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The "Plain Feel" Exception in Minnesota v. Dickerson: A Further Erosion of the Fourth Amendment

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INTRODUCTION

In Minnesota v. Dickerson, a case further defining the meaning of the Fourth Amendment to the United States Constitution, the Supreme Court addressed the issue of whether the Fourth Amendment permits the seizure of non-threatening contraband detected by the sense of touch during a protective search for weapons based on reasonable suspicion. The Court granted certiorari in order to resolve a dispute among federal appellate courts and several state appellate courts as to this issue. In this case, the

1. 113 S.Ct. 2130 (1993).
2. The Fourth Amendment states: "[t]he 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." U.S. CONST. amend. IV. As Justice Brandeis stated in Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting), the Fourth Amendment "confers, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men." See, e.g., Rakas v. Illinois, 439 U.S. 128, 134-37 (1978); United States v. United States District Court, 407 U.S. 297, 326-27 (1972) (Douglas, J., concurring); Alderman v. United States, 394 U.S. 165, 179-80 (1969); Silverman v. United States, 365 U.S. 505, 511-12 (1961); Taylor v. United States, 286 U.S. 1, 2 (1932); Boyd v. United States, 116 U.S. 616, 626-30 (1886).
3. Dickerson, 113 S.Ct at 2133 (referring to the cursory "pat down" or frisk for weapons as allowed by Terry v. Ohio, 392 U.S. 1 (1968)).

Court held that law enforcement officials may seize non-threatening contraband during the course of a lawful Terry "pat down" of a suspect when they feel an object whose mass or contour makes its identity as contraband immediately apparent. In so holding, the Court drew an analogy between the discovery of contraband during a lawful Terry frisk and the discovery of contraband under the "plain view" doctrine. The Court reasoned that if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the "plain view" context. Yet, until this decision, pursuant to a warrantless search based on reasonable suspicion, a law enforcement officer could seize only weapons or other hard objects which he could reasonably have believed to be a weapon.

This Note will discuss the legal development of the "plain feel" exception to the Fourth Amendment. It will reveal how the Supreme Court in Dickerson used a combination of the Terry cursory, "pat down" exception to the Fourth Amendment and the "plain view" doctrine to justify a warrantless search and seizure. It will examine the extent to which police officers may manipulate lawful powers without overstepping the Amendment's safeguards. Finally, this Note will describe how Dickerson's "plain feel" exception weakens Fourth Amendment guarantees and concludes it could lead to an unwarranted invasion of the public's right to be secure in their person.

THE CASE

On the night of November 9, 1989, two Minneapolis police officers were patrolling Morgan Avenue. At approximately 8:15 p.m., they observed defendant Timothy Dickerson leaving what police described as a known "crack house." Upon making eye contact with one officer, Dickerson immediately turned around

5. Dickerson, 113 S.Ct. at 2139.
6. Id. Earlier cases alluding to a "plain view" exception to the Fourth Amendment include Harris v. United States, 390 U.S. 234, 236 (1968) ("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.") and Ker v. California, 374 U.S. 23, 42-43 (1963).
7. Dickerson, 113 S.Ct. at 2134.
8. Terry v. Ohio, 392 U.S. 1, 27 (1968); see also United States v. Gonzalez, 763 F.2d 1127 (10th Cir. 1985) (noting intrusion is unauthorized if true goal of search is discovery or preservation of contraband rather than weapons).
9. Dickerson, 113 S. Ct. at 2133.
10. Id.
and began walking toward a side alley. Based upon Dickerson's evasive actions and the fact he had just left a building known for cocaine trafficking, the officers decided to investigate the situation further. The officers ordered Dickerson to stop and submit to a "pat down" search for weapons. The search did not reveal any weapons. However, it did reveal a small lump in the front pocket of Dickerson's nylon jacket. Upon reaching into Dickerson's pocket, the officer retrieved a small plastic bag containing one fifth of one gram of crack cocaine. The officers then arrested Dickerson and charged him with possession of a controlled substance. The officer testified at no time did he ever believe that the small lump in Dickerson's jacket was a weapon.

Prior to trial, Dickerson made a motion to suppress the crack cocaine. Relying on Terry, the trial court concluded the officers were justified in stopping Dickerson to further investigate the possibility of criminal conduct. Also, the trial court found that the frisk performed by the officer was justified to ensure the suspect did not possess a weapon. Finally, by analogy to the "plain view" doctrine, the court ruled that the officer's seizure of the crack cocaine did not violate the Fourth Amendment. With the court's ruling of the cocaine admissible, the case proceeded to trial, where

11. Id.
12. Id.
13. Id.
14. Id.
15. Id. The officer later testified: "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." Id.
16. Id.
17. Id. at 2133-34.
19. Dickerson, 113 S.Ct. at 2134.
20. Dickerson, 469 N.W.2d at 464.
21. Id.
22. Id. In its opinion, the trial court noted:
To this Court there is no distinction as to which sensory perception the officer uses to conclude that the 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 an 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.

