencing option for minor drug offenses.[326] Because this was Dickerson's first offense, and because he had an otherwise clean record, the trial court judge placed Dickerson on probation for two years, requiring that he

322. Klatzky '85 Study, *supra* note 281, at 301.

323. *See* Petitioner's Brief on the Merits at 15-17, Minnesota v. Dickerson, 113 S. Ct. 2130 (1993) (No. 91-2019); Brief for the American Civil Liberties Union and the Minnesota Civil Liberties Union as Amicus Curiae at 15, Minnesota v. Dickerson, 113 S. Ct. 2130 (1993) (No. 91-2019).

324. MINN. STAT. §§ 152.025 subd. 2 (1) & (3)(a) (1989).

325. Petition for a Writ of Certiorari at 5, Minnesota v. Dickerson, 113 S. Ct. 2130 (1993) (No. 2019); Respondent's Brief in Opposition to Petition for a Writ of Certiorari at 3, Minnesota v. Dickerson, 113 S. Ct. 2130 (1993) (No. 91-2019).

326. MINN. STAT § 152.18 subd. 1 (1989).

fulfill a number of conditions, including drug testing.[327] After Dickerson satisfied these conditions, the state District Court entered an order on April 28, 1992, dismissing the complaint against Dickerson, and discharging him from supervision.[328] Dickerson's successful completion of the program also entitled him to apply for an order expunging his record.[329]

As noted earlier, the Minnesota appellate courts accepted the premise that Officers Rose and Johnson properly conducted their investigative stop of Dickerson upon a reasonable, articulable suspicion that he was engaged in criminal activity. The Minnesota appellate courts further accepted, as did the Supreme Court, that the officers reasonably feared Dickerson was armed and presently dangerous when Officer Rose frisked him for weapons (*and* contraband, as Officer Rose admitted). A close examination of the record in comparison with other stop-and-frisk precedents, however, leads to the inescapable conclusion that the officers were unjustified in forcibly stopping and frisking Dickerson.

A. THE STOP

In *Brown v. Texas*,[330] police stopped Zachery Brown in an alley located in an area of El Paso, Texas known for its high incidence of drug trafficking[331] after observing suspicious behavior.[332] In sharp contrast to Timothy Dickerson's response during his stop, Brown "refused to identify himself and angrily asserted that the officers had no right to stop him."[333] The officers then frisked him, and, finding nothing remarkable, arrested him for violating a Texas statute criminalizing a person's refusal to give his name and address to a police officer who has lawfully stopped him and requested the information.[334] The Court found both the stop and the statute, as applied in this situation, unconsti-

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327. Hennepin County District Court Probation Order, Filed June 4, 1990, *reprinted in* Joint Appendix, Minnesota v. Dickerson, 113 S. Ct. 2130 (1993) (No. 91-2019); Transcript at 68-69, *Dickerson* (No. 89067687).

328. Hennepin County District Court Order Discharging Defendant from Supervision and Dismissing Complaint, Filed May 6, 1992, *reprinted in* Joint Appendix at 37-38, Minnesota v. Dickerson, 113 S. Ct. 2130 (1993) (No. 91-2019).

329. MINN. STAT. § 152.18 subd. 2 (1989). Dickerson did not have to follow this procedure, however, since the state exhausted all appeals from the reversal of his criminal conviction. Instead, Section 299C.11 of the Minnesota Statutes entitled him to apply for expungement of his criminal record after the state's final appeal. Judge Lynn granted the expungement motion on October 28, 1993.

330. 443 U.S. 47 (1979).

331. Brown v. Texas, 443 U.S. 47, 49 (1979).

332. *Id.* at 48-49. The police officers had observed Brown and another man walking in opposite directions. *Id.* Both officers believed that the two had been together or were about to meet until the police car appeared. *Id.* at 48.

333. *Id.* at 49.

334. *Id.*

tutional.[335] In arriving at this conclusion, the Court reasoned "[t]here is no indication in the record that it was unusual for people to be in the alley. The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct."[336]

Likewise, in *Reid v. Georgia*,[337] DEA agents stopped an individual because he conformed with many characteristics of a "Drug Courier Profile,"[338] including (1) he had arrived from Fort Lauderdale, a point of origin for cocaine trafficking, (2) he "arrived in the early morning, when law enforcement activity is diminished," (3) he and his companion appeared to be "trying to conceal the fact that they were traveling together," and (4) they had no luggage other than their identical shoulder bags.[339] The Court held these factors insufficient to support a forcible stop under the Fourth Amendment and *Terry*.

> Of the evidence relied on, only the fact that the petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct. The other circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure . . . . Although there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot, this is not such a case.[340]

In light of *Brown* and *Reid*, serious questions arise about the constitutionality of the forcible stop of Dickerson. First, "[t]here is no indication in the record that it was unusual for people to be in the alley."[341] Second, "[t]he fact that [Dickerson] . . . was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that [Dickerson] . . . himself was engaged in criminal conduct."[342] Third, Dickerson's abrupt change in direction upon leaving the apartment building could be attributed to any one of a number of lawful reasons.[343] Assuming that Dickerson's behavior manifested his desire to

