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THE PLAIN FEEL DOCTRINE AND THE EVOLUTION OF THE FOURTH AMENDMENT

Anne Bowen Poulin*

I. INTRODUCTION

The development of the law involves constant tension between abstract principles and practical applications. Nowhere is this more true than in Fourth Amendment jurisprudence. While defining Fourth Amendment protection, the United States Supreme Court has lamented the difficulty of attaining governmental conformity with the constitutional restrictions imposed. Because of this limited congruence between abstract and actual Fourth Amendment protection, even reasonable and principled interpretations of the Constitution may effectively reduce the protection of Fourth Amendment interests. Any new rule permitting the government to justify intrusions under the Fourth Amendment threatens to erode fundamental individual protections when the government exploits any perceived latitude in the rule and the courts must respond to a new set of arguments and new testimonial claims.¹

In Minnesota v. Dickerson,² the Court held that tactile exploration of an object could provide the basis to conclude it is seizable, recognizing the “plain feel” corollary to the plain view doctrine.³ One method for determining whether the Dickerson decision has ef-

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¹. See Transcript of Petitioner’s Oral Argument at 10, Maryland v. Wilson, 117 S. Ct. 882 (1997) (No. 95-1268) ("[I]t's privacy and dignity, and we all know that the police will take our decisions as far as their language and logic will permit . . . ."). During this oral argument, Justice Kennedy expressed his concern that no matter which way the Court decided, the police would push their holding as far as they possibly could. See id.
³. Id. at 378.
fected an erosion of protection is to examine the results of its application in state and federal courts. By assessing the action of the rule as applied, we learn whether principled lines are firmly drawn or whether lines drawn on sound principles acquire flexibility when shaped by specific factual situations. In addition, however, we must realize that police actions reflected in written judicial decisions reflect only a minute segment of actual police behavior. Thus, even 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. Whether the "plain feel" exception under Dickerson encourages more invasive but unfruitful searches is an elusive and troublesome question. Although Dickerson itself represented no remarkable erosion of Fourth Amendment protection, sloppy reasoning and overly deferential fact finding typify its application and threaten Fourth Amendment rights.

II. BACKGROUND

When the Supreme Court decided Terry v. Ohio, some commentators feared that the Court had unleashed police discretion. Although Terry articulates careful limitations on stop and frisk, demanding reasonable suspicion for both the stop and the frisk, some scholars feared that the limitations would break down, the standards would not be enforced and that law enforcement would exploit the exceptions to the detriment of privacy interests. Today, almost thirty years later, some believe that those fears have been realized.


5. See Louis Henkin, The Supreme Court 1967 Term, 82 Harv. L. Rev. 63, 183-186 (1968) (contending that it may be difficult to limit scope of Terry search); Donetta Wypiski, Note, Criminal Law—Searches and Seizures, 7 Duq. L. Rev. 144, 150-151 (1968) (fearing that minorities will be subject to police harassment as result of reasonable suspicion standard); cf. Mitchel D. Platt, The Limits of Stop and Frisk—Questions Unanswered by Terry, 10 Ariz. L. Rev. 419, 435-37 (1968) (discussing risks, but concluding that adequate protections are available). See generally Wayne R. LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 Mich. L. Rev. 40, 122-26 (1968) (summarizing debate, but concluding that discretion afforded by Terry can be adequately controlled).

6. See, e.g., Henkin, supra note 5, at 185 (concluding that police might abuse "self-protective frisk" and intrude on individual's constitutional rights); Wypiski, supra note 5, at 151 (finding that police officer's determination of probable cause would not protect citizen from unwarranted invasions).

Immediately after *Terry* was decided, the government exerted pressure to extend the scope of the holding to permit the police to search not merely for weapons, but also for any contraband or criminal evidence officials suspect will be found on the defendant’s person. The courts have resisted this pressure, repeatedly suppressing evidence seized in *Terry* frisks that went beyond the permitted search for weapons. Nevertheless, the permission to search combined with the belief that the defendant possesses some evidence of criminal activity creates too great a temptation for law enforcement officials. Many cases illustrate encounters in which police officers unabashedly overstepped the limitations *Terry* established with regard to seeking and finding nonweapon evidence.