Dickerson, 113 S.Ct at 2134.
the court found Dickerson guilty of possession of a controlled substance.23

Dickerson appealed to the Minnesota Court of Appeals.24 The appellate court agreed with the lower court by explaining the investigative stop and protective “pat down” search were lawful under Terry.25 However, the court of appeals refused to adopt the “plain feel” exception to the Fourth Amendment. The court concluded the officers had overstepped the bounds allowed by Terry in the conduct of the protective search.26

In affirming the court of appeals, the Minnesota Supreme Court upheld the validity of both the stop and frisk pursuant to Terry and agreed that the seizure of the cocaine violated the Fourth Amendment.27 In its decision, the court appeared to adopt a categorical rule barring the admissibility of any non-threatening contraband detected by a police officer’s sense of touch during a “pat down” search for weapons.28 The Minnesota Supreme Court held if during the course of a “pat down” search for weapons, an officer detects through the sense of touch an object which could not possibly be a weapon, he is not entitled to go further with his search in order to satisfy his curiosity as to what the object is.29 The Minnesota Court noted even if it did recognize a “plain feel” exception to the Fourth Amendment, the search in this case would not meet that exception because “the pat search of the defendant went far beyond what is permissible under Terry.”30

Granting certiorari, the United States Supreme Court agreed with the Minnesota Court in holding the police officer in this case

23. Dickerson, 113 S.Ct. at 2134.
25. Id. The court of appeals noted that the officers had a reasonable belief based on specific and articulable facts that Dickerson was engaged in criminal activity and that he might be armed and dangerous. Id. at 465.
26. Id. at 466.
28. See id. at 845-46. The Minnesota Supreme Court rejected an analogy to the “plain view” doctrine on two grounds. First, its belief that “the sense of touch is inherently less immediate and less reliable than the sense of sight,” and second, “the sense of touch is far more intrusive into the personal privacy that is at the core of the Fourth Amendment.” Id. at 845.
29. Id. at 844.
30. See id. at 843-44. The Court concluded that the officer determined that the lump was contraband only after “squeezing, sliding and otherwise manipulating the contents of the defendant’s pocket” — a pocket which the officer already knew did not contain a weapon. Id. at 844.
overstepped the "strictly circumscribed" bounds of Terry\textsuperscript{31} because the officer determined the lump was contraband only after "squeezing, sliding, and otherwise manipulating the contents of the defendant's pocket."\textsuperscript{32} The Court, however, went on to hold that if an officer conducts a lawful "pat down" of a suspect's outer clothing, within the bounds of Terry,\textsuperscript{33} and detects through the sense of touch an object whose contour and mass make its identity immediately apparent, there is no invasion of the person's privacy beyond that which was already authorized by Terry in a protective "pat down" search for weapons.\textsuperscript{34}

**BACKGROUND**

**A. The Limits of the Terry Frisk**

In *Terry v. Ohio*,\textsuperscript{35} the United States Supreme Court recognized the Fourth Amendment's prohibition against unreasonable searches and seizures, but the Court determined the Amendment permitted a stop and frisk of a suspect by police officers.\textsuperscript{36} To justify an investigatory stop the officer must have a reasonable suspicion that "criminal activity may be afoot."\textsuperscript{37} During a Terry stop, the police are further allowed to "seize" the suspect long enough to conduct a cursory "pat down" search of the suspect's outer clothing in an effort to discover weapons.\textsuperscript{38} Yet, the officer may only conduct this search if he has reasonable suspicion based on specific and articulable facts that the suspect is presently armed and dan-

\begin{itemize}
  \item 31. *Terry v. Ohio*, 392 U.S. 1, 29 (1968); see also *United States v. Pajari*, 715 F.2d 1378, 1383-84 (8th Cir. 1983) (allowing limited patdown search based on reasonable suspicion when suspect appears nervous while leaving house and in car, and appears to reach for weapon).
  \item 32. *Dickerson*, 481 N.W.2d at 844.
  \item 33. 392 U.S. at 27.
  \item 35. 392 U.S. 1 (1968).
  \item 36. *Id.* at 23-27. The Court defines a stop and frisk as an interference with a person's liberty, short of a full arrest, where a police officer reasonably suspects a person is involved in criminal conduct and is armed. *Id.* at 30-31.
  \item 37. *Id.* at 30; *United States v. Place*, 462 U.S. 696, 702 (1983) ("[T]he Court . . . acknowledge[s] the authority of the police to make a forcible stop of a person when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity.").
\end{itemize}
To determine whether a police officer acted reasonably in a Terry context, the Court noted "due weight must be given to the specific and reasonable inferences an officer is reasonably entitled to draw from the facts in light of his experience," and not to his inchoate and unparticularized suspicions or 'hunch.'

