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NOTES

WAKE UP AND SMELL THE CONTRABAND: WHY COURTS THAT DO NOT FIND PROBABLE CAUSE BASED ON ODOR ALONE ARE WRONG¹

It was around midnight on March 9, 1994, when Officer Walendzik of the Wyoming, Michigan police department drove through the parking lot of a known high-crime area as part of his routine patrol.² Officer Walendzik observed a car with five male occupants in the parking lot.³ After noticing that the car was not running and that the occupants were not attempting to exit the car, Officer Walendzik approached and spoke to the individual in the driver's seat.⁴

When the driver rolled down his window, Officer Walendzik immediately detected the odor of burned marijuana.⁵ Although Officer Walendzik was familiar with the smell based on his prior experience arresting marijuana offenders,⁶ he called a fellow officer to the scene to confirm his detection of the odor before searching the car.⁷ The second officer confirmed the odor of marijuana

1. This Note stems from a case the author observed in the General District Court of Hampton, Virginia, in which odor alone was found insufficient for a finding of probable cause. The case was a felony preliminary hearing argued on July 12, 1999, by James Schliessmann, Assistant Commonwealth's Attorney. The author would like to thank Mr. Schliessmann for his insights on this topic before and in the early stages of the writing process.

2. See *People v. Taylor*, 564 N.W.2d 24, 26 (Mich. 1997), *overruled by* *People v. Kazmierczak*, 605 N.W.2d 667 (Mich. 2000).

3. See *id.*

4. See *id.*

5. See *id.* Officer Walendzik described the odor as the "strong pungent odor" of marijuana." *Id.* at 31 (Weaver, J., dissenting).

6. See *id.* at 26.

7. See *id.*

immediately upon approaching the passenger's side of the vehicle.⁸ He recognized the odor from his previous contact with marijuana during two years of police experience.⁹

After the second officer detected the odor, the officers ordered the occupants out of the car and conducted a pat-down search, which uncovered a handgun in the possession of a passenger.¹⁰ A subsequent search of the vehicle uncovered three additional handguns, three facemasks, pagers, and pieces of a cigar that appeared to contain marijuana.¹¹

At the preliminary hearing, the defense attorney moved to suppress all of the evidence obtained from the vehicle, arguing that the search was illegal because it was not supported by probable cause.¹² Despite the immediate and unequivocal detection of the

8. *See id.*

9. *See id.*

10. *See id.*

11. *See id.* at 26, 31.

12. *See id.* at 27. The Fourth Amendment requires "probable cause" before conducting a search. *See* U.S. CONST. amend. IV; *Nathanson v. United States*, 290 U.S. 41, 46 (1933). Although the Amendment refers explicitly to the need for probable cause to obtain a warrant, there are numerous well-settled exceptions to the warrant requirement. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (indicating that no warrant is needed for items in "plain view"); *Carroll v. United States*, 267 U.S. 132, 153 (1925) (detailing the automobile exception, which recognizes the mobility of vehicles as a reason to overlook the warrant requirement); *Hester v. United States*, 265 U.S. 57, 59 (1924) (articulating the "open fields" exception, which provides that items left out in the open, even when on private property, are not protected by the Fourth Amendment); *Weeks v. United States*, 232 U.S. 383, 392 (1914) (explaining that no warrant is needed for a search incident to arrest); *see also* Andrew Agati, Note, *The Plain Feel Doctrine of Minnesota v. Dickerson: Creating an Illusion*, 45 CASE W. RES. L. REV. 927, 932-36 (1995) (discussing some common exceptions to the warrant requirement); Brett Andrew Harvey, Comment, *Minnesota v. Dickerson and the Plain Touch Doctrine: A Proposal to Preserve Fourth Amendment Liberties During Investigatory Stops*, 58 ALB. L. REV. 871, 875 n.31 (1995) (providing a list of exceptions to the warrant requirement). The question of whether a warrant is required, however, does not affect the need to establish probable cause before a search is permissible. *See Carroll*, 267 U.S. at 161 (stating that probable cause is required for warrantless searches); *id.* at 155-56 (indicating that probable cause is necessary before conducting a search even when the automobile exception to the warrant requirement is at play); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.1(a), at 543 (2d ed. 1987) (asserting that a warrantless search is not permissible without probable cause). The determination of the existence of probable cause is based on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949). Probable cause to search requires proof of "a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The determination ultimately rests on a common sense analysis of

odor of marijuana by both police officers, the magistrate agreed with defense counsel and dismissed the case.¹³ The prosecutor appealed to the Supreme Court of Michigan,¹⁴ which affirmed in *People v. Taylor*,¹⁵ holding that the odor of marijuana by itself is insufficient to sustain a finding of probable cause.¹⁶ As a result, five young males found by police to have handguns, facemasks, and illegal contraband in their possession were back on the street, unpunished.

The anomalous holding in *Taylor* is not an isolated result. Although most jurisdictions would disagree with *Taylor*,¹⁷ a significant number of jurisdictions have either refused to accept a plain smell corollary to the plain view doctrine,¹⁸ or have given ambiguous or contradictory rulings on the issue.¹⁹ In jurisdictions that have failed to adopt plain smell, officers who have sufficient training or experience to immediately identify certain odors are placed in a conundrum. They can either 1) let someone go who they are fairly certain is in possession of contraband, or 2) strive to uncover an additional piece of evidence to create sufficient probable cause to justify a search. Each of these options is unsatisfactory. The former is unsatisfactory because it may allow a large number

the totality of the circumstances. *See id.* at 230-31.

13. *See Taylor*, 564 N.W.2d at 27.

14. *See id.*

15. 564 N.W.2d 24 (Mich. 1997), *overruled by* *People v. Kazmierczak*, 605 N.W.2d 667 (Mich. 2000). Although the Michigan Supreme Court overruled *Taylor* while this Note was in progress, *Taylor* is representative of the inherently illogical results that occur in jurisdictions that have failed to adopt the plain smell doctrine.

16. *See id.* at 30 ("We hold that the smell of marijuana is but one factor to consider . . . in determining whether probable cause exists to conduct a search of a parked vehicle without a warrant.").

17. *See* Larry E. Holtz, *The "Plain Touch" Corollary: A Natural and Foreseeable Consequence of the Plain View Doctrine*, 95 DICK. L. REV. 521, 533 (1991) ("[A] substantial majority of the courts across the country that have addressed the issue have routinely recognized a 'plain smell' corollary to the plain view doctrine."). The term plain smell, as the relation to the plain view doctrine suggests, refers to the situation in which an officer makes his determination of probable cause based *solely* on his detection of some distinctive odor. This Note employs the terms "plain smell," "the plain smell doctrine," and "the plain smell corollary to plain view" interchangeably.

18. For a discussion of two states that have repudiated plain smell, see *infra* notes 61-66 and accompanying text.

19. Exemplary are Virginia, Georgia, and Ohio. For a discussion of how these jurisdictions have treated plain smell, see *infra* notes 55-60 and accompanying text.

of criminals to escape arrest, even though they are within the grasp of a police officer whose level of suspicion exceeds that which is constitutionally required to conduct a search.²⁰ The latter is unsatisfactory because there will be many situations in which the officer is unable to perceive any incriminating factors beyond the odor that he has already detected. Moreover, this latter option encourages officers to fabricate additional evidence in order to consummate the arrest of a subject who they are confident possesses contraband.²¹ Judicial recognition of the officer's ability to identify a distinctive odor based on his training or experience eliminates the illogical situation where the officer must choose between two such unsatisfactory options.

This Note provides an overview of the principal arguments advocating and condemning the adoption of a plain smell corollary to the plain view doctrine.²² This Note concludes that those jurisdictions that have yet to definitively resolve the issue should adopt the plain smell doctrine, and those that have rejected plain smell should reconsider their position.

The first section of this Note briefly discusses the history of the plain smell doctrine and how commentators and courts, particularly the Supreme Court, have treated it. The second section focuses on the manner in which state courts have treated plain smell. This section notes that the contradictory application of the plain smell doctrine in some jurisdictions leaves law enforcement and attorneys with little certainty as to whether searches based solely on scent are valid. The section then turns to the divergence among state court interpretations of the Fourth Amendment and discusses why

20. Probable cause is usually required before conducting a search. Under limited circumstances, however, police may search based on a lesser showing, commonly referred to as reasonable suspicion. See *Terry v. Ohio*, 392 U.S. 1, 26-27 (1968). This Note is limited to situations requiring a showing of probable cause. For a discussion of what is required to establish probable cause, see *supra* note 12.

21. Contributing to the problem is the danger that "when citizens see obviously guilty and perhaps dangerous criminals being allowed to go free, there is a temptation to take the law into their own hands." HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* 62 (1996).

22. This is not a survey of all fifty states and how they have treated plain smell. Rather, the jurisdictions that are analyzed are meant to be representative of those jurisdictions whose current situation substantially parallels that of one of the treated jurisdictions.

such a disparity is problematic. The third section presents the arguments against the adoption of the plain smell doctrine and explains why those arguments are unconvincing. The section concludes by analyzing the arguments in favor of plain smell. The fourth section examines some of the policy and logistical issues that accompany the adoption of plain smell. Finally, this Note concludes that the arguments in favor of a plain smell corollary to plain view greatly outweigh the arguments against plain smell. As such, this Note encourages those jurisdictions in which the issue is unsettled to affirmatively adopt the plain smell doctrine.