In 1993, in *Minnesota v. Dickerson*, the Court clarified the extent of police authority to seize items felt during a *Terry* pat down search. Two Minneapolis police officers stopped Dickerson after he left a suspected “crack” house. The officer who frisked Dickerson for weapons felt a lump in the pocket of Dickerson’s nylon coat. Although the officer knew the lump was not a weapon, he manipulated the lump with his fingers to determine what it was. Deciding that “it felt to be a lump of crack cocaine in cellophane,” the officer removed the item from Dickerson’s pocket. His assessment was correct, and Dickerson was prosecuted for possession of a controlled substance. Dickerson’s claim that the seizure of the cocaine violated his Fourth Amendment rights eventually reached the Supreme Court. The Court acknowledged that touch could provide information that would warrant a seizure, but held that the officer’s manipulation of the lump went beyond the scope of a weapons frisk and violated Dickerson’s constitutional rights.

While arguably broadening police authority to search and seize nonweapon contraband during a *Terry* stop, the Court simultaneously reaffirmed previous restrictions on police authority. The place in Fourth Amendment jurisprudence and concluding that reasonable suspicion is even more ambiguous than probable cause).

8. *Dickerson*, 508 U.S. at 366-67 (holding that search is not valid if it goes beyond what is necessary to determine if suspect is armed).

9. *See id.* at 368 (noting that officer had previously responded to complaints of drug sales in hallways of “crack house”).

10. *See id.* at 369 (finding that officer examined lump with his fingers and “it slid”).

11. *See id.* at 378 (stating that officer never thought lump was weapon).

12. *Id.* at 369.

13. *See id.* (noting that small plastic bag contained one-fifth of one gram of crack cocaine).

14. *See id.* at 378 (holding that continued exploration of suspect’s pocket was not justified).
Court recognized the plain feel doctrine, concluding that an officer's sense of touch may provide probable cause to seize an item detected during an authorized touch of the person. The Court held, however, that a *Terry* frisk for weapons is strictly circumscribed and does not permit an officer to probe an object that does not feel like a weapon. The plain feel doctrine, according to *Dickerson*, permits seizure only if the nature of the object was immediately apparent to the officer during the pat down.

Reactions to *Dickerson* have been mixed. Some applaud the decision as a rational application of accepted Fourth Amendment principles, and many state courts have adopted the plain feel doctrine as an aspect of state constitutional protection. Other com-

15. See id. at 375 (stating that if contour or mass makes object "immediately apparent," then there is no unreasonable invasion of suspect's rights).

16. See id. at 378 (noting that officer was only able to identify lump as contraband after "squeezing, sliding and otherwise manipulating" it).

17. See, e.g., Andrew Agati, Note, *The Plain Feel Doctrine of Minnesota v. Dickerson*; Creating an Illusion, 45 Case W. Res. L. Rev. 927, 928-29 (1995) ("[T]he *Dickerson* ruling will prove to be a sensible decision that will not further erode the Fourth Amendment.")


mentators and courts, however, predict that the decision will erode Fourth Amendment protection because the courts cannot or will not maintain the restrictions affirmed by the Supreme Court.19 A