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335. *Id.* at 52, 53.
336. *Brown*, 443 U.S. at 52.
337. 448 U.S. 438 (1980).
338. For an explanation of the "drug courier profile," see *supra* note 155 and accompanying text.
339. Reid v. Georgia, 448 U.S. 438, 441 (1980).
340. *Id.* (citation omitted).
341. *See Brown*, 443 U.S. at 52.
342. *See id.*
343. Transcript at 29, *Dickerson* (No. 89067687). During the suppression motion, he claimed that the alley provided the fastest route to a friend's house. *Id. See also* State v. Hobart, 617 P.2d 429,

avoid the police, whether this fact, even when *combined* with his presence in a neighborhood known for drug activity, supports *either* a forcible stop *or* a frisk is questionable. Law-abiding citizens who reside in neighborhoods with high crime rates may wish to avoid visible contact with police due to a fear that their less savory neighbors may suspect them of being informers, and the possible reprisals that would flow therefrom.[344] Avoiding the police simply because one dislikes them, moreover, is not a crime.[345] Given the nature of the neighborhood, Dickerson's behavior may well "describe a very large category of presumably innocent [pedestrians in the neighborhood], who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure."[346]

In *State v. Tucker*,[347] both the New Jersey Appellate Division and the New Jersey Supreme Court recently held that an individual's effort to avoid the police does not justify a forcible stop. While on patrol in Trenton, New Jersey, a police officer observed Stanley Tucker seated on a curb.[348] When Tucker saw the approaching police vehicle, he "quickly got up, turned, and started running through [a nearby yard]."[349] The officer then alerted other officers in the neighborhood, who joined him in pursuing Tucker.[350] At one point, Tucker tossed a clear plastic bag into the opening of a nearby porch.[351] The officer eventually appre-

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433 (Wash. 1980) (remarking that a driver's decision to suddenly turn his automobile down a side street "can be engendered by any number of circumstances, including the realization by the driver that he reached or passed the street for which he was looking").

344. One motive for drug-related murders is the suspicion by drug traffickers that the victim may have been an informer. *See* Paul J. Goldstein et al., *Drug-Related Homicide in New York: 1984 and 1988*, 38 CRIME & DELINQUENCY 459, 462 (1992) ("Systemic homicides include . . . killing of informers in drug cases.").

345. Distrust of the police among black males sometimes manifests itself in flight when police appear. Tracey Maclin, *"Black and Blue Encounters" - Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 256-57 (1991). A recent New Jersey Supreme Court task force report also indicated that "blacks are less likely to report crimes to police because many feel victimized by police and believe that police do not adequately protect their neighborhoods." *Minorities and the Courts: Equal Use, Unequal Justice?*, THE RECORD, Jan. 25, 1994, at A-12. This distrust also seems to hold true for members of other ethnic minorities. *See* Gabriel Silva, *Police 'Should Not Make Assumptions'*, L.A. TIMES, Sept. 28, 1992, at B4 (detailing an incident during which teen-age Latinos fled in fear from the presence of a police officer, although the youths had committed no crime). Blair Underwood, star of television's "LA Law," explained one reason why people may assume a defensive posture when they are confronted by the police. "A silent fear has been generated within Black men across the nation," he said. "For now, there is a fear that the enemy is dressed in blue." *National Study Reports White Cops' Beatings of Blacks Reveal 'Dirty Secrets of Racism'*, JET, May 3, 1993, at 14, 17. *See also* Eloise Salholz et al., *Blacks and Cops: Up Against a Wall*, NEWSWEEK, May 11, 1992, at 52; Daniel E. Georges-Abeyie, *Law Enforcement and Racial and Ethnic Bias*, 19 FLA. ST. U. L. REV. 717 (1992).

346. *Reid*, 448 U.S. at 441.

347. 627 A.2d 174 (N.J. Super. Ct. App. Div. 1993), *aff'd*, 642 A.2d 401 (N.J. 1994).

348. 627 A.2d at 175.

349. *Id.*

350. *Id.*

351. *Id.*

hended Tucker and retrieved the plastic bag, which proved to contain crack cocaine.[352] Reversing Tucker's conviction, Judge Geoffrey Gaulkin wrote that "the only ostensible basis for [the officer] to have pursued defendant was that defendant had inexplicably fled when he saw the police van. But flight from the police does not alone create a reasonable suspicion of criminal conduct."[353] Judge Gaulkin, therefore, held that the trial court should have suppressed the evidence of the crack cocaine.[354] The New Jersey Supreme Court affirmed, reasoning that guilty knowledge does not necessarily explain "why a young man in a contemporary urban setting may run at the sight of the police. That some city residents may not feel entirely comfortable in the presence of some, if not all, police is regrettable but true."[355]

The constitutionality of forcibly stopping Dickerson grows more doubtful when one compares the officers' conduct with that of the police in other landmark search-and-seizure cases. In *Terry*, for example, the investigating police officer approached the suspects only *after* his extended observations confirmed his fear that the three men were preparing for an *armed* robbery—a crime of violence.[356] He identified himself as a police officer and requested their names.[357] He grabbed one suspect only *after* the suspects' response proved evasive.[358] Similarly, in *Adams v. Williams*,[359] the investigating police officer confronted the suspect in his car only *after* the officer received a tip from a reliable informant that the suspect was armed and carrying narcotics.[360]

In contrast, Officers Rose and Johnson observed Timothy Dickerson for a matter of seconds before deciding to stop him.[361] Their observa-