THE DEVELOPMENT OF PLAIN SMELL

Although the Supreme Court has accepted the validity of the plain view doctrine since 1971,²³ and has recently adopted a plain touch corollary to plain view,²⁴ the Court has never explicitly extended plain view to include the sense of smell. In *Taylor v. United States*,²⁵ decided during the Prohibition Era, the Court held that the detection by officers of the odor of whiskey did not authorize a warrantless search.²⁶ *Taylor*, however, involved the search of part of the defendant's home,²⁷ and therefore should not be interpreted as a blanket condemnation of plain smell.²⁸

23. See *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971). The plain view doctrine allows an officer to seize evidence in plain view without a warrant. See *id.*

24. See *Minnesota v. Dickerson*, 508 U.S. 366, 373-75 (1993). Most state and federal courts had already recognized a plain feel corollary to plain view at the time *Dickerson* was decided. See *id.* at 371 n.1; Harvey, *supra* note 12, at 889 & n.131. The terms "plain touch" and "plain feel" are used interchangeably in this Note.

25. 286 U.S. 1 (1932).

26. See *id.* at 6.

27. The law enforcement agents smelled the odor of whiskey coming from the defendant's garage. See *id.* at 5.

28. Fourth Amendment protection is contingent upon a showing of a legitimate expectation of privacy. See Agati, *supra* note 12, at 931 (citing *United States v. Katz*, 389 U.S. 347, 352 (1967)). The expectation of privacy in buildings, especially the home, is greater than that in other places, such as vehicles. See *Carroll v. United States*, 267 U.S. 132, 153 (1925); see also *Dorman v. United States*, 435 F.2d 385, 389 (D.C. Cir. 1970) ("Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment.").

Sixteen years later, in *Johnson v. United States*,²⁹ the Court again invalidated a warrantless search based on the officers' detection of a distinctive odor.³⁰ Like *Taylor*, however, the place searched in *Johnson* was part of a building.³¹ Significantly, the Court indicated that *Taylor* did not stand for the proposition that evidence of odors could never constitute sufficient probable cause for a search.³² The Court also stated that:

[i]f the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of most persuasive character.³³

Thus, the Court expressly recognized the validity of considering distinctive odors in the determination of probable cause for obtaining a search warrant.³⁴ Nevertheless, the Court was openly wary of any search conducted without a warrant.³⁵ At best, therefore, *Johnson* was inconclusive on the issue of plain smell.

The most recent Supreme Court case to address plain smell, *United States v. Johns*,³⁶ has been cited by some courts and commentators as an endorsement of the plain smell doctrine.³⁷

29. 333 U.S. 10 (1948).

30. See *id.* at 15. The Court so held even though the officers immediately detected the "strong odor of burning opium which to them was distinctive and unmistakable." *Id.* at 12.

31. See *id.*

32. See *id.* at 13.

33. *Id.*

34. If the Supreme Court is willing to concede that odor alone may be enough to obtain a search warrant, it is difficult to imagine why odor alone could not justify a warrantless search when an exception to the warrant requirement exists.

35. See *Johnson*, 333 U.S. at 14 ("Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.").

36. 469 U.S. 478 (1985).

37. See *People v. Cruz*, 409 N.W.2d 797, 799-800 (Mich. Ct. App. 1987) ("[T]he Court [in *United States v. Johns*] reasoned that the officers had probable cause to search the vehicles themselves once they detected the distinct odor of marijuana. Given this probable cause, the search of the package without a warrant was permissible"); *State v. Afisprung*, 854 P.2d 873, 877 (N.M. Ct. App. 1993) (citing *United States v. Johns* as recognizing the "plain odor"

Unfortunately for plain smell proponents, however, such claims are untenable. Justice O'Connor expressly stated in her majority opinion that the plain smell issue was not before the Court.³⁸ Moreover, in acknowledging that the officers had probable cause to search without a warrant, the Court mentioned a series of factors leading to the finding of probable cause,³⁹ and indicated that it was a combination of those surrounding circumstances that suggested that the trucks were involved in smuggling activity.⁴⁰ The finding of probable cause in *Johns*, therefore, is more aptly characterized as a totality of the circumstances analysis than as an implementation of the plain smell doctrine. As such, *Johns* does not represent Supreme Court approval of plain smell.

Despite the Supreme Court's failure to adopt plain smell, the lower federal courts embrace it overwhelmingly.⁴¹ The Fourth

doctrine); Ned E. Schwartz, Comment, *Constitutional Law - Fourth Amendment - When May a Police Officer's Perception of Certain Odors Provide a Sufficient Basis for Searches or Seizures Without Warrants?*, 32 N.Y.L. SCH. L. REV. 137, 148 (1987) ("In *United States v. Johns*, the odor of marijuana emanating from trucks justified a search of their contents." (footnote omitted)). Although the Schwartz Comment also advocates adoption of plain smell, it focuses narrowly on United States Supreme Court jurisprudence. See *id.* at 140. This Note, in contrast, argues that Supreme Court resolution of the plain smell issue is unlikely at this juncture, and that each jurisdiction in which the issue remains unsettled should therefore take the initiative to adopt plain smell without waiting for the Supreme Court to do so.

38. See *Johns*, 469 U.S. at 481 ("The Court of Appeals rejected the Government's contentions that the plain odor of mari[j]uana emanating from the packages made a warrant unnecessary and that respondents . . . lacked standing to challenge the search of the packages. *Neither of these issues is before this Court.*" (emphasis added) (citation omitted)).

39. See *id.* at 480-81 (noting that defendants were already under surveillance for suspected drug smuggling; defendants drove trucks to a remote airstrip near the Mexican border; two small planes landed; defendants' trucks approached the planes and then the planes left).

40. See *id.* at 482.

41. See, e.g., *United States v. Neumann*, 183 F.3d 753, 756 (8th Cir. 1999) (finding that officer's detection of the odor of marijuana gave him probable cause to search the entire vehicle for drugs); *United States v. Taylor*, 162 F.3d 12, 21 (1st Cir. 1998) (same); *United States v. Downs*, 151 F.3d 1301, 1303 (10th Cir. 1998) (holding that strong odor of raw marijuana emanating from defendant's vehicle gave officer probable cause to search trunk); *United States v. Garza*, 10 F.3d 1241, 1246 (6th Cir. 1993) (holding that agent's detection of the odor of marijuana gave him probable cause to search vehicle); *United States v. Pierre*, 958 F.2d 1304, 1310 (5th Cir. 1992) (upholding a warrantless search of a vehicle when border patrol agents stopped vehicle for routine questioning and smelled freshly burned marijuana); *United States v. Morin*, 949 F.2d 297, 300 (10th Cir. 1991) (holding that the "odor of marijuana alone can satisfy the probable cause requirement to search a vehicle or baggage"); *United States v. Russell*, 670 F.2d 323, 325 (D.C. Cir. 1982) (stating, "[p]lain view,' we think it safe to say, encompasses 'plain touch,' and probably 'plain smell' as well"); *United States*

Circuit has taken a particularly strong stance on the issue of plain smell.⁴² In *United States v. Sifuentes*,⁴³ for example, the Fourth Circuit suggested that the detection of the odor of marijuana places it into "plain view."⁴⁴ In *United States v. Haley*,⁴⁵ that court again noted that an odor emanating from a container brings the contents of that container "into plain view,"⁴⁶ and further stated that "odor alone is sufficient cause to search" such containers.⁴⁷ The *Haley* Court expressly asserted that an officer's detection of the odor of marijuana originating from a vehicle creates sufficient probable cause for a warrantless search.⁴⁸ Thus, despite a lack of guidance from the Supreme Court on plain smell, the Fourth Circuit, like the majority of federal courts, has unambiguously given its imprimatur to the plain smell doctrine.

The groundwork for the Supreme Court to decisively adopt plain smell was sufficiently laid over a decade ago, yet the Court has

v. *Haley*, 669 F.2d 201, 203 (4th Cir. 1982) (upholding a warrantless search of garbage bags containing marijuana based on the smell of marijuana); *United States v. Rivera*, 595 F.2d 1095, 1099 (5th Cir. 1979) (finding that odor of marijuana established probable cause for a search); *United States v. Pond*, 523 F.2d 210, 211 (2d Cir. 1975) (holding that informant's detection of odor of marijuana was sufficient to provide probable cause for issuance of a search warrant); *United States v. Johnston*, 497 F.2d 397, 398 (9th Cir. 1974) (recognizing the validity of finding probable cause based on odor alone); *United States v. Valen*, 479 F.2d 467, 471 (3d Cir. 1973) (validating a search of a suitcase based solely on officer's detection of the odor of marijuana); *United States v. Leazar*, 460 F.2d 982, 984 (9th Cir. 1972) (holding that police officer's detection of marijuana odor in car created probable cause for arrest); see also *Holtz*, *supra* note 17, at 533 & n.73 (stating that the majority of courts addressing plain smell have adopted it, and providing a list of such courts). But see *United States v. Dien*, 609 F.2d 1038, 1045 (2d Cir. 1979) (refusing to apply plain smell doctrine to odor of marijuana emanating from cardboard boxes in defendant's van). Neither the Seventh nor the Eleventh Circuit have ruled directly on plain smell.

42. See *United States v. Norman*, 701 F.2d 295, 297 (4th Cir. 1983) (stating that for an object to be in plain view, it must be "obvious to the senses," and "[t]o be obvious to the senses, [an item] need only reveal itself in a characteristic way to one of the senses" (emphasis added)); *Haley*, 669 F.2d at 203 (upholding a warrantless search of garbage bags based on the smell of marijuana); *United States v. Sifuentes*, 504 F.2d 845, 848 (4th Cir. 1974) (holding that officer had probable cause to conduct a warrantless search of a vehicle when he smelled marijuana).

