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Pocket Police: The Plain Feel Doctrine Thirty Years Later

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NOTE

POCKET POLICE: THE PLAIN FEEL DOCTRINE THIRTY YEARS LATER

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The idea that a police officer can park in a low-income neighborhood, pull someone over because of their race, frisk everyone in the car, let them go if their pockets are empty, and do the whole thing over and over again until the officer finds something illegal seems deeply upsetting and violative, to say the least. And yet, pretextual traffic stops are constitutional per a unanimous Supreme Court in Whren v. United States*, 517 U.S. 806 (1996), as is seizing obvious contraband during a frisk per* Minnesota v. Dickerson*, 508 U.S. 366 (1993). In the thirty years since these cases were decided, their disproportionate impact on minority communities has become clear, and yet courts have struggled to place meaningful limits on officer discretion. Amid the growing national conversation on police practices, this Note analyzes the role of* Dickerson*'s plain feel doctrine, which permits an officer to seize contraband during a frisk so long as the illicit nature of the item is immediately apparent upon "plain feel." First, it reviews the doctrine as it was established in* Dickerson *and traces its roots to understand the rationale behind the ruling. Second, it identifies the key factors state and federal courts consider when applying* Dickerson *and demonstrates that courts presented with similar facts routinely come to conflicting conclusions. Third, this Note assesses the ways modern plain feel doctrine is in tension with core Fourth Amendment principles and argues that, in the thirty years since* Dickerson*, it has quietly become an ever-broadening loophole enabling the ongoing targeting of minority populations. As calls to address inequitable policing grow louder, the plain feel doctrine is a crucial site for reform.*

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INTRODUCTION

In 2008, David Ourlicht, a twenty-five-year-old Black man, was walking to a deli near his university dorm with a notebook sticking out of his jacket pocket.[1] A police officer who thought Mr. Ourlicht was concealing something stopped him and asked for his ID.[2] When Mr. Ourlicht asked why, the officer frisked him and radioed for backup.[3] After backup arrived, the officer said, "[O]kay now you're going to get the full treatment, get against the wall."[4] As Mr. Ourlicht stood with his hands behind his head, officers pulled everything out of his jacket pockets and reached into his empty pants pockets. Finding nothing unlawful, they wrote Mr. Ourlicht a ticket for disorderly conduct and left.[5]

In 2010, Devin Almonor, a thirteen-year-old Black boy, was walking home with a friend when he was stopped by officers investigating a claim that youth in the area were fighting, throwing garbage cans, and might have weapons.[6] When police identified themselves, Devin pulled away, and within moments, officers pushed him down on the hood of their car and handcuffed him.[7] As the officers patted him down, Devin asked, "What are you doing?" and explained, "I'm going home. I'm a kid."[8] One of the officers later testified that he saw no suspicious bulge indicating a weapon.[9] Although they found

1. Floyd v. City of New York, 959 F. Supp. 2d 540, 640 (S.D.N.Y. 2013).
2. *Id.*
3. *Id.* at 640–41.
4. *Id.* at 641.
5. *Id.*
6. *Id.* at 628.
7. *Id.* at 628–29.
8. *Id.* at 629.
9. *Id.*

nothing but a phone and a few dollars in his pockets, the officers put Devin in the back of a car and took him to the precinct, where he was later released.[10]

Mr. Ourlicht and Devin's searches were two of many deemed illegal in *Floyd v. City of New York*, a landmark class action challenging unconstitutional stop-and-frisks by the New York Police Department (NYPD).[11] The lawsuit illuminated the breadth and frequency of racially discriminatory stops in New York City. According to the data in *Floyd*, the NYPD conducted over 4.4 million stops from January 2004 to June 2012.[12] Officers performed a frisk for weapons in 52% of stops but found weapons in only 1.5% of those stops; officers searched inside a person's clothing in 8% of stops and found contraband in just 14% of those searches.[13] White people were the most likely demographic to have contraband (in 2.3% of stops, as compared to Black people in 1.8% and Latinx people in 1.7%) and the most likely to have weapons (in 1.4% of stops, as compared to Black people in 1% and Latinx people in 1.1%).[14] Black and Latinx people, however, were more likely to be stopped and more likely to be subjected to the use of force than White people.[15]

These racially biased stop-and-frisk practices were not unforeseen. In *Minnesota v. Dickerson*, the Supreme Court opened the door to officers seizing contraband during frisks, holding that the Fourth Amendment permits the warrantless seizure of contraband when its identity is immediately apparent to an officer conducting a lawful pat down.[16] Shortly thereafter, scholars argued the rule would provide cover for officers to use the "plain feel doctrine as a convenient proxy for conducting a warrantless, general investigatory search for contraband."[17] Or, as Judge Henry Friendly cautioned, the rule

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10. *Id.*

11. *Id.* at 624–56.

12. *Id.* at 558.

13. *Id.*

14. *Id.* at 559.

15. *Id.* at 560, 562. More recent data indicate the dynamics in the *Floyd* suit persist. *See, e.g.*, Shytierra Gaston & Rod K. Brunson, *Reasonable Suspicion in the Eye of the Beholder: Routine Policing in Racially Different Disadvantaged Neighborhoods*, 56 URB. AFFS. REV. 188, 215 (2020) (finding in the same racially-mixed neighborhood, "Black suspects' mere presence was usually enough to arouse officers' suspicion whereas Whites were described as being engaged in illegal behavior (e.g., participating in hand-to-hand drug transactions) prior to being stopped"); Amanda Geller et al., *Measuring Racial Disparities in Police Use of Force: Methods Matter*, 37 J. QUANTITATIVE CRIMINOLOGY 1083, 1106 (2021) (finding across multiple police departments that White people were subjected to less force and lower force severity than non-White people and noting the disparities were most pronounced in Black/White comparisons). In May 2022, the court-appointed independent monitor overseeing the *Floyd* settlement found that although racial disparities in stops have "diminished substantially" since 2013, NYPD's persistent underreporting of stops means disparities remain. Sixteenth Report of the Independent Monitor at 6, 17, *Floyd*, 959 F. Supp. 2d 540 (No. 08-cv-01034).

16. 508 U.S. 366, 375 (1993).

17. Ronald S. Sullivan, Jr., *A License to Search: The Plain Feel Exception Under* Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993)*, 11 HARV. BLACKLETTER L.J. 181, 185 (1994). These concerns were also raised prior to *Dickerson*. *See, e.g.*, David L. Haselkorn, Comment, *The Case*

could create "too much danger that, instead of the stop being the [officer's] object and the protective frisk an incident thereto, the reverse will be true."[18] Some worried that courts would see an inaccurate picture of actual police behavior given that the only cases brought to trial are those where contraband was detected, and not those where officers wrongly seized, say, candy in a pocket.[19] Others presciently noted that the "conspicuous absence of guidelines" for what counts as immediately apparent contraband "suggests that trial courts will be unable to uniformly apply this new Fourth Amendment exception."[20]

Thirty years later, these concerns proved true: matchboxes, pill bottles, baggies, and film canisters have been deemed plainly obvious contraband in some jurisdictions while suppressed as the fruit of an illegal search in others.[21] As courts struggle to determine what can and cannot be identified through layers of clothing during a cursory pat down, police are incentivized to conduct stop-and-frisks in the hopes that any contraband found can be justified as obvious after the fact.[22] The consequences of this increased police contact for racial and ethnic minorities, particularly in an America where Black people "are considered dangerous even when they are in their living rooms eating ice cream, asleep in their beds, playing in the park, standing in the pulpit of their

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Against a Plain Feel Exception to the Warrant Requirement, 54 U. CHI. L. REV. 683, 700 (1987) ("[U]ndoubtedly police would occasionally be able to convince a court, after the fact, that their touch provided them with the requisite probable cause—for at that point the seized evidence will be before the judge.").

18. Williams v. Adams, 436 F.2d 30, 38 (2d Cir. 1970) (Friendly, J., dissenting), *rev'd on reh'g per curiam*, 441 F.2d 394 (2d Cir. 1971), *rev'd*, 407 U.S. 143 (1972).