In Terry, Chief Justice Warren developed a bright line test, drawing a distinction between a limited "pat down" search or frisk, and a more intrusive, full search of the person. A protective search, permitted without a warrant and on the basis of reasonable suspicion, something less than probable cause, must be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.

39. Id. at 23-24 (when the officer believes an individual is armed and presently dangerous, it would be "unreasonable to deny the officer the power to take necessary measures . . . to neutralize the threat of physical harm.").

40. The test is an objective rather than a subjective one and thus it is not essential that the officer actually have been in fear. Id. at 21-22. As stated in United States v. Tharpe:

We know of no legal requirement that a policeman must feel "scared" by the threat of danger. Evidence that the officer was aware of sufficient specific facts as would suggest he was in danger satisfies the constitutional requirement. Terry cannot be read to condemn a pat-down search because it was made by an inarticulate policeman whose inartful courtroom testimony is embellished with assertions of bravado, so long as it is clear that he was aware of specific facts which would warrant a reasonable person to believe he was in danger. Under the familiar standard of the reasonable prudent man, no purpose related to the protective function of the Terry rule would be served by insisting on the retrospective incantation "I was scared."

536 F.2d 1098, 1101 (5th Cir. 1976).

41. Terry, 392 U.S. at 27; see also United States v. Kerr, 817 F.2d 1384, 1387 (9th Cir. 1987), where the court noted:

[W]e recognize that effective law enforcement is often predicated on hunches developed from a police officer's years of experience in detecting criminal activity. However, underlying every Fourth Amendment analysis is a balancing between two competing concerns — society's interest in effective law enforcement and the individual's privacy and liberty interests. A Fourth Amendment stop [and search] based on hunches alone will not withstand constitutional scrutiny.

See also United States v. Strickland, 902 F.2d 937, 940 (11th Cir. 1990) ("[I]nvestigative stops are invalid if they are solely based upon unparticular suspicion or unarticulable hunches . . . .").

42. Reasonable suspicion requires "specific articulable facts which, taken with rational inferences from those facts, reasonably warrant" the belief a crime is being or has been committed. Terry, 392 U.S. at 21.
Thus, seizure is not permitted where the object felt during the course of the search is soft in nature. Also, if the protective "pat down" search goes beyond what is needed to determine whether the suspect is armed, the search is not valid under Terry, and its fruits will be suppressed. The Supreme Court has stated "the narrow intrusions involved in [Terry and its progeny] were judged by a balancing test rather than by the general principle that Fourth Amendment seizures must be supported by the 'long-prevailing standards' of probable cause, . . . only because these

43. Id. at 26; see also Michigan v. Long, 463 U.S. 1032, 1049 (1983); Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979). The following Supreme Court cases indicate that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between suspects and police are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect: Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977) (police may order persons out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is a reasonable belief that they are armed and dangerous — decision rested in part on "the inordinate risk confronting an officer as he approaches a person seated in an automobile"); Adams v. Williams, 407 U.S. 143 (1972) (police officer, acting on an informant's tip, may reach into the passenger compartment of an automobile to remove a gun from a driver's waistband even where the gun was not apparent to police from outside the car and the police knew of its existence only because of the tip — again the Court's decision rested in part on the danger presented to police officer's in traffic stop situations).

44. Id. at 29 (search confined to discovery of "guns, knives, clubs, or other hidden instruments for the assault of the officer"). Accord State v. Collins, 679 P.2d 80, 84 (Ariz. Ct. App. 1983) (officer may seize only weapons during "stop and frisk" weapons search, not any and all suspicious items discovered); People v. Collins, 463 P.2d 403, 406 (Cal. 1970) (officer's "fanciful speculation" that soft object might be atypical weapon must be supported by reasons why that detainee would be so armed and why that object feels like an atypical weapon); People v. McCarty, 296 N.E.2d 862, 863 (Ill. App. Ct. 1973) (officer had no right to seize a soft plastic bag from defendant's coat pocket, after determining pocket did not contain a weapon); State v. Rhodes, 788 P.2d 1380, 1381 (Okla. Crim. App. 1990) (officer may not seize object felt during patdown search unless it reasonably resembles a weapon); State v. Hobart, 617 P.2d 429, 434 (Wash. 1980) (patdown search for weapons, but included an exploration the defendant might be in possession of narcotics because of a prior arrest).