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352. *Id.*

353. State v. Tucker, 627 A.2d at 175. *See also In re* James R., 559 N.E.2d 1273 (N.Y. 1990) (finding that the flight of suspect's three companions when approached by police, combined with officer's previous observation of the four walking in unison, did not necessarily rise to the level of reasonable suspicion required for a forcible stop). *But see* State v. Johnson, 444 N.W.2d 824 (Minn. 1989) (finding that a suspect's evasive conduct can justify an investigative stop). *See also* California v. Hodari D., 111 S. Ct. 1547 (1991). In *Hodari*, two police officers on routine patrol observed a group of youths huddled around a car in a high-crime area of Oakland, California. *Id.* at 1549. One officer chased a suspect and seized him by tackling him after the group fled in an apparent state of panic upon seeing the police. Immediately prior to the seizure, the suspect tossed away a small object which later proved to be crack cocaine. *Id.* The issue of whether the officer had sufficient reasonable suspicion to justify an investigative stop was not before the Court. *Id.* at 1549 & n.1. The State conceded, however, that the chasing officer "did not have the 'reasonable suspicion' required to justify stopping Hodari."

354. *Tucker*, 627 A.2d at 175.

355. 642 A.2d at 407 (citations omitted).

356. *Terry*, 392 U.S. at 33 (Harlan, J., concurring) (describing the suspected armed robbery as a "crime of violence").

357. *Id.* at 6-7.

358. *Id.* at 7.

359. 407 U.S. 143 (1972).

360. Adams v. Williams, 407 U.S. 143, 144-45 (1972).

361. The *length* of an observation alone, of course, is not dispositive in determining whether a

tions consisted of (1) Dickerson allegedly making eye contact with Officer Rose,[362] and (2) Dickerson abruptly turning and walking down the alley. Indeed, the investigating officers decided to stop Dickerson immediately after watching him walk into the alley.[363] To support the stop, Officer Rose cited these observations and the fact that Dickerson had exited a known "crack house,"[364] where Rose had "responded to calls of drug dealers in the hallways,"[365] and where he had previously recovered weapons and narcotics.[366] Officer Rose could not, however, identify *which* of the twelve apartment units he had executed warrants in, or how many warrants he had executed in the building overall.[367] His best estimate was that he had executed approximately four warrants over the previous two years.[368] Officer Rose's knowledge of illicit drug trade conducted in the hallways of 1030 Morgan Avenue, moreover, did not support a conclusion that every unit in the apartment building was an armed drug den, or that every person leaving the building was probably a criminal. If one considers the continual flow of people into and from the building, *in addition to* the apartment residents, it becomes clear that many innocent people enter and leave the building every day, including friends, relatives, neighbors, and repairmen. If nothing more than an individual's action in leaving a so-called "crack house" is sufficient to justify an investigative stop, then numerous people could be stopped on sight. The identity of the people who placed the "calls of drug dealers in the hallways" at 1030 Morgan Avenue also remains a mystery. *Residents* of 1030 Morgan Avenue may have made these complaints. Until the search proved otherwise, the unidentified black male whom the officers observed exiting the building may very well have been a law-abiding resident who had previously placed calls to the police about drug dealers in the hallways.

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stop or a frisk is justified. *Compare* Sibron v. New York, 392 U.S. 40 (1968) (observation over eight hours) *with Terry*, 392 U.S. 1 (1968) (observation for 12 minutes).

362. Whether Dickerson in fact made eye contact with Officer Rose is also questionable. Rose estimated that he and Dickerson made eye contact from a distance of 20 to 40 feet in the darkness of night. Transcript at 23, *Dickerson* (No. 89067687).

363. Transcript at 14, 16, 24, *Dickerson* (No. 89067687). Officer Johnson's written report indicated that after observing Dickerson walk into the alley, he told Officer Rose that he "wanted to stop this party." *Id.* at 24.

364. Rose testified that he knew of "[n]umerous complaints about a crack house." Transcript at 14, *Dickerson* (No. 89067687). He added: "that place goes 24 hours a day." *Id.* The Solicitor General's brief described the building as a "known 'crack house.'" Brief for the United States as Amicus Curiae at 2, Minnesota v. Dickerson, 113 S. Ct. 2130 (1993) (No. 91-2019).

365. Transcript at 7, *Dickerson* (No. 89067687).

366. *Id.*

367. *Id.* at 22. When the cross-examining public defender pressed him for an estimate of the number of warrants he had executed in the building over the previous two years, suggesting ten or fifteen as general figures, Officer Rose responded "I wouldn't say ten." *Id.*

368. *See id.* ("I know we have done a couple of doubles").

B. THE FRISK

Judge Friendly once remarked that he had "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 an incident thereto, the reverse will be true."[369] The Court, he believed, intended the exception "for the serious cases of *imminent danger* or of *harm* recently perpetrated to persons or property, not the conventional ones of possessory offenses."[370] Justice Harlan similarly concluded that there was no need for immediate action in *Sibron v. New York*[371] because the suspect did nothing to suggest that he was planning a violent crime. "If the nature of the suspected offense creates no reasonable apprehension for the officer's safety," Justice Harlan wrote, "I would not permit him to frisk."[372] As noted earlier, the Court's simultaneous decisions upholding the frisk and seizure of *weapons* in *Terry*, and striking down the seizure of *narcotics* in *Sibron*, support the conclusion that police may conduct protective pat-down frisks on less than probable cause only in situations where they fear imminent violence, and not in situations where they suspect a passive crime such as possession of narcotics. In recognizing a plain-touch doctrine, therefore, the Court seems to have opened the door to the very sort of abuse that Judge Friendly warned of—the danger that the police may use a *Terry* search ostensibly for *weapons* to justify a search in fact for *contraband*.[373]

In *Terry*, however, Justice Harlan also suggested that "the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence."[374] Justice Harlan further observed "it is not clear that suspected possession of narcotics falls into this category."[375]

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369. Williams v. Adams, 436 F.2d 30, 38-39 (2d Cir. 1971) (Friendly, J., dissenting) (emphasis added), *vacated*, 441 F.2d 294 (2d Cir. 1971), *rev'd*, 407 U.S. 143 (1972).