19. Anne Bowen Poulin, *The Plain Feel Doctrine and the Evolution of the Fourth Amendment*, 42 VILL. L. REV. 741, 759 (1997).

20. Steven T. Atneosen & Beverly J. Wolfe, *The "Plain Feel" Exception: Is the Standard Sufficiently Plain?*, 20 WM. MITCHELL L. REV. 81, 101 (1994).

21. *Compare* State v. Parker, 622 So. 2d 791, 795 (La. Ct. App. 1993) (finding a matchbox could not be immediately identified as contraband), *with* State v. Stevens, 672 So. 2d 986, 988 (La. Ct. App. 1996) (finding a matchbox could be immediately recognized as a depository for crack cocaine); State v. Bridges, 963 S.W.2d 487, 495 (Tenn. 1997) (finding a pill bottle could not be immediately recognized as contraband), *with* People v. Champion, 549 N.W.2d 849, 858–59 (Mich. 1996) (finding a pill bottle could be recognized as obvious contraband); G.M. v. State, 172 So. 3d 963, 968–69 (Fla. Dist. Ct. App. 2015) (finding an officer's "educated hunch" based on experience insufficient to establish probable cause for seizing plastic bag of marijuana), *with* Cox v. United States, 999 A.2d 63, 67 n.3 (D.C. 2010) (finding an officer's experience having felt similar objects justified seizing plastic bag of cocaine); Harris v. Commonwealth, 400 S.E.2d 191, 196 (Va. 1991) (finding an officer's belief that a film canister contained drugs based on experience and information from an informant was not sufficient to establish probable cause), *with* State v. Robinson, 658 S.E.2d 501, 505 (N.C. Ct. App. 2008) (finding an officer's prior experience, the defendant backing away from the police, and the area's reputation was sufficient to establish probable cause to seize a film canister containing drugs).

22. *See infra* notes 128–130 and accompanying text.

church, birdwatching, exercising in public, or walking home from a trip to the store to purchase a bag of Skittles,"[23] cannot be overstated.

For thirty years, the plain feel doctrine has largely evaded scholarly attention. Despite incentivizing and enabling an unknowable number of searches each day, it has blended into the background of the routine overpolicing of marginalized communities. This Note aims to shed light on the doctrine by analyzing its evolution and highlighting the modern inconsistencies in its application. Part I reviews the Fourth Amendment precedent that led to the development of the doctrine. Part II identifies the primary factors courts look to when reviewing plain feel questions and demonstrates that the lack of clear guidelines has led to sharply contradictory outcomes across jurisdictions. Part III argues that a broad plain feel doctrine is in tension with core Fourth Amendment principles and suggests first steps toward change.

I. DOCTRINAL ORIGINS

In order to understand why an officer can sometimes lawfully search a person without a warrant, it is helpful to first review when an officer can stop someone, what is required for a frisk, and the level of certainty an officer must have before reaching into someone's pocket. Part I summarizes the plain feel doctrine's predecessor, the plain view doctrine, and explains how that doctrine was expanded in *Dickerson* to allow officers to seize "immediately apparent" contraband during a frisk.[24]

A. *Fourth Amendment Foundations and the Plain View Doctrine*

Although the Fourth Amendment generally requires police to have a warrant for searches and seizures,[25] police officers can initiate warrantless investigatory stops if certain conditions are met. Under *Terry v. Ohio*, an officer who suspects criminal activity can stop a person if the officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[26] In other words, the officer needs to have more than a simple hunch that criminal activity might be afoot, but the officer can consider the totality of the circumstances in formulating their suspicion. Factors that can collectively lead to this "reasonable suspicion" include nervousness, unprovoked flight, being in a high crime area, furtive actions, and failure to cooperate.[27] Of course, these factors can cut in

23. Jamison v. McClendon, 476 F. Supp. 3d 386, 415 (S.D. Miss. 2020) (quoting United States v. Curry, 965 F.3d 313, 332 (4th Cir. 2020) (Gregory, C.J., concurring)).

24. Minnesota v. Dickerson, 508 U.S. 366, 375 (1993).

25. U.S. CONST. amend. IV.

26. 392 U.S. 1, 21 (1968).

27. Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (finding nervousness, evasive behavior, unprovoked flight, and presence in a high crime area as factors relevant to reasonable suspicion); *Terry*, 392 U.S. at 23 (finding reasonable suspicion when two men alternated walking along an identical route and conferenced together). *But cf.* Florida v. Bostick, 501 U.S. 429, 437 (1991)

opposite directions.[28] Race and ethnicity may also be a relevant factor, either to undercut reasonable suspicion or to add to it.[29]

Once a person is stopped, officers can conduct a frisk if they have reasonable suspicion the person is armed and dangerous.[30] The search must be "strictly circumscribed" to a limited pat down of the outer clothing to look for weapons.[31] A person is not assumed to be armed and dangerous any time there is suspicion of criminal activity, as the Supreme Court made clear in *Sibron v. New York*, a case decided the same day as *Terry*.[32] The *Sibron* Court ruled that frisking a person who was observed interacting with narcotics users over a period of eight hours was invalid for two reasons: first, because simply talking to narcotics users was not enough to establish reasonable suspicion, and second, because suspecting a person of narcotics possession was not the same thing as suspecting the person was armed.[33] *Terry* frisks are thus only appropriate when an officer can point to specific facts leading them to suspect a person is armed and dangerous, and can only extend to places where a weapon might reasonably be hidden.[34]

The plain feel doctrine expands that scope by allowing an officer to seize contraband when, in the midst of a protective weapons frisk, the incriminating character of an illicit object is "immediately apparent" without further tactile manipulation.[35] This "immediately apparent" requirement is typically synonymous with an officer having probable cause for the search.[36] Probable cause is a "fluid," fact-specific, totality-of-the-circumstances test indicating a

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(noting refusal to cooperate alone is not enough for reasonable suspicion); Brown v. Texas, 443 U.S. 47, 52 (1979) (finding presence in a high crime area alone is insufficient to establish reasonable suspicion).

28. *See, e.g.*, United States v. Broomfield, 417 F.3d 654, 655 (7th Cir. 2005) ("Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you. Such subjective, promiscuous appeals to an ineffable intuition should not be credited.").

29. *See* Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 256–57 (1991) (noting that nervousness, distrust, and flight are understandable reactions for Black men interacting with the police given the prevalence of police misconduct); United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975) (finding Mexican appearance is not alone enough for reasonable suspicion, but it is "a relevant factor").

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

31. *Id.* at 26, 30–31.

32. 392 U.S. 40, 64–65 (1968).

33. *Sibron*, 392 U.S. at 64–65.

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

35. Minnesota v. Dickerson, 508 U.S. 366, 375 (1993).

36. Texas v. Brown, 460 U.S. 730, 741–42 (1983) (plurality opinion); *see also* Arizona v. Hicks, 480 U.S. 321, 326 (1987) ("We have not ruled on the question whether probable cause is required in order to invoke the 'plain view' doctrine. . . . We now hold that probable cause is required.").

"fair probability that contraband or evidence of a crime will be found in a particular place."[37] It is in part anchored by what it is not: it must be higher than the reasonable suspicion standard, which requires an officer to point to particularized facts beyond just a hunch before lawfully conducting a frisk, but it does not require an officer's absolute certainty.[38] Thus, the test for whether contraband is "immediately apparent" is a fact-specific inquiry into the totality of the circumstances that led to the item's seizure.

