Ad Hoc Adjudication: People v. Champion, Another Confusing Element in the Turmoil Following Minnesota v. Dickerson

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AD HOC ADJUDICATION: PEOPLE v. CHAMPION, ANOTHER CONFUSING ELEMENT IN THE TURMOIL FOLLOWING MINNESOTA v. DICKERSON

Picture two incidents separated by more than two hundred years, but uniquely similar: a government search of a private citizen suspected of committing a crime. A writ of assistance, similar to a modern search warrant but affording greater police discretion, justified the first search. The plain feel doctrine justified the second search. This exception to the Fourth Amendment's warrant requirement, established by the U.S. Supreme Court in Minnesota v. Dickerson, allows an officer to search for and seize contraband that is immediately apparent to him during a patdown search for weapons.

In 1756, two uniformed customs agents stopped a man suspected of smuggling illegal goods into the colonies. Under the guise of a writ of assistance, the officers searched his person and his home in an effort to find damning evidence against him. The colonist was innocent, but the officers continued the search in an attempt to find even the tiniest shred of evidence linking him to the crime. After an unsuccessful search, the officers vowed to return, as their search authority remained valid during the reign of the monarch in power during their issuance.

2. See Minnesota v. Dickerson, 508 U.S. 366, 375-76 (1993). Many courts use the phrases "plain feel" and "plain touch" interchangeably. This Note uses the term "plain feel" throughout for consistency.
4. See id. at 375-76.
5. See generally LANDYNNSKI, supra note 1, at 30-48 (outlining a detailed history of British colonial practices that caused controversy among colonists and formed the basis for the Bill of Rights); Maclin, supra note 1, at 219-24 (discussing the history of the Fourth Amendment through an analysis of colonial search and seizure practices before the Revolutionary War).
6. See generally Maclin, supra note 1, at 219-24 (describing the process of ex officio searches and writs of assistance in the colonies).
7. See generally id. (illustrating the invasive nature of these searches).
8. See generally id. at 224 (describing the longevity of a writ).
In 1996, two uniformed police officers stopped a man suspected of possessing illegal narcotics in Michigan. Following clearly enumerated exceptions to the Fourth Amendment, the officers conducted a patdown search of his person and felt potential contraband in his pants. When the officers removed the question-able object, they found a prescription pill bottle, a container that is legal to possess. The officers then invaded the sanctity of the suspect's privacy interests by opening the container to discover cocaine. During this final search, the officers' conduct more closely resembled the custom agents' behavior in 1756 than conduct deemed allowable by Dickerson's plain feel exception.

Fortunately, from the time of the searches of the 1750s and the searches of 1996, the U.S. Congress ratified the Fourth Amendment to guarantee all citizens freedom from unreasonable searches and seizures. Unfortunately, although the Framers drafted the amendment to require a neutral magistrate to act as a buffer in justifying warrants and protecting individual rights, the Court has carved many exceptions into this protection. Similarly, with the clear delineation of such exceptions to the warrant requirement, including the doctrines of stop and frisk, plain view, search incident to arrest, and plain

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10. See generally Minnesota v. Dickerson, 508 U.S. 366 (1993) (creating the plain feel exception to Terry searches); Terry v. Ohio, 392 U.S. 1 (1968) (allowing a brief patdown search for weapons of a suspect if the officer has reasonable, articulable suspicion concerning potential criminal activity by the suspect).
11. See Champion, 549 N.W.2d at 852.
12. See id.
13. See id.
14. See Dickerson, 508 U.S. at 375-76.
15. See U.S. CONST. amend. IV.
   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.
16. See infra notes 69-156 and accompanying text.
17. See Terry v. Ohio, 392 U.S. 1, 16-17 (1968).
feel, the courts have all too willingly extended the scope of these exceptions as part of the war on drugs and crime in America. Although fighting drugs and crime is a laudable goal, there is now overwhelming confusion surrounding the rights of suspects at a very critical stage.

One of the most confusing exceptions to the Fourth Amendment stems from the Court's 1993 Dickerson decision. In creating the plain feel doctrine, the Court expanded the Terry patdown searches, specifically limited to weapons, to include the discovery of contraband in the suspect's possession if the contraband is "immediately apparent" to the officer during the initial patdown. When interpreting the plain feel doctrine, other courts have taken Dickerson's standards and manipulated the language to support the "proper" outcome of a case. The cases interpreting Dickerson's requirements establish seemingly bright-line rules that should provide consistent interpretations of the plain feel doctrine. The result, however, is inconsistent. The cases delineate factors such as the officer's experience, the location of the contraband, and the packaging of the contraband, and these factors have led to disparate re-

21. See, e.g., State v. White, 674 N.E.2d 405 (Ohio Ct. App. 1996). In the White decision, the court acknowledged, "[w]e are keenly aware that the drug problem poses a great threat to our nation and that the deterrence of drug activity is an overwhelming public concern" and emphasized the importance of social policy as a guide in judicial decision making. Id. at 411.
22. Justice Powell described the state of Fourth Amendment precedent most accurately when he stated, "the law of search and seizure . . . is intolerably confusing." Robbins v. California, 453 U.S. 420, 430 (1981) (Powell, J., concurring). Many state courts have contributed to this confusion by applying Dickerson's requirements inconsistently, leaving Fourth Amendment case law in a constant state of upheaval. See infra text accompanying notes 157-218.
23. See Dickerson, 508 U.S. at 375-76.
24. Id.
25. See infra text accompanying notes 164-218.
26. See infra text accompanying notes 164-218.
27. See infra text accompanying notes 164-218.
28. See infra text accompanying notes 164-80.
29. See infra text accompanying notes 196-207.
30. See infra text accompanying notes 181-95.
sults, ranging from the exclusion of evidence\textsuperscript{31} to the use of the evidence to obtain a conviction against the defendant.\textsuperscript{32}

These decisions illustrate a movement away from the initial belief that "[t]he criminal is to go free because the constable has blundered"\textsuperscript{33} toward "common sense in law enforcement,"\textsuperscript{34} a change that does not reflect the rights of individuals under the Fourth Amendment accurately. This trend is especially concerning because, as the Court once stated, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of the law."\textsuperscript{35}

This Note analyzes the impact of the plain feel exception to the Fourth Amendment, focusing specifically on the confusion in many jurisdictions resulting from the Court's original delineation of the doctrine in \textit{Dickerson} and concludes that these interpretations lead to varying results in jurisdictions construing the plain feel doctrine. The first section briefly explores the history of the Fourth Amendment and the importance of using a historical context in Fourth Amendment jurisprudence. The second section addresses specific exceptions to the Fourth Amendment carved out by the Court, including the doctrines of search incident to arrest,\textsuperscript{36} the \textit{Terry} stop and frisk doctrine,\textsuperscript{37} the plain view doctrine,\textsuperscript{38} and the plain feel doctrine;\textsuperscript{39} the Court's

\begin{itemize}
\item \textsuperscript{33} \textit{People v. Defore}, 150 N.E. 585, 587 (N.Y. 1926).
\item \textsuperscript{34} Marcia M. McBrien, \textit{Drugs Seized in 'Plain Feel' Search Admissible}, \textsc{Mich. L. Wkly.}, July 15, 1996, at 1, available in LEXIS, Legnew Library, Milawr File (quoting Saginaw County Prosecuting Attorney Michael D. Thomas's comments following the Michigan Supreme Court's decision in \textit{Champion}).
\item \textsuperscript{35} \textit{Union Pac. Ry. Co. v. Botsford}, 141 U.S. 250, 251 (1891).
\item \textsuperscript{36} \textit{See} \textit{Chimel v. California}, 395 U.S. 752 (1969).
\item \textsuperscript{37} \textit{See} \textit{Terry v. Ohio}, 392 U.S. 1 (1968).
\item \textsuperscript{38} \textit{See} \textit{Coolidge v. New Hampshire}, 403 U.S. 443 (1971) (plurality opinion).
\item \textsuperscript{39} \textit{See} \textit{Minnesota v. Dickerson}, 508 U.S. 366 (1993).
\end{itemize}
strange discussion of containers in relationship to these doctrines;\textsuperscript{40} and the Court's creation of an exclusionary rule.\textsuperscript{41} The third section discusses the confusion resulting from an inconsistent application of \textit{Dickerson} and concludes that the Court must address this confusion because individuals' Fourth Amendment rights currently vary from jurisdiction to jurisdiction.\textsuperscript{42} The fourth section addresses \textit{People v. Champion},\textsuperscript{43} a case that clearly illustrates this confusion. This section argues that \textit{Champion} is a rather tenuous opinion, focusing on factors that cannot justify the court's ultimate finding of probable cause.\textsuperscript{44} Finally, the last section discusses the policy implications of the plain feel decisions and the need for a coherent rule concerning suspects' Fourth Amendment rights following the \textit{Dickerson} decision.\textsuperscript{45} This Note concludes that the plain feel doctrine, although applied inconsistently, is an important exception to the Fourth Amendment warrant requirement and the Supreme Court must revisit the doctrine to reformulate the elements of such a search.

\textbf{ENFORCING INDIVIDUAL RIGHTS V. EFFICIENT LAW ENFORCEMENT: THE TENUOUS BALANCE OF INTERESTS IN THE FOURTH AMENDMENT CONTEXT}

To understand the Fourth Amendment's exceptions, the underlying premise of the Fourth Amendment's guarantee against unreasonable searches and seizures must be analyzed. Given the disparity in potential interpretations, the historical underpinnings of the Fourth Amendment must be analyzed to determine its \textit{raison d'être}.

During the 1750s, British customs officers implemented ex officio searches in the colonies.\textsuperscript{46} Under this authority, officials conducted warrantless searches of private homes in search of

\begin{enumerate}
\item See United States v. Place, 462 U.S. 696 (1983).
\item See infra text accompanying notes 157-218.
\item See id. at 853.
\item See infra text accompanying notes 272-328.
\item See Maclin, supra note 1, at 219.
\end{enumerate}
Ex officio searches were extremely unpopular, forming the basis for the British government's even more controversial and unpopular writs of assistance and serving as the precursor for the modern search warrant.48 To many colonists, these searches were "two different sides of the same coin[, as both allowed broad, discretionary governmental search power without any requirement of specific cause or judicial oversight."49 These rampant abuses enraged the colonists.50 Similarly, colonial judges opposed the writs, claiming that the writs had no legal basis and certainly afforded no opportunity for judicial oversight.51 In contrast to modern search warrants, these writs remained valid during the reign of the monarch and did not require a special hearing before their issuance.52 Given the highly controversial nature of the writs, judges began rejecting these writs by refusing to enforce them, ultimately beginning the demise of such writs in colonial America.53 With this background of unbridled police discretion, the Framers drafted a constitutional amendment,54 broad enough in scope to protect individuals' rights in situations such as unnecessarily intrusive searches of private homes.55 In response to the colonists' experiences with these searches and the public outcry against these writs, the Framers drafted the Fourth Amendment to encompass such abuses.56 The Fourth Amendment thus stands as a guardian of individual liberty against the unbridled discretion of the police.