intrusions fell far short of the kind of intrusion associated with an arrest.\textsuperscript{46}

In a companion case to \textit{Terry}, \textit{Sibron v. New York},\textsuperscript{47} the Supreme Court emphasized the limited nature of a protective search by reversing a heroin possession conviction. The Court held, pursuant to \textit{Terry}, a search of the suspect's pocket was unlawful because the officer was looking for narcotics, not weapons.\textsuperscript{48} Because the search conducted by the officer was so clearly unrelated to the officer's right to frisk for weapons, the search could not stand.\textsuperscript{49} Reading \textit{Terry} and \textit{Sibron} together evidences the Supreme Court's desire to limit pat searches to a careful exploration of outer surfaces of the suspect's clothing.

\subsection*{B. The "Plain Feel" Analogy to "Plain View"}

Several federal circuit courts and state appellate courts have applied a "plain feel" exception to the Fourth Amendment, describing it as an extension of the "plain view" doctrine.\textsuperscript{50} The "plain view" doctrine provides for the warrantless search and seizure of any contraband found in plain view if: (1) the law enforcement officers have legitimately entered a constitutionally protected area,\textsuperscript{51} either by a warrant or an exception to the warrant requirement; (2) probable cause exists to associate the contraband with criminal conduct; and (3) the contraband's criminal nature is immediately apparent.\textsuperscript{52} If the incriminating nature of the object is not immediately apparent, no probable cause to believe it is contraband exists, and therefore its seizure cannot be

\begin{itemize}
\item \textsuperscript{46} Dunaway v. New York, 442 U.S. 200, 212 (1979). Hornbook law has been that "the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so." New York v. Belton, 453 U.S. 454, 457 (1981).
\item \textsuperscript{47} 392 U.S. 40 (1968).
\item \textsuperscript{48} \textit{Id.} at 62.
\item \textsuperscript{49} \textit{Id.} at 62-65.
\item \textsuperscript{50} See supra note 4 (collecting cases).
\item \textsuperscript{51} See Silverman v. United States, 365 U.S. 505, 512 (1961) (fourth amendment rights violated by unauthorized physical penetration into petitioner's home.). As the majority in Olmstead v. United States concluded: The Fourth Amendment . . . [has not] been violated . . . unless there has been an official search and seizure of [the] person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house "or curtilage" for the purpose of making a seizure.
\item \textsuperscript{52} 277 U.S. 438, 466 (1928).
\item \textsuperscript{52} Horton v. California, 496 U.S. 128, 136-37 (1990).
\end{itemize}
justified under the "plain view" doctrine.\textsuperscript{53} As a result, the evidence is suppressed.\textsuperscript{54}

The Second Circuit, in \textit{United States v. Ocampo},\textsuperscript{55} became the first appellate court to apply the "plain feel" exception. The court reasoned "[w]here the contents of a container are easily discernible by frisking the exterior of a package, there is little likelihood that the owner could reasonably expect any substantial degree of privacy."\textsuperscript{56} However, not all states have adopted the "plain feel" doctrine.\textsuperscript{57} For instance, the following year, in \textit{United States v. Ross},\textsuperscript{58} a plurality of the Court rejected the \textit{Ocampo} court's distinction between containers. In \textit{Ross}, the Court expressly noted it would not base the "plain feel" exception upon the difference between sturdy containers (the inside of which contents cannot be felt) and flimsy containers (the inside of which contents can be felt).\textsuperscript{59}

Prior to \textit{Dickerson}, other courts have acknowledged a plain feel exception by analogizing it to the plain view exception.\textsuperscript{60}

\textsuperscript{53} \textit{Id.}

\textsuperscript{54} \textit{See, e.g., United States v. Donnes, 947 F.2d 1430, 1438 (10th Cir. 1991) (because "[t]he 'incriminating character' of the contents of a closed, opaque, innocuously shaped container, such as a camera lens case, is not 'immediately apparent,'" court rejected application of "plain view" exception); United States v. Beal, 810 F.2d 574, 576-77 (6th Cir. 1987) (affirming suppression of "pen guns" where their incriminating nature was neither "immediate" nor "apparent"); Moya v. United States, 761 F.2d 322, 326 (7th Cir. 1984) (approving suppression of plastic bag containing drug paraphernalia seized after officers had observed only a corner of the bag; court found that "[t]here is nothing apparently incriminating about a plastic bag"); United States v. Dart, 747 F.2d 263, 269-70 (4th Cir. 1984) (weapons underneath opaque blanket not immediately apparent); United States v. Szymkowiak, 727 F.2d 95, 98-99 (6th Cir. 1984) (criminal activity was neither "immediate" nor "apparent" from discovery of firearm).}

\textsuperscript{55} 650 F.2d 421 (2d Cir. 1981).