The plain *feel* doctrine described above is an extension of the plain *view* doctrine. The latter allows an officer to seize clearly visible contraband without a warrant if (1) there is probable cause to believe the item being seized is illicit, and (2) the officer is lawfully in a position to view and seize the object.[39] So, if an officer saw a brick of cocaine but unlawfully broke into a home to view it, the seizure would be invalid; but, if the officer lawfully pursued a suspect into a home and saw the drugs, the seizure would be valid. While the Fourth Amendment protects against unjustified privacy intrusions, the logic is essentially that there is no additional privacy violation in seizing the contraband so long as officers were legitimately present.[40] Where the initial intrusion is lawful, the "minor peril to Fourth Amendment protections" in permitting the seizure is outweighed by the "major gain in effective law enforcement."[41] It would be a "needless inconvenience" and possibly dangerous "to the evidence or to the police" to require officers to ignore the evidence until they obtained a warrant.[42] Furthermore, the discovery of the contraband need not be inadvertent. If an officer is interested in a particular item and expects to find it in the course of a lawful search for something else, the officer's subjective intent does not invalidate the seizure.[43] Thus, in *Horton v. California*, officers armed with a search warrant for stolen jewelry were able to lawfully seize weapons in plain view, even though weapons mentioned in the supporting affidavit for the warrant were not included on the warrant itself.[44]

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37. Illinois v. Gates, 462 U.S. 213, 232, 238 (1983); *see also Brown*, 460 U.S. at 742 ("[P]robable cause is a flexible, common-sense standard. . . . [It] would warrant a man of reasonable caution in the belief that certain items may be contraband . . . ." (citation and internal quotation marks omitted) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

38. Alabama v. White, 496 U.S. 325, 330 (1990); *Gates*, 462 U.S. at 235–36 (explaining a magistrate must have a "substantial basis" for concluding probable cause exists, but the standard requires less evidence than "would justify condemnation" (quoting Brinegar v. United States, 338 U.S. 160, 173 (1949))).

39. Coolidge v. New Hampshire, 403 U.S. 443, 465–66 (1971) (plurality opinion) (permitting the warrantless seizure of evidence discovered while lawfully in a position to view it); *Hicks*, 480 U.S. at 321 (finding that for plain view seizures, probable cause is required).

40. *Coolidge*, 403 U.S. at 467–68. For a general discussion of the Court's Fourth Amendment balancing jurisprudence, see Kit Kinports, *The Origins and Legacy of the Fourth Amendment Reasonableness-Balancing Model*, 71 CASE W. RSRV. L. REV. 157 (2020).

41. *Coolidge*, 403 U.S. at 467.

42. *Id.* at 468.

43. Horton v. California, 496 U.S. 128, 138–39 (1990).

44. *Id.* at 130–31.

The plain view doctrine has some scope limitations. It only applies to evidence that is immediately apparent contraband, and it cannot be used "to extend a general exploratory search from one object to another until something incriminating at last emerges."[45] It also prohibits manipulation of an object, no matter how slight, in order to establish probable cause of its illicit nature. For example, in *Arizona v. Hicks*, an officer who was lawfully present in an apartment and thought an expensive stereo looked out of place could not pick it up to locate the serial number without first having probable cause to believe it was stolen.[46] While it might not be an additional privacy violation to seize contraband that is plainly visible when officers are lawfully in a position to view it, picking up a stereo or nudging open a closet door is another story. Manipulating the object constitutes a search, and the Fourth Amendment mandates that searches must be supported by probable cause. Without probable cause, the evidence is the "fruit" of an illegal search and may be excluded at trial if it will deter the police from future violations.[47]

B. Dickerson's *Additions*

In *Minnesota v. Dickerson*, the Supreme Court extended the logic of the plain view doctrine to cases in which an officer discovers contraband while conducting a lawful *Terry* frisk.[48] Because there is no additional invasion of privacy, and because obtaining a warrant would be impractical for reasons similar to those that apply in the plain view context, the Court reasoned that an officer using the sense of touch to discover contraband is analogous to using the sense of sight.[49] Although the Minnesota Supreme Court had rejected the plain view analogy because it found touch to be both less reliable than sight and more intrusive into personal privacy, the U.S. Supreme Court dismissed these concerns.[50] The Court reasoned that *Terry* presumes an officer can adequately detect weapons through touch, which is the whole purpose of allowing a weapons frisk.[51] And even if touch is less reliable than sight, the Court asserted that this difference in reliability would mean officers would be able to justify seizing *felt* contraband less often than *seen* contraband. In other words, perhaps courts would ask officers to point to more facts to establish probable

45. *Coolidge*, 403 U.S. at 466.

46. 480 U.S. 321, 323, 325 (1987).

47. *See, e.g.*, Herring v. United States, 555 U.S. 135, 144 (2009) (finding evidence admissible despite a Fourth Amendment violation because the violation was not the result of deliberate, reckless, or grossly negligent police conduct); *see also infra* note 136 and accompanying text (noting the increasing limits on the exclusionary rule).

48. 508 U.S. 366, 375–76 (1993). *Dickerson* applied to the frisk of a person; prior to *Dickerson*, the Court held an officer could "frisk" a vehicle for weapons during a lawful *Terry* stop in *Michigan v. Long*, 463 U.S. 1032, 1049 (1983).

49. *Dickerson*, 508 U.S. at 375.

50. *Id.* at 376–77.

51. *Id.*

cause in the plain feel context than in the plain view context.[52] The Court similarly dismissed the argument that touch is more intrusive, noting that the intrusion "has already been authorized by the lawful search for weapons," and that "seizure of an item whose identity is already known occasions no further invasion of privacy."[53]

Dickerson then applied the plain view analogy to the facts before it. Timothy Dickerson, a Black man, was walking away from a twelve-unit apartment building that officers characterized as a "crack house" when he allegedly made eye contact with officers and turned to walk in the opposite direction.[54] Officers stopped and frisked him for weapons, finding none.[55] The officer conducting the search felt a small lump in Mr. Dickerson's jacket pocket, examined it with his fingers, and reached into the pocket to retrieve a small plastic bag of crack cocaine.[56] The Minnesota Court of Appeals and Minnesota Supreme Court held that the investigative stop and frisk were valid under *Terry*, even though the officers' reasonable suspicion was based on the bare facts of the location and Mr. Dickerson's change in direction.[57] However, both courts, along with the U.S. Supreme Court, ruled the subsequent seizure was unconstitutional because the officer was only able to determine the lump was cocaine after "squeezing, sliding and otherwise manipulating the contents" of Mr. Dickerson's pocket, "which the officer already knew contained no weapon."[58]

The Court analogized to the plain view scope limitation from *Hicks*, noting that just like the seizure of the stereo could not be justified "because the incriminating character of the stereo equipment was not immediately apparent," so too the seizure of the cocaine was invalid because "the officer determined that the item was contraband only after conducting a further search."[59] Thus, while the Court opened the door to the seizure of contraband when its identity is obvious upon plain feel, it also made clear that officers cannot go digging for more information based on a suspicion or hunch. Officers can seize an illicit item if its identity becomes immediately apparent during an ongoing search for weapons, but the moment officers know an item is not a weapon, their search must end.

In sum, *Dickerson* extends the plain view doctrine to *Terry* frisks and permits officers to seize contraband if they are lawfully in a position to feel it and

52. *Id.* at 376.

53. *Id.* at 377.

54. *Id.* at 368–69.

55. *Id.* at 369.

56. *Id.*

57. *Id.* at 370. For a fuller description of the stop based on trial transcripts, see Robert Fraser Miller, *"I Want to Stop This Guy!" Some "Touchy" Issues Arising from* Minnesota v. Dickerson, 71 N.D. L. REV. 211, 258–62 (1995). Miller presents a compelling argument that there was not enough evidence giving rise to reasonable suspicion, making the initial stop in *Dickerson* unconstitutional. *Id.*

58. *Dickerson*, 508 U.S. at 378 (quoting State v. Dickerson, 481 N.W.2d 840, 844 (Minn. 1992), *aff'd*, 508 U.S. 366 (1993)).

59. *Id.* at 378–79.

the identity of the contraband is "immediately apparent." The first prong is a relatively simple inquiry—an officer is lawfully in a position to feel the contraband if they have reasonable suspicion the person was engaged in criminal activity and was armed and dangerous. As Part II will demonstrate, the second prong is much more complicated. An item is "immediately apparent" if an officer has probable cause to believe it is contraband, but the absence of clear guidelines for when that standard is met has led to widespread confusion about how to review plain feel seizures.