47. See id.
48. See LANDYNSKI, supra note 1, at 31; Maclin, supra note 1, at 220-21. "The obnoxious feature of writs of assistance was their character as permanent search warrants placed in the hands of customs officials: they might be used with unlimited discretion and were valid for the duration of the life of the sovereign." LANDYNSKI, supra note 1, at 31.
49. Maclin, supra note 1, at 222-23.
50. See LANDYNSKI, supra note 1, at 36-38.
51. See id. at 33-35; Maclin, supra note 1, at 223-24.
52. See LANDYNSKI, supra note 1, at 31; Maclin, supra note 1, at 224.
53. See LANDYNSKI, supra note 1, at 33-35; Maclin, supra note 1, at 224-26.
54. See U.S. CONST. amend. IV.
55. See Maclin, supra note 1, at 197.
56. See generally LANDYNSKI, supra note 1, at 41-42 (detailing the Framers' concern for protecting citizens from unreasonable searches); Maclin, supra note 1, at 212-19 (discussing the Framers' motivations for writing the Fourth Amendment).
One commentator has described the Fourth Amendment as having "both the virtue of brevity and the vice of ambiguity." It is subject to much speculation and interpretation because of its broadly sweeping language, leaving courts free to define the term "unreasonable" using many methods of interpretation.

Two schools of thought have emerged concerning constitutional interpretation generally and in this context specifically.

One view analyzes the wording of the Constitution, relying solely on written words as the source for constitutional interpretation. This textualist view emphasizes the plain meaning of the words employed in the legislation itself. This approach "read[s] constitutional provisions literally so that government is permitted to do nothing more than what is explicitly stated in the document." Following a textualist interpretation, the Fourth Amendment merely guarantees reasonable police conduct; therefore, most police action in the area, although intrusive, will not be deemed unreasonable.

Another approach follows a more liberal interpretation of the Constitution, focusing on the need to have a pliable, living document, relying heavily on the historical context of the Constitution. Supporters of this interpretivist approach believe one can reach a better understanding of the meaning of the words used in the document itself by analyzing the Framers' intent. Under this view, the Fourth Amendment protects the individual against the potential for illegal state action, and thus, govern-

57. LANDYNSKI, supra note 1, at 42.
59. See id.; CHRISTOPHER WOLFE, HOW TO READ THE CONSTITUTION 3-25 (1996) (comparing various approaches to constitutional interpretation).
60. See DUCAT, supra note 58, at 95.
61. See id.
62. Id. Ducat also describes this form of interpretation as "essentially a mechanical, uncreative enterprise." Id.
63. See Maclin, supra note 1, at 198-99.
64. See DUCAT, supra note 58, at 96.
65. See id.
mental intrusions are violations of the individual's Fourth Amendment rights.66

A literal interpretation of the Fourth Amendment would suggest that its drafters merely intended a reasonableness standard of analysis for rights in this area, but the historical context of the drafting of the Fourth Amendment suggests a much different approach.67 Because the colonists faced seemingly random, warrantless searches of their private property and of their person, the expansive discretion of the police is evident.68 This Note, therefore, will explore the Fourth Amendment's exceptions and their clear limitations within this context.

THE UNDERPINNINGS OF THE PLAIN FEEL DOCTRINE

Realizing that certain situations, given their exigencies or other unique characteristics, could not conform to the Fourth Amendment's warrant requirements, the Supreme Court began carving exceptions to the rule in limited circumstances.69 Many of these exceptions promoted the goals of preserving potential

66. See Maclin, supra note 1, at 201 & n.16.
67. See id. at 223-24; see also LANDYNISKI, supra note 1, at 42-43 (describing the birth of the Fourth Amendment in light of British abuses of colonists' rights through the implementation of ex officio searches and writs of assistance).

One of the clearest examples of the dichotomy between these two approaches to constitutional interpretation lies within the Supreme Court's opinion in Olmstead v. United States, 277 U.S. 438 (1928). This case addressed the outer limits of the Fourth Amendment in the context of wiretapping, see id. at 464, and pitted Chief Justice Taft, a strict constructionist or textualist, see id. at 455, against Justice Brandeis, a well-known interpretivist. See id. at 471 (Brandeis, J., dissenting).

Finding that wiretapping fell outside the Fourth Amendment's protections, Chief Justice Taft, relying on the plain meaning of the Amendment, declared that "[t]he language of the [Fourth] Amendment can not be extended and expanded . . . . [T]he courts may not adopt . . . a policy by attributing an enlarged and unusual meaning to the Fourth Amendment." Id. at 465-66.

Justice Brandeis, however, disagreed strongly with this approach and chose instead to focus on the policy behind the Fourth Amendment. He summarized, "[t]o protect [the] right [to be left alone], every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." Id. at 478 (Brandeis, J., dissenting).

68. See LANDYNISKI, supra note 1, at 31; Maclin, supra note 1, at 223-24.
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Evidence and protecting the officer’s safety. Similarly, the Court justified these exceptions based on the low intrusion on the suspect’s rights and delineated the exceptions clearly and explicitly to curb the discretion of individual officers in interpreting the parameters and guidelines of warrantless searches.

Warrantless Searches Incident to Arrest

The most basic and least intrusive exception to the search warrant requirement of the Fourth Amendment involves a search incident to a lawful arrest. With a rich tradition of judicial acceptance, the Court enumerated this exception most clearly in the 1969 case of Chimel v. California. While arresting Mr. Chimel for burglary, police officers searched his entire home, opening drawers and moving objects in an attempt to find evidence of Mr. Chimel’s crime. According to the Court, it was reasonable to allow the arresting officer to search a suspect for weapons in an effort to protect the officer’s safety, to preserve the sanctity of the arrest, and to prevent the potential destruction of evidence. Similarly, the search could extend to the ar-

70. See Chimel, 395 U.S. at 763.
71. See id. at 763; Terry v. Ohio, 392 U.S. 1, 3 (1968).
72. See Terry, 392 U.S. at 15.
73. See Chimel, 395 U.S. at 755.
74. 395 U.S. 752 (1969). The Court’s acceptance of the doctrine of search incident to arrest has deep roots. In 1914, in Weeks v. United States, 232 U.S. 383 (1914), the Court referred to the ability of the police “to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime.” Id. at 392. Expanding on this philosophy, the Court in Carroll v. United States, 267 U.S. 132 (1925), extended the search provisions to include “whatever is found upon [a suspect’s] person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution.” Id. at 158. The final expansion of the doctrine of search incident to arrest prior to Chimel came from the Court in Agnello v. United States, 269 U.S. 20 (1925), allowing the police to “search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed.” Id. at 30.
75. See Chimel, 395 U.S. at 753-54.
76. See id. at 763.
ea under the suspect's control for the reasons enumerated above.\textsuperscript{77} The allowable scope of the search, however, could not extend to rooms beyond the location of the suspect's arrest as "[t]he 'adherence to judicial processes' mandated by the Fourth Amendment requires no less."\textsuperscript{78}

Again in 1973, the Court undertook the process of refining the doctrine of search incident to arrest in \textit{United States v. Robinson}.\textsuperscript{79} Following his arrest, the officer searched Mr. Robinson and found a crumpled cigarette package.\textsuperscript{80} Upon the officer's continued inspection of the package, he discovered heroin capsules within the package.\textsuperscript{81} The Court in \textit{Robinson} extended the interpretation of the search incident to arrest doctrine to include containers in the suspect's possession at the time of the arrest.\textsuperscript{82} "The justification [for the search] ... rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial."\textsuperscript{83} This expansion laid the foundation for the Court's consideration of searches of closed containers in situations other than a search incident to arrest.\textsuperscript{84}

Beyond the policy justifications for the search incident to arrest, these searches have minimal intrusion on suspects' Fourth Amendment rights because these individuals lost their liberty during the lawful arrest that justified the search.\textsuperscript{85} Likewise, these searches have deep roots. "[T]o protect the lives of the arresting officers, to ensure that the fugitive would not escape, and to prevent him from destroying the evidence of his crime," colonial American laws acknowledged an exception to the warrant requirements for a search pursuant to a lawful arrest.\textsuperscript{86} The Court has thus justified the search incident to arrest exception

\textsuperscript{77} See \textit{id.}


\textsuperscript{79} 414 U.S. 218 (1973).

\textsuperscript{80} See \textit{id.} at 223.

\textsuperscript{81} See \textit{id.}

\textsuperscript{82} See \textit{id.} at 236.

\textsuperscript{83} Id. at 234.

\textsuperscript{84} See infra text accompanying notes 112-21.


\textsuperscript{86} \textit{Landynski}, supra note 1, at 98.
to the warrant requirement based on factors such as the safety of officers, the preservation of evidence, and a minimal intrusion upon the suspect’s rights.87

Patdown Searches Under the Terry Doctrine

In 1968, the Court carved another exception into the Fourth Amendment’s guarantees against unreasonable searches and seizures.88 If an officer has articulable, individualized suspicion of a suspect’s criminal activity, then he may conduct a limited patdown search for weapons of the suspect.89 The Terry patdown emerged during the Court’s attempt to balance the safety concerns of individual officers who must risk their lives fighting crime against the constitutional rights of suspects.90 Concluding that “[t]he protective search for weapons, ... constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person,” the Court upheld the officer’s limited patdown search of a suspect who may be armed and dangerous.91

To limit the intrusion upon the suspect’s Fourth Amendment rights, the Court delineated a test to ensure the protection of these rights while preserving the officer’s safety.92 This test allows the police officer “to conduct a carefully limited search [for weapons] of the outer clothing” of a suspect, provided that the officer reasonably believes his safety is in jeopardy.93 This reasonable belief must be justified by individualized, articulable suspicion concerning the suspect’s criminal activity and a continued fear for one’s safety following the officer’s inquiry into the suspect’s motives.94 Any weapons discovered during the officer’s patdown search are admissible against the suspect without vio-

87. See Chimel, 395 U.S. at 763.
89. See id. at 30.
90. See id. at 10.
91. Id. at 26.
92. See id. at 27.
93. Id. at 30.
94. See id.
lating his Fourth Amendment rights.\textsuperscript{95}

In a lengthy analysis of the competing interests involved in Terry, the Court emphasized its responsibility "to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires."\textsuperscript{96} This decision carved a very limited exception into the Fourth Amendment despite the recognized potential for unauthorized police discretion in this area.\textsuperscript{97} Unfortunately, the Court's creation of this stop and frisk exception illustrates just the beginning of exceptions authorized by the Court in the Fourth Amendment realm.