43. 504 F.2d 845 (4th Cir. 1974).

44. See *id.* at 848.

45. 669 F.2d 201 (4th Cir. 1982).

46. *Id.* at 203.

47. *Id.* at 204 n.3.

48. See *id.* at 203 (citing *United States v. Haynie*, 637 F.2d 227 (4th Cir. 1980)).

continually failed to do so.⁴⁹ In fact, the last time the plain smell issue was involved in a Supreme Court opinion, the Court made it clear that it was not settling the question.⁵⁰ Thus, despite the virtually unanimous acceptance of plain smell among the federal circuits, state courts are free to decide the issue on their own. As a result, two problems have arisen. First, the interpretation of the Fourth Amendment by some states' highest courts directly conflicts with the federal courts' interpretation of the Fourth Amendment. Second, in states in which the highest court has yet to address the issue, the lower courts are left with no mandatory authority from which to draw guidance. The result of the second problem is an ad hoc determination of probable cause each time a plain smell case arises, allowing for lack of uniformity within the same state. Supreme Court adoption of plain smell would remedy both problems. With no serious split among the federal circuits, however, waiting for the Supreme Court to resolve the issue may not be the wisest solution.

THE UNDERLYING PROBLEM WITH LEAVING THE ISSUE UNSETTLED

It is axiomatic that the law should be administered uniformly within the same jurisdiction. This concept applies to both the application of state law within a single state, as well as the application of federal law across all fifty states. Obvious concerns over fairness, certainty, and stability in the law arise when there is variance in the interpretation of a specific law⁵¹ within the same jurisdiction.⁵² Despite the indisputable logic behind consistency in law enforcement, there is a current lack of uniformity in the United

49. See Schwartz, *supra* note 37, at 140. Schwartz based his argument largely on the fact that Supreme Court jurisprudence reflects substantial confidence in the role of odor as a factor leading to a determination of probable cause. See *id.* at 147-48, 157, 159.

50. See *supra* note 38 and accompanying text.

51. This reasoning applies equally whether the law in question is a statute, a constitutional provision, or common law.

52. See Laurie R. Wallach, Note, *Intercircuit Conflicts and the Enforcement of Extracircuit Judgments*, 95 YALE L.J. 1500, 1506 (1986) (recognizing that subjecting different people in a single jurisdiction to different sets of laws "raises the specter of inequitable treatment").

States with regard to the application of the plain smell doctrine.⁵³ This lack of uniformity results in confusion among the lower courts, police officers, attorneys, and citizens of those jurisdictions as to whether an officer's olfactory detection of the odor of marijuana⁵⁴ is sufficient in itself to create probable cause for a search.

Lack of Uniformity Within States

Through their rulings at the intermediate appellate level, several states have failed to articulate a clear position on the issue of plain smell.⁵⁵ One state appears to be so confused with regard to plain smell that its appellate courts have oscillated on the issue on an

53. This lack of uniformity can be seen within individual states that have given contradictory rulings on plain smell, see *infra* notes 55-60 and accompanying text, as well as across state borders, with states differing over whether the Fourth Amendment authorizes the adoption of the plain smell doctrine, see *infra* notes 61-66 and accompanying text.

54. The plain smell doctrine is not limited to the detection of the smell of marijuana. See, e.g., *Pong Ying v. United States*, 66 F.2d 67, 67-68 (3d Cir. 1933) (holding that narcotics officer's detection of the odor of burning opium justified a warrantless search); *State v. Schubert*, 561 A.2d 1186, 1192 (N.J. Super. 1989) (holding that the strong odor of gasoline emanating from car of arson suspect created probable cause to search the vehicle). The vast majority of plain smell cases, however, involve the odor of marijuana. As such, this Note speaks primarily about police officers' detection of the odor of marijuana, but its thesis is not so limited in scope.

55. Virginia and Georgia are exemplary. In Virginia, the Court of Appeals has hinted at an acceptance of plain smell, but has never clearly adopted the doctrine. See *Commonwealth v. Jones*, 1997 WL 557005, at *1 (Va. Ct. App. Sept. 9, 1997) (appearing to find probable cause based on odor alone, but not clearly excluding other factors from the holding); *Lewis v. Commonwealth*, 1997 WL 260581, at *1-2 (Va. Ct. App. May 20, 1997) (suggesting, but not expressly stating, that the odor of marijuana alone gave officer probable cause to search vehicle). The situation in Georgia is substantially similar to that in Virginia. Compare *Brewer v. State*, 199 S.E.2d 109, 112 (Ga. Ct. App. 1973) (stating that odor of marijuana is not in itself sufficient evidence to establish probable cause), *overruled by State v. Folk*, 521 S.E.2d 194, 198 (Ga. Ct. App. 1999), and *Albert v. State*, 511 S.E.2d 244, 248 (Ga. Ct. App. 1999) (recognizing that the issue of plain smell was still unresolved in Georgia, and holding that odor of marijuana was only one factor in the determination of probable cause), with *Rogers v. State*, 205 S.E.2d 901, 903 (Ga. Ct. App. 1974) (recanting prior statement from *Brewer* that odor alone cannot establish probable cause), and *State v. Folk*, 521 S.E.2d 194, 198 (Ga. Ct. App. 1999) ("We now hold that a trained police officer's perception of the odor of burning marijuana . . . constitutes sufficient probable cause to support the warrantless search of a vehicle."). Although *Folk* appears to settle the issue of plain smell in Georgia, it remains to be seen whether the Georgia Supreme Court will ratify that decision if given the opportunity to rule on plain smell.

almost yearly basis.⁵⁶ The fact that the intermediate appellate courts in these jurisdictions have given contradictory rulings on plain smell, coupled with these states' highest courts' failure to decide the issue, leaves the lower courts free to accept or reject plain smell on an ad hoc basis.⁵⁷ With a plain smell case before it, therefore, a court in one of these jurisdictions may simply choose to follow the precedent that most conveniently matches its own personal views.⁵⁸ The inevitable result is a disturbing lack of uniformity in the administration of the law within the same jurisdiction.⁵⁹ Such lack of uniformity wears the badge of arbi-

56. Ohio has been extraordinarily indecisive on the plain smell issue. *Compare* *State v. Jones*, 1998 WL 515939, at *3 (Ohio Ct. App. Aug. 3, 1998) (holding that "suspicious odors must be confirmed by tangible evidence in order to justify a search"), and *State v. Fisher*, 1997 WL 799912, at *2-3 (Ohio Ct. App. Dec. 26, 1997) (holding that odor of marijuana could lead to a finding of probable cause only in conjunction with other factors), and *State v. Haynes*, 1996 WL 649167, at *5 (Ohio Ct. App. July 19, 1996) (holding that odor of marijuana plus "additional articulable facts, is sufficient to establish probable cause"), and *State v. Younts*, 637 N.E.2d 64, 67-69 (Ohio Ct. App. 1993) (holding that odor of marijuana alone did not provide officer with probable cause to search vehicle) *with* *State v. Moore*, 1999 WL 770216, at *5 (Ohio Ct. App. Sept. 1, 1999) (holding that detection of odor of marijuana by trained police officer is sufficient probable cause to search a vehicle), and *State v. Woods*, 680 N.E.2d 729, 731 (Ohio Ct. App. 1996) ("The plain view and plain smell doctrines have both been accepted by the courts of this state. . . ."), and *State v. Garcia*, 513 N.E.2d 1350, 1352 (Ohio Ct. App. 1986) (stating that the smell of marijuana by itself could provide probable cause for a warrantless search).

57. *See, e.g.*, *Commonwealth v. Poe*, (Va. Gen. Dist. Ct., July 12, 1999) (notes on file with the author) (ruling that smell alone of marijuana did not support a finding of probable cause); *Commonwealth v. Braun*, 1992 WL 884994, at *1-2 (Va. Cir. Ct. Oct. 29, 1992) (holding search illegal after failing to consider the fact that the officer had detected the odor of marijuana before extending the scope of a Terry search to the defendant's pocket knife and vehicle). Although such rulings appear contrary to the spirit of rulings by the Virginia Court of Appeals, *see supra* note 55, they will continue to be possible until the Virginia Court of Appeals, or preferably the Virginia Supreme Court, takes a firm stance on plain smell.

58. *Compare* *Moore*, 1999 WL 770216, at *4 (citing an Ohio case from 1986 as support for its holding that plain smell is enough for probable cause), *with* *Haynes*, 1996 WL 649167, at *5 (adhering to two 1995 Ohio cases in holding that odor is only one factor in finding of probable cause).

59. In such jurisdictions, those who rely on the law as guidance for their daily responsibilities are consistently forced onto shaky ground when dealing with a plain smell situation. Police officers are left with uncertainty and frustration when faced with the prospect of making a probable cause determination in the field. With no way to be certain whether a court will uphold a determination of probable cause based on plain smell, the officer is forced to release suspects even when he is relatively certain they possess contraband, or risk conducting a search that a court will later find illegal. Given the nature of the profession, it is not an earth-shattering assertion to say that it is preferable to provide police officers with as much certainty as possible in the performance of their duties. *See*

trariness, thus engendering distrust and confusion among citizens with regard to the criminal justice system.⁶⁰ Consistency in decisionmaking, conversely, engenders the respect and deference that our justice system should command.