II. INCONSISTENT APPLICATIONS

This Note's analysis of cases applying the plain feel doctrine reveals that the concerns of *Dickerson*'s early critics have largely come to fruition in the thirty years since the case was decided. The lack of clear guidelines for how a court should assess whether contraband is "immediately apparent" to an officer has led to serious differences among judicial interpretations. While some courts require an officer to identify a specific kind of contraband before seizing it, others grant broad latitude to seize objects or containers whose contents cannot be identified by feel. Courts generally look to the same three factors—the officer's experience, the specificity with which the officer can identify the contraband, and the circumstances surrounding the seizure—and yet, cases with similar facts are often decided in conflicting ways. This Part reviews the application of these factors: first, in the context of seizing suspected contraband, and then, in the context of seizing suspected weapons.

A. *Contraband Analysis*

Courts reviewing contraband seizures must determine whether an object's illicit nature was immediately apparent to an officer. Before turning to how that analysis often unfolds, it is helpful to remember the only cases brought to trial are those in which officers found something illicit.[60] However, "a search is not . . . made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."[61]

1. Officer Training and Experience

One way that courts assess whether contraband's incriminating character could be "immediately apparent" is to consider the individual officer's train-

60. *E.g.*, People v. Mitchell, 650 N.E.2d 1014, 1025 (Ill. 1995) (Heiple, J., dissenting) ("The 'plain touch' doctrine will encourage officers to investigate any lump or bulge in a person's clothing . . . . If it turns out to be something [other than contraband], then there is no case and the matter ends there."); Poulin, *supra* note 19, at 742 ("[E]ven though we rarely find a decision in which the police search uncovered no evidence of criminal wrongdoing, we must assume that some searches similar to those reported are carried out without yielding evidence and, consequently, without generating judicial proceedings and decisions.").

61. United States v. Di Re, 332 U.S. 581, 595 (1948).

ing and experience. Courts may look for officer testimony about specific training to support the claim that they could identify contraband like marijuana or cocaine through layers of clothing during a cursory weapons frisk. In *Jordan v. State*, a police officer who conducted a frisk testified that he felt a "hard, rocky-like substance" inside Mr. Jordan's pocket before reaching in and pulling out a piece of crack cocaine.[62] The Florida District Court of Appeal suppressed the evidence because the officer did not testify that he could identify cocaine by touch, nor did he testify about any prior experience with crack cocaine.[63] Similarly, in *Rice v. State*, an officer testified that, based on his training and experience, it was immediately apparent to him that the object he felt in Mr. Rice's pocket was crack cocaine.[64] However, because he did not explain what it was about the shape, feel, or contour of the lump that allowed him to identify it as contraband, the Arkansas Court of Appeals suppressed the evidence.[65]

Once an officer testifies to basic prior training, some courts are then deferential about the ability to identify contraband by touch. In *Ramsey v. State*, an officer frisked Mr. Ramsey, a passenger in a vehicle that smelled of marijuana, and seized a bulge from his watch pocket that was indeed marijuana.[66] Although the officer did not testify to any specific experience with marijuana identification, his explanation that it "felt like a narcotic," and that he knew contraband was sometimes hidden in watch pockets was sufficiently credible to the Georgia Court of Appeals.[67] Similarly, in *Cox v. United States*, an officer testified that he felt a bag of narcotics in a pocket of Mr. Cox's jacket and explained its identity was "immediately apparent" because he had felt similar objects "over a hundred times easy."[68] The D.C. trial court credited the officer's explanation without requiring further testimony about his experience, and the D.C. Court of Appeals affirmed that decision.[69]

Other courts, however, conduct a more searching inquiry into an officer's expertise, noting that an officer may testify to having specialized experience, but "[t]o testify that one knows what a particular substance is solely from touch is not irrefutable proof of the accuracy of that assertion."[70] In *Jones v. State*, an officer felt a bulge while frisking Mr. Jones's pocket and removed a

62. 664 So. 2d 272, 273 (Fla. Dist. Ct. App. 1995).

63. *Jordan*, 664 So. 2d at 274.

64. 219 S.W.3d 672, 673–74 (Ark. Ct. App. 2005).

65. *Rice*, 219 S.W.3d at 675.

66. 703 S.E.2d 339, 340–41 (Ga. Ct. App. 2010). A watch pocket, also known as a coin pocket, is the small front pocket often found on jeans. *Id.* at 341.

67. *Ramsey*, 703 S.E.2d at 343. Compare this with *State v. Garvin*, 207 P.3d 1266, 1271–72 (Wash. 2009), in which an officer testified that he knew coin pockets were common places to stash drugs, but his seizure of methamphetamine was nevertheless suppressed because he only knew it was contraband after squeezing the pocket contents. While an officer's experience may be credited, it typically cannot excuse manipulating the object to determine if it is contraband.

68. 999 A.2d 63, 66–67 (D.C. 2010).

69. *Cox*, 999 A.2d at 67 n.3.

70. Jones v. State, 682 A.2d 248, 256 (Md. 1996).

package containing crack cocaine.[71] The officer testified that he had been involved in twenty drug arrests that year, 90 percent of which involved crack cocaine, and indicated he knew the package contained cocaine by "the way it felt."[72] The trial court, however, found the officer's testimony did not establish his ability to identify contraband through clothing, explaining "it's not just a question of being an expert and coming in and saying the magic words."[73] The Maryland Court of Appeals agreed, finding the officer's testimony was less credible given that although he claimed to have found crack cocaine on defendants in the past, he did not explain if he had identified crack cocaine in similar circumstances and did not describe how crack cocaine feels to the touch.[74]

Compare this with the specific testimony in *Doctor v. State*, in which the Florida Supreme Court found an officer reliable after he testified about his extensive experience with the particular drug and concealment method at issue (cocaine hidden in the groin).[75] The officer noted he could identify it because of the texture of the "little rock formations," which were "almost like a peanut brittle type feeling."[76] Thus, while some courts look for testimony specifically about expertise to identify contraband through layers of clothing, others are deferential to an officer's general training and experience.

2. Specificity of "Contraband"

Another way courts can determine whether an object was "immediately apparent" to an officer is to consider how the officer described what they thought they were seizing. Generally, a bare assertion that the item was contraband is not enough to uphold the seizure. In *D.D. v. State*, an officer frisking a child reported he "felt *a little thing*" in a pocket that turned out to be a bag of cocaine.[77] The Indiana Court of Appeals found the officer's subsequent testimony that it "felt . . . like contraband" and was "probably cocaine or marijuana," was not sufficiently particularized to satisfy the plain feel doctrine, "as contraband can include any number of distinct and dissimilar objects with differing contours and masses."[78] Similarly, in *G.M. v. State*, the Florida Court of Appeal suppressed an officer's seizure of a marijuana baggie during a frisk, even though he said he believed it was marijuana based on his training and

71. *Id.* at 250.

72. *Id.* at 251.

73. *Id.* at 252.

74. *Id.* at 256.

75. 596 So. 2d 442, 445 (Fla. 1992).

76. *Doctor*, 596 So. 2d at 445. Although *Doctor* predates *Dickerson*, its probable cause analysis is cited in subsequent cases assessing plain feel credibility. *See, e.g.*, C.A.M. v. State, 819 So. 2d 802, 805 (Fla. Dist. Ct. App. 2001); State v. J.D., 796 So. 2d 1217, 1219–20 (Fla. Dist. Ct. App. 2001).

77. 668 N.E.2d 1250, 1253–54 (Ind. Ct. App. 1996).

78. *D.D.*, 668 N.E.2d at 1253–54.

experience, because he testified he felt a baggie of "plantlike material" and had "no clue what type of plant it was at the time."[79]

Some courts require that an officer must be able to identify the particular object being seized as contraband. In *United States v. Schiavo*, Mr. Schiavo was the subject of a drug investigation and was suspected of possessing the $9,000 in cash that a confidential informant had just used to purchase cocaine.[80] When an officer stopped and frisked him, Mr. Schiavo opened his jacket to show he did not have a weapon, enabling the officer to see a brown bag inside the jacket.[81] The officer asked about the bag's contents[82] and later testified that he did not realize what it contained until he seized the bag and saw it held the money.[83] As a result of the officer's failure to perceive the contents at the time of seizure, both the district court and the First Circuit suppressed the bag of money because it was not immediately apparent contraband.[84]

Other courts do not require officers to specifically allege what they thought they seized. In *United States v. Bustos-Torres*, an officer observed three men conduct what appeared to be narcotics transactions.[85] When officers stopped and frisked the men for weapons, they found $10,000 in one of the men's pockets.[86] The officer conducting the frisk did not say what he thought the cash was when he felt it in the man's pocket prior to seizing it—the record simply showed that he found the cash while searching for weapons.[87] According to the Eighth Circuit, the cash was nevertheless deemed admissible, not because officers thought the money itself was contraband, but because the court found the cash was immediately identifiable as incriminating evidence.[88]

Interpreting "contraband" to include any incriminating evidence comes from language in *Hicks* (establishing the plain view doctrine), which found that an officer must have probable cause to believe the item to be seized "is *evidence of a crime* or is contraband."[89] This expands the universe of things

79. 172 So. 3d 963, 968 (Fla. Dist. Ct. App. 2015).