The Warrantless Seizure of Items in Plain View

Just a few years after Terry v. Ohio,\textsuperscript{98} the seizure of an item in the plain view of an officer became another important exception to the Fourth Amendment's warrant requirement.\textsuperscript{99} Coolidge v. New Hampshire created the plain view doctrine.\textsuperscript{100} In Coolidge, the plurality announced that during the course of a legal search, whether authorized by a warrant or by one of the enumerated exceptions, an officer who inadvertently discovers an "article of incriminating character" may seize the item without a warrant provided that the item was in "plain view."\textsuperscript{101} The plain view doctrine relies on the philosophy that it would be unfair to blind police officers to contraband or evidence of a crime merely because a search warrant did not enumerate these items specifically and that the subsequent intrusion into the individual's Fourth Amendment rights is slight because a warrant justifies the original search.\textsuperscript{102}

\textsuperscript{95} See id. at 31.
\textsuperscript{96} Id. at 15.
\textsuperscript{97} See id.
\textsuperscript{98} 392 U.S. 1 (1968).
\textsuperscript{100} See id. at 465 (plurality opinion).
\textsuperscript{101} Id. (plurality opinion). According to the plurality, in this case, the defendant's conviction was improper because a neutral magistrate did not issue the warrant justifying the officer's search, see id. at 453 (plurality opinion); therefore, the principles of the plain view doctrine could not justify an already invalid search. See id. (plurality opinion).
\textsuperscript{102} See id. at 467 (plurality opinion).
In 1987, the Court clarified the plain view doctrine in *Arizona v. Hicks*. While conducting a valid search, police officers discovered stereo components they believed to be stolen. The officers touched and moved the goods as they recorded the serial numbers on the components. The Court invalidated the search because the officers' actions "produce[d] a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry." The Court held that the plain view doctrine involved a line of vision test, requiring the officer to actually see, in plain view, not hidden in a drawer or out of the officer's sight, an item that he has probable cause to believe is contraband. The officer cannot create probable cause on the basis of something that is not immediately apparent to him, in this case, not in his line of sight. Excluding the fruits of the search of the respondent's apartment, the Court in *Hicks* clarified that the plain view doctrine required probable cause for an officer to seize an item. These standards support the underlying requirement of the plain view doctrine that the item in plain view must be *immediately apparent* as contraband or as evidence of a crime. Otherwise, the seizure of such an item could not be justified without a warrant.

104. See id. at 323.
105. See id.
106. Id. at 325.
107. See id. at 326.
108. See id. The officer determined the stereo did not belong to the suspect only after viewing the serial numbers. See id. at 323. The officer, however, could not see the serial numbers without manipulating the stereo's position. See id.
109. See id. at 326. The Court went on to conclude that "[n]o reason is apparent why an object should routinely be seizable on lesser grounds, during an unrelated search and seizure, than would have been needed to obtain a warrant for that same object if it had been known to be on the premises." Id. at 327.
110. See id. at 326.
111. See id. at 326-27.
Privacy Expectations and the Allowable Scope of Searches Within Closed Containers

In defining the appropriate scope of a search, whether a warrant or an exception to the warrant requirement justifies the search, the requirements for the search of a closed container differ from the requirements for the search of other items. In 1983, the Court addressed the search of a container carried by a suspect in United States v. Place. After arousing the suspicion of officers in Miami International Airport, Mr. Place's point of departure, the officers at LaGuardia Airport, Mr. Place's destination, detained him after his arrival. Subsequently, the officers searched his bags. During this ninety-minute search, the officers discovered cocaine in Mr. Place's luggage. The Court balanced Mr. Place's privacy interest in his personal possessions against the police interest in enforcing the law. This balancing test led directly to the distinction in intrusiveness between a seizure and a search of the container. In concluding that the seizure of Mr. Place's luggage for ninety minutes was unreasonable, the Court did not foreclose the possibility of allowing the seizure and search of such a container in different circumstances.

113. See Place, 462 U.S. at 698.
114. See id.
115. See id. at 698-99.
116. See id.
117. See id. at 703.
118. See id. at 705-06; see also Texas v. Brown, 460 U.S. 730, 747 (1983) (Stevens, J., concurring) ("The [Fourth] Amendment protects two different interests of the citizen—the interest in retaining possession of property and the interest in maintaining personal privacy. A seizure threatens the former, a search the latter.").
119. See Place, 462 U.S. at 710; see also California v. Acevedo, 500 U.S. 565, 576 (1991) (determining that the search of a container within a vehicle was allowable under the automobile exception to the Fourth Amendment's warrant requirement). Based on the exigent circumstances that justify the warrantless search of a vehicle, containers located within an automobile have the same potential for flight, given their location. Similarly, according to the Court, one's privacy expectation within a vehicle is much lower there than in any other location, justifying the greater intrusion of searching a closed container within an automobile. See id. at 574. Ultimately, the Court in Acevedo concluded "that automobile searches differ from other searches," and as such, different standards apply to these situations. Id. at 578.
Searching containers during the course of another search is more intrusive than a search of a person, given the higher degree of privacy associated with personal possessions. This heightened scrutiny, however, does not apply to all forms of closed containers. The container doctrine thus applies only in connection with an authorized exception to the warrant requirement.

Merging Terry and Plain View into a Plain Feel Exception

In 1993 in *Minnesota v. Dickerson*, the Supreme Court created a hybrid exception to the warrant requirement of the Fourth Amendment by combining the principles enumerated in *Terry v. Ohio* with the plain view doctrine as outlined in *Coolidge v. New Hampshire*. In *Dickerson*, while conducting a lawful *Terry* patdown search, a police officer felt and seized what he perceived to be contraband after manipulating the object in his fingers. Although the Court invalidated the seizure in *Dickerson*, the officer's conduct became the basis for yet another exception to the Fourth Amendment. To create the parameters for a plain feel search, this new exception combined the limited scope of the *Terry* patdown with the immediately apparent requirement of the plain view doctrine. The plain feel doctrine, thus, hinges on the officer's ability to feel immediately the contraband nature of an item while conducting a minimally intrusive patdown of the suspect's outer clothing.

120. See *Place*, 462 U.S. at 708; see also *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (citing *Almeida-Sanchez v. United States*, 413 U.S. 266, 279 (1973) (Powell, J., concurring)) (holding that personal searches are more intrusive than automobile searches).
121. See supra note 119 (discussing containers located within an automobile).
123. 392 U.S. 1 (1968).
125. See *Dickerson*, 508 U.S. at 369.
126. See *Dickerson*, 508 U.S. at 376-78.
127. See *Dickerson*, 508 U.S. at 375-79.
128. See *Dickerson*, 508 U.S. at 375. This immediately apparent requirement caused the downfall of the officer's search in *Dickerson* because the officer did not suspect contraband until he had manipulated the contents of the defendant's pockets. See *Dickerson*, 508 U.S. at 376-78.
Plain feel searches hinge on an officer's determination of probable cause; therefore, the Court concluded that such a search does not violate the suspect's Fourth Amendment rights. The \textit{Terry} standard merely required a reasonable, individualized suspicion by the officer, a much lower standard than probable cause. The plain view exception requires the higher standard of probable cause, rather than mere reasonable suspicion, because the item seized was not authorized by a warrant or an exception that originally justified the search, and because the plain feel doctrine is an amalgamation of the \textit{Terry} search and a plain view search, it also requires this higher threshold. Likewise, because the need to protect the officer's safety justifies neither plain view nor plain feel searches, such searches require a greater justification for intrusion.

The search of Mr. Dickerson went beyond the simple patdown advocated by the Court; therefore, the search was too intrusive, and the contraband seized during the search was inadmissible at trial. The officer's manipulation of the lump in the suspect's pocket more closely paralleled the inadmissible search of \textit{Hicks} than the permissible search of \textit{Terry}.

\textit{Dickerson} hinged on the timing of the officer's decision that the item he perceived was contraband. The officer failed to identify \textit{immediately} the contraband nature of the lump; thus, the search became too intrusive, and the evidence seized became inadmissible under the exclusionary rule. For a search to be

129. See id. at 376. Although officers determine probable cause through the analysis of many factors specific to each case, the underlying premise of probable cause includes "evidence which would 'warrant a man of reasonable caution in the belief that a felony has been committed." Wong Sun v. United States, 371 U.S. 471, 479 (1963) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

130. See \textit{Terry} v. Ohio, 392 U.S. 1, 24 (1968).


132. See \textit{Dickerson}, 508 U.S. at 376.

133. See id. at 378-79. To counterbalance concerns about the reliability of the officer's sense of touch, the Court required that the contraband be immediately apparent to satisfy a probable cause determination. According to the Court, this strict standard "only suggests that officers will less often be able to justify seizures of unseen contraband." Id.

134. See id. at 379.

135. See id. at 378-79.

136. See id.

137. See id. For a discussion of the exclusionary rule, see \textit{infra} text accompanying
valid under the plain feel doctrine, therefore, the nature of the contraband must be *immediately apparent*.

This requirement stems from the plain view search requirements. Unfortunately, this requirement provides the source of much confusion concerning the current state of this exception.

**The Exclusionary Rule: Excluding Evidence Obtained Outside the Scope of the Fourth Amendment**

The Court's delineation of multiple exceptions to the warrant requirement of the Fourth Amendment expanded the allowable scope of police searches. Yet, some searches still fall outside these wide boundaries. One such search occurred in 1961 in *Mapp v. Ohio*.

In *Mapp*, three police officers arrived at Ms. Mapp's home because they suspected that she had information about a recent bombing in Cleveland. Upon their arrival, the officers requested permission to enter her home, but Ms. Mapp refused. The officers forcefully entered her home hours later, wielding a paper purporting to be a search warrant for her home. During their search, the officers took items out of drawers, overturned pieces of furniture, and finally discovered obscene materials used to arrest Ms. Mapp.

During the trial, the prosecution failed to produce the search warrant that the officers used to justify their search of Ms. Mapp's home, but the state attempted to use the fruits, or evidence, of this search against Ms. Mapp. The Supreme Court rejected the use of these papers, following the precedent of a federal exclusionary rule created in 1914 in *Weeks v. United States*. In *Weeks*, the

notes 140-56.
138. See id.
140. See supra text accompanying notes 69-139.
142. See id. at 644.
143. See id.
144. See id.
145. See id. at 645.
146. See id.
147. See id. at 647-49 (citing Weeks v. United States, 232 U.S. 383 (1914)).
Supreme Court barred the admission of evidence seized without a warrant for federal prosecutions.\textsuperscript{148} Extending this exclusion to state court proceedings, the majority in \textit{Mapp} sustained the force of the Fourth Amendment by rejecting evidence seized contrary to the Amendment's requirements.\textsuperscript{149}

Critics of the exclusionary rule claim that it hinders the truth-seeking process of the criminal justice system.\textsuperscript{150} One outspoken critic of the exclusionary rule is New York Superior Court Judge Harold Rothwax. Articulating the views of many critics of the exclusionary rule, he stated, "with many of the exclusionary rules, we are dealing with unquestionably reliable and highly probative evidence; when we exclude it, we are hampering the fact finders (the judge or jury) in their quest of the full truth."\textsuperscript{151}

Although the foundation of the exclusionary rule involves the exclusion of evidence from trial, the rule itself serves to protect the Fourth Amendment rights of individuals rather than to hamper the fact-finding process.\textsuperscript{152} "The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest";\textsuperscript{153} therefore, the exclusionary rule forces the government to abide by the rights preserved by its citizens, and in this guarantee, it legitimizes the criminal justice system, forbidding

\begin{footnotesize}
\textsuperscript{148} See \textit{Weeks}, 232 U.S. at 393.
If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

\textit{Id.}

\textsuperscript{149} See \textit{Mapp}, 367 U.S. at 655.