\textsuperscript{56} \textit{Id.} at 429.

\textsuperscript{57} \textit{See supra} note 4.

\textsuperscript{58} 456 U.S. 798 (1982).

\textsuperscript{59} \textit{Id.} at 822. The Court explained:

[A] constitutional distinction between "worthy" and "unworthy" containers would be improper . . . . For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case.

\textit{Id.}

\textsuperscript{60} \textit{See, e.g., United States v. Coleman, 969 F.2d 126, 132 (5th Cir. 1992); United States v. Salazar, 945 F.2d 47, 51 (2d Cir. 1991), cert. denied, 112 S.Ct.}
These cases, which draw a connection between the "plain feel" doctrine and the "plain view" exception to the Fourth Amendment, set the stage for the Court's decision in Dickerson, adopting the "plain feel" exception to cover situations where nonlethal contraband is detected during the course of a legitimate Terry frisk.

ANALYSIS

A. Supreme Court's Extension of Terry Frisk

1. Weakening of the Fourth Amendment

Minnesota v. Dickerson is the first Supreme Court case broadening the Fourth Amendment limitations on warrantless searches and seizures established in Terry. The basic policy behind the Terry frisk is to allow police officers to investigate suspected criminal conduct without having to fear for their safety. Even though this search involves a significant intrusion of personal liberty, the need to locate hidden weapons which a suspect could use against the officer permits a thorough patdown.

It has long been fundamental that warrantless searches and seizures are per se unreasonable unless they fall within one of the acknowledged exceptions to the Fourth Amendment's warrant requirement. Prior to the Court's ruling in Dickerson, the general rule provided that once an officer has concluded that no


62. Terry v. Ohio, 392 U.S. 1, 25-26 (1968); see id. at 33 (Harlan, J., concurring) ("[T]here is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.").

63. Id. at 17. The Court described the intrusion in this way:

Consider the following apt description: 'The officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, and the groin and area about the testicles, and the entire surface of the legs down to the feet.'

Id. at 17 n. 13 (citation omitted).

weapon is present, the search is over and there is no authority for further intrusion.\textsuperscript{65} The Court in \textit{Adams v. Williams}\textsuperscript{66} advanced this position by noting a policeman must limit a "pat down" to what is necessary only to protect the police and others nearby and must not use the "pat down" to further search for evidence.\textsuperscript{67} In analyzing the reasonableness of police conduct, the \textit{Terry} Court balanced the need of the police to perform a search against the privacy interests of the person being searched.\textsuperscript{68} The Court determined the police conduct in \textit{Terry} was reasonable because the police interest in safety during the course of investigating criminal activity outweighed the brief, but severe, intrusion of personal privacy.\textsuperscript{69}

According to the Court in \textit{Michigan v. Long},\textsuperscript{70} when police officers conduct a \textit{Terry} search of the inside of an automobile, they must limit the search to areas where weapons could be hidden.\textsuperscript{71} The Court further explained that if the conduct of a legitimate \textit{Terry} search of the inside of an automobile revealed evidence other than weapons, the police do not have to simply overlook the evidence.\textsuperscript{72} However, the Court based its justification upon the "plain view" doctrine, where the evidence is seen, not simply revealed by the sense of touch.

The Minnesota Supreme Court's decision in this case reveals the difficulties contained in the Supreme Court's decision. The state court rejected the "plain feel" exception, first, on the ground that "the sense of touch is inherently less reliable than the sense of sight", and second, "that the sense of touch is far more intrusive into the personal privacy that is at the core of the Fourth Amend-


\textsuperscript{66} 407 U.S. 143 (1972).

\textsuperscript{67} \textit{Id.} at 146; see also \textit{Sibron v. New York}, 392 U.S. 40, 65-66 (1968) (to be valid, a protective search under \textit{Terry} can go no further than what is necessary to determine if the suspect has a weapon).

\textsuperscript{68} \textit{Terry}, 392 U.S. at 20-21.

\textsuperscript{69} \textit{Id.} at 24-25 (noting justification for a \textit{Terry} stop and frisk must be judged according to whether the police acted as a reasonable, prudent man in the situation would).

\textsuperscript{70} 463 U.S. 1032 (1983).

\textsuperscript{71} \textit{Id.} at 1049.