Inconsistency Across State Lines

In addition to the contradictory rulings on plain smell that exist within certain states, there is a lack of uniformity on the plain smell issue across state borders. Although the majority of jurisdictions addressing the issue have adopted the plain smell doctrine,⁶¹ Michigan and Montana have expressly rejected it.⁶² Consequently, one may gain or lose a certain amount of Fourth Amendment protection simply by traveling from one state to

ROTHWAX, *supra* note 21, at 60 ("[E]very day of the week, cops have to make quick decisions under highly stressful circumstances, burdened by the foggyiness of the law.").

With such uncertainty in the courts, both prosecutors and defense attorneys will be on unsteady ground when they pursue a plea bargain in a plain smell case. On the one hand, prosecutors will be pressured to strike a bargain rather than risk seeing the defendant go unpunished. As a result, dangerous criminals will sometimes be put back on the street much sooner than they would have been had the case gone to trial. On the other hand, defense attorneys will be pressured to accept a deal rather than risk the tougher sentence for their client that would result from a conviction. As a result, defendants who could have walked away with a dismissal will now have a criminal record.

60. See, e.g., *New York v. Belton*, 453 U.S. 454, 459-60 (1981) ("When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority."); see also *Wallach*, *supra* note 52, at 1511 (noting a correlation between a lack of uniformity in the application of the law and diminishing faith in the judicial system).

61. See *Holtz*, *supra* note 17, at 533; see, e.g., *State v. Harrison*, 533 P.2d 1143, 1144 (Ariz. 1975); *People v. Gregg*, 117 Cal. Rptr. 496, 499 (1974); *Porter v. State*, 302 So. 2d 481, 482 (Fla. Dist. Ct. App. 1974); *State v. Sandoval*, 590 P.2d 175, 177 (N.M. Ct. App. 1979); *State v. Wallace*, 563 P.2d 1237, 1239 (Or. Ct. App., 1977); *Commonwealth v. Stoner*, 344 A.2d 633, 636 (Pa. Super. Ct. 1975); *Luera v. State*, 561 S.W.2d 497, 498 (Tex. Crim. App. 1978); *State v. South*, 932 P.2d 622, 624 (Utah Ct. App. 1997) (recognizing the validity of the plain smell doctrine with regard to searches of vehicles).

62. See *People v. Taylor*, 564 N.W.2d 24, 30 (Mich. 1997), *overruled by* *People v. Kazmierczak*, 605 N.W.2d 667 (Mich. 2000); *People v. Hilber*, 269 N.W.2d 159, 161-63 (Mich. 1978); *State v. Olson*, 589 P.2d 663, 665 (Mont. 1979); *State v. Schoendaller*, 578 P.2d 730, 734 (Mont. 1978). This Note was substantially in progress at the time *Taylor* was overruled. The fact that the Michigan Supreme Court has now adopted the plain smell doctrine serves to bolster this Note's ultimate thesis. See *infra* note 143. By recognizing that plain smell is a viable doctrine, Michigan has implicitly acknowledged that the arguments in favor of plain smell outweigh the arguments in opposition.

another. From a purely legal standpoint, such discrepancies would not be troubling if they were based on a distinction between the state constitutions and the Fourth Amendment.⁶³ Both Michigan and Montana, however, made it clear that their decisions to reject plain smell were based on their interpretations of the Fourth Amendment to the United States Constitution, not on some broader provision of their own constitutions.⁶⁴ The problem, therefore, lies in the lack of uniformity among states in interpreting the same provision of the Federal Constitution.⁶⁵ Such a divergence of interpretation is contrary to the constitutional mandate that all people are to receive the "equal protection of the laws."⁶⁶

THE PROS AND CONS OF PLAIN SMELL

The Case Against Plain Smell

The Supreme Court accepted the validity of the plain view doctrine in 1971,⁶⁷ and recently adopted a plain touch corollary to plain view.⁶⁸ The sense of smell, however, has been criticized as being less reliable than the senses of sight and touch.⁶⁹ The

63. States are free to shape their own constitutions to provide *more* protection to their citizens from governmental intrusions than the Federal Constitution provides. See *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982); Kevin John Licciardi, *Criminal Procedure: Search and Seizure*, 29 RUTGERS L.J. 1308, 1308 (1998).

64. See *Taylor*, 564 N.W.2d at 28 n.4; *Schoendaller*, 578 P.2d at 733. With regard to the determination of probable cause, state courts generally read their own constitution as a mirror of the Fourth Amendment. See Licciardi, *supra* note 63, at 1314 & n.43.

65. What makes this situation especially perplexing is that both the United States District Court for the Eastern District of Michigan and the Sixth Circuit Court of Appeals have clearly approved of plain smell in a case with facts similar to those in *Taylor*. See *United States v. Garza*, 10 F.3d 1241, 1246 (6th Cir. 1993) (affirming the District Court's holding that the smell of marijuana gave a government agent probable cause to search a vehicle). This provides an added layer of dissension between Michigan's state courts and the federal courts within Michigan's own circuit with regard to the interpretation of the Fourth Amendment.

66. U.S. CONST. amend. XIV, § 1. The Fourth Amendment is applicable to the states through the Fourteenth Amendment. See *Mapp v. Ohio*, 367 U.S. 643 (1961); see also *Aguilar v. Texas*, 378 U.S. 108, 110 (1964) (holding that the same standards for obtaining a warrant apply to the states as to the federal government).

67. See *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971).

68. See *Minnesota v. Dickerson*, 508 U.S. 366, 373-75 (1993).

69. See *United States v. Pace*, 709 F. Supp. 948, 956 (C.D. Cal. 1989); *Taylor*, 564 N.W.2d at 30; *People v. Hilber*, 269 N.W.2d 159, 164 (Mich. 1978).

principal arguments for rejecting a plain smell corollary to plain view focus on the difficulty in determining the amount of time that the odor has been present,⁷⁰ the mobility of odors,⁷¹ and the inability to immediately attribute the odor to an identifiable source.⁷² Each of these arguments suggests that the sense of smell is too unreliable to support a finding of probable cause.

The sense of smell may be inadequate to create probable cause because it is difficult to ascertain how long an odor has been present in the location where it is detected. Several courts and commentators have focused on the fact that odors can "linger" for a substantial period of time after the source of the odor is no longer present.⁷³ Such a lingering effect makes it uncertain whether the odor that the officer has detected can be attributed to an object that is physically present. The argument has been raised, therefore, that "it is not reasonable to infer present use of marijuana, or to conduct a search for it . . . absent determination with reasonable accuracy of the time frame of use in relation to defendant's" current location.⁷⁴ Given the difficulty of such a determination, the mere odor of marijuana should arguably not be sufficient to create probable cause for a search.

Plain smell, moreover, may not be viable because of the mobility of odors. In choosing to reject plain smell, one court referred to the fact that odors can be carried by the wind to a location where the

70. See *Brewer v. State*, 199 S.E.2d 109, 112 (Ga. Ct. App. 1973); *Hilber*, 269 N.W.2d at 164; *State v. Schoendaller*, 578 P.2d 730, 734 (Mont. 1978); *State v. Jones*, 1998 WL 515939, at *3 (Ohio Ct. App. Aug. 3, 1998).

71. See *Jones*, 1998 WL 515939, at *3; see also *Taylor*, 564 N.W.2d at 30 (suggesting that the odor of marijuana could travel in a car that has never contained marijuana).

72. See *Taylor*, 564 N.W.2d at 30. Additional arguments against plain smell assert that there is inconsistency among people with regard to the acuteness of their sense of smell, see *Hilber*, 269 N.W.2d at 164, that it is not always logical to infer that one who has smoked marijuana recently now possesses it, see *id.*, and that there is a lack of tangible evidence that the odor ever existed, see *Pace*, 709 F. Supp. at 956; *Jones*, 1998 WL 515939, at *3. Inasmuch as the latter concern reflects a distrust of taking a police officer at his word, it should be noted that much of the evidence upon which police base their determinations of probable cause cannot be produced at trial, such as furtive movements, suspicious behavior, tips of confidential informants, etc. Moreover, it is patently unworkable to base Fourth Amendment jurisprudence on the assumption that police officers will lie.

73. See *Brewer*, 199 S.E.2d at 112; *Taylor*, 564 N.W.2d at 30; *Hilber*, 269 N.W.2d at 164; *Schoendaller*, 578 P.2d at 734 ("[T]he mere odor of marijuana might linger in an automobile for more than a day."); Schwartz, *supra* note 37, at 162.

74. *Hilber*, 269 N.W.2d at 164.

source of the odor was never present.⁷⁵ Relying on their sense of smell alone, consequently, "might very easily mislead officers into fruitless invasions of privacy where there is no contraband."⁷⁶ The concern appears to be that an officer will conduct some searches based on his detection of a suspicious odor that has no actual connection, past or present, to the place or party being searched. Thus, the mobility of odors may weigh against the adoption of the plain smell doctrine.

Another criticism of plain smell is that, unlike plain view or plain feel, it is virtually impossible to attribute an odor to a precise location or person without additional evidence. "When an officer sees or feels contraband, he knows it is present and he can tell who has possession of that contraband. The same is not true with the sense of smell."⁷⁷ The idea is that a search predicated on smell alone will necessarily be more intrusive than a search that follows the detection of an item by sight or touch, because the officer does not know the precise location of the contraband before searching.⁷⁸ This potential inability to begin the search by focusing immediately on a particular place or individual creates another argument against the adoption of a plain smell corollary to plain view.