80. 29 F.3d 6, 7–8 (1st Cir. 1994).

81. *Schiavo*, 29 F.3d at 8.

82. While the Schiavo court did not comment on the effect of the question, some courts have ruled that an officer asking questions after a frisk suffices as corroboration that the identity of the object was apparent to the officer, while others have interpreted questions as an indicator that an officer was unsure. *Compare* State v. Robinson, 658 S.E.2d 501, 505 (N.C. Ct. App. 2008) (finding an officer asking "[i]s that crack in your pocket?" did not contradict his testimony that the identity of the contraband was immediately apparent), *with* Jones v. State, 682 A.2d 248, 257 (Md. 1996) (noting an officer's testimony that he recognized crack cocaine by feel during a frisk "seemed to have been contradicted" by the fact that he asked what the pocket contained).

83. *Schiavo*, 29 F.3d at 9.

84. *Id.*

85. 396 F.3d 935, 939–40 (8th Cir. 2005).

86. *Bustos-Torres*, 396 F.3d at 940.

87. *Id.* at 944.

88. *Id.* at 944–45.

89. Arizona v. Hicks, 480 U.S. 321, 323 (1987) (emphasis added).

that can be seized, from items that are by their nature illicit (the classic example being a crack pipe) to anything under the sun (such as cell phones, wallets, or keys), so long as an officer has probable cause to believe the item is evidence of a crime. This is arguably a broad reading of *Dickerson*,[90] but it is nevertheless an interpretation that many courts follow. For example, in *McCracken v. State*, an officer seized Mr. McCracken's car keys from his pocket after a woman alleged he provided taxi services without a license and threatened to shoot her during the drive.[91] The Maryland Court of Appeals found that although car keys are typically innocuous, they were admissible because the officer had amassed sufficient information for the keys to be immediately apparent evidence of Mr. McCracken's suspected illicit driving.[92]

By contrast, the same court later ruled the cell phone of a murder suspect inadmissible. In *State v. Zadeh*, detectives suspected Mr. Zadeh of murdering the husband of a woman with whom they believed he was having an affair.[93] Officers obtained a warrant to search Mr. Zadeh's car, and when they pulled him over to execute the warrant, an officer frisked Mr. Zadeh and seized his cell phone as immediately apparent incriminating evidence.[94] The cell phone was later suppressed because the officer could not tell the incriminating nature of the cell phone "merely by *feel*" without more facts about Mr. Zadeh's involvement in the crime.[95]

Had the *Zadeh* court's logic been applied in the *McCracken* case, the arresting officer there could not have been able to identify keys by feel alone as incriminating evidence of driving a taxi without a license.[96] Regardless, it is clear that while some courts require an officer to allege the particular item to be seized, others are more deferential and allow seizure of incriminating evidence as well as contraband.

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90. The *Dickerson* court justified its ruling by noting that *Terry* is predicated on the sense of touch being reliable enough for an officer to identify weapons. Minnesota v. Dickerson, 508 U.S. 366, 376–77 (1993). However, weapons are a discrete category—it is another thing entirely to say the sense of touch is reliable enough to identify literally anything.

91. 56 A.3d 242, 244 (Md. 2012).

92. *McCracken*, 56 A.3d at 249. Compare this with *Purnell v. State*, 832 A.2d 714, 723 (Del. 2003), in which the Delaware Supreme Court suppressed the seizure of keys because their incriminating character could not have been immediately apparent to officers stopping Mr. Purnell on suspicion of drug possession.

93. 226 A.3d 463, 469–70 (Md. 2020).

94. *See Zadeh*, 226 A.3d at 470.

95. *Id.* at 486.

96. Although the *Zadeh* court did not discuss it, part of the difference in treatment from *McCracken* may have come from a hesitancy to extend the plain feel doctrine to cell phones given the sheer volume of personal information they contain. *See* Riley v. California, 573 U.S. 373, 393–98 (2014) (requiring law enforcement to obtain a warrant before digitally searching an arrestee's cell phone given the immense amount of data phones contain). That said, the omission of relevant factors from the face of the *Zadeh* opinion adds to the confusion and contradictory outcomes that characterize plain feel cases.

3. Surrounding Circumstances

Another way courts assess whether an object's identity was immediately apparent is to consider whether the context surrounding the seizure corroborates the officer's suspicion. In some cases, there is a fairly close connection between the circumstances and the suspected contraband. In *United States v. Proctor*, the First Circuit credited an officer's testimony that he was able to consistently identify marijuana based on feel in part because of the context of this particular frisk: the officer seized a bag of marijuana from Mr. Proctor's pocket after serving a search warrant on his residence because it was a suspected marijuana distribution hub.[97] The court found that the combination of the officer's prior experience and the circumstances of the search corroborated the officer's claim that the marijuana was immediately apparent contraband.[98]

In other cases, the connection between the circumstances and the alleged contraband is more tenuous. In *People v. Custer*, police responding to a trespassing call confronted a driver sitting in a car with a passenger, Mr. Custer.[99] Police discovered marijuana and a large amount of money on the driver, and while they arrested him, he yelled at Mr. Custer not to talk.[100] An officer then frisked Mr. Custer and felt what he believed to be a small cardboard card of blotter acid, containing LSD, in his pocket.[101] The object turned out to be Polaroid photographs of marijuana.[102] Although the officer did not explain what about these circumstances made him suspect LSD might be in Mr. Custer's pocket beyond the mere fact that he knew LSD was sometimes stored on cardboard, the Michigan Supreme Court nevertheless credited the officer's many years of experience and upheld the seizure.[103]

Some courts have held that surrounding circumstances and officer experience are not enough to justify seizing contraband—an officer still must feel the contraband itself. In *State v. McClure*, an officer suspected Ms. McClure was under the influence of opioids based on her agitated demeanor when she was stopped for driving in the wrong direction.[104] When the officer frisked her, he felt a small, folded piece of paper no bigger than a gum wrapper in her pocket, which, based on his training and experience, he believed was "some type of contraband[,] specifically drugs."[105] While the paper did contain drugs, the Ohio Court of Appeals suppressed the seizure because the officer did not testify that he actually felt anything inside the paper, and "there are numerous

97. 148 F.3d 39, 40–41, 43 (1st Cir. 1998).
98. *Proctor*, 148 F.3d at 40–41, 43.
99. 630 N.W.2d 870, 875 (Mich. 2001).
100. *Custer*, 630 N.W.2d at 875.
101. *Id.*
102. *Id.*
103. *Id.* at 879.
104. No. 19CA9, 2020 WL 1910737, at *1–2 (Ohio Ct. App. Apr. 16, 2020).
105. *McClure*, 2020 WL 1910737, at *2.

innocuous reasons a person might have a piece of paper in his or her pocket."[106]

This is where the largest split in applications of the plain feel doctrine appears—some courts maintain that an officer must be able to feel the actual contraband at issue, while others maintain that they need only feel a container for suspected contraband. Some courts, like the *McClure* court addressing folded paper, argue that the ability to feel the contraband is required. However, many others have found hard containers that conceal their contents may still be seized under the plain feel doctrine. These cases—where the container obscures the feel of the contraband—most often lead courts to decide similar facts in opposite ways. Matchboxes, film canisters, and pill bottles have all been suppressed in courts that find an officer cannot possibly know an object is contraband when it is housed in an innocuous object beneath layers of clothing. Other courts have asserted with equal confidence that the very same items can be identified as contraband based on the surrounding circumstances and an officer's training and experience.[107]