370. 436 F.2d at 39 (emphasis added).

371. 392 U.S. 40 (1968).

372. *Sibron*, 392 U.S. at 74 (Harlan, J., concurring).

373. At least three state supreme courts have warned of the pretext searches that would result from recognizing a plain-touch exception. *See* People v. Diaz, 612 N.E.2d 298, 302 (N.Y. 1993); State v. Collins, 679 P.2d 80, 84 (Ariz. 1984); State v. Broadnax, 654 P.2d 96, 102 (Wash. 1982); State v. Hobart, 617 P.2d 429, 434 (Wash. 1980) (en banc).

374. *Terry*, 392 U.S. at 33 (Harlan, J., concurring). *See also Sibron*, 392 U.S. at 74 (Harlan, J., concurring) (stating that the right to frisk is automatic where the police officer "lawfully stops a person suspected of a crime whose nature creates a substantial likelihood that he is armed"). One author has taken the extreme position that the Court should permit police officers to automatically frisk *all* suspects whom they have legitimately stopped. Mitchell Lampson, *On the Silver Anniversary of* Terry v. Ohio: *The Reasonableness of an Automatic Frisk*, 28 CRIM. L. BULL. 336, 337 (Jul./Aug. 1992) (emphasis added).

375. *Sibron*, 392 U.S. at 74 (Harlan, J., concurring).

If it is uncertain whether drug *possessors* fall into the category of potentially violent criminals whom the police may frisk immediately, drug *dealers* certainly do. The violence inherent in the illicit drug trafficking system accounted for 74% of drug-related homicides committed in New York City in 1988.[376] In *United States v. Ceballos*,[377] Judge Weinstein of the Eastern District of New York concluded that the nature of narcotics trafficking justifies an officer's belief that a suspected drug dealer may be armed and dangerous.[378] The Wisconsin Supreme Court has also candidly remarked "that drug dealers and weapons go hand in hand, thus warranting a *Terry* frisk for weapons."[379] The drug-related violence regularly reported in the nation's news media further confirms the image of drug dealers as dangerous criminals.[380] As Chief

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376. Goldstein et al., *supra* note 334, at 466. In classifying a homicide as "drug-related," police included homicides in which the perpetrator or the victim had ingested alcohol. *Id.* at 463, 466-67 (Tables 1 & 2). For a discussion of the impact of alcohol upon drug-related violence, see *infra* notes 384-86 and accompanying text. In 1988 in New York City, 52.7% of all homicides committed were classified generally as "drug-related." *Id.* at 465. In New York State (outside New York City) 41.7% of homicides reported in 1984 were classified as "drug-related." *Id.* The study categorized drug-related homicides as "Psychopharmacological," "Economic Compulsive," "Systemic," and "Multidimensional." *Psychopharmacological* homicides were homicides in which either the victim or the perpetrator had ingested a mood-altering substance, including alcohol. *Economic Compulsive* violence was thought to occur when a drug user felt compelled to engage in a crime to support a drug habit. *Systemic* homicides are those homicides related to the generally aggressive behavior of individuals within the drug-trafficking system. *Multidimensional* homicides, as the name suggests, were homicides that combined elements of two or more of the first three categories. *Id.* at 461-62.

As mentioned in the text, *systemic* violence accounted for 74% of all "drug-related" homicides. Of the systemic homicides, 61% were related to crack cocaine trafficking, while 27% were related to trafficking in powdered cocaine. *Id.* at 469. Thus, cocaine trafficking accounted for 93% of the systemic homicides committed in New York City in 1988. *Id.* Multidimensional homicides accounted for 8% of drug-related homicides committed in New York City in 1988. *Id.* at 466. For a discussion of psychopharmacological homicides and economic-compulsive homicides, see *infra* notes 382-86 and accompanying text.

377. 719 F. Supp. 119 (E.D.N.Y. 1989).

378. United States v. Ceballos, 719 F. Supp. 119, 128 (E.D.N.Y. 1989). It is important to note that the *Ceballos* court repeatedly referred to *drug trafficking suspects* in approving the use of an automatic frisk. The court made no similar statement regarding individuals whom the police suspect of *possession*. *See id.* at 126.

379. State v. Richardson, 456 N.W.2d 830, 836 (Wis. 1990), *cert. denied*, 113 S. Ct. 3020 (1993). *See also* United States v. Post, 607 F.2d 847, 852 (9th Cir. 1979) (DEA agent alone in a room with a suspected narcotics dealer was justified in frisking the suspect for weapons); State v. Guy, 492 N.W.2d 311, 315 (Wis. 1992) (noting the violence associated with drug trafficking), *cert. denied*, 113 S. Ct. 3020 (1993).