Why the Case Against Plain Smell is Unconvincing

Although the arguments against plain smell have merit, they all have weaknesses that weigh against a blanket refusal to allow odor alone to support a finding of probable cause. The case against plain

75. See *Jones*, 1998 WL 515939, at *3.

76. *Schoendaller*, 578 P.2d at 734; see also *People v. Marshall*, 442 P.2d 665, 670 (Cal. 1968) ("Even a most acute sense of smell might mislead officers into fruitless invasions of privacy where no contraband is found."), *disapproved in Guidi v. Superior Court*, 513 P.2d 908 (Cal. 1973) (overruling any interpretation of *Marshall* that created a holding on the issue of the power of police to seize a bag in plain sight that had previously been described as containing contraband, based on odor and other evidence).

77. *Taylor*, 564 N.W.2d at 30; see also *Marshall*, 442 P.2d at 670 (suggesting that one problem with plain smell is that the officer must still conduct a search for the item after he has detected the odor in "plain view").

78. See *Marshall*, 442 P.2d at 669-70 ("To hold . . . that an odor, either alone or with other evidence of invisible contents can be deemed the same as or corollary to plain view, would open the door to snooping and rummaging through personal effects."). This may be especially problematic in a situation in which more than one person occupies the area to be searched because the officer cannot readily connect the odor to a specific individual.

smell is unconvincing for three key reasons. First, with regard to the determination of whether contraband is present, the sense of smell is at least as reliable as the sense of touch, which has the Supreme Court's imprimatur as a corollary to plain view.⁷⁹ Second, the fact that odors have the ability to linger and move from one place to another merely suggests that an officer cannot be one hundred percent certain that contraband is present.⁸⁰ It does not, however, suggest that an officer cannot reasonably believe from his detection of an odor that there is a "fair probability that contraband or evidence of a crime will be found in a particular place."⁸¹ Third, the inability to immediately link an odor to a particular individual militates against the determination of probable cause to arrest, but not against the determination of probable cause to search.⁸²

The sense of smell is at least as reliable as the sense of touch in determining whether contraband is present, and should therefore be accorded equal status to touch within the plain view doctrine. Use of the sense of touch "does not usually result in the *immediate* knowledge of the nature of the item."⁸³ With regard to the detection of certain items of contraband, however, the sense of touch can be just as reliable as the sense of sight.⁸⁴ Such is the case when "objects have a distinctive and consistent feel and shape that an officer has been trained to detect and has previous experience in detecting . . ."⁸⁵ To put it plainly, the sense of touch is occasionally

79. See *infra* notes 84-87 and accompanying text.

80. See *infra* notes 88-92 and accompanying text.

81. *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (discussing what is required to find probable cause).

82. See *infra* notes 93-98 and accompanying text.

83. *State v. Broadnax*, 654 P.2d 96, 102 (Wash. 1982), *overruled by Minnesota v. Dickerson*, 508 U.S. 366 (1993) (abrogating *Broadnax's* holding that nonthreatening contraband could not be seized in a *Terry* frisk). Like smell, the sense of touch has also been criticized as too unreliable to create probable cause. See Anne Bowen Poulin, *The Plain Feel Doctrine and the Evolution of the Fourth Amendment*, 42 VILL. L. REV. 741, 775 (1997). As previously noted, however, the Supreme Court has recognized the validity of the sense of touch in creating probable cause. See *supra* note 68 and accompanying text.

84. See *United States v. Pace*, 709 F. Supp. 948, 955 (C.D. Cal. 1989).

85. *Id.* By analogy then, the sense of smell would also be reliable in detecting objects that have a distinctive odor, such as marijuana, when an officer has previous experience or training in identifying the smell. Some courts have even suggested that the sense of hearing may fit into the plain view doctrine, allowing statements overheard without the benefit of listening devices to be admissible at trial. See, e.g., *United States v. Jackson*, 588 F.2d 1046, 1051-52 (5th Cir. 1979), *cert. denied*, 442 U.S. 941 (1979); *United States v. Fisch*, 474 F.2d

as reliable as the sense of sight. The same can certainly be said for the sense of smell. Although smell will not always be highly reliable, in some circumstances "smell may actually convey a *more certain* indication of crime than sight."⁸⁶ Smell, therefore, is analogous to touch in that it is occasionally as reliable as sight. More importantly, the reliability of the sense of smell will sometimes exceed that of touch in determining the nature of a particular object.⁸⁷ Thus, given the broad acceptance of plain view and plain touch, the argument that plain smell should be rejected because the sense of smell is too unreliable must fail.

The mobility of odors and their ability to linger are also unconvincing as impediments to the creation of a uniform exception based on plain smell. The thrust behind these criticisms is that officers will be misled into conducting searches that do not actually uncover contraband, thus creating "fruitless invasions of privacy."⁸⁸ The obvious flaw with this argument is that it demands from police officers a level of certainty well beyond that required for probable cause. Probable cause does not mandate that the officer be absolutely certain that his search will uncover contraband, but rather requires "a fair probability that contraband or evidence of a crime will be found in a particular place."⁸⁹ Provided the officer has a reasonable belief that contraband is present, it is irrelevant

1071, 1076-78 (9th Cir. 1973), *cert. denied*, 412 U.S. 921 (1973). Taste has also been mentioned. *See State v. Washington*, 396 N.W.2d 156, 161-62 (Wis. 1986) ("Evidence in plain view . . . includes the realization of items or events to all of the human senses, smell, sight, touch, hearing and taste."). Compared to sight, smell, and touch, however, the senses of taste and hearing have received minimal attention in discussions of probable cause to search.

86. Schwartz, *supra* note 37, at 161 (citing 1 WAYNE R. LAFAYE, SEARCH AND SEIZURE § 3.6, at 651 (1978)) (emphasis added). Although this may not always be the case, it is easy to imagine circumstances in which the odor of a substance will be more telling than its physical appearance. For example, while the odor of marijuana is unique, its physical appearance could easily be confused with other green leafy substances, such as parsley or oregano. *See Henry Farber, Crime Evidence Technician Maintains 'Chain of Custody'* ATLANTA J. & ATLANTA CONST., Nov. 11, 1999, at 5, available in 1999 WL 3811320.

87. *Cf. Broadnax*, 654 P.2d at 102 (rejecting officer's plain touch finding of probable cause in part because the feel of the drug lacked the same "distinctive character" as the smell of marijuana).

88. *People v. Marshall*, 442 P.2d 665, 670 (Cal. 1968); *State v. Schoendaller*, 578 P.2d 730, 734 (Mont. 1978).

89. *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *see also Brinegar v. United States*, 338 U.S. 160, 175 (1949) ("In dealing with probable cause, . . . as the very name implies, we deal with probabilities.").

whether the search bears fruit.⁹⁰ In justifying its acceptance of the plain touch doctrine, moreover, the Supreme Court characterized the sense of touch as having "*sufficient* reliability," not absolute reliability.⁹¹ It has already been established that the sense of smell is as reliable as the sense of touch in detecting contraband.⁹² Thus, rejecting plain smell based on the fear that it will produce occasional fruitless searches is inconsistent with both the Supreme Court's acceptance of plain touch and the standard of probable cause dictated by the Fourth Amendment.

The criticism that plain smell searches will be overly broad because odors can seldom be immediately attributed to a specific individual is also untenable, especially when one considers situations in which officers detect an odor that can be linked only to a single person.⁹³ Furthermore, even when the officer is confronted with a group of people in the vicinity of the odor, the fact that he may not be able immediately to ascertain which of those individuals is linked to the odor is not dispositive of his right to conduct a search. To draw such a conclusion is to confuse the demands of probable cause to arrest with those of probable cause to search.

Although the same *amount* of evidence is required to create probable cause to search and probable cause to arrest, "[e]ach requires a showing of probabilities as to somewhat different facts and circumstances—a point which is seldom made explicit in the appellate cases."⁹⁴ Whereas probable cause to *arrest* exists where an officer has a reasonable belief that some *person* possesses contraband,⁹⁵ probable cause to *search* exists "if the man of ordinary

90. See *Texas v. Brown*, 460 U.S. 730, 742 (1983).

91. See *Minnesota v. Dickerson*, 508 U.S. 366, 376 (1993) (emphasis added). Significantly, the Supreme Court has endorsed plain touch despite criticism that the doctrine results in searches that uncover nothing illegal. See Poulin, *supra* note 83, at 759.

92. See *supra* notes 83-87 and accompanying text.

93. An officer detecting the odor of marijuana emanating from a vehicle with a single occupant is an example of such a situation.

94. 1 *LAFAVE*, *supra* note 12, § 3.1(b), at 544; see also *United States v. Watson*, 423 U.S. 411, 425-33 (1976) (Powell, J., concurring) (acknowledging the distinction between arrests and searches with regard to the warrant requirement); *State v. Heinz*, 480 A.2d 452, 460 (Conn. 1984) (recognizing the distinction between probable cause to search and probable cause to arrest); *State v. Doe*, 371 A.2d 167, 169 (N.H. 1975) ("[P]robable cause to search is not the same as probable cause to arrest.").

95. See Poulin, *supra* note 83, at 775.

caution would be justified in believing that what is sought will be found in the *place* to be searched⁹⁶ Thus, it is perfectly conceivable that probable cause would exist to search a particular place although there is no probable cause to arrest any person who occupies that place.⁹⁷ Probable cause to arrest, for example, may arise only after a search produces incriminating evidence, which can then be linked to a particular individual. In the common situation in which an officer detects the odor of marijuana emanating from a vehicle with multiple occupants, therefore, the fact that the odor is not immediately attributable to any one of the occupants is immaterial to the determination of probable cause to search the vehicle.⁹⁸ In the plain smell context, consequently, the argument that odors are not always immediately attributable to a particular individual may militate against a contemporaneous finding of probable cause to arrest, but not against a finding of probable cause to search.