detected in pat down); People v. Champion, 549 N.W.2d 849, 851 (Mich. 1996) (applying Dickerson and upholding seizure of pill bottle from suspect's sweatpants); State v. Craven, 560 N.W.2d 512, 513-14 (Neb. Ct. App. 1997) (following Dickerson and upholding search which uncovered spark plug that officer believed was marijuana pipe); State v. Jackson, 648 A.2d 738, 740 (N.J. Super. Ct. App. Div. 1994) (applying Dickerson and holding seizure of plastic bags filled with cocaine invalid); State v. Wilson, 437 S.E.2d 387, 387-89 (N.C. Ct. App. 1993) (holding seizure of cocaine from suspect's breast pocket valid under Dickerson); State v. Hunter, 649 N.E.2d 289, 290-92 (Ohio Ct. App. 1994) (applying Dickerson and upholding seizure of cocaine after officer witnessed suspicious transfer of "wadded-up plastic bag"); State v. Bridges, No. 02C01-9412-CC-00298, 1995 WL 764998, at *5-6 (Tenn. Crim. App. Dec. 28, 1995) (finding seizure of pill bottle valid under Dickerson); State v. Johnson, 522 N.W.2d 688, 589-90 (Wis. Ct. App. 1994) (holding seizure of film canister invalid under Dickerson because officer shook canister and determined contents were "light in weight" and might be marijuana seeds); cf. People v. Limon, 21 Cal. Rptr. 2d 397, 402-05 (Ct. App. 1993) (citing Dickerson approvingly, but resolving issue on other grounds); People v. Corpany, 859 P.2d 865, 871-72 (Colo. 1993) (applying Dickerson and concluding that search of "fanny pack" following pat down exceeded scope of that permitted under federal constitution but not reaching plain feel question); State v. Scott, 518 N.W.2d 347, 349 (Iowa 1994) (citing Dickerson and holding that officer stayed within confines of Terry frisk because once she determined object was not weapon, she did not manipulate it further, but inquired and was told it was marijuana); State v. Hayes, 535 N.W.2d 715, 722-23 (Neb. Ct. App. 1995) (citing Dickerson, but upholding seizure of three and one-half ounces of crack cocaine on basis of search incident to arrest). The legal posture of the Arizona courts on the question of plain feel is somewhat unclear. The court of appeals apparently applied Dickerson in State v. Sigro, No. 1CA-CR 93-0681, 1995 WL 13556 (Ariz. Ct. App. Jan. 17, 1995), but later withdrew its opinion. In In re Pima County Juvenile Delinquency Action, 891 P.2d 243, 246 (Ariz. Ct. App. 1995), the court held that the seizure of a soft object from the juvenile's pocket was not a valid plain feel seizure under Dickerson. Id. The court distinguished Sigro on the ground that, unlike the officer in Sigro, the officer who seized the drugs did not testify that "he knew as soon as he felt it that the minor had drugs in his pocket." Id.

In addition, some states applied plain touch in decisions predating Dickerson and have not revisited the question since the Supreme Court's decision. See Dickerson v. State, No. 228, 1993 WL 22025, at *2 (Del. Super. Ct. Jan. 26, 1993) (applying pre-Dickerson federal law and concluding that seizure of crack vials was justified under plain feel); State v. Alamont, 577 A.2d 665, 667-69 (R.I. 1990) (upholding seizure of crack vials identified by touch during pat down); Ruffin v. Commonwealth, 409 S.E.2d 177, 179 (Va. Ct. App. 1991) (concluding that plain view doctrine permitted officer to remove and examine packet which frisk revealed under suspect's sock); see also State v. Ortiz, 683 P.2d 822, 824 (Haw. 1984) (applying plain feel reasoning to officer's detection of gun in knapsack); State v. Zearley, 444 N.W.2d 353, 356-59 (N.D. 1989) (citing plain feel decision favorably and remanding for further proceedings to determine whether officer thought suspect was armed), appeal after remand, 468 N.W.2d 391 (N.D. 1991).

review of the decisions since *Dickerson* reveals that those predictions were accurate.