\textsuperscript{72} \textit{Id.} at 1050.
ment." The United States Supreme Court attempts to defuse this reasoning by reliance on Terry itself. The Court expressed that Terry supports the reliability of the sense of touch in police conduct. This reasoning is flawed, as a weapon, especially a gun, is something that one can easily recognize by the sense of touch. The Court disposes of the Minnesota Court's second concern by stating the limited search for weapons authorized by Terry already sanctions the intrusion into personal privacy. This reasoning ignores the fact the limited search allowed by Terry is solely for the protection of the police and others who may be nearby. Under Terry, this safety interest outweighs any invasion of personal privacy. Yet, in Dickerson, the Court fails to acknowledge any interest which would outweigh such invasion.

The result of the Dickerson decision is a circumvention of established precedent by extending the recognized "plain view" exception to the Fourth Amendment warrant requirement to justify the search and seizure of contraband. Very clearly, the Supreme Court cannot justify its position under the Terry rationale or its progeny.

B. Blurring of Bright-Line Terry Rule

Terry sets a clearly defined line justifying a limited protective search only where the police officer considers the suspect armed and dangerous. As a result, police officers and courts know that

73. State v. Dickerson, 481 N.W.2d 840, 845 (Minn. 1992).
74. Minnesota v. Dickerson, 113 S.Ct. 2130, 2137-38 (1993) ("The very premise of Terry, after all, is that officers will be able to detect the presence of weapons through the sense of touch and Terry upheld precisely such a seizure.").
75. E.g., United States v. Portillo, 633 F.2d 1313 (9th Cir. 1980) (handgun in paper bag); State v. Ortiz, 683 P.2d 822 (Haw. 1984) (handgun in knapsack).
76. Dickerson, 113 S.Ct. at 2137-38; see also Michigan v. Long, 463 U.S. 1032, 1060 (1983) (Brennan, J., dissenting) (nothing in Terry justifies a cursory search of an automobile; "[t]he Court flouts Terry's holding that Terry searches must be carefully limited in scope.").
77. Terry, 392 U.S. at 20-21.
78. See supra notes 41-45 and accompanying text.
79. See Pennsylvania v. Mimms, 434 U.S. 106, 111-12 (1977) (in conducting an investigatory detention of an individual in a motor vehicle, the officer may frisk the individual for weapons if the officer has formed a reasonable belief that the person is armed and dangerous); Sibron v. New York, 392 U.S. 40, 63 (1968) (when the justification for conducting a search is the protection of the officer, s/he must be able to point to particular facts from which it may be inferred that the individual was "armed and dangerous").
80. See supra notes 37-38 and accompanying text.
a search for contraband during a Terry stop and frisk is unlawful.\textsuperscript{81} The Supreme Court's decision changes this clear-cut rule dramatically. Now, police officers have the burden of making quick, affirmative judgments as to what they feel underneath a person's outer garments. At the same time, courts will bear a further burden to determine when the nature of a small, unremarkable object is or was "immediately apparent" to the police officer.\textsuperscript{82}

Further, the Court jeopardizes the effective Terry bright-line rule based on claimed police efficiency.\textsuperscript{83} The Court has previously recognized the need to prevent the destruction of evidence or the unlawful use of contraband is an insufficient justification to permit the feeling of a person's body without the judicial authorization of a warrant or facts sufficient to establish probable cause to place the individual under arrest.\textsuperscript{84} Even where the efficiency of law enforcement is enhanced, the Court has often emphasized that this enhancement simply cannot justify unconstitutional police procedures.\textsuperscript{85} By replacing the bright-line rule of Terry with an undefined "plain feel" exception, the Court inevitably permits police officers to conduct full-blown searches.


\textsuperscript{82} See United States v. Grubczak, 793 F.2d 458, 461 (2d Cir. 1986) (avoiding heavy burden of plain feel application by finding that plain view was properly applied since officer knew that a case contained burglar tools before he felt it).

\textsuperscript{83} Minnesota v. Dickerson, 113 S.Ct. 2130, 2136 (1993) (tactile discoveries of contraband are justified by the realization that resort to a neutral magistrate would often be impracticable); see Coolidge v. New Hampshire, 403 U.S. 443, 467-68, 469-70 (1971) (Stewart, J.).


\textsuperscript{85} See Mincey v. Arizona, 437 U.S. 385, 393 (1978); see also Arizona v. Hicks, 480 U.S. 321, 329 (1987). For courts rejecting a "plain feel" exception despite the possibility of improved efficiency, see State v. Collins, 679 P.2d 80, 81-82, 83 (Ariz. Ct. App. 1983) (noting where the "state appears to claim a 'plain feel' exception to the Fourth Amendment," court invalidated a search and seizure in which officer "felt 'soft' objects which were obviously not weapons."); Commonwealth v. Marconi, 597 A.2d 616, 623-24 (Pa. Super. Ct. 1991), appeal denied, 611 A.2d 711 (Pa. 1992) (rejecting a "plain touch" exception by noting that "we can not lose sight of the fact that this began as a Terry frisk. Once the officer was satisfied that Marconi was not armed and dangerous, the inquiry should have ended.").
C. The Court's Analogy To Plain View