380. *See, e.g.*, Felicia R. Lee, *A Drug Dealer's Rapid Rise and Ugly Fall*, N.Y. TIMES, Sept. 10, 1994, at 1; *4 Dead, 3 Wounded in Bronx Rampage*, THE RECORD, Sept. 17, 1993, at A-6; Arnold H. Lubasch, *8 Are Charged in Drug Slayings*, N.Y. TIMES, Mar. 25, 1993, at B3; Richard D. Lyons, *Child, 11, Wounded as Two Groups Trade Fire in Bronx*, N.Y. TIMES, Jan. 5, 1993, at B3; Dennis Hevesi, *9 Men Posing as Police are Indicted in 3 Murders*, N.Y. TIMES, Sept. 30, 1992, at B3; James Bennet, *Condition Worsens for Baby Who Escaped Triple Slaying*, N.Y. TIMES, July 18, 1992, at 27; David Gonzalez, *Ring That Kidnaps Drug Dealers Is Linked by Police to Murders*, N.Y. TIMES, Dec. 25, 1991, at 35; Seth Faison, Jr., *Man's Corpse Is Discovered in Cardboard Box Outside a Bank on Park Avenue*, N.Y. TIMES, Sept. 7, 1991, at 27; George James, *Twice Killed, Once Dead: Drug Suspect Dies for Real*, N.Y. TIMES, May 24, 1991, at A20; Clara Germani, *'My Future's Good - If I Live'*, CHRISTIAN SCI. MON., Jan. 25, 1991, at 12; *Another Bloody Year*, TIME, Jan. 8, 1990, at 51.

Justice Rehnquist once commented, "[i]n the narcotics business, 'firearms are as much "tools of the trade" as are most commonly recognized articles of narcotics paraphernalia.'"[381] For these reasons, police could easily justify an immediate frisk where they suspect the individual whom they have stopped of being a drug *dealer*.

No authority similarly supports an immediate frisk where the police have less than probable cause to suspect possession only. One study has questioned the "common assumption . . . that the public safety is endangered by persons who are 'crazed killers' due to the use of illicit substances,"[382] finding that drug users who finance their habits through criminal activity normally avoid violent crimes when seeking money to purchase drugs.[383] The study further reported that alcohol, a legally obtainable substance, played a role in the vast majority (77%) of "psychopharmacological" homicides in which the crime occurred after either the victim or the perpetrator ingested an intoxicating substance.[384] Psychopharmacological homicides accounted for 14% of drug-related homicides committed in New York City overall.[385] After factoring out alcohol-related homicides from this figure, it is doubtful whether illicit drug use, by itself, contributes significantly to the homicide rate.[386] These data, of course, do not explain what circumstances would support a police officer's fear of violence to the degree that would justify immediate action, such as that which Officer Rose undertook in *Dickerson*.

The Illinois Supreme Court recently addressed this question in the context of deciding whether the police were justified in dispensing with the "knock-and-announce rule"[387] when they executed a search warrant

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381. Ybarra v. Illinois, 444 U.S. 85, 106 (1979) (Rehnquist, J., dissenting) (quoting United States v. Oates, 560 F.2d 45, 62 (2d Cir. 1977)).

382. Goldstein et al., *supra* note 344, at 473.

383. *Id.* These so-called "economic-compulsive" homicides accounted for only 4% of all drug-related homicides committed in New York City in 1988. *Id.* at 466. For an definition of "economic-compulsive" violence and drug-related homicides, see *supra* note 376.

384. Goldstein *supra* note 344, at 467-68. This statistic is for drug-related homicides committed in New York City in 1988. Alcohol contributed to 95% of psychopharmacological homicides committed in New York State outside New York City in 1984. *Id.* at 468. For a general discussion of drug-related homicides in New York and psychopharmacological homicides, see *supra* note 376.

385. Goldstein et al., *supra* note 344, at 466.

386. *See id.* at 473-74. "The . . . data indicate that homicides do occur as a result of perpetrator and/or victim inebriation. *But generally these cases involve people under the influence of alcohol*, a legally obtainable substance" (emphasis added).

387. Justice Cunningham, writing for the Illinois Supreme Court in People v. Condon, 592 N.E.2d 951 (Ill. 1992), gave an excellent concise summary of the knock-and-announce rule, which I have adopted to provide background for the limited purpose of this discussion:

> The purpose of the knock-and-announce rule is to notify the person inside of the presence of police and of the impending intrusion, give that person time to respond, avoid violence, and protect privacy as much as possible. Officers may be excused from the knock-and-announce requirement if exigent circumstances exist sufficient to justify the intrusion. Where exigent circumstances exist, the failure of the police to knock and

for drugs and weapons at the residence of a suspected drug dealer in *People v. Condon*.[388] In *Condon*, twelve police officers executed a search warrant at the residence of defendant Timothy Condon by breaking through his front door with a battering ram.[389] The state argued that exigent circumstances justified the officers' conduct in not warning the occupants of their presence and purpose prior to taking this action.[390] These alleged exigencies included reliable information that the residence contained an electronic advance warning system consisting of two closed-circuit television cameras and a police scanner, and that the defendant possessed weapons to protect drugs and currency.[391] In addition, the police had previously arrested the defendant's brother, who owned the house, for possession of a large quantity of cocaine and a loaded pistol.[392] The ensuing search confirmed the information. The police recovered a total of thirteen guns, including ten shotguns, one rifle, a loaded revolver in the defendant's bedroom, and a loaded pistol in the defendant's "office."[393]

The state urged that the above factors, when viewed concurrently, supported a reasonable fear of danger to dispense with the knock-and-announce rule.[394] The court disagreed,[395] emphasizing that "nothing in the warrant or the record . . . [indicated] that these were exceptionally

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announce their authority and purpose in the execution of a search warrant for narcotics does not violate the fourth amendment right against unreasonable searches and seizures. Exigent circumstances may encompass such considerations as danger to the police officers executing the warrant, or the uselessness of the announcement, or the ease with which the evidence may be destroyed.