III. **Dickerson's Place in the Fourth Amendment: Nothing New Under *Dickerson***?

Many of the searches and seizures currently evaluated under the plain feel doctrine resemble intrusions previously assessed under different Fourth Amendment doctrines. To the extent that these intrusions would have been permitted by pre-*Dickerson* doctrine, *Dickerson*'s impact may be inconsequential. Prior to *Dickerson*, two rules were critical to law enforcement's ability to discover evidence and contraband without probable cause to believe it was present. First, permission to conduct a weapons frisk under the authority of *Terry* allows the police to discover both weapons and items resembling weapons if officers have a reasonable suspicion that the person they are detaining is armed and presents a violent threat. Second, permission to search incident to arrest allows police to discover items concealed on or near an arrestee once they acquire probable cause to arrest. These two rules permit law enforcement officers to justify many discoveries of contraband or evidence. *Dickerson* becomes significant only when the police discover evidence while acting outside the range of authority defined by the two pre-existing rules.

A. **Weapons Searches**

*Terry* established the government's authority to search for weapons long before *Dickerson* was decided.\(^\text{20}\) Therefore, without relying on *Dickerson*, the government can justify seizing any object beyond that contemplated by the *Terry* reasonableness standard\(^*\)); Stacey Paige Rappaport, Note, *Search and Seizure—Stop and Frisk—Police May Seize Nonthreatening Contraband Detected Through the Sense of Touch During a Protective Pat Down Search So Long As the Search Stays Within the Bounds Marked by *Terry* v. Ohio—Minnesota v. *Dickerson*, 24 SETON HALL L. REV. 2257, 2315-16 (1994) (describing inherent difficulty in *Dickerson* rule because its application is impractical); see also Lawrence J. Wadsack, *The Plain Touch Doctrine and the Confusion Following United States v. *Dickerson: The Terry Frisk Needs an Expansion*, 39 ST. LOUIS U. L.J. 1053, 1097-98 (1995) (arguing that *Dickerson* should have expanded scope of *Terry* frisks). Some courts have rejected the plain feel doctrine under their state constitutions. *See*, e.g., People v. Diaz, 612 N.E.2d 298, 299-301 (N.Y. 1993) (remarking that "the claimed analogy to the plain view exception does not withstand analysis" and holding that plain view is not consistent with New York State Constitution).

\(^\text{20}\) See *Terry* v. Ohio, 392 U.S. 1, 9-11 (1968) (establishing grounds for police officers to conduct protective pat-down search). The *Terry* Court held that:

[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individ-
felt during a search that is of sufficient hardness and size that it may be a weapon.\textsuperscript{21} For example, in \textit{People v. Limon},\textsuperscript{22} the officer was justified in removing a hide-a-key box from the defendant’s pocket because the hard, rectangular object felt like a possible weapon.\textsuperscript{23} Similarly, in \textit{State v. Goodman},\textsuperscript{24} the court held that a detective who was authorized to frisk the defendant could lawfully seize a crack pipe (described as “a three- to four-inch-long glass vial with one jagged, pointed edge”) because it felt like a weapon.\textsuperscript{25}

In some cases, the government invokes the authority to frisk for weapons to support the seizure of objects that share few characteristics with a gun or knife, arguing that they felt sufficiently

\begin{itemize}
  \item[	extsuperscript{21}] See United States v. Clipper, 973 F.2d 944, 945-46 (D.C. Cir. 1992) (upholding seizure of money because it felt like possible weapon); Roberts v. State, 386 S.E.2d 921, 925 (Ga. Ct. App. 1989) (upholding seizure of plastic bag containing four plastic baggies of cocaine on grounds that officer thought small bulge might be pocketknife); Drake v. State, 655 N.E.2d 574, 577 (Ind. Ct. App. 1995) (upholding seizure of cocaine inside roll of cash because officer thought it might be can of mace); State v. Evans, 618 N.E.2d 162, 171-72 (Ohio 1993) (upholding seizure of wad of cash and packet of crack cocaine because officer could not discount possibility that object was knife or other weapon). For a further discussion of the seizure of objects which feel like weapons, see infra notes 20-30 and accompanying text.
  \item[	extsuperscript{22}] 21 Cal. Rptr. 2d 397 (Ct. App. 