\textsuperscript{150} See \textsc{Judge Harold J. Rothwax, Guilty: The Collapse of Criminal Justice} 26 (1996).

\textsuperscript{151} \textit{Id.}

\textsuperscript{152} See \textit{Mapp}, 367 U.S. at 657-59; see also Roger B. Dworkin, \textit{Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering}, 48 IND. L.J. 329, 331 (1973) (advocating the use of the exclusionary rule because it frees "us from unlawful police invasions of our security and [it] maintain[s] the integrity of our institutions . . . . The innocent and society are the principal beneficiaries of the exclusionary rule.").

\textsuperscript{153} \textit{Mapp}, 367 U.S. at 660.
\end{footnotesize}
the government from advocating illegal behavior. The exclusionary rule, therefore, must be analyzed in connection with the exceptions to the warrant requirement, as an item need not be excluded unless its seizure is improper, i.e., its seizure did not follow the scope of the Fourth Amendment or an allowable exception to the warrant requirement. If a search fails the requirements of one of the exceptions to the warrant requirement, then the exclusionary rule dictates the exclusion of the seized item from trial.

THE POST-DICKERSON CONFUSION CONCERNING THE IMMEDIATELY APPARENT REQUIREMENT OF PLAIN FEEL

Following Minnesota v. Dickerson, state courts have addressed the principles enumerated by the Supreme Court in an attempt to create consistency within the plain feel doctrine. Yet, the result is an even more confusing body of law. Cases addressing and interpreting the plain feel doctrine focus almost entirely on specific facts, unique to each case, rather than on the underlying principles of the plain feel doctrine. These cases address issues including the officer’s experience, the packaging of the contraband, the location of the contraband, and the type of container, if any, in which the contraband is hidden. Using these factors, state court decisions vary significantly in the importance afforded each factor, leading to disparate results in applying the plain feel doctrine.

154. See id. at 657-60.
155. See id. at 654.
156. See id. at 647-48.
158. See infra text accompanying notes 164-218.
159. See infra text accompanying notes 164-80.
160. See infra text accompanying notes 181-95.
161. See infra text accompanying notes 196-207.
162. See infra text accompanying notes 208-18.
163. See supra notes 24-32 and accompanying text (discussing the varying results from an inconsistent application of the plain feel doctrine).
Justifying Plain Feel Searches Based on the Experience of the Officer Conducting the Search

State courts have wrestled with concerns about the officer’s experience at identifying narcotics during cursory searches. The aspects of an officer’s experience discussed in the case law include the officer’s tenure on the force,\(^ {164}\) the number of narcotics arrests conducted by the officer,\(^ {165}\) and the officer’s ability to feel contraband through multiple layers of clothing.\(^ {166}\) This seemingly neutral standard produces a wide range of results in practice.

In *Jordan v. State*,\(^ {167}\) a police officer conducted a patdown search during a routine traffic stop.\(^ {168}\) The officer discovered crack cocaine in Mr. Jordan’s pocket while conducting the search.\(^ {169}\) The court suppressed the evidence because, at trial, the officer, although a five-year veteran on the force, could not state the number of times he had seized crack cocaine during a patdown search.\(^ {170}\) The officer’s failure to describe his experience identifying contraband during a patdown search led the court to conclude that the immediately apparent requirement of *Dickerson* was unsatisfied.\(^ {171}\)

In marked contrast, in *Andrews v. State*,\(^ {172}\) the court found that the officer’s experience justified the patdown search.\(^ {173}\) When the police responded to a robbery call, they confronted Mr. Andrews in a nearby hotel.\(^ {174}\) Upon their arrival, the police

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168. See *id.* at 273.
169. See *id.*
170. See *id.* at 274.
171. See *id.*
174. See *Andrews*, 471 S.E.2d at 568.
discovered marijuana paraphernalia in plain view. 176 This discovery created the individualized suspicion required to justify a patdown search of Mr. Andrews. 176 During this search, the officer felt a cookie of crack cocaine, and given his “seven years’ experience” and “thousands of narcotics-related arrests,” the court upheld the admissibility of the cocaine seized. 177

Ironically, this officer only had two more years of experience than the officer in Jordan; however, the court in Andrews reached a remarkably different result. Both courts based their decisions to admit or deny the use of the seized evidence on the officers’ experience; yet, the experience of the officers in these cases is not as disparate as the results would imply. 178

Courts following an Andrews analysis presume that an officer’s training gives him or her the ability to perceive contraband through multiple layers of clothing during a quick, cursory search. 179 This presumption carries much less weight with courts following a Jordan line of reasoning because those courts require much more significant proof of the officer’s tactile skills before admitting the fruits of these searches. 180 The disagreement on this issue alone illustrates the lack of continuity across the country in interpreting Dickerson’s standards. Likewise, this distinction contains inconsistent presumptions, producing disparate results in court decisions attempting to use the officer’s experience as a factor in determining if the Dickerson immediately apparent requirement is satisfied.

175. See id.
176. See id.
177. Id.
178. Compare Jordan v. State, 664 So. 2d 272, 274 (Fla. Dist. Ct. App. 1995) (holding that a five-year veteran lacked experience to immediately identify the contraband) with Andrews, 471 S.E.2d at 568 (determining that seven years of police work constituted enough experience to satisfy Dickerson’s immediately apparent requirement).
179. See Andrews, 471 S.E.2d at 568.
180. See Jordan, 664 So. 2d at 274.
Using the Nature and Packaging of the Contraband to Justify a Seizure Under Dickerson

Jurisdictions also disagree over the packaging of the contraband, providing a further impediment to the immediately apparent requirement of Dickerson. The thinner the packaging, the more likely a court will accept the assertion that the officer could immediately identify the contraband. In Seaman v. State, a patdown search produced a plastic baggie that, upon further visual inspection, contained marijuana. Because the officer did not manipulate the baggie in order to determine its contraband nature, the court upheld this discovery. In fact, the officer felt the contraband through the plastic packaging; therefore, the search satisfied the immediately apparent requirement of Dickerson according to the court.

Indiana faced a similar case in Parker v. State. In Parker, the officer discovered cocaine in a baggie located in the suspect's pocket. Because the officer's "tactile sense, found contraband that he instantly ascertained was cocaine," the search satisfied the immediately apparent requirement. Some courts have accepted readily the officer's sense of touch in determining contraband when contained by thin packaging.

Other courts, however, have found that contraband located within a container was not immediately apparent to the officer and was, therefore, inadmissible at trial. In Commonwealth v. Crowder, the police officer conducted a patdown search of the suspect and felt what may have been "a bindle of drugs" or

183. See id. at 527.
184. See id.
185. See id.; see also State v. Wilson, 437 S.E.2d 387, 390 (N.C. Ct. App. 1993) (feeling small lumps inside a baggie during a patdown search justified the seizure).
187. See id. at 999.
188. Id.
189. See, e.g., id.; Allen v. State, 689 So. 2d 212, 216-17 ( Ala. Crim. App. 1995) (admitting marijuana found within a small manila envelope under the plain feel exception to the warrant requirement).
190. 884 S.W.2d 649 (Ky. 1994).
"a small gumball" in the suspect's pocket. The officer's uncertainty concerning the nature of the contraband failed the immediately apparent requirement; therefore, the subsequent seizure of the item violated Dickerson's plain feel requirements. Although a plastic baggie held the contraband, the Kentucky court required a higher standard of tactile skill from its officers than other courts. This decision and others contributed to the current confusion surrounding the Dickerson decision.

Ironically, once again, very similar factors led different state courts to disparate conclusions in interpreting Dickerson's requirements. Some courts believed that a baggie containing drugs did not act as a further impediment to the officer's sense of touch. Other courts concluded that a container caused the contraband to be less than immediately apparent; thus, the search failed to satisfy one element of the plain feel doctrine.

The Location of the Contraband as a Factor in Determining Its Immediately Apparent Nature

The area in which the police officer discovers the contraband during a patdown search provides yet another factor courts consider when determining if the contraband was immediately apparent. Contraband discovered in a suspect's pocket raises competing views on the strictness of the immediately apparent requirement. In Commonwealth v. Dorsey, the court addressed a Dickerson patdown search that produced a bag of marijuana from the suspect's pocket. Fearing that "[r]ejection of the [plain feel] doctrine would merely require an officer to ignore

191. Id. at 650 (quoting the testimony of Officer Sanford).
192. See id. at 652; see also State v. White, 674 N.E.2d 405, 410-11 (Ohio Ct. App. 1996) (determining that a "balled up" object located in the defendant's sock, later determined to be contraband, was inadmissible).
193. See Crowder, 884 S.W.2d at 652.
194. See Parker, 662 N.E.2d at 999.
195. See Crowder, 884 S.W.2d at 652.
197. See id. at 1087.
that which, as the result of training, experience and common
sense, is known to be contraband,” the court admitted the seized
contraband into evidence.198 The balance between the suspect’s
privacy interests and the officer’s intuition weighed in favor of
law enforcement in this case.199

An Indiana court reached a different conclusion while analyz-
ing very similar facts. In D.D. v. State,200 the officer conducting
a patdown search of the suspect discovered rocks of cocaine in
the suspect’s pants pocket.201 The officer testified that upon
touching the item he felt it to be contraband generally but could
not specifically identify the object without actually removing it
from the suspect’s pocket.202 This testimony proved that the
officer’s sense of touch was not accurate enough to justify the
search.203 The officer lacked probable cause to conduct a fur-
ther investigation of the potential contraband.204 To “ensure[]
against excessively speculative seizures,” the seizure of the con-
traband was inadmissible at trial because it failed to meet the
immediately apparent test.205

Given the disparate results illustrated above, the location of
the contraband clearly does not provide a bright-line rule to de-
termine if the contraband is immediately apparent. The location
of the contraband within a suspect’s pocket has led some courts
to conclude that the officer’s sense of touch was not accurate
enough to determine the contraband nature of the item.206 Oth-
ner courts, however, have reached the opposite conclusion.207
This dichotomy illustrates the confusion surrounding the courts’
Attempts at identifying factors that are useful in analyzing the
immediately apparent requirement of a plain feel search.

198. Id. at 1089.
199. See id.
201. See id. at 1251.
202. See id. at 1253.
203. See id. at 1254.
204. See id.
205. Id.
206. See id.
Contraband Within an Opaque Container: Can This Be Immediately Apparent?

Contraband hidden within an opaque container creates an additional burden for police officers attempting to conduct a Dickerson patdown search. In order to meet the immediately apparent requirement of the plain feel doctrine, the officer must feel the contraband and clearly identify it during the cursory search.²⁰⁸ Because the container conceals the contraband inside, it is much more difficult for the officer to identify the contraband immediately. This issue has plagued the courts, especially given the wide range of containers used to carry contraband.