592 N.E.2d at 954-55 (citations omitted).

388. 592 N.E. 2d 951 (Ill. 1992), *cert. denied*, 113 S. Ct. 1359 (1993).

389. 592 N.E.2d at 954.

390. *Id.*

391. *Id.* at 953.

392. *Id.*

393. *Id.* at 954. The police also recovered cocaine, marijuana, and currency. *Id.*

394. Another factor included in the state's argument for exigent circumstances was the potential destruction of the cocaine. 592 N.E.2d at 955. When viewed together with the perceived danger, the state argued that sufficient exigent circumstances existed to dispense with the knock-and-announce rule. *Id.*

395. *Condon*, 592 N.E.2d at 957. The court also found no basis for the state's argument that the officers feared the potential destruction of evidence. *Id.* The Court, therefore, found all circumstances listed by the state insufficient to constitute exigent circumstances, reasoning that "[w]hile there is a certain appeal to the State's argument, we cannot agree that just because there are a number of circumstances, not one of which standing alone would create an exigency, the sheer volume of circumstances without something more is sufficient to create exigent circumstances." *Id.* at 955.

For contrary views, see, e.g., United States v. Keene, 915 F.2d 1164, 1168-69 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1001 (1991) (finding that state agents were justified in dispensing with the knock-and-announce rule because the suspects could easily have destroyed the illicit narcotics that were in liquid form); State v. Matos, 605 A.2d 223, 224 (N.H. 1992) (finding that exigent circumstances existed to dispense with the notice requirement because the suspects could have easily destroyed cocaine packaged in small "street quantities"). *See also* Illinois v. Condon, 113 S. Ct. 1359 (1993) (mem.) (White, J., dissenting), *denying cert. in* People v. Condon, 592 N.E.2d 951 (Ill. 1992).

violent people."[396] Although the officers were aware that the defendant's brother had weapons and drug charges pending against him, the court concluded that the search warrant evidenced no fear that the brother posed any danger to them.[397] "[T]here is nothing in the record to suggest that Bernard Condon had ever been violent or used the gun or even threatened to use it,"[398] wrote Justice Cunningham. "Only if the officers feared that Bernard Condon would use a gun against them were they justified in dispensing with the knock-and-announce requirement."[399] Second, Justice Cunningham distinguished the state's reliance upon *People v. Trask*,[400] where the court had said, "The police should not have to be certain that they will be shot at if they wait very long before entering; they just have to have a reasonable apprehension of danger."[401] "The key words," Justice Cunningham emphasized, "are 'wait very long.' The police here did not knock or wait at all—they just barged in."[402] The court also found the presence of weapons in the house insufficient to justify an apprehension of danger. "[T]he existence of a weapon should excuse the knock-and-announce rule only where the officers reasonably believe the weapon will be used against them if they proceed with ordinary announcements."[403] Finally, the court dismissed the notion that an advance warning system posed any danger to the officers. "[E]ven if the occupants of the house had been aware of the police approaching via the surveillance cameras or the police scanner, it does not necessarily follow that they would have 'gone for their guns.'"[404]

The officers' hasty action in *Condon*—barging into the suspects' house without first knocking and announcing their presence—is analogous to the officers' conduct in *Dickerson*. In *Dickerson*, neither officer attempted to question Dickerson *before* frisking him. The only verbal communication between the officers and Dickerson prior to the frisk occurred when Rose commanded Dickerson to place his hands on the squad car.[405] This behavior contrasts with police conduct in other

396. *Condon*, 592 N.E.2d at 956.

397. *Id.* at 955.

398. *Id.*

399. *Id. Cf.* State v. Williams, 485 N.W.2d 42, 48 (Wis. 1992) (finding that officer was justified in dispensing with the knock-and-announce requirement where he believed the suspect possessed both drugs and a firearm, and where the suspect had previously represented that he would use the firearm to defend himself).

400. 521 N.E.2d 1222 (Ill. 1988).

401. *Id.* at 1230 (quoted in *Condon*, 592 N.E.2d at 955).

402. 592 N.E.2d at 955.

403. *Id.* at 956 (relying on People v. Ouellette, 401 N.E. 2d 507 (Ill. 1979)).

404. *Id.*

405. Transcript at 17, 25, *Dickerson* (No. 89067687). During his testimony, Officer Rose indicated no oral communication other than his command for Dickerson to place his hands on the

landmark cases. In *Terry*, Officer McFadden frisked the suspects only *after* they had evasively responded to his inquiries.[406] In *Adams v. Williams*,[407] the investigating officer seized a gun from the suspect's belt only *after* the suspect disobeyed the officer's command to step out of the car.[408] In *Michigan v. Long*,[409] the police frisked an intoxicated suspect and searched his car only *after* they noticed a large hunting knife on the floorboard of the driver's side of his car.[410] (The suspect had also failed to respond to the officers' request for his registration.)[411] In *Dickerson*, the suspect engaged in no such evasive, unresponsive, or threatening conduct when the officers confronted him. He continued walking toward the squad car when it entered the alley, and he fully cooperated with Officer Rose's commands.[412] As in *Condon*, nothing in the record indicates that Dickerson was a violent person, or that the police had reason to believe he was. Under these circumstances, it is difficult to understand how the two police officers could have feared that Dickerson was "armed and presently dangerous" to them, or to anyone else. The only explanation that Officer Rose offered to justify the frisk "for weapons and contraband"[413] was a vague generalization that the police had found numerous weapons in the area.[414] Nothing in the record indicates what crime the officers suspected Dickerson of committing.[415] Officer Johnson's police report merely stated that, upon observing

squad car. *Id.* Dickerson's testimony provided the only hint that there may have been any other communication:

> As I was coming up on the car, the police officers got out of their car and they said, "I hope you wasn't coming out of this crack house," and I said, "Excuse me," you know, because I didn't hear them at first and then he said, "I hope you wasn't coming out of this crack house," so I didn't say nothing after that, you know. So then he told me to put my hands on the car so I put my hands on the car.

Id. at 30.

406. 392 U.S. at 6-7.

407. 407 U.S. 143 (1972).

408. Adams v. Williams, 407 U.S. 143, 144-45 (1972).

409. 463 U.S. 1032 (1983).

410. Michigan v. Long, 463 U.S. 1032, 1036 (1983).

411. *Id.*

412. Transcript at 16-17, *Dickerson* (No. 89067687). *See* State v. Broadnax, 654 P.2d 96, 98-99 (Wash. 1982) (involving a police entry into the home of a suspected drug dealer and the execution of a search warrant for narcotics). Upon entering the premises, the police ordered two male suspects to place their hands on their heads while one officer searched the house. *Id.* Shortly thereafter, a third detective arrived and frisked the two suspects as they stood with their hands atop their heads. *Id.* The frisk revealed narcotics in the clothing of the Petitioner, Arthur Thompson, who was not named in the warrant. *Id.* Citing Thompson's cooperation with the police and the officers' failure to indicate a reasonable belief that the petitioner was armed or presently dangerous, the court held that the facts did not support a frisk. *Id.* at 105. "Petitioner's 'mere presence' at a private residence being searched pursuant to a search warrant cannot justify a frisk of petitioner's person . . . ." *Id.* at 101.

413. Transcript at 9, *Dickerson* (No. 89067687).

414. *Id.*

415. In contrast, Officer McFadden testified in *Terry* that his numerous years of experience had enabled him to diagnose the suspects' behavior as that commonly associated with "casing . . . a stick-up." *Terry*, 392 U.S. at 6.

Dickerson walk into the alley, Johnson told Rose "I want[] to stop this party."[416]

At best, the record indicates that the officers suspected Dickerson of possessing narcotics—the very sort of suspicion held insufficient to support a frisk in *Sibron*. Justice Tomljanovich arrived at the same conclusion when she remarked that Officer Rose "continued feeling the defendant's person until he found what he was looking for all along."[417] The trial court order, moreover, underscored the trivial nature of Mr. Dickerson's offense, permitting him to truthfully claim that he had never been convicted of a crime once he had fulfilled the conditions of his probation.[418] Chief Justice Warren's analysis in *Sibron* readily applies to the *Dickerson* scenario: "[t]he suspect's mere act of [abruptly changing direction] . . . no more gives rise to reasonable fear of life or limb on the part of the police officer than it justifies an arrest for committing a crime."[419] Given Dickerson's subsequent behavior in continuing to walk toward the squad car and obeying the officer's commands without any sort of evasive conduct, "one important factor, missing here," as Justice Harlan commented, was "any need for [the] *immediate* action"[420] that Officer Rose undertook without first questioning Dickerson.

Ybarra v. Illinois[421] is also instructive. In *Ybarra*, police officers obtained a warrant to search the premises of a bar and the bartender for evidence of narcotics dealing.[422] When the officers executed the search warrant, they also pat-frisked the patrons of the bar, and discovered narcotics concealed within a cigarette package belonging to one patron, Ventura Ybarra.[423] Justice Rehnquist, dissenting, would have upheld the search and the seizure.[424] The warrant had thrust the officers into a situation where they confronted approximately one dozen people in a dimly-lit bar suspected of being a center for narcotics trafficking.[425] The patrons' presence in this suspicious location, he argued, supported a reasonable assumption that they may also be drug dealers.[426] Given the violent nature of drug trafficking, this suspicion likewise justified a fear that the patrons may be armed and dangerous.[427]

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416. Transcript at 25, *Dickerson* (No. 89067687).
417. *Dickerson II*, 481 N.W.2d at 846.
418. Transcript at 68, *Dickerson* (No. 89067687). *See also* MINN. STAT. ANN. § 152.18 subd. 1 (West 1989).
419. *Sibron*, 392 U.S. at 64.
420. *Id.* at 73 (Harlan, J., concurring) (emphasis added).
421. 444 U.S. 85 (1979).
422. Ybarra v. Illinois, 444 U.S. 85, 87-88 (1979).
423. *Id.* at 88-89.
424. *Id.* at 110.
425. *Id.* at 106.
426. *Id.*
427. *Ybarra*, 444 U.S. at 106. *See also supra* note 381 and accompanying text.

The Court, in an opinion by Justice Stewart, disagreed and held the pat-frisk of Ybarra violated *Terry*'s requirement that the police officers must fear that the individual is armed and dangerous *before* conducting a frisk.