1. Plain Feel is not Immediately Apparent

In addition to Terry, the Court relies heavily on the "plain view" doctrine to justify its holding. The rationale behind this doctrine is that where apparent contraband is left in plain view and is observed by law enforcement officers from a place they have a right to be, there is no search for Fourth Amendment purposes beyond that already authorized. In Texas v. Brown, the Court stated where evidence reveals itself in a "plain view" context, no Fourth Amendment purpose is promoted by requiring police officers to visit a magistrate for a warrant to seize the evidence. Based on this doctrine, the Dickerson Court justifies the warrantless seizure of contraband discovered through the sense touch during a lawful patdown search, when the object's contour and mass makes its identity immediately apparent as contraband.

While a police officer can generally determine immediately whether an item in plain view is contraband, an officer conducting a "pat down" in most cases cannot be so sure, particularly when the item is an especially small one that is never seen and only felt through an outer garment. Moreover, the essential conditions which justify a "plain view" exception to the warrant requirement cannot justify an exception for plain feel searches. The touching of an object whose identity is concealed by a covering

88. Id. at 740.
90. For cases in which easily-distinguishable facts show that the police knew, to a reasonable certainty, what was in the containers after lawfully feeling them from the outside, see United States v. Russel, 670 F.2d 323 (D.C. Cir. 1982) (handgun in paper bag); United States v. Ocampo, 650 F.2d 421 (2d Cir. 1981) (paper bags with bundles of currency overflowing both seen and felt); United States v. Portillo, 633 F.2d 1313 (9th Cir. 1980) (handgun in paper bag); People v. Chavers, 658 P.2d 96 (Cal. 1983) (handgun in shaving kit); State v. Ortiz, 683 P.2d 822 (Haw. 1984) (handgun in knapsack).
91. See Commonwealth v. Marconi, 597 A.2d 616, 623 (Pa. Super. Ct. 1991) ("[W]hen an individual feels an object through a pants pocket, . . . the sense of touch is not so definitive. The structure and shape of a small packet is not unique so as to preclude other options as to what that item might be."). appeal denied, 611 A.2d 711 (Pa. 1992); State v. Broadnax, 654 P.2d 96, 102 (Wash. 1982) (en banc) ("The tactile sense does not usually result in the immediate knowledge of the nature of the item.").
92. See supra notes 51-53 and accompanying text.
cannot conclusively establish an object's identity or criminal nature. Knowledge concerning an object by merely feeling it through an exterior covering is necessarily based on the police officer's expert opinion. However, the Court rejected this type of knowledge in earlier decisions.

Likewise troubling is the fact that even if the intrusion inherent in the initial act of touch is constitutional, the discovery and seizure of the items entails even a further intrusion. Conducting this second search reveals the nature of the object is not "immediately apparent" within the meaning of the "plain view" rule.

2. Personal Privacy Intrusions

The theory underlying the justification for the plain view exception cannot logically be extended to concealed items which are discoverable only through the sense of touch. In its traditional context, the "plain view" doctrine is associated with seizures, not searches. Unlike the "plain view" doctrine, under which the owner has no privacy expectation, the owner of a concealed item retains a legitimate expectation that the item's existence and characteristics will remain unrevealed. The identity

93. See, e.g., Commonwealth v. Marconi, 597 A.2d at 623, n. 17 (sense of touch "is not so definitive as the recognition of certain sounds, smells or tastes."); appeal denied, 611 A.2d 711 (Pa. 1992); United States v. Most, 876 F.2d 191, 195 (D.C. Cir. 1989) (plain feel does not permit "police officers to eviscerate the [F]ourth [A]mendment by performing warrantless searches one layer at a time."); State v. Dickerson, 481 N.W.2d 840, 845 (Minn. 1992) (touching is inherently less reliable).


95. See Terry, 392 U.S. at 27 (citations omitted).

96. Cf. Arizona V. Hicks, 480 U.S. 321, 324-25 (1987) (movement of stereo in plain view to record serial numbers was a second, impermissible search; one which "is much more than trivial for purposes of the Fourth Amendment.").

97. See United States v. Martin, No. 90-6318, 1991 U.S. App. Lexis 19740, at 19747 (6th Cir. Aug. 19, 1991) ("[P]lain view" is not "a talisman that the police can invoke in order to ward off any constitutional scrutiny[,] . . . nor does it "justify a cascading series of intrusions.").