In Jackson v. State,²⁰⁹ officers found contraband within a partially transparent prescription pill bottle during a patdown search.²¹⁰ The container held a white chunky substance that the officer identified as cocaine, although he did not testify that he "instantly recognized" the contraband to be cocaine.²¹¹ Because the officer failed to recognize the contraband immediately and because the container had illegal as well as legal uses, the search and seizure of the cocaine were illegal because of the cocaine's location within a container.²¹²

Similarly, in United States v. Ross,²¹³ while conducting a patdown search, an officer discovered a seemingly empty matchbox located in the suspect's groin region.²¹⁴ The officer testified that he continued his inspection of the matchbox because it could have contained a razor blade or contraband.²¹⁵ The court concluded that the immediately apparent requirement of Dickerson could not be satisfied in this situation unless the

²¹⁰ See id. at 746.
²¹¹ Id. at 749.
²¹² See id.
²¹⁴ See id. at 713; see also Commonwealth v. Smith, 685 A.2d 1030 (Pa. Super. Ct. 1996), appeal denied, 695 A.2d 785 (Pa. 1997) (determining that because an envelope cannot contain a potential weapon, the search produced inadmissible evidence).
²¹⁵ See Ross, 827 F. Supp. at 714.
The court distinguished Ross on the basis of the container holding the contraband, stating, "knowledge' under Dickerson really translates into 'suspicion' if one considers that an officer cannot truly verify the illegal character of a substance without looking at it and, perhaps, testing it." The court concluded that the "holding in this case might have been different if Ross ha[d] been carrying the cocaine simply in a plastic baggie in his pelvic area, through which the contours or mass of contraband could be sensed." The location of the contraband within another container, one that has a purpose other than carrying illegal narcotics, is therefore an important distinction. Not all courts, however, have found that a container prohibited the use of the plain feel doctrine in seizing contraband located within it.

**PEOPLE V. CHAMPION: AN ANALYSIS OF THE CONFUSING STATE OF THE PLAIN FEEL DOCTRINE FOLLOWING DICKERSON**

*The Situation in Saginaw*

On April 9, 1990, two officers patrolling a high crime area in Saginaw, Michigan, witnessed a man approach their marked car and flee down an alley. While pursuing this man, the officers encountered two other men exiting a parked car and walking away from the approaching officers. One of the officers recognized Mr. Champion, the driver who was walking away with his hands in his sweatpants, as a convicted felon. On four separate occasions, the officers instructed Mr. Champion to stop, but he did not, and when the police finally caught him, they conducted a Terry patdown search. The search resulted in one of the

216. *Id.* at 719.
217. *Id.* at 719 n.15.
218. *Id.*
220. *See id.*
221. *See id.* at 852.
222. *See id.*
officer's feeling a pill bottle located in Mr. Champion's groin.\textsuperscript{223}

Attempting to follow the requirements of \textit{Dickerson}'s plain feel doctrine, the officer removed a brown plastic pill bottle from Mr. Champion's pants.\textsuperscript{224} The search followed the \textit{Dickerson} guidelines, occurring after the officer formed individualized, articulable suspicion concerning Mr. Champion's potential criminal activity.\textsuperscript{225} The officer, however, continued his inspection by opening the pill bottle, and upon this greater intrusion, he discovered cocaine and arrested the suspect.\textsuperscript{226} This second search is troubling because the officers found the contraband within a hard container.\textsuperscript{227} The court of appeals found this subsequent search to be much more intrusive than the initial search, although the Michigan Supreme Court reversed this decision and upheld the intrusion.\textsuperscript{228}

\textbf{The Majority Opinion: Applying the Hybrid Plain Feel Doctrine Through \textit{Terry}, Plain View, and Search Incident to Arrest}

In analyzing the appropriateness of the seizure, the Michigan Supreme Court traced the allowable reaches of the patdown, determining that the search was admissible initially under the \textit{Terry} doctrine.\textsuperscript{229} Because the officer had "particularized suspicion," the patdown was appropriate under \textit{Terry}.\textsuperscript{230}

Once the officer satisfied the \textit{Terry} requirements, the analysis next addressed the requirements of a plain view seizure, the un-

\begin{itemize}
  \item \textsuperscript{223} See \textit{id}.
  \item \textsuperscript{224} See \textit{id}.
  \item \textsuperscript{225} See \textit{id} at 853.
  \item \textsuperscript{226} See \textit{id} at 852.
  \item \textsuperscript{227} See \textit{id}.
  \item \textsuperscript{228} See \textit{id} at 860, rev'g 518 N.W.2d 518 (Mich. Ct. App. 1994).
  \item \textsuperscript{229} See \textit{id} at 853.
  \item \textsuperscript{230} \textit{id}. The court enumerated many factors that contributed to the determination of individualized suspicion including: the suspect's location in a high crime area; the suspect initially walked away from the approaching officers; the officers knew of Mr. Champion's criminal background; and Mr. Champion walked with his hands tucked in his sweatpants, refusing to move them when commanded to do so by the officers. See \textit{id}.
\end{itemize}
derpinning doctrine of the Dickerson standard.\textsuperscript{231} In a plain view seizure, the seized item must be immediately apparent as contraband to establish the requisite probable cause for the search.\textsuperscript{232} Dickerson requires a probable cause determination for the search, illustrating the plain feel doctrine's coalescence of Terry and plain view.\textsuperscript{233} Using the factors that contributed to a determination of individualized suspicion, the Champion majority determined that the totality of the circumstances satisfied both the Dickerson probable cause standard and the immediately apparent requirement of Hicks.\textsuperscript{234}

Using the same standard, however, the Michigan Court of Appeals reached a remarkably different conclusion than the Michigan Supreme Court.\textsuperscript{235} "Merely from feeling the contours of a pill bottle," the officer immediately identified the item as a pill bottle and nothing more; therefore, the officers did not find the pill bottle during the scope of a proper Dickerson search, and the court of appeals excluded it from evidence.\textsuperscript{236} The court of appeals differentiated between contraband located in a suspect's pocket in a thin baggie and contraband located within a hard container.\textsuperscript{237} Using this benchmark, the scope of Dickerson does not extend to searching closed containers because "a closed container may contain any number of innocent and legal items [and] . . . generally requires visual inspection to determine its contents."\textsuperscript{238}

\begin{footnotes}
\textsuperscript{231} See id. at 854.
\textsuperscript{232} See Arizona v. Hicks, 480 U.S. 321 (1987). Oddly enough, the court in Champion acknowledged that the seizure in Hicks was inappropriate because the officer had to manipulate the stereo in order to view the serial numbers, and it thus failed to meet the immediately apparent standard. See id. at 323. The officer "could not form probable cause upon viewing the object, but had to manipulate the object, going beyond the authorized plain view search." Champion, 549 N.W.2d at 855 (emphasis added). The court failed to equate the manipulation in Hicks with the officer's opening of the pill bottle in Champion. Instead, the Court in Champion distinguished the cases on a technicality. See id. at 859.
\textsuperscript{234} See Champion, 549 N.W.2d at 856.
\textsuperscript{236} Id. at 522.
\textsuperscript{237} See id.
\textsuperscript{238} Id.
\end{footnotes}
The Michigan Supreme Court disagreed strongly with this strict application of the immediately apparent requirement. Instead, it found that a search incident to arrest, rather than the plain feel doctrine, validated the subsequent search of the contents of the pill bottle. During this muddled analysis, the court held that the totality of the circumstances justifying the search of Mr. Champion provided the basis for the probable cause determination required by the plain view and plain feel standards, rather than the probable cause standard required of a search incident to arrest. The probable cause for plain view justifies the seizure of the item, although the standard for a search incident to arrest merely reflects the officer's determination of probable cause to arrest the suspect, two inherently different standards.

In wrestling with the applicable doctrines in an effort to admit the pill bottle, the court used skewed and often contradictory logic. In one paragraph, the majority opinion "disagree[d] with the distinction between the plain feel of contraband versus the plain feel of an object containing contraband [as] such a distinction should be immaterial where probable cause exists and ... serve[s] only to encourage better packaging of illicit drugs." Paragraphs later, the court scoffed at the court of appeals' conclusion that the officer could not have concluded that the pill bottle contained contraband, using the plain view standard to supplement the officer's plain feel of the pill bottle.

239. See Champion, 549 N.W.2d at 861.
240. See id.
241. See id. The majority's determination of probable cause relied in part on their assumption that no one would carry prescription medication, in a pill bottle, in their pants. See id. at 859. "We cannot imagine that any reasonable person in Officer Todd's position, given all of the above circumstances, could have concluded that Mr. Champion was carrying prescription medication, or any other legitimate item, in the pill bottle in his groin region." Id.
243. See Chimel v. California, 395 U.S. 752, 762-63 (1969); see also infra text accompanying notes 249, 251-52 (differentiating between probable cause to arrest and probable cause to search).
244. Champion, 549 N.W.2d at 856 n.8.
245. See id.
ImPLYING THAT THE OFFICER’S TOUCH IMMEDIATELY IDENTIFIED THE CONTRABAND NATURE OF THE PILL BOTTLE’S CONTENTS, THE OPINION CONCLUDED THAT “OFFICER TODD DID NOT FURTHER MANIPULATE OR GROPE THE OBJECT IN ORDER TO DETERMINE ITS INCrimINATING CHARACTER.”  THE PLAIN FEEL DOCTRINE thus ALLOWED THE REMOVAL OF THE PILL BOTTLE FROM MR. CHAMPION’S POCKET BECAUSE THE OFFICER HAD PROBABLE CAUSE BASED ON THE TOTALLTY OF THE CIRCUMSTANCES TO BELIEVE THE CONTAINER HELD CONTRABAND.

The most tenuous portion of the court’s reasoning lies within the analysis of the doctrine of search incident to arrest. Justifying the more intrusive search of opening the pill bottle, the court reasoned that the officer’s determination of probable cause to believe that the pill bottle contained contraband equated to probable cause sufficient to arrest the suspect. This logic, however, is circular. A search incident to arrest occurs only after the suspect’s arrest for criminal activity. The officer perceived the contraband and discovered Mr. Champion’s crime after the search within the container; therefore, the search into the pill bottle could not have occurred incident to arrest.

The probable cause needed to conduct an arrest requires “an arresting officer . . . [to] possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it”; however, the court failed to identify any factors that could support such a finding. Proba-

246. Id. at 858 (emphasis added).
247. See id. at 861.
248. See id. at 860-61.
249. See Sibron v. New York, 392 U.S. 40, 63 (1968). In Sibron, the Supreme Court, in analyzing a search incident to arrest, determined “[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification.” Id. at 63 (emphasis added). It is therefore troubling that the majority relied heavily on a search incident to arrest to justify the police conduct when the officers formulated probable cause for the search only after the completion of the search. See Champion, 549 N.W.2d at 862.
250. See Champion, 549 N.W.2d at 860-61.
251. Id. at 860 (emphasis added). Although the court quoted a Michigan statute codifying probable cause, this definition is fairly typical of the requirements for probable cause in many jurisdictions. See Sibron, 392 U.S. at 75 (Harlan, J., concurring) (defining the elements of probable cause to arrest).
252. See Champion, 549 N.W.2d at 861. The court identified many factors, but none of them articulated a reasonable belief that Mr. Champion committed a crime. Instead, the factors were biased and vague, including the location of the pill bottle,
ble cause for an arrest existed through the court's reliance on the circumstances enumerated that gave the officer probable cause to conduct the initial patdown search. Because the pill bottle was within an area of the suspect's control at the time of the arrest, the doctrine of search incident to arrest justified its opening to prevent the potential destruction of evidence.