> Upon seeing Ybarra, they neither recognized him as a person with a criminal history nor had any particular reason to believe that he might be inclined to assault them. Moreover, as Police Agent Johnson later testified, Ybarra, whose hands were empty, gave no indication of possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening. At the suppression hearing, the most Agent Johnson could point to was that Ybarra was wearing a 3/4-length lumber jacket, clothing which the State admits could be expected on almost any tavern patron in Illinois in early March. In short, the State is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that Ybarra was armed and dangerous.[428]

Justice Stewart further commented that Ybarra's mere presence on premises where agents were executing a warrant to search for evidence of narcotics dealing was insufficient to support a reasonable suspicion directed at him.[429]

In *Dickerson*, Officers Rose and Johnson neither recognized Dickerson as a person with a criminal history "nor had any particular reason to believe that he might be inclined to assault them."[430] He "gave no indication of possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening."[431] Finally, the fact that the police had previously found "numerous weapons"[432] in the area where they stopped Dickerson provided no further justification for frisking him. An individual's mere presence in a "bad" neighborhood no more supports a suspicion that he is an armed and dangerous criminal than did Sibron's eight hours' of conversation with known narcotics addicts, Brown's presence in an alley known for narcotics trafficking, or Ybarra's presence in a bar where police suspected narcotics dealing. As Justice Stewart commented in *Ybarra*, Officer Rose pointed to no "specific fact

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428. 444 U.S. at 93.

429. *Id.* at 91 (relying on *Sibron*, 392 U.S. at 62-63). *See also supra* note 412 (discussing State v. Broadnax, 654 P.2d 96, 101, 104 (Wash. 1982)).

430. *Ybarra*, 444 U.S. at 93.

431. *Id.*

432. Transcript at 9, *Dickerson* (No. 89067687).

that would have justified a police officer at the scene in even suspecting that [Dickerson] was armed and dangerous."[433]

Although he concurred in *Minnesota v. Dickerson*, Justice Scalia wrote separately to express his skepticism about whether "the physical search—the 'frisk'—that produced the evidence at issue here complied with" the Fourth Amendment's guarantee against unreasonable searches and seizures.[434] Justice Scalia also questioned the constitutionality of *Terry* frisks in general. "I frankly doubt," he wrote, "whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity."[435] The *Dickerson* trial court record confirms that Officers Rose and Johnson did not comply with even this low standard when they stopped Timothy Dickerson and immediately frisked him.

V. CONCLUSION

The plain-touch doctrine applies the plain-view doctrine to an officer's tactile observations. Thus, in order to seize an incriminating object under the plain-touch doctrine, an officer must satisfy three criteria. First, the officer must lawfully be in a position to feel an object concealed within an outer covering. The situation that will most often place officers lawfully in a position to make such tactile observations will be the weapons frisk, although plain-touch can arise in other situations as well. Second, the object's incriminating nature must be immediately apparent, giving the officer probable cause to believe that it is contraband or evidence of a crime. The officer's examination of the object is "a truly cursory inspection—one that involves"[436] *momentary contact* with the object, *without* manipulating it in any way. Third, if the officer immediately recognizes the object as contraband or evidence of a crime, he must have a lawful right of access to the object before seizing it. At the moment the officer develops probable cause to suspect that the object is incriminating evidence, he has grounds to apply for a search warrant. Absent a search warrant, the officer may not take further intrusive action to seize the object *unless* an exception to the Warrant Requirement applies that would give him a lawful right of access to the object. In the case of an officer's plain touch during a weapons frisk, the

433. *Ybarra*, 444 U.S. at 95.
434. *Dickerson III*, 113 S. Ct. at 2141 (Scalia, J., concurring).
435. 113 S. Ct. at 2140.
436. Arizona v. Hicks, 480 U.S. 321, 328 (1987).

exception that will allow the officer to seize the object is the search-incident-to-arrest exception.

Thus, a police officer must comply with the requirements of an investigative stop, a weapons frisk, and the plain-touch doctrine in order to seize a nonthreatening object discovered during a weapons frisk. To initially detain a suspect, the officer must have a reasonable, articulable suspicion that the suspect is engaged in criminal activity. The officer must also reasonably fear that the suspect may be armed and presently dangerous in order to conduct a weapons frisk. When the officer feels a nonthreatening object that he immediately recognizes as contraband, without expanding the scope of the weapons frisk, this sensation raises his level of suspicion to probable cause to arrest the suspect for committing a crime. The officer may then arrest the suspect and seize the object under the search-incident-to-arrest exception to the Warrant Requirement.

Before a trial court reaches a plain-touch issue in the context of a weapons frisk, therefore, it must first determine whether the investigating officers properly stopped and frisked the suspect. The lower court opinions in *Dickerson* suggest that some courts will readily defer to a police officer's determination of reasonable suspicion and fear of violence necessary to stop the suspect and frisk him for weapons. It also seems that some courts will uphold an investigative stop and a weapons frisk supported by weak justifications. Now that the police may seize nonthreatening objects discovered during a frisk, what will prevent a police officer from using a frisk ostensibly for *weapons* to justify a search in fact for *contraband*? What will prevent an officer in the field from manipulating an object concealed within someone's clothing until the officer determines that the object is contraband, and then later testifying that the object's incriminating nature was "immediately apparent?" Indeed, is it truly possible for an officer to *immediately* recognize an object sandwiched between layers of clothing as contraband? This question awaits an answer from scientific experts on tactile perception.