This split illustrates a core doctrinal confusion: how anchored to "feel" must the plain feel doctrine be? In admitting plain feel evidence, some courts have accepted officer testimony suggesting "remarkable sensory powers" that strain credulity.[108] In one case, the D.C. Circuit credited the testimony of an officer who "immediately" knew he felt crack cocaine during a cursory frisk, even though it was found "inside two pairs of pants, a pair of briefs, a paper bag, a paper napkin, and a plastic bag."[109] In another, both the district court and the Third Circuit found an officer's testimony credible when, after patting a "middle medium weight jacket" for what "[p]robably wasn't even a half second," he could still "tell right away" that a lump in a pocket was marijuana.[110]

While courts typically consider similar factors when reviewing plain feel cases—officer training and experience, the specificity of the alleged contraband, and the circumstances surrounding the seizure—they frequently come to differing conclusions given the lack of clear guidelines for what qualifies as immediately apparent contraband. These contradictory outcomes engender ongoing confusion about what constitutes a lawful or unlawful search, and that confusion persists when an officer seizes potential weapons.

B. *Weapons Analysis*

Sometimes officers seize contraband they initially thought might have been a weapon. Courts consider many of the same factors in determining

106. *Id.* at *4. For similar reasons, the Virginia Supreme Court suppressed loose pills seized from a pocket because their illicit nature could not be determined by feel alone. Cost v. Commonwealth, 657 S.E.2d 505, 509 (Va. 2008).

107. *See supra* note 21.

108. United States v. Yamba, 506 F.3d 251, 258 (3d Cir. 2007).

109. United States v. Ashley, 37 F.3d 678, 681 (D.C. Cir. 1994).

110. *Yamba*, 506 F.3d at 258, 260.

whether evidence is admissible under these circumstances, but an officer's belief that a weapon may be present changes the analysis in some important ways. Because the sole purpose of a frisk is to find and remove weapons that could pose a threat to officer safety,[111] officers have much wider latitude to manipulate and explore objects—which *Dickerson* typically prohibits—so long as they think the objects could be weapons. As a result, officers testifying that they suspected an item could be a weapon (or could not rule out that it was *not* a weapon) often have carte blanche to manipulate and seize whatever they find.[112]

Courts are often highly deferential about what officers think could be weapons, as in *United States v. Brown*, where an officer seized a bag with three rocks of cocaine, each smaller than a ping pong ball, because he thought they were the butt of a gun.[113] Although it is hard to imagine how three ping pong balls could feel like a gun, the Seventh Circuit upheld the seizure and noted that officers should be "[b]etter safe than sorry."[114] In *United States v. Johnson*, the Eleventh Circuit upheld the seizure of a single bullet and an empty gun holster as weapons.[115] Although Mr. Johnson was handcuffed when he was frisked, limiting his mobility, the court nevertheless credited the officer's fear that Mr. Johnson could pair the single bullet with a missing weapon to harm the officer.[116] Considering the totality of the circumstances—it was very late, they were in a high crime area, and the officer was responding to a burglary where parties might be armed—the court found the bullet could be used as a weapon and its seizure was valid.[117]

Some courts have found that an officer does not need to testify that they actually thought a given object was a weapon in order to seize it; the question is rather whether some other reasonable person could think the object was a weapon. In *United States v. Swann*, an officer seized a stack of credit cards in a sock.[118] The Fourth Circuit noted that because an objectively reasonable person could think the cards were a box cutter—even though this particular officer did not suspect the presence of a weapon and instead testified he did not know what was in the sock when he seized it—the credit cards were admissible as evidence.[119]

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

112. *E.g.*, United States v. Rogers, 129 F.3d 76, 79 (2d Cir. 1997) (admitting into evidence a paper bag of cocaine the officer was "fairly certain" contained drugs after pressing and manipulating it because the officer could not exclude the possibility that it also contained a weapon).

113. 188 F.3d 860, 863 (7th Cir. 1999).

114. *Brown*, 188 F.3d at 866.

115. 921 F.3d 991, 1000–01 (11th Cir. 2019).

116. *Johnson*, 921 F.3d at 1001.

117. *Id.* at 998. By contrast, in *United States v. Miles*, 247 F.3d 1009, 1010–12 (9th Cir. 2001), the seizure of a box of bullets was invalid because, although the officer similarly feared for his safety, he realized the box was not a weapon after shaking it but seized it anyway.

118. 149 F.3d 271, 273 (4th Cir. 1998).

119. *Swann*, 149 F.3d at 275–76.

Other courts require more particularized facts to justify suspicion that an object might contain a weapon. In *King v. United States*, a detective justified seizing a wallet because it could contain razor blades or "artfully concealed weapons."[120] The Sixth Circuit rejected that argument and suppressed the evidence because the detective did not allege any specific facts about why he suspected this wallet posed a danger. The court explained, "the fact that razor blades exist does not give rise to a reasonable inference that there is a razor blade in any particular person's wallet."[121] Compare this, however, with *United States v. Muhammad*, where the Eighth Circuit upheld an agent's seizure of Mr. Muhammad's wallet from his back pocket because it "felt like an object that could conceal a weapon."[122] The officer was not required to specify why he thought there might be a weapon in these particular circumstances.[123]

While courts reviewing plain feel cases involving potential weapons make many of the same analytical moves as cases involving contraband, there are important distinctions—namely, that officers are free to manipulate objects to determine their identity and can seize anything so long as it could possibly be interpreted as a weapon.

The foregoing survey of cases highlights both the inconsistencies prevalent in the doctrine and foreshadows the problems those inconsistencies create. Because the line between lawful and unlawful seizures is unclear, officers have an incentive to seize items that might be contraband and allow the issue to be litigated later. This approach encourages searches beyond what *Dickerson* contemplated and, as Part III shows, marks the plain feel doctrine as a crucial site for reform.

III. Plain Feel Problems and Solutions

The plain feel doctrine is, simply put, a mess. Cases with nearly identical facts routinely lead to conflicting conclusions in state and federal courts across the country, and in many ways, this is no surprise. Because the doctrine has virtually no guardrails, two courts can be in perfect alignment with *Dickerson* in saying that car keys in a pocket are or are not "immediately apparent" contraband. But while broad and narrow interpretations of the plain feel doctrine are both consistent with *Dickerson*, they are not both consistent with the Constitution. This Part reviews the ways in which an ambiguous and poorly delimited plain feel doctrine runs contrary to the Fourth Amendment and concludes with suggested steps toward reform.

120. 917 F.3d 409, 428 (6th Cir. 2019).

121. *King*, 917 F.3d at 428.

122. 604 F.3d 1022, 1026 (8th Cir. 2010).

123. *Muhammad*, 604 F.3d at 1026.

A. *Fourth Amendment Contradictions*

A broad plain feel doctrine is in tension with core Fourth Amendment principles in two ways: first, by undervaluing the intrusiveness of plain feel searches, and second, by excessively deferring to law enforcement.

Courts traditionally analyze whether a search is "reasonable" by balancing an individual's reasonable expectation of privacy against the government's interest in the intrusion.[124] A highly invasive search sensibly requires a more compelling justification. In *Dickerson*, the Court dismissed concerns that a plain *feel* search (where the privacy invasion occurs via touch) is more invasive than a plain *view* search (where the privacy invasion occurs via sight).[125] Because the intrusion is already authorized by the weapons frisk permitted under *Terry*, the Court argued, the plain feel doctrine does not create additional privacy violations and thus requires no additional justification.[126] An officer reaching into your underwear on a public street is no more invasive than an officer looking around your house, so the argument goes, because the officer would have been reaching into your underwear anyway.