The Dissent: Policy Reasons Why the Scope of the Search Exceeded the Officer's Authority

Using the same hybrid analysis as the majority opinion, the dissent focused on the limitations given under each of the doctrines used by the majority to bolster the admissibility of the pill bottle into evidence. Focusing on the limited scope allowed by a Terry search, Chief Justice Brickley determined that the majority ignored the limitations enumerated in Terry, and in this ignorance, took a "treacherous step, facilitating the danger the Dickerson Court warned of, 'that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will.'" Chief Justice Brickley analyzed Mr. Champion's situation under the Terry doctrine because Dickerson merely extended the Terry stop and frisk patdown to include searches of con-

Mr. Champion's furtive glances, his past criminal record, and the high crime neighborhood in which the offense occurred. The court found these factors indicated Mr. Champion's propensity to commit a crime, rather than illustrating his actual commission of a crime. See id. In fact, in United States v. Gibson, 19 F.3d 1449 (D.C. Cir. 1994), the court declared, "[t]he Fourth Amendment stands in the way of the police arresting people simply because they appear suspicious and may be hiding something." Id. at 1452 (excluding evidence that the police officer discovered during a plain feel search because the flat, angular substance was unidentifiable to the officer as contraband).

253. See Champion, 549 N.W.2d at 861.
254. See id.; see also United States v. Robinson, 414 U.S. 218, 234 (1973) (articulating the policies underlying the search incident to arrest doctrine).
255. See Champion, 549 N.W.2d at 861 (Brickley, C.J., dissenting).
He noted that the officer's determination that the pill bottle was not a weapon served as the line of demarcation between acceptable and unacceptable police conduct in this case. His analysis relied on the premise in Terry that a search "in the absence of probable cause to arrest . . . must, like any other search, be strictly circumscribed by the exigencies which justify its initiation.

Similarly, the Court in Terry and Dickerson specifically recognized restrictions on the scope of the allowable patdown search in an effort to protect citizens against overzealous police conduct. The precedent in the plain feel doctrine, therefore, is restrictive rather than inclusive, according to the dissent. The dissent concluded correctly that the officer's sense of touch could not have perceived the contraband within the pill bottle during this cursory search. It would be impossible for the contraband nature of the pill bottle to be immediately apparent to the officer, especially because two layers of clothing and a pill bottle protected the contraband; therefore, the search would be inadmissible under Dickerson. Likewise, the majority's reliance on the search incident to arrest justification was tenuous at best because the officer had no other articulable justification for an arrest.

The dissent used the factors enumerated by the majority to create probable cause to illustrate the vague, fact-specific justification for the search. Chief Justice Brickley contended that "[p]eople with past legal troubles travel the streets of high-crime

257. See id. (Brickley, C.J., dissenting).
258. See id. (Brickley, C.J., dissenting).
260. See Dickerson, 508 U.S. at 378; Terry, 392 U.S. at 11.
261. See Champion, 549 N.W.2d at 865 (Brickley, C.J., dissenting).
262. See id. at 865-66 (Brickley, C.J., dissenting).
263. See id. at 865 (Brickley, C.J., dissenting).
264. See id. at 866-68 (Brickley, C.J., dissenting). The factors that the majority found compelling to determine probable cause were the same factors used by the dissent to invalidate the search. Chief Justice Brickley found the majority's reliance on the defendant's behavior most troubling as he stated that the defendant's actions of placing "his hands in his sweatpants did nothing to distinguish him as a criminal. Indeed, while placing his hands in his pants may rightly be considered in bad taste, I am aware of no law that punishes individuals for such an exercise of poor manners." Id. at 868 (Brickley, C.J., dissenting).
265. See id. at 869 (Brickley, C.J., dissenting).
areas every day in this country, some may even prefer to walk with their hands in their pants.” He continued, “[t]his behavior should not give rise to a finding of probable cause merely because someone half a block away fled at the sight of a police car.”

Likewise, the dissent examined the nature of the individual’s privacy interest intruded upon during the officer’s search, questioning “if individuals do not have a legitimate expectation of privacy in their groin, where do they have such an expectation?” Using this line of analysis, Chief Justice Brickley attacked the majority’s implication that Mr. Champion’s desire for privacy by keeping his hands in his pants justified the officer’s intrusive search. Ultimately, Chief Justice Brickley used this privacy interest as the linchpin of his argument, determining that “it is unclear, given that defendant has a police record and lives in a poor neighborhood, what the Constitution permits him to do, if the simple act of putting his hands down his pants jettisons his constitutional rights.” The application of the standard advocated by the majority infringes upon the constitutional rights of suspects, especially those individuals unfortunate enough to live in high-crime areas. The dissent concluded that the majority incorrectly admitted the evidence against the defendant and created a confusing line of analysis to arrive at its conclusion.

266. Id. at 868 (Brickley, C.J., dissenting).
267. Id. (Brickley, C.J., dissenting).
268. Id. at 871 (Brickley, C.J., dissenting).
269. See id. (Brickley, C.J., dissenting). Chief Justice Brickley noted, “[w]hile it is true that persons engaged in illegal transactions will desire to conceal those transactions, the desire for privacy in one’s affairs is common among law-abiding persons as well.” Id. at 870 (Brickley, C.J., dissenting) (quoting United States v. Green, 670 F.2d 1148, 1152 (D.C. Cir. 1981)). The court in United States v. Green determined that “the police cannot conclude that merely because an object or a transaction is not openly displayed, it is necessarily illegal.” Green, 670 F.3d at 1152. Following this logic, Chief Justice Brickley demonstrated that this was an unfair inference by the police because it clearly intruded upon the rights of the suspect. See Champion, 549 N.W.2d at 871 (Brickley, C.J., dissenting).
270. Champion, 549 N.W.2d at 871 (Brickley, C.J., dissenting).
271. See id. at 872 (Brickley, C.J., dissenting).
CRITICISMS OF CHAMPION: THE CONFLICTING RESULTS OF AN INCONSISTENT APPLICATION OF DICKERSON

Relying on the Officer’s Tactile Perception to Support an Intrusive Search

Following the precedent of both the Terry and Dickerson decisions, the Michigan Supreme Court relied heavily on the officer’s training and ability to perceive contraband through multiple layers of clothing.272 Relying on the officer’s ability to distinguish between contraband and noncontraband in a cursory search is too speculative of a trend to be allowed by the courts.273 Although an officer’s training certainly would heighten his tactile perception,274 using his touch as the sole justification for an intrusion on individuals’ Fourth Amendment rights cuts contrary to the Fourth Amendment’s history.275

The courts’ reliance on the officer’s experience in this area is troubling because the court implies that the more experience an officer has, the less likely he is to violate the suspect’s rights.276 Unfortunately, this inference cannot always be made. Similarly, the purpose of the Fourth Amendment is to protect individuals’ rights against unbridled police discretion at any level, regardless of the officer’s tenure on the police force.277 Although an experienced officer may be able to more accurately perceive contraband, even through bulky layers of clothing, experience alone should not afford officers the ability to conduct extensive searches with little more than suspicions of criminal behavior. This wide-reaching discretion is problematic especially because the probable cause

272. See Terry v. Ohio, 392 U.S. 1, 26 (1968); Champion, 549 N.W.2d at 859. But see Minnesota v. Dickerson, 508 U.S. 366, 379 (1993) (holding that the officer’s touch was too manipulative to justify the admissibility of the fruit of the search).
273. See supra text accompanying notes 164-80.
274. See State v. Wonders, 929 P.2d 792 (Kan. Ct. App. 1996). “When objects have a distinctive and consistent feel and shape that an officer has been trained to detect and has previous experience in detecting, then touching these objects provides the officer with the same recognition his sight would have produced.” Id. at 801 (citing United States v. Pace, 709 F. Supp. 948, 955 (C.D. Cal. 1989)).
275. See Maclin, supra note 1, at 222-23.
277. See Maclin, supra note 1, at 213-24.
determinations, which justify the searches, rely more on the quality of the neighborhood than on the suspect's actual criminal behavior during the police confrontation.\textsuperscript{278}

The Framers drafted the Fourth Amendment to preserve individual privacy and personal liberty in response to their concern with the political turmoil and excessive police discretion during the 1760s and 1770s.\textsuperscript{279} Today, these concerns continue as the police use the patdown search to justify initiating police contact with suspicious individuals.\textsuperscript{280} In turn, the Court has been sympathetic to both the safety concerns of the officers and to the public's cries against crime. The Court has allowed a balancing test, weighing many factors, to determine the disruption of a suspect's fundamental right.\textsuperscript{281}

Fourth Amendment case law relating specifically to warrantless searches is extremely troubling. Although the text of the Constitution clearly delineates the right to be free from unreasonable searches,\textsuperscript{282} the Court has interpreted the Fourth Amendment less strictly.\textsuperscript{283} The Fourth Amendment's guaran-

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\textsuperscript{278} See People v. Champion, 549 N.W.2d 849, 853 (Mich. 1996), cert. denied, 117 S. Ct. 747 (1997) (outlining factors the court used to justify the officer's probable cause determination).
\textsuperscript{279} See LANDYNSKI, supra note 1, at 44-45.
\textsuperscript{280} See, e.g., Katherine M. Skiba, 'Zero Tolerance' for Crime, Houston Moves to Sweep up Gangs, Sees the Statistics Drop, MILWAUKEE J. SENTINEL, Mar. 12, 1996, at 1, available in 1996 WL 7838708 (illustrating vigorous police tactics with a "get tough on crime" attitude as Houston police enforce even minor offenses as the pre-requisite to conducting a Terry patdown); Street Searches Increase, NEW ORLEANS TIMES-PICAYUNE, Apr. 8, 1995, at B1, available in 1995 WL 6067568 (increasing the use of Terry patdowns to fight crime and describing the need to educate officers on the legal ramifications of such searches).
\textsuperscript{281} See infra note 284 (discussing the Court's treatment of different rights with varying levels of scrutiny); see also Minnesota v. Dickerson, 508 U.S. 366, 374-76 (1993) (defining the scope of a plain feel search in terms of "reasonableness"); Terry v. Ohio, 392 U.S. 1, 20-21 (1968) (addressing the need for a balancing test to determine the reasonableness of the officer's conduct during a stop and frisk search); Champion, 549 N.W.2d at 858-59 (proceeding under a totality of the circumstances analysis to determine the intrusiveness of the search).
\textsuperscript{282} See U.S. CONST. amend. IV.
\textsuperscript{283} See, e.g., Dickerson, 508 U.S. 366 (1993) (defining a plain feel exception to the Fourth Amendment); Coolidge v. New Hampshire, 403 U.S. 443, 464-73 (1971) (plurality opinion) (creating a plain view exception to the warrant requirement); Chimel
tees relate most importantly to those individuals who may lose their liberty as the result of improper searches; therefore, these rights should receive the same heightened scrutiny analysis that other enumerated rights receive. Instead, the Supreme Court has determined that because these rights generally relate to criminals, the rights merely deserve a balancing test, similar to a rational basis inquiry.284 This line of analysis produces a markedly different result, one generally supporting the police conduct rather than favoring the individual right at stake.285

**Containing One's Privacy Expectations: How Much Privacy Do Closed Containers Receive?**

Generally, items located within containers receive the highest level of privacy afforded by the Supreme Court.286 In *California v. Acevedo*,287 the Court limited this privacy expectation by re-

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284. Ironically, individuals whose liberty may be taken away through imprisonment receive only a balancing test to ensure the maintenance of some of these rights. Individuals who are merely exercising their rights to freedom of speech, religion, and assembly, however, receive much greater constitutional protection through the use of heightened scrutiny analysis. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (freedom of religion); *Cohen v. California*, 403 U.S. 15 (1971) (freedom of speech); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (freedom of assembly).