The Case for Plain Smell

There are several compelling arguments in support of plain smell. First, plain smell is a logical extension of the well-established plain view doctrine. Second, human olfactory detection of contraband cannot logically be distinguished from a trained canine "alert" on an object or place that contains contraband, which is almost

96. *Doe*, 371 A.2d at 169 (emphasis added); see also 1 LAFAVE, *supra* note 12, § 3.1(b), at 545 (indicating that determination of probable cause to search is based on connecting the items sought with their present location); Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687 (1961) (stating that the function of probable cause to search "is to guarantee a substantial probability that the invasions involved in the search will be justified by discovery of offending items").

97. See 1 LAFAVE, *supra* note 12, § 3.1(b), at 544.

98. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978) ("The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought."); *Carroll v. United States*, 267 U.S. 132, 158-59 (1925) (asserting that probable cause to search an automobile is not dependent upon having probable cause to arrest anyone inside, but rather upon having a reasonable "belief that the contents of the automobile offend against the law"); 1 LAFAVE, *supra* note 12, § 3.1(b), at 547 ("[T]here can be probable cause to search a vehicle without there also being probable cause to arrest the owner or operator of that vehicle.").

universally recognized as giving rise to probable cause to search.⁹⁹ Finally, certain items of contraband emit odors that are so distinctive that the mere olfactory detection of them is sufficient to create probable cause. Hence, the case in favor of plain smell is a powerful one.

Plain smell is a logical extension of the universally accepted plain view doctrine. When formulating and developing plain view, the Supreme Court was careful to leave the door open for the expansion of the doctrine to include senses other than sight.¹⁰⁰ As previously noted, the Supreme Court has officially recognized the extension of plain view to include the sense of touch.¹⁰¹ In so doing, the Court suggested that there is no constitutional significance in distinguishing between probable cause created by touch and probable cause created by sight.¹⁰² Moreover, "[a]ny attempt to create a

99. See, e.g., *infra* note 111 and accompanying text; see also 1 LAFAYE, *supra* note 12, § 2.2(f), at 366-67 (stating that "an 'alert' by a dog is deemed to constitute probable cause for an arrest or search . . ."); cf. *Florida v. Royer*, 460 U.S. 491, 506 (1983) (plurality opinion) (indicating that a positive result of a dog sniff would have given officers probable cause to arrest the defendant).

100. In first articulating the plain view doctrine, the Supreme Court stated: "Incontrovertible testimony of the senses that an incriminating object is on the premises . . . may establish the fullest possible measure of probable cause." *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971) (emphasis added). While discussing the plain view doctrine twelve years later, the Court indicated that an officer may conduct a warrantless search if he is in a lawful position when he comes to "perceive a suspicious object." *Texas v. Brown*, 460 U.S. 730, 739 (1983). By using the word "perceive" instead of "see," the Court "implicitly acknowledged the possibility of a future invocation of the doctrine by the use of a sense other than sight." Holtz, *supra* note 17, at 525 n.32. Moreover, in his concurring opinion in *Brown*, Justice Stevens stated that "contraband need not be visible in order for a plain view seizure to be justified." *Brown*, 460 U.S. at 747 (Stevens, J., concurring).

101. See *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). The plain touch doctrine is not an independent exception to the warrant requirement, but rather is simply an extension of plain view. See Agati, *supra* note 12, at 942. As a result, the test used to determine whether touch may give rise to a finding of probable cause is identical to that used for plain view, see *id.* at 939; Harvey, *supra* note 12, at 900, which requires that: (1) the officer must be lawfully in the position from which he perceives the object, and (2) the object's incriminating nature must be immediately apparent. See Holtz, *supra* note 17, at 528; Agati, *supra* note 12, at 933. The "immediately apparent" prong does not require certainty by the officer, but rather is based on probability. See *Brown*, 460 U.S. at 741-42; Holtz, *supra* note 17, at 528; Gordon Van Kessel, *Chief Justice Roger Traynor and the United States Supreme Court: Contrasting Approaches to Search and Seizure*, 25 PAC. L. J. 1235, 1324 (1994). Although the test initially articulated by the Supreme Court included a third requirement of inadvertency, that requirement has since been eliminated. See *Horton v. California*, 496 U.S. 128, 136-37 (1990).

102. See *Dickerson*, 508 U.S. at 375-76; Harvey, *supra* note 12, at 903.

hierarchy of senses under the Fourth Amendment probable cause standard defies common sense and unjustifiably hinders effective law enforcement."¹⁰³ It is clear that the sense of smell is at least as reliable as the sense of touch in determining whether contraband is present.¹⁰⁴ Furthermore, "[j]ust as there is no reasonable expectation of privacy in items left in the plain view of an officer . . . , there can be no reasonable expectation that plainly noticeable odors will remain private."¹⁰⁵ To extend plain view to the sense of touch and not to the sense of smell, therefore, would be manifestly unreasonable.

This is not to say that the sense of smell is always as reliable as the sense of sight, or that plain smell should apply in all instances in which plain view would apply. Many items of contraband or evidence of crime are easily identifiable by sight, or even touch, but not by smell.¹⁰⁶ The fact that one sense is less reliable than another in certain situations, however, is not reason enough to exclude that sense from the plain view doctrine.¹⁰⁷ It simply means that other senses may be used less frequently than sight when establishing probable cause.¹⁰⁸ As such, there is no reason why each extension of plain view, whether it be for touch, smell, or any other sense, should not be allowed to operate within its own sphere of reliability.

Along the same vein as the logic behind extending plain view to include plain smell, finding probable cause based on canine detection of odors is arguably incompatible with the rejection of plain smell for humans.¹⁰⁹ With regard to a finding of probable cause, human olfactory detection of contraband cannot logically be

103. Harvey, *supra* note 12, at 902; *see also* State v. Washington, 396 N.W.2d 156, 161-62 (Wis. 1986) ("Evidence in plain view is not restricted to items which can only be seen, but rather includes the realization of items or events to all of the human senses, smell, sight, touch, hearing and taste."); Harvey, *supra* note 12, at 903 ("Probable cause is probable cause, whether based on visual, aural, olfactory, or tactile identification.").

104. *See supra* notes 83-87 and accompanying text.

105. People v. Price, 431 N.E.2d 267, 269 (N.Y. 1981).

106. Perhaps the clearest example would be a gun, or other types of weapons.

107. *See Dickerson*, 508 U.S. at 376; Agati, *supra* note 12, at 944.

108. *See Dickerson*, 508 U.S. at 376.

109. Significantly, the plain smell doctrine is the most common rationale offered to support the constitutionality of canine sniff searches. *See* William M. FitzGerald, Comment, *The Constitutionality of the Canine Sniff Search: From Katz to Dogs*, 68 MARQ. L. REV. 57, 69 (1984).

distinguished from a trained canine "alert" on an object or place that contains contraband.¹¹⁰ Nevertheless, even jurisdictions that have rejected or failed to adopt plain smell for humans allow for a finding of probable cause based solely on canine detection of odors.¹¹¹ Although it is indisputable that the canine sense of smell is much more acute than that of humans,¹¹² that simply means that human smell should be relied on in fewer cases, not that it should be rendered useless in all instances. The underlying principle is identical: One who has training or experience in detecting a particular odor is deemed sufficiently reliable in his detection of that odor to warrant a finding of probable cause.

If the odor is strong enough for a human to be able to detect it with his comparatively weak olfactory powers, there is arguably a *stronger* showing of probable cause because of the greater likelihood that contraband is currently present. Whereas a dog may detect a very faint trace of an odor that indicates only the prior presence of contraband in the area searched,¹¹³ human detection of the odor will necessarily only occur when the odor is stronger than that necessary for a canine to alert. In order for the odor to be strong

110. See *United States v. Goldstein*, 635 F.2d 356, 361 (5th Cir. 1981) (equating dog's smelling of an odor with officer's smelling of it); *United States v. Bronstein*, 521 F.2d 459, 461 (2d Cir. 1975) (equating human and canine detection of odors for Fourth Amendment purposes).

111. See *Roundtree v. State*, 446 S.E.2d 204, 206 (Ga. Ct. App. 1994) (stating that canine alert provided probable cause to search); *Kenner v. State*, 703 N.E.2d 1122, 1127 (Ind. Ct. App. 1999) (basing ultimate determination of probable cause on canine alert, and reserving "for another day the resolution of whether in Indiana the odor of marijuana standing alone constitutes probable cause" with regard to human olfactory detection); *People v. Clark*, 559 N.W.2d 78, 80 (Mich. Ct. App. 1996) (holding that canine's alert provided probable cause for warrantless search of vehicle's trunk); *State v. Riley*, 624 N.E.2d 302, 307 (Ohio Ct. App. 1993) (finding probable cause to search trunk of car based on canine alert); *Alvarez v. Commonwealth*, 485 S.E.2d 646, 650 (Va. Ct. App. 1997) (finding probable cause based on positive canine sniff of defendant's package); *Brown v. Commonwealth*, 421 S.E.2d 877, 881 (Va. Ct. App. 1992) (acknowledging that canine alert on luggage gave police probable cause to search); *Limonja v. Commonwealth*, 383 S.E.2d 476, 483 (Va. Ct. App. 1989) (finding probable cause to search based on canine alert on gift-wrapped package).

112. See JEFFREY MOUSSAIEFF MASSON, *DOGS NEVER LIE ABOUT LOVE: REFLECTIONS ON THE EMOTIONAL WORLD OF DOGS* 68 (1997) (indicating that a dog's sense of smell is up to 100 million times better than that of a human being).

113. Use of trained dogs to search is not foolproof. See, e.g., *Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd in part*, 631 F.2d 91 (7th Cir. 1980) (discussing a situation in which police dogs experienced a significant percentage of false alerts); FitzGerald, *supra* note 109, at 87 (highlighting the fact that canine sniff searches are fallible).

enough to be detected by a human, there will be either a substantial quantity of contraband in the immediate area or the contraband will have been exposed to the air fairly recently. It follows, then, that a human will be less likely than a dog to detect the odor of contraband when there is none present. The result will be fewer fruitless searches, which is good for both police, who will spend less time searching, and law-abiding citizens, who will be subjected to fewer searches. If a canine alert on an object provides sufficient probable cause to search, there is no reason that human smell should not do the same.

In addition, the fact that certain types of contraband emit an odor so distinctive as to make their source immediately apparent bolsters the arguments that plain smell is a logical extension of plain view and that acceptance of canine plain smell is incompatible with rejection of human plain smell. Numerous courts have explicitly acknowledged the distinctive character of the smell of marijuana.¹¹⁴ Significantly, police officers are consistently quoted as referring to the "distinctive" odor of marijuana.¹¹⁵ The odor is so recognizable, in fact, that acknowledgment of its uniqueness is not limited to courts and law enforcement personnel, but also extends to, among others, newspaper reporters,¹¹⁶

114. See *Bronstein*, 521 F.2d at 461 ("It is well understood that marijuana . . . has an offensive and pungent aroma."); *State v. Raymond*, 516 P.2d 58, 61 (Ariz. Ct. App. 1973); *People v. Reisman*, 277 N.E.2d 396, 399 (N.Y. 1971) (characterizing the odor of marijuana as a "telltale odor"); *State v. Broadnax*, 654 P.2d 96, 102 (Wash. 1982); *Court Decisions*, N.Y. L.J. 32 (1997) (reporting on *People v. Luis Huertas*, an unpublished decision, in which the court referred to the "distinctive odor of marijuana").

115. See *Law & Order*, STAR-LEDGER (Newark, N.J.), Oct. 7, 1997, at 39, available in 1997 WL 12565553; *News from Nashville's Neighbors*, TENNESSEAN (Nashville), May 25, 1996, at 2B, available in 1996 WL 10354054; *Take Drugs Away, Suspect Tells Police*, SEATTLE TIMES, Mar. 19, 1991, at B3, available in 1991 WL 4449881 (referring to the "unique and distinctive" odor of marijuana); Adam Weintraub, *State DWI Laws Address Drugs*, ARKANSAS GAZETTE, Oct. 2, 1989, at 4A, available in 1989 WL 6910311.

116. See Bill Coats, *Marijuana Plants Create a 'Sea of Green' in Home Series*, ST. PETERSBURG TIMES (Fla.), Oct. 17, 1997, at 6, available in 1997 WL 14071787; Diane Crowley, *"Metalhead" Son Expects Mom to Honor Their Deal*, CHI. SUN-TIMES, May 2, 1989, at 39, available in 1989 WL 5503210; Sockwell Ikimulisa, *Police Discuss Drugs, Gangs in Indianola*, DES MOINES REG., Apr. 19, 1996, at 6, available in 1996 WL 6235111 (describing the "pungent, unique scent of marijuana"); John Painter, Jr., *Drug Agents Go Calling, Hit Marijuana Jackpot*, PORTLAND OREGONIAN, Nov. 10, 1996, at C2, available in 1996 WL 11403485.

teenagers,¹¹⁷ elementary and high school principals,¹¹⁸ and retired secretaries.¹¹⁹ The odor is so readily identifiable that it has even been described as "unmistakable."¹²⁰ In light of the distinctive odor of marijuana, it is illogical to assert that an officer who has training or experience with the odor could not base his finding of probable cause on his detection of that odor alone.¹²¹ An officer who is familiar with the odor of marijuana undoubtedly could conclude, solely from his detection of that odor, that there is "a fair probability that contra-band or evidence of a crime will be found in [that] particular place."¹²² Because this standard is all that probable cause demands, the smell of marijuana alone should be sufficient to allow a finding of probable cause.

THE IMPLICATIONS OF ADOPTING PLAIN SMELL

For some, the notion of extending plain view to include the sense of smell would signal further "erosion" of the Fourth Amendment and hence result in more invasions of one's privacy.¹²³ Fears that

117. See Daryl Kelley, *Juvenile Drug Charges Have Increased Tenfold Law Enforcement: Many Teen-agers Are Using Methamphetamine, Which Is Cheaper Than Beer. But Police Work Is More Effective*, L.A. TIMES, June 19, 1995, at 1; *Port Orchard Police Arrest Husband, Wife in Pot Bust*, SEATTLE POST-INTELLIGENCER, Jan. 14, 1999, at B3, available in 1999 WL 6579912.

118. See Timothy Appleby, *Pupils Suspended After Lunch-time Drug Party*, GLOBE & MAIL (Toronto), Jan. 7, 1999, at A4, available in WL, News Library, Globemail File; Bret Jessee, *Student Accused of Drug Use Says Process Flawed*, CHARLESTON GAZETTE AND DAILY MAIL (W. Va.), Apr. 2, 1996, at 1C, available in 1996 WL 5182850.

119. See Sean Kirst, *Average Couple Wows 'Em at Woodstock*, POST-STANDARD (Syracuse, N.Y.), July 26, 1999, at B1, available in 1999 WL 4694382.

120. See Thor Christensen, *The Other Ones and the Grateful Faithful are Proving . . . THE DEAD DON'T DIE*, DALLAS MORNING NEWS, July 5, 1998, at 1C, available in 1998 WL 13085690; Mary Curtius, *Marijuana Movement Pushes Founder Aside / California Guru Irks Medical Cannabis Club*, HOUSTON CHRON., Jan. 4, 1998, at 2, available in 1998 WL 3553007; Dave Howland, *Close-Up: 40,000 Mellow Out at Boston Pro-pot Rally*, PATRIOT LEDGER (Quincy, Mass.), Oct. 5, 1998, at 2, available in 1998 WL 8103359; Priya Ramani & Robin Abreu, *Cocaine the Deceptive Glamour Drug is Quickly Becoming the With-it Statement in Mumbai*, INDIA TODAY, Dec. 14, 1998, available in 1998 WL 2085219.

121. In determining whether probable cause exists, a police officer is justified in drawing inferences based on his past experience. See *Ornelas v. United States*, 517 U.S. 690, 700 (1996).

122. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

123. See, e.g., George M. Dery III, *The Uncertain Reach of the Plain Touch Doctrine: An Examination of Minnesota v. Dickerson and Its Impact on Current Fourth Amendment Law*

adoption of plain smell will dramatically increase the number of warrantless searches performed are unfounded. As a preliminary matter, there are few substances that emit an odor distinctive enough to justify a finding of probable cause. In addition, even when odors are distinctive, an officer's detection of those odors will not always satisfy the standard of probable cause to search. Furthermore, even in a plain smell jurisdiction, certain places, such as the home, carry a heightened expectation of privacy that precludes warrantless searches except in the rarest of cases.¹²⁴ Adoption of plain smell, therefore, does not open the floodgates to a rash of previously prohibited warrantless searches.

There are only a handful of substances that emit odors distinctive enough to justify a finding of probable cause. Beyond marijuana's distinctive odor, the smells of opium and gasoline have also served to support findings of probable cause.¹²⁵ Additionally, methamphetamine ("speed") and phencyclidine ("PCP") have been described as having "distinctive" odors,¹²⁶ which may indicate that

and *Daily Police Practice*, 21 AM. J. CRIM. L. 385, 387-88 (1994) (condemning the extension of plain view to include the sense of touch as "erosion of the warrant clause"). See generally Todd Martin Gascon, Casenote, *Criminal Procedure: Something Smells in the Fifth Circuit: The Further Erosion of the Fourth Amendment—United States v. Lovell*, 849 F.2d 910 (5th Cir. 1988), 14 U. DAYTON L. REV. 761, 761-74 (1989) (arguing against creating more exceptions to the Fourth Amendment warrant requirement).

124. See *Payton v. New York*, 445 U.S. 573, 590 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."); see also *infra* notes 129-36 and accompanying text. But see *State v. Hughes*, 607 N.W.2d 621, 629 (Wis. 2000) (upholding the search of a home based on the detection of the odor of marijuana). For a discussion of the *Hughes* case, see Dennis Chaptman, *Odor of Pot Permits Search*, MILWAUKEE J. SENTINEL, Mar. 18, 2000, at 1A, available in 2000 WL 3838843.

125. See, e.g., *Pong Ying v. United States*, 66 F.2d 67, 67-68 (3d Cir. 1933) (holding that narcotics officer's detection of the odor of burning opium justified a warrantless search); *State v. Schubert*, 561 A.2d 1186, 1192 (N.J. Super. Ct. App. Div. 1989) (holding that the strong odor of gasoline emanating from an arson suspect's car created probable cause to search the vehicle).

126. See John Ward Anderson, *Police Arrest 50 in Widespread Drug Sweep in Anacostia*, WASH. POST, Aug. 12, 1984, at D7; Nancy Garland, *Country Trio Indicted for Dealing 'Speed'*, BANGOR DAILY NEWS (Bangor, Me.), Nov. 14, 1997, available in 1997 WL 11886260 (stating that the manufacture of methamphetamine produces a "strong, distinctive odor"); J. Stryker Meyer, *Nightmare of PCP Passed to Children*, SAN DIEGO UNION & TRIB., Nov. 20, 1985, at A12, available in 1985 WL 2829354; Richard Powelson, *Wamp Gets House OK on \$1 Million to Fight Illegal Drug Labs*, KNOXVILLE NEWS-SENTINEL, Oct. 22, 1999, at A5, available in 1999 WL 20031185 (stating that methamphetamine emits a "distinctive ether-like odor during production").

the detection of those odors by a trained or experienced police officer could give rise to a finding of probable cause. Alcohol, although it emits a distinctive odor, is distinguishable from the aforementioned substances in that it is not ordinarily illegal contraband. Whereas the odor of marijuana, methamphetamine, or PCP is immediately attributable to illegal activity, the odor of alcohol is indicative of illegal activity only in conjunction with other circumstances, such as an illegally excessive blood alcohol level while driving or consumption by a minor. Thus, the mere detection of the odor of alcohol, without other evidence that the subject is impaired or underage,¹²⁷ should not justify a warrantless search of the area.

In addition to the inherent limitations placed on plain smell by the small number of substances that emit sufficiently distinctive odors, there is a heightened expectation of privacy attached to certain places that will often serve to preclude a warrantless search.¹²⁸ Because a legitimate expectation of privacy is essential to any claim of Fourth Amendment protection,¹²⁹ the setting of the incident is an important consideration in the determination of whether plain smell justifies a warrantless search.¹³⁰ With regard to the need for a warrant, the Supreme Court has consistently drawn a distinction between stores, homes, or other buildings, and movable items such as vehicles.¹³¹ The Court has stated that there is a "diminished expectation of privacy which surrounds the automobile."¹³² In contrast, warrantless searches of a home are considered presumptively unreasonable.¹³³ Moreover, "no amount

127. In a drunk driving situation, this limitation on plain smell should not hinder effective law enforcement. Other evidence of impairment, such as slurred speech, reckless or overly cautious driving, or bloodshot eyes will almost always be apparent to the officer.

128. See *supra* note 28.

129. See *supra* note 28.

130. See Schwartz, *supra* note 37, at 167-68.

131. See *Carroll v. United States*, 267 U.S. 132, 153 (1925).

132. *United States v. Chadwick*, 433 U.S. 1, 12 (1977); see also *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (stating that the owner of a vehicle has a diminished expectation of privacy in his automobile).

133. See *United States v. Karo*, 468 U.S. 705, 714-15 (1984) (finding that "the monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence").

of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'¹³⁴ Although the mobility of vehicles is itself considered an exigent circumstance that excuses the warrant requirement,¹³⁵ no such automatic exigent circumstance is attached to buildings.¹³⁶ As a result, warrantless searches of a home or other building will not be widespread in a plain smell jurisdiction.

It is also important to note that not every situation in which an officer detects a distinctive odor will give rise to probable cause to search. As previously stated, probable cause requires that the information known by the officer be sufficient for him to conclude that there is "a fair probability that contraband or evidence of a crime will be found in a particular place."¹³⁷ Stated another way, it must be reasonably *probable* that the officer will find the evidence for which he is looking. Although this is admittedly not a stringent standard for police to meet, it is a necessary threshold nonetheless.

In the plain smell context, several factors will contribute to whether a police officer is justified in finding probable cause based on odor alone. First, and most obvious, the officer must be highly familiar with the odor. Any officer who is not sufficiently familiar with the odor in question should not be permitted to find probable cause based solely on his detection of that odor.¹³⁸ Second, a court should consider whether more than one officer detected the odor. Although detection by a single officer who is familiar with the odor can certainly be sufficient, the fact that multiple officers testify to the presence of the odor should weigh in favor of finding probable cause. Third, the relative strength of the odor should be important. On the one hand, if an officer detected only a faint trace of an odor,

134. *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971); *see also Texas v. Brown*, 460 U.S. 730, 750 (1983) ("Exigent circumstances must be shown before the Constitution will entrust an individual's privacy to the judgment of a single police officer.").

135. *See Carroll*, 267 U.S. at 153. The mobility of automobiles makes the warrant requirement impractical. By the time the officer returned with a search warrant, the automobile easily could have left its previous location and moved out of the jurisdiction where the warrant was obtained. *See id.*

136. *See supra* note 28.

137. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

138. The plain view doctrine requires that: (1) the officer must be lawfully in the position from which he perceives the object, and (2) the object's incriminating nature must be immediately apparent. *See supra* note 101. The requirement that the officer be highly familiar with the odor goes to the "immediately apparent" prong: If an officer is not familiar with the odor, the odor's incriminating nature cannot be immediately apparent to him.

and only for a brief moment before losing the scent, it would be highly suspect for that officer to argue that it was *probable* that a search would uncover the substance he smelled. If, on the other hand, an officer detected a strong odor of contraband, and that odor remained in the air throughout a substantial portion of the officer's encounter with the subject, the officer would be justified in believing it probable that a search would uncover that contraband. Thus, not every situation in which an officer detects the odor of contraband will give rise to probable cause to search. Only those situations in which the officer is familiar with the odor and the odor is relatively strong should meet the requirements of probable cause.¹³⁹

As a result of these threshold requirements for a finding of probable cause based on odor alone, there is a potential concern that adoption of the plain smell doctrine will add significant costs to the training of police officers. Allowing a finding of probable cause based on odor alone necessarily assumes that the officer perceiving the odor is capable of reliably identifying the nature of the odor's source. One could argue, therefore, that officers in plain smell jurisdictions must be required to undergo extensive and costly training in the detection of odors such as that of marijuana. The need to raise additional tax money in order to expand the training of police officers may be more than some jurisdictions are willing to bear.

Such training, however, need not be extensive or costly. The underlying premise of plain smell is that certain odors are so distinctive as to make their mere detection sufficient to create probable cause to search.¹⁴⁰ The distinctive nature of odors such as marijuana makes extensive training unnecessary. One who has been exposed to the odor of marijuana only a few times, knowing that the odor he smelled was marijuana, will certainly recognize the

139. The burden of proving these threshold requirements will rest, of course, with the prosecution should the legality of the search be challenged on Fourth Amendment grounds.

140. See *United States v. Rivera*, 486 F. Supp. 1025, 1033 (N.D. Tex. 1980), *aff'd*, 654 F.2d 1048 (5th Cir. 1981), *reh'g granted and rev'd on other grounds*, 684 F.2d 308 (5th Cir. 1982); cf. 1 JOHN WESLEY HALL, JR., *SEARCH AND SEIZURE* § 9:8, at 493 (2d ed. 1991) (indicating that an odor must be subject to accurate identification to fall within plain smell).

odor the next time he smells it.¹⁴¹ Thus, only minimal training would be necessary.

Moreover, the manner in which the officer becomes familiar with the odor is immaterial. What matters is that the detection of the odor creates a sufficient level of suspicion in the officer to support a finding of probable cause. Therefore, if an officer without formal training in the detection of the odor of marijuana is able to testify that he is familiar with the odor through other means,¹⁴² there is no reason why his determination of probable cause should be treated differently than that of an officer with formal training. Allowing officers to base their determinations of probable cause on odors with which they are independently familiar will reduce the costs that may be necessary to train officers in the detection of odors. Consequently, the added costs of training police officers in plain smell jurisdictions should be minimal.

CONCLUSION

The current state of the law with regard to the plain smell doctrine is unacceptable. Although the lower federal courts have overwhelmingly endorsed plain smell, the Supreme Court has failed to do so. States, therefore, are free to accept or reject plain smell as they please. Most states that have addressed the issue have chosen, wisely, to adopt plain smell.¹⁴³ Many states, however, have either rejected plain smell or have given contradictory rulings.¹⁴⁴ The result is an atmosphere of uncertainty and a lack of uniformity in the administration of Fourth Amendment jurisprudence, both within states and across state borders.

141. This assertion hardly requires scientific support. Most adults, regardless of whether they have actually used marijuana, have probably been exposed to its odor at some point in their lives. For those who have, the odor is readily identifiable.

142. For example, an officer may have been involved in numerous arrests for marijuana possession and have had the odor identified by other officers.

143. Interestingly, the newest addition to the list, Michigan, was also the state that most recently rejected plain smell. See *People v. Taylor*, 564 N.W.2d 24 (Mich. 1997) (applying a totality of the circumstances approach and holding that odor alone is insufficient to create probable cause), *overruled by* *People v. Kazmierczak*, 605 N.W.2d 667 (Mich. 2000) (stating that "[p]robable cause can exist when the odor of marijuana is the only factor indicating the presence of contraband"). By reconsidering their former position and choosing to adopt plain smell in *Kazmierczak*, the Michigan Supreme Court has done exactly what this Note encourages from all jurisdictions that have failed to recognize plain smell.

144. See *supra* notes 55-66 and accompanying text.

The arguments against plain smell are specious at best, and are outweighed by the arguments in favor of plain smell. With no significant split among the federal circuits, however, Supreme Court resolution of the issue may never occur. Consequently, it is incumbent upon those jurisdictions that have failed to make a conclusive decision about plain smell to weigh the issue for themselves. After considering all pertinent information, there can be only one conclusion: Plain smell is a logical and necessary corollary to the plain view doctrine.

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