The *Dickerson* logic that the plain feel doctrine incurs no additional privacy violation relies on a number of assumptions: (1) the availability of the plain feel doctrine will not incentivize an officer to conduct a frisk in the hopes of finding contraband, despite lacking reasonable suspicion a person is armed; (2) nor will the plain feel doctrine incentivize an officer who felt an unknown non-weapon item during a frisk to reach into the underwear and say they knew what they would find after the fact; (3) courts will be able to accurately and consistently assess an officer's ability to identify objects obscured by clothing via touch; and (4) courts will have a window into how often violations occur and will be able to deter them. In the thirty years since *Dickerson*, these ideas rest on increasingly shaky ground.

The presumption that the plain feel doctrine will not create perverse officer incentives contradicts the logic behind the warrant requirement, which recognizes that a probable cause determination should be made by a "neutral and detached magistrate" rather than by an officer "engaged in the often competitive enterprise of ferreting out crime."[127] Because officers are not disinterested parties, exceptions to the warrant requirement are meant to be rarities, "jealously and carefully drawn."[128] Instead, the plain feel doctrine puts the decision about whether or not to reach into someone's pocket in the hands of an officer who, if they find something illicit, can later say the legal "magic words" attesting to their certainty.[129] This concern does not require an assumption that officers will act in bad faith; it simply acknowledges that officers are not

124. *See* Smith v. Maryland, 442 U.S. 735, 740 (1979).

125. Minnesota v. Dickerson, 508 U.S. 366, 377 (1993).

126. *Id.* at 376–77.

127. Johnson v. United States, 333 U.S. 10, 14 (1948).

128. Jones v. United States, 357 U.S. 493, 498–99 (1958).

129. Sullivan, *supra* note 17, at 188.

neutral parties. A reasonable officer who seizes an item on a hunch, before they have developed the requisite probable cause, is likely to feel the effect of confirmation bias if their hunch was correct, coloring their perception of how sure they were prior to the seizure.

One might counter that bare assertions are not enough, and that a reviewing court can assess the credibility of an officer who claims contraband was apparent on plain feel. However, as Part II demonstrates, in practice courts have struggled to reach consistent results. If your wallet is seized during a frisk, the degree to which the Fourth Amendment protects you will vary from court to court.[130] Furthermore, as Professor Anna Lvovksy observes, courts may not be as discerning about police expertise because "the cumulative effects of judges' many encounters with the police . . . give courts an unusual regard for the reliability of the police's professional insight."[131] The practical difficulties of knowing when it is physically possible to identify various forms of contraband through layers of clothing, combined with routine deference to law enforcement expertise, means that courts are an inconsistent referee on plain feel seizures.

Finally, trusting courts to deter plain feel violations ignores the unknowable number of illegal searches that are never reviewed in court. Consider the statistics from *Floyd*, the NYPD racial profiling case in which the court found that "88% of the 4.4 million stops resulted in no further law enforcement action."[132] An officer who believes they have found contraband in a pill bottle but instead seizes someone's aspirin will not have cause for arrest, and it is unlikely any court will review or deter their actions.[133] A similar problem exists if the violation occurs in misdemeanor cases, which outnumber felony cases three-to-one.[134] If the seizure is not litigated initially, the rarity of misdemeanor appeals means it is extremely unlikely to be reviewed later.[135] Furthermore, even if a violation is identified, the Supreme Court's trend toward limiting the application of the exclusionary rule—which is meant to deter Fourth Amendment violations by suppressing the resulting evidence—raises

130. *See supra* notes 120–123 and accompanying text.

131. Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2080 (2017).

132. Floyd v. City of New York, 959 F. Supp. 2d 540, 558–59 (S.D.N.Y. 2013).

133. Section 1983 claims allow civil suits against state or local officials to challenge some civil rights violations. However, given both the increasing limits to § 1983 applicability and the quagmire of qualified immunity, these suits are not likely to provide broad relief or deterrence. *See* Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, DISSENT, Fall 2017, at 119, 121–22.

134. Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV. 1933, 1933 (2019).

135. *See id.*

concerns that the rule's days are numbered.[136] As the Court expands the situations in which illegally obtained evidence may be admitted, the impact this may have on officer behavior cannot be ignored.

Practically, this means that officers, who are able to establish reasonable suspicion, a standard well below 51 percent accuracy[137] that can arise out of factors like location, race, and police avoidance,[138] are free to frisk a person, seize anything they find, and profess their certainty after the fact, knowing that inaccurate seizures are unlikely to be litigated. This places a disproportionate burden on racial minorities, who are more likely to be frisked.[139] In weighing the intrusiveness of these searches, the doctrine fails to consider their stigmatic and dignitary harms. An officer reaching inside your pants on a public street is a deeply violative experience on its own; knowing that the search is more likely to occur if you are Black or Latinx, even though the White person walking by you is more likely to have contraband,[140] aggravates the intrusion. The violation also goes beyond the search itself. As David Ourlicht from the *Floyd* suit later explained: "[E]very time I step outside my house, I plan for how I might interact with a cop . . . . There's not a time when I take my dog for a walk in my own neighborhood when those thoughts don't run through my head."[141] These comments reflect both the fear of the stop and the fear of how it might end, particularly when fatal police shootings of unarmed Black people remain a regular occurrence.[142]

The legal context of this intrusion matters. In the decades since the plain feel exception was established, Fourth Amendment doctrine has evolved to include what Justice Sotomayor has called "an array of instruments to probe and examine you."[143] As she highlights, an officer can stop you pretextually[144] or based on the officer's "reasonable mistake of law,"[145] can handcuff you and take you to jail for minor infractions like not wearing a seatbelt,[146] can search

136. David A. Moran, *Hanging On by a Thread: The Exclusionary Rule (or What's Left of It) Lives for Another Day*, 9 OHIO ST. J. CRIM. L. 363, 375 (2011).

137. Kansas v. Glover, 140 S. Ct. 1183, 1188 (2020).

138. *See supra* notes 27–29 and accompanying text.

139. *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 559 (S.D.N.Y. 2013); *see also supra* note 15.

140. *Floyd*, 959 F. Supp. 2d at 559.

141. David Ourlicht as told to Margo Snipe, *I'm 31. I'm a Lawyer. And I'm Still Getting Stopped by the Police.*, THE MARSHALL PROJECT (July 11, 2019, 10:00 PM), https://www.themarshallproject.org/2019/07/11/i-m-31-i-m-a-lawyer-and-i-m-still-getting-stopped-by-the-police [perma.cc/BRC3-JWQB].

142. *See* Cheryl W. Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Patterns*, NPR (Jan. 25, 2021, 5:00 AM), https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns [perma.cc/2UUT-R7RV].

143. Utah v. Strieff, 136 S. Ct. 2056, 2069 (2016) (Sotomayor, J., dissenting).

144. Whren v. United States, 517 U.S. 806, 813 (1996).

145. Heien v. North Carolina, 574 U.S. 54, 61 (2014).

146. Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001).

you and your belongings incident to that arrest,[147] can force you to "shower with a delousing agent"[148] at the jail before inspecting your mouth, hair, anal cavity, and genitals,[149] and in some circumstances can hold you for forty-eight hours before a judge reviews whether the officer had probable cause for the arrest.[150]

The *Dickerson* Court's confidence that the plain feel doctrine occasions no further invasion of privacy thus fails to comprehend the ways in which carrying pill bottles,[151] cardboard,[152] paper,[153] car keys,[154] mints,[155] or a phone,[156] particularly as a person of color,[157] can bring you within the crosshairs of the Fourth Amendment tools described above.

B. *Steps toward Reform*

Given that a broad interpretation of the plain feel doctrine undermines core Fourth Amendment principles, there are two options moving forward—get rid of the doctrine or put guardrails on it. This Section explores what both options might look like and concludes with suggested steps toward reform.

First, a point of clarity—the plain feel doctrine is a site of contradictions and confusion, and has enabled an unknowable number of lawless searches, particularly of racial minorities, across the country for thirty years. In my mind, it should not exist, and much of Fourth Amendment law should look very different. That said, overruling the doctrine seems unlikely given both the makeup of the current Supreme Court[158] and the overall conservative turn in constitutional criminal procedure since the 1970s.[159] There is also a concern that disturbing a thirty-year-old precedent could undermine the solidity of

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

148. *Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting) (quoting Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 323 (2012)).

149. Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 342–43 (2012) (Breyer, J., dissenting) (describing a typical strip search).

150. Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

151. People v. Champion, 549 N.W.2d 849, 858 (Mich. 1996).

152. *See supra* notes 99–103 and accompanying text.

153. *See supra* notes 104–106 and accompanying text.

154. *See supra* notes 91–92 and accompanying text.

155. *Ex parte* Warren, 783 So. 2d 86, 88 (Ala. 2000).

156. *See supra* notes 93–95 and accompanying text.

157. *See supra* note 15 and accompanying text.

158. *See* Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022, 7:04 AM), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative [perma.cc/6C52-65GN].

159. Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 938–39 (2010).

other monumental precedents, although given recent decisions reversing decades of precedent on abortion rights[160] and separation of church and state,[161] it is not clear that such logic holds.[162]

If the Supreme Court is unwilling to overrule the plain feel doctrine, advocates of reform could attempt a "death by a thousand cuts" strategy. Under this option, state legislatures could pass statutes prohibiting plain feel seizures as a matter of state law, or state supreme courts could interpret the plain feel doctrine as violating state constitutional prohibitions on unreasonable searches and seizures. Similarly, Congress could prohibit plain feel seizures as a matter of federal law. While this would provide some measure of relief to some people, the downside of this approach is clear—state-by-state and federal variations in the scope of protection during a frisk inject even more confusion into a chaotic area of criminal procedure. Furthermore, this assumes a level of political will to protect the accused that has been historically absent.[163]

More realistically, the Court could place guardrails on the doctrine by offering guidance on when contraband is "immediately apparent." Figuring out what would protect against unwarranted intrusions, however, is no easy task. The Sixth Circuit looks for (1) a nexus between the object and the suspected criminal activity, (2) whether the intrinsic nature of the object gives probable cause to believe it is associated with criminal activity, and (3) the facts available to officers at the time of the seizure.[164] This formalizes some of the factors that courts typically look at and is a step in the right direction, but open-ended considerations that are not required but merely "instructive" are unlikely to cure the doctrine's widespread inconsistencies.[165] Indeed, wallets, keys, and hard containers that conceal their contents could all pass this test. The Sixth Circuit's test thus highlights the ways that any guidance must walk a delicate

160. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

161. Carson *ex rel.* O. C. v. Makin, 142 S. Ct. 1987, 1997 (2022) (requiring Maine to fund private religious schools as part of its tuition assistance program); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427–28 (2022) (siding with a public school football coach leading students in prayer).

162. *See Dobbs*, 142 S. Ct. at 2319, 2338 (Breyer, J., Sotomayor, J. & Kagan, J., dissenting) ("[N]o one should be confident that this majority is done with its work. . . . [T]he majority throws longstanding precedent to the winds without showing that anything significant has changed to justify its radical reshaping of the law.").

163. As Professor Donald Dripps put it, "[S]o long as the vast bulk of police and prosecutorial power targets the relatively powerless (and when will that ever be otherwise?), criminal procedure rules that limit public power will come from the courts or they will come from nowhere." Donald A. Dripps, *Constitutional Theory for Criminal Procedure:* Dickerson*,* Miranda*, and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY L. REV. 1, 46 (2001).

164. United States v. Pacheco, 841 F.3d 384, 395 (6th Cir. 2016).

165. As one dissenting judge put it, "the distinctions *Dickerson* requires courts to make are often ethereal. . . . [The] questions judges ask to decide cases of this kind connote less the lore of law than a bad *Seinfeld* episode." United States v. Gordon, 104 F. App'x 275, 278–79 (3d Cir. 2004) (Ambro, J., dissenting), *cert. granted, vacated and remanded*, 544 U.S. 901 (2005).

tightrope—adding a handful of open-ended factors is an imitation of the current system, but firm rules undermine the idea that officers need some discretion to do their jobs.

Another option for identifying appropriate guardrails is to consider whether the plain feel doctrine is based on a false premise—that is, whether officers can reliably identify contraband through touch at all, let alone briefly through layers of clothing without any manipulation. There is very little empirical data on the question. A series of studies measuring whether people could identify objects solely by touch were cited in Minnesota's brief before the *Dickerson* Court.[166] The studies overall found a fairly high degree of accuracy when participants were tasked with identifying common objects (such as combs, balloons, and potatoes), but only after prolonged object manipulation—which *Dickerson* expressly prohibits.[167] The researchers noted, "[W]e do not mean to claim that the perception of form through touch is generally accurate and efficient."[168] Furthermore, none of the studies involved identifying objects through layers of clothing or testing the specific abilities of police officers.

One answer to this profound lack of relevant data is to conduct a range of experiments. Volunteers concealing various illicit and innocent objects in their clothing could consent to being frisked by police officers, who would decide which objects (if any) they had probable cause to believe were contraband. Studies could test officers' accuracy in identifying a range of potentially contraband substances, such as powders, rocks, plantlike material, and syringes. They could also assess accuracy in identifying items concealed within various objects, such as bags or napkins, and under different layers of clothing, such as jackets, pants pockets, or underwear. This kind of data does not take into account the other factors that might lead an officer to have probable cause, such as the circumstances of the frisk, but it would offer baseline statistics against which a court could compare an individual officer's claims that they identified an object as contraband without having to manipulate it.

The proposal to gather empirical data is not meant to offer a veneer of legitimacy to a confused, chaotic doctrine—it would only answer the discrete question of whether officers can identify some objects under some circumstances, and the results by themselves would not be sufficient to prove or disprove the validity of a seizure in a given case. However, it would provide a critical window into the level of accuracy that is even possible. It might also provide a counterbalance to the circumstances Professor Lvovsky identified,

166. Petitioner's Brief on the Merits, Minnesota v. Dickerson, 508 U.S. 366 (1993) (No. 91-2019), 1992 WL 511980, at *15 n.10. For a helpful summary of the studies cited, see Miller, *supra* note 57, at 251–54.

167. Miller, *supra* note 57, at 251–54.

168. *Id.* at 252–53. As Miller explains, one of the major studies cited was conducted "with the goal of developing tangible graphics for the visually handicapped." *Id.* at 257.

wherein the ways courts interact with officers overexposes judges to "circumstances that [make] the police's expert claims appear more credible."[169] Empirical evidence about the accuracy of officer seizures would provide context for an individual officer's claimed expertise in sensing contraband. Furthermore, the results of these studies could guide the Supreme Court in putting effective limits on the doctrine—or perhaps overruling it, if studies show plain feel presumes abilities officers do not have.[170]

As calls to address the inequities of the criminal legal system grow louder, the plain feel doctrine is a critical site for reform. But if the present state of the doctrine is unsatisfying, so too is the lack of easy solutions. The doctrine is in desperate need of guardrails at a minimum, but precisely what those should be is hard to say. Gathering empirical data offers a crucial first step toward identifying the appropriate contours, and it might even set out a path for overruling the doctrine.

CONCLUSION

For thirty years, the plain feel doctrine has quietly grown into a massive exception to the Fourth Amendment's warrant requirement. This Note attempts to shine a light on the ways that, in the absence of clear guidance, courts have struggled to referee plain feel seizures. What qualifies as immediately apparent contraband—and how to assess factors like officer training and experience, the specificity of the alleged contraband, and the circumstances surrounding the search—varies between and among state and federal courts. The end result is a doctrine that undermines core Fourth Amendment principles and demands reform. One option is to gather empirical data on the accuracy of officer seizures, which could guide the Supreme Court in articulating clearer standards for what qualifies as "immediately apparent" and might even lead to overruling the doctrine. Until then, and without sustained criticism, the plain feel doctrine will continue to enable an unknowable number of illegal searches each day—and minority groups are likely to bear the brunt of them. Courts reviewing contraband seizures will rarely hear the story of the man whose pockets were searched on the way to his dorm, or the crying child who was pushed on the hood of an officer's car,[171] but their stories are inextricably linked to this doctrine. These collective harms point to the one thing that is immediately apparent: the plain feel doctrine demands reform.

169. Lvovsky, *supra* note 131, at 2059.

170. As was the case in *Dickerson* itself, given that officers could only identify the contraband after manipulating it.

171. *See supra* notes 1–11 and accompanying text.