285. Likewise, the Court has afforded greater protection to rights that are not clearly enumerated in the Constitution, such as the right to privacy, see, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (applying strict scrutiny for the right to privacy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (same), than rights that the Constitution enumerates in the Fourth Amendment, such as the right to be free from an unreasonable search and seizure; although in other areas of constitutional rights affecting criminals, the Court has interpreted the relevant Amendments explicitly and absolutely. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (interpreting the constitutional guarantees of the right to counsel and the freedom from self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (interpreting the Sixth Amendment’s provision for guaranteed counsel).

286. See *United States v. Place*, 462 U.S. 696 (1983) (rejecting the search as unreasonable but creating a balancing test to determine the intrusiveness of such a search); *Terry*, 392 U.S. at 20-27 (balancing the suspect’s rights against the officer’s rights to safety in determining the limits on the scope of a patdown search for weapons).

287. *See Place*, 462 U.S. at 700-01.

fusing to extend a privacy interest to closed containers located in automobiles.\textsuperscript{288} Traditionally, automobile searches received lower standards of privacy, given the exigent circumstances surrounding these searches.\textsuperscript{289} Even in \textit{Acevedo}, the Court acknowledged the greater expectation of privacy in a container carried with oneself, such as a purse, briefcase, or luggage.\textsuperscript{290}

Using this logic, the search in \textit{Champion} should have received more heightened scrutiny protection by the court because the search affected a container carried by the suspect.\textsuperscript{291} The court, however, reasoned that the officer could legitimately open the pill bottle if, based on the totality of the circumstances, he believed the suspect was committing a crime.\textsuperscript{292} Yet, the officer used very general factors to justify his search, factors that would justify the search of any suspect who happens to be in a high-crime area, although the same suspect in a low-crime area would most likely not be subjected to such an intrusive search.\textsuperscript{293}

The majority in \textit{Champion} failed to analyze the suspect's privacy expectations surrounding the container he carried.\textsuperscript{294} Mr.

\textsuperscript{288} See id. at 578-79.
\textsuperscript{289} See id. at 569 (discussing an exception to the warrant requirement for mobile vehicles).
\textsuperscript{290} See id. at 580.
\textsuperscript{291} See \textit{Place}, 462 U.S. at 703 (describing the analysis for the search of a container carried by a suspect); People v. Champion, 549 N.W.2d 849, 862 (Mich. 1996), cert. denied, 117 S. Ct. 747 (1997) (allowing the search of the container carried by Mr. Champion in his pants).
\textsuperscript{292} See \textit{Champion}, 549 N.W.2d at 860.
\textsuperscript{293} See id. at 861; supra notes 244-54 and accompanying text.
\textsuperscript{294} Although \textit{Place}, 462 U.S. at 696, held that an individual does not have a reasonable expectation of privacy in contraband, the \textit{Champion} majority ignored that the officer could not determine conclusively the contraband nature of the pill bottle until he actually opened the container. See \textit{Champion}, 549 N.W.2d at 858-59. Given that individuals use a prescription pill bottle to carry legal items, the officer and the court should have respected the defendant's privacy interest in the container, waiting to search the pill bottle until the officer obtained a search warrant. This process ensures that a suspect's rights remain intact because a neutral magistrate must determine if the circumstances enumerated by the officer constitute probable cause to search the suspect. See U.S. CONST. amend. IV.

Likewise, with the growth in acceptance of telephone warrants, the police need only call a judge on the telephone in order to obtain a search warrant. See Daniel
Champion clearly believed he had a privacy interest in the container, especially because he did not hold the container to public view and because he carried the pill bottle in a very private area. This privacy expectation is similar to one's interest in the contents of a purse or briefcase carried with an individual, a privacy interest that is "self-evident." As Professor Tracey Maclin noted, "[p]rivate containers are typically not transparent for a reason—individuals do not wish disclosure of their contents."

The court in Champion ignored this entire line of analysis in favor of a reasonableness balancing test, despite the Supreme Court's extension of greater Fourth Amendment protection to containers. This reasonableness determination, however, should not arise in this situation because the scope of the search clearly exceeded the limits established in Dickerson. The police conduct in Dickerson exceeded the bounds of a plain feel search because the officer admitted to manipulating the contraband with his fingers during the patdown. Likewise, the police conduct in Hicks caused a violation of the suspect's privacy rights because the police moved potential contraband to determine its illegal nature.

If the court rejected those manipulations, then the Michigan Supreme Court should have rejected the intrusive search of Mr. Champion, which involved the opening of a container he was carrying in his pocket. The court's failure to reject this

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L. Rotenberg, On Seizures and Searches, 28 CREIGHTON L. REV. 323, 325 n.9 (1995) (discussing the use of telephone warrants and the circumstances under which such warrants may be issued). Although problems do exist with these warrants, including the length of time a suspect may be detained while waiting for a warrant and the difficulty of reviewing the justifications for the warrant on appeal, telephone warrants are growing in popularity and acceptance. The Federal Rules of Criminal Procedure even authorize such a procedure. See FED. R. CRIM. P. 41(c)(2). With this quick, easy process available, the court's failure to require a warrant in situations such as Champion trivializes the warrant requirement of the Fourth Amendment.

295. See Champion, 549 N.W.2d at 870-71 (Brickley, C.J., dissenting).
296. Maclin, supra note 1, at 230.
297. Id.
298. See Champion, 549 N.W.2d at 859.
299. See id. at 865 (Brickley, C.J., dissenting).
302. See Champion, 549 N.W.2d at 852.
search illustrates the difficult precedent established by *Dickerson*. The Supreme Court must revisit this issue as many jurisdictions discard individual's privacy interests in favor of a reasonableness determination based on a balancing test of the surrounding circumstances.\textsuperscript{303}

**Using Fact-Specific Decisions to Ignore Larger Legal Issues Underlying the Cases**

After delineating rather explicit guidelines for patdown searches for weapons and for contraband, many jurisdictions are unwilling to use these standards as bright-line rules.\textsuperscript{304} Favoring an approach that instead uses individual circumstances to distinguish these cases, many courts carved their interpretations into the Supreme Court's established doctrines.\textsuperscript{305} Using this alternative analysis affords the courts greater flexibility to decide cases and to allow greater deference to the law enforcement community. This approach, however, removes consistency from the judicial decision-making process, producing contradictory decisions in each jurisdiction.\textsuperscript{306}

By focusing specifically on facts that differentiate the case before them, the courts have created fact-specific case law, leaving little room for the tradition of stare decisis and the goal of consistency in the realm of Fourth Amendment case law. Instead, a criminal defendant contesting a search must hope that the circumstances that distinguish his case are such that the officer's conduct was inappropriate. Ironically, the *Dickerson* decision focused on the inappropriateness of the police conduct

\textsuperscript{303} See supra text accompanying notes 157-218.

\textsuperscript{304} See id.

\textsuperscript{305} See *Dickerson*, 508 U.S. at 374-76; *Champion*, 549 N.W.2d 858-59; see also supra text accompanying notes 157-218 (illustrating the disparate outcomes resulting from different interpretations of *Dickerson*'s plain feel standard).

\textsuperscript{306} "The ad hoc approach [to Fourth Amendment cases] not only makes it difficult for the policeman to discern the scope of his authority . . . ; it also creates a danger that constitutional rights will be arbitrarily and inequitably enforced." Oliver v. United States, 466 U.S. 170, 181-82 (1984) (citation omitted).
in that instance, yet, most of the cases following the establishment of the plain feel doctrine have reached an opposite conclusion, siding with law enforcement.

In cases such as Champion, involving closed containers, jurisdictions once again remain split as to the precedential value of Dickerson's probable cause requirement that the contraband be immediately apparent to the officer conducting the search. Analyzing the intrusiveness of the search in Dickerson in comparison to the search in Champion, it seems utterly ridiculous that courts can conclude that the search in Dickerson was more intrusive. The officer merely squeezed contraband while feeling through the defendant's jacket in Dickerson; however, in Champion, an officer blatantly opened a closed container carried by the individual after reaching inconclusive results from his patdown. This distinction resulted from the court's enumeration of many factors that created the basis for a probable cause determination by the officer in Champion. In reality, these factors are merely the court's attempt at manipulating the fact pattern to differentiate the case slightly from Dickerson so as to reach a completely contradictory, pro-law enforcement result.

Advancing Social Policies Through Search and Seizure Decisions

Because crime rates continue to skyrocket and drugs continue to pervade American culture, judicial opinions have addressed
these concerns. Unfortunately, these concerns tend to outweigh other equally important concerns, such as the individual's privacy interest and the fundamental underpinnings of the Fourth Amendment relating to the individual's freedom.

Courts quickly began to delineate circumstances under which an individual has a lower expectation of privacy—the circumstances that produced probable cause for the majority in Champion. Unfortunately, these standards, even when viewed under the totality of circumstances approach, do not always produce a result that is consistent with the citizens' constitutional rights.

The location of the search, such as a high-crime neighborhood, the prior criminal record of the suspect, the activity of other individuals in the area at the time of the police confrontation, and the reaction of the suspect to the police are all factors used to justify these more intrusive searches. These standards, however, are arbitrary and inherently discriminatory based on socioeconomic circumstances because most convicted felons generally return to live in the neighborhood in which they lived prior to their conviction. Following this line of analysis, con-

315. See State v. White, 674 N.E.2d 405, 411 (Ohio Ct. App. 1996). The court in White invalidated the search of Mr. White; however, the court acknowledged the importance of fighting crime through judicial decision making. See id.

316. The court used officers' safety or crime prevention as the justifications for warrantless searches in Dickerson, 508 U.S. at 373, Terry v. Ohio, 392 U.S. 1, 23 (1968), and Champion, 549 N.W.2d at 853-54. Yet, in each case, the privacy expectation of the individual diminished with the increased scope of the warrantless search advocated by the courts.