99. See supra note 85 and accompanying text.

and criminal nature of a concealed object are not likely to be discernible upon mere touch or patdown within the scope of the intrusion authorized by Terry, especially when the person makes a conscious effort to place the object in a container. Conversely, when an item is in plain view its identity and criminal nature are discernible upon sight and thus no justification for a search is required.

Further, a police officer's determination the object touched is some sort of contraband will, in many situations, require some degree of pinching, squeezing or probing beyond the limited intrusion allowed under Terry. The proposed "plain feel" exception could ultimately invite circumvention of the Terry limits and thereby allow warrantless searches in violation of an individual's expectation of privacy. Such violation would be inevitable under a doctrine that would tolerate warrantless touching and feeling of objects hidden in a person's clothing beyond the limited scope of a Terry frisk for weapons.

D. Result Of The Court's Decision

Although the requirements of the Fourth Amendment inevitably make police work less efficient, the framers of the Fourth Amendment found those requirements necessary to prevent abuses of the power held by police officers. Though Terry addressed both safety concerns (the frisk) and efficiency concerns

101. Chadwick, 433 U.S. at 11 ("By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination.").


104. See State v. Collins, 679 P.2d 80, 84 (Ariz. Ct. App. 1983) (arguing a "plain touch" exception would "invite the use of weapons' searches as a pretext for unwarranted searches, and thus to severely erode the protection of the Fourth Amendment.") (citing State v. Hobart, 617 P.2d 429, 433-34 (Wash. 1980)).

105. Id.

106. See Mapp v. Ohio, 367 U.S. 643, 656-57 (1960). Also, in a frequently quoted dissent, Justice Brandeis explained:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of a man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as
(the stop), the Court noted that the “stop and frisk” power given to the police was grounded entirely upon a safety rationale.\(^{107}\) Because the power to frisk is grounded in a safety rationale, the governing principle in deciding the scope of the frisk power should be whether police face a reasonable fear of danger and not any notions of criminal culpability of the person being frisked.\(^{108}\)

The \textit{Dickerson} Court held the frisk of the defendant went beyond the scope of \textit{Terry} because the officers had to pinch and manipulate the defendant's pocket in order to discern what the pocket contained.\(^{109}\) However, the Court notes that had this manipulation not have occurred and the officers knew upon touch that what they were feeling was crack cocaine, the search would have been valid under the “plain feel” exception.\(^{110}\) In other words, police officers may not manipulate an object, which they have previously determined not to be a weapon, in order to ascertain its incriminating nature. What the Court in effect does is tell police officers what must be done in order to make evidence admissible under the “plain feel” exception. Further, the evaluation of whether an item of contraband became “immediately apparent” to police officers may be so prejudiced by the results of the search as to motivate the court to look for post hoc justifications for an ultimately successful search which was not reasonable at its inception.\(^{111}\) As stated by Justice Scalia in his concurrence in this case, “as a policy matter, it may be desirable to permit ‘frisks’ for weapons, but not to encourage ‘frisks’ for drugs by admitting evidence other than weapons.”\(^{112}\)

against the Government, the right to be let alone — the most comprehensive of rights and the rights most valued by civilized men.


108. Several members of the Court have recognized the propensity of police to exploit criminal procedure loopholes to their fullest extent. \textit{See}, e.g., Robbins \textit{v. California}, 453 U.S. 420, 451 (1981) (Stevens, J., dissenting) (noting that to obtain full search incident to arrest powers, officers may be prompted to make a full custody arrest after stopping an automobile for a traffic violation if they see an “interesting looking” item in the automobile).


110. \textit{Id.}


112. \textit{Dickerson,} 113 S.Ct. at 2141.
CONCLUSION

The Dickerson Court held police officers may seize non-threatening contraband immediately perceived to be such, during a protective Terry search. In reaching its decision, the Court adopted a "plain feel" exception to the Fourth Amendment warrant requirement by drawing an analogy to the previously defined "plain view" doctrine. However, because the essential conditions which justify the "plain view" doctrine are lacking under the "plain feel" exception, police officers are forced to engage in further intrusions in order to discover the identity of an item they are feeling.

While an item of contraband is immediately apparent upon sight, the possibility of the sense of touch revealing an object as contraband is highly remote. In most cases, the only way a police officer will know an item is contraband, while feeling it through a suspect's outer clothing, is by manipulating and probing beyond the well-defined parameters of Terry. Further, this decision tempts police officers to go beyond traditional Fourth Amendment principles in order to discover evidence. In effect, the Court arms police officers with the necessary ammunition to convince a court that evidence of an ultimately successful search, which was not reasonable at its inception, should be admitted at trial under the "plain feel" exception. The result is a weakening of Fourth Amendment guarantees and an invasion of the public's right to be secure in their person.

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