317. See Champion, 549 N.W.2d at 853 (using general factors to create probable cause for warrantless searches).

318. See id. at 862 (allowing the admission of contraband seized during the search of a container, a search that arguably was beyond the scope of Dickerson).

319. See id. at 853.

320. See Tucker Carlson, Town Criers Need to Track Ex-cons, INSIGHT ON THE NEWS, May 1, 1995, at 34, available in 1995 WL 12332172 (detailing city efforts to notify residents of the return of an offender to a neighborhood following release from prison); John J. DiIulio, Jr., Moral Poverty: The Coming of the Super-Predators Should Scare Us into Wanting to Get to the Root Causes of Crime a Lot Faster, CHI. TRIB., Dec. 15, 1995, at 31, available in 1995 WL 13111020 (discussing juvenile offenders' crime statistics and the tendency for violence as a root cause of the pover-
victed felons and low-income individuals who cannot afford to leave the high-crime neighborhood in which they reside have a lesser expectation of privacy interests under the Fourth Amendment, according to some courts.\textsuperscript{321}

This discrimination resembles the redlining that many financial institutions allegedly implemented in an effort to assign different mortgage rates to homes depending on the character of the neighborhood in which the home was located.\textsuperscript{322} The courts correctly were skeptical of this argument and required statistics or other factual support to prove that the redlining actually occurred.\textsuperscript{323} Finding that these guidelines are economically rather than racially motivated, courts established tougher standards to prove redlining.\textsuperscript{324} Analogizing financial redlining to the totality of the circumstances approach used by courts construing \textit{Dickerson}'s plain feel exception, the accusation of potential redlining should be taken seriously.\textsuperscript{325} "Police redlining" directly infringes upon the constitutional rights of the accused in the search and seizure context by using the location of the potential crime as the basis for the intrusiveness of the search.

Following the totality of circumstances approach advocated by the court in \textit{Champion}, individuals who live in specific neighborhoods immediately become an easy target for overzealous police. By using a balancing test that measures the intrusion on the individual against society's interests in protecting the safety of

\textsuperscript{321} See, e.g., \textit{Champion}, 549 N.W.2d at 858-59 (using these factors in an attempt to formulate a probable cause determination to justify the officer's search of the pill bottle).


\textsuperscript{324} See id.

police officers and decreasing crime, the courts were all too will-
ing to let this intrusion pass the balance, weighing in favor of law enforcement.\textsuperscript{326} As the historical underpinnings of the Fourth Amendment illustrate, this line of reasoning is unfairly discriminatory, relying on arbitrary factors that are not proven to be dispositive of criminal potential,\textsuperscript{327} leaving individuals in crime-ridden neighborhoods with a lower expectation that their Fourth Amendment rights will be protected.\textsuperscript{328}

**Future Application of Dickerson**

After reviewing the disparate results reached by state courts attempting to analyze the *Dickerson* plain feel standards, the Supreme Court must clarify this exception to the Fourth Amendment.\textsuperscript{329} Because the state courts have produced contradictory results by relying on a wide range of neutral factors to decide if seized contraband was immediately apparent to the officer, the *Dickerson* decision can no longer be left to fact-specific interpretation and analysis.\textsuperscript{330} Within this lack of definition, a suspect's rights vary significantly from state to state and from jurisdiction to jurisdiction.\textsuperscript{331}

The *Dickerson* decision relies on the officer's ability to identify contraband immediately; however, the officer searching Mr. Dickerson failed to meet this requirement.\textsuperscript{332} By using this vague, undefined standard of immediate apparentness, the *Dickerson* majority effectively enumerated a requirement that in practice is virtually impossible to meet. This requirement paral-

\begin{footnotes}
\item[326] See *Terry v. Ohio*, 392 U.S. 1, 22-23 (1968) (allowing a patdown search of a suspect because of his location and his furtive behavior); *Champion*, 549 N.W.2d at 858-59 (admitting evidence obtained through a seizure justified on the location of the suspect, the location of the contraband, and the suspect's nervousness around the police officer).
\item[327] See *LANDYNSKI*, supra note 1, at 31-45 (discussing English abuses of the writ of assistance as the impetus for the warrant requirements of the Fourth Amendment).
\item[328] See *Terry*, 392 U.S. at 22-23; *Champion*, 549 N.W.2d at 858-59.
\item[329] See supra text accompanying notes 157-218.
\item[330] See supra text accompanying notes 157-218.
\item[331] See supra text accompanying notes 157-218.
\end{footnotes}
lels the plain view guidelines; however, an authorized warrant or exception originally justifies the plain view search.\(^{333}\) Similarly, during a plain view search, an officer views the contraband in his line of sight before seizing the item.\(^{334}\)

*Dickerson* searches reach contraband in a much more deceptive form.\(^{335}\) The contraband produced from a plain feel search lies within the clothing of a suspect, sometimes hidden by multiple layers of clothing.\(^{336}\) The doctrine's requirement of immediate apparentness is nearly impossible for officers to meet because of often multiple layers of insulation.

Many state courts created factors to aid in interpreting the immediately apparent requirement of the plain feel doctrine; yet, these factors are inconclusive in determining if such contraband actually falls within the scope of an allowable plain feel search.\(^{337}\) Rather, these factors produce inconsistent results.\(^{338}\) The Court itself acknowledged the problems with a totality of the circumstances analysis in the Fourth Amendment context by admitting there are "difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances."\(^{339}\) Given this disparity, the Supreme Court must revisit *Dickerson* and reformulate new guidelines for an allowable plain feel search.

A plain feel search merely extends the *Terry* patdown by allowing officers to seize contraband in addition to weapons found during the search.\(^{340}\) The premise of such a search is justifiable given the rising crime rates across the country, especially in re-

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334. *See id.*
335. *See Dickerson*, 508 U.S. at 369.
336. *See id.*
340. *See Dickerson*, 508 U.S. at 375-76. The Court's delineation of the plain feel doctrine did not expand the allowable scope of a patdown significantly. "Officers must remember that, even after *Dickerson*, a frisk is still a limited patdown for weapons only, not for narcotics. Finding narcotics during a protective frisk is merely a bonus." Kevin Corr, *Debunking the Myths: A Compendium of Law Enforcement Misconceptions*, 23 AM. J. CRIM. L. 121, 133 (1995).
Although the Court's goal of fighting crime was laudable, the methods the Court crafted to promote such a goal created confusion. Rather than allowing an officer to seize immediately the contraband he discovers, the plain feel doctrine should require the officer to obtain a search warrant prior to the seizure. With the advent of telephone warrants that may be obtained quickly while detaining the suspect, probable cause determinations can be made by a neutral magistrate. This process echoes the Framers' belief that a detached observer would protect the suspect's rights in such instances. Modifying the plain feel doctrine to require a warrant before seizure of potential narcotics would decrease an officer's discretion concerning such searches and move these searches away from their current ad hoc state.

Because individual liberty is at stake, the warrant requirement is a minimal intrusion on the officer's efficiency and discretion during an arrest. Likewise, the justification for a plain feel search is less compelling than the traditional warrantless searches. Requiring a warrant for a plain feel search would

342. See Rotenberg, supra note 294, at 325 n.9.
343. See LANDYNSKI, supra note 1, at 41-43; Maclin, supra note 1, at 213-14.
344. The Court itself acknowledged that Fourth Amendment case law should be more than "subtle nuances and hairline distinctions." Oliver, 466 U.S. at 181 (citing New York v. Belton, 453 U.S. 454, 458 (1981) (quoting Wayne LaFave, "Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 SUP. CT. REV. 127, 142)). The Court in Oliver warned of the dangers of a case-by-case approach to the Fourth Amendment because "police officers would have to guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy." Id.
345. Justifications for warrantless searches include the preservation of evidence, see Chimel v. California, 395 U.S. 752, 763 (1969), and the protection of the officer's safety, see Terry v. Ohio, 392 U.S. 1, 23 (1968). Ironically, officer efficiency justifies a plain feel search, a search that has become even more intrusive than other warrantless searches justified by more compelling state interests. See Dickerson, 508
decrease the confusion and inconsistency that have resulted following the creation of the doctrine in Dickerson.\textsuperscript{346}

**CONCLUSION**

In his famous dissent in *Olmstead v. United States*,\textsuperscript{347} Justice Brandeis concluded, "[c]rime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."\textsuperscript{348} By allowing the government to intrude into the most private of places and obtain evidence against a man, the government merely authorizes a clear violation of the Fourth Amendment. In its zeal to fight crime, the government has overlooked the fundamental limits on convicting criminals. Because the Court delineated many exceptions to the Fourth Amendment, officers have begun pressing the line to attempt to see how far the limits of the Fourth Amendment may be pushed.\textsuperscript{349} These attempts, although seeking to promote society's interest in fighting crime, are unjust when applied in a manner inconsistent with the Fourth Amendment.

The Court enumerated the considerations that must exist for a *Terry* stop as well as for a seizure of other contraband felt during such a patdown search.\textsuperscript{350} Yet, clear restrictions exist on the use of such evidence, and in the case of the plain feel doctrine, the contraband must be immediately apparent to the officer's touch.\textsuperscript{351} In *Champion*, it was virtually impossible for the officer to immediately identify the nature of the item as contraband because the defendant had contraband within a pill bottle in his pants.\textsuperscript{352} The warrantless search was unjustified; however, following a convoluted analysis, the court nevertheless

\footnotesize{U.S. at 375-76.}

\textsuperscript{346} See supra text accompanying notes 157-218.

\textsuperscript{347} 277 U.S. 438 (1928).

\textsuperscript{348} Id. at 485 (Brandeis, J., dissenting).

\textsuperscript{349} See supra note 280 (discussing new ideas in vigorous law enforcement tactics aimed at reducing crime and increasing *Terry* patdown searches).

\textsuperscript{350} See *Dickerson*, 508 U.S. at 375; *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

\textsuperscript{351} See *Dickerson*, 508 U.S. at 375.

\textsuperscript{352} See *People v. Champion*, 549 N.W.2d 849, 866 (Mich. 1996), cert. denied, 117 S. Ct. 747 (1997).}
admitted the evidence.\textsuperscript{353}

In its decision, the Michigan Supreme Court took a major step toward breeding of contempt for the law, which Justice Brandeis warned against. It is within the permutations and reinterpretations of the Fourth Amendment that individuals' rights cede to the all-powerful state, just the type of intrusion the Framers attempted to avoid when drafting the Bill of Rights.\textsuperscript{354} Requiring a warrant for a plain feel search moves such a search away from an intrusion on the suspect's rights and ensures that individual's rights remain intact during an investigation.

Justice Brandeis warned of such a problem when he stated, "[m]en born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."\textsuperscript{355} It is the responsibility of the courts and the judicial process to guard against this encroachment, and when the courts do not act in that role, the individual's rights are trampled.

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\textsuperscript{353} See \textit{id}. at 858-61 (applying the plain feel and search incident to arrest doctrines).
\textsuperscript{354} See \textit{LANDYNSKI}, \textit{supra} note 1, at 41-42; Maclin, \textit{supra} note 1, at 209.
\textsuperscript{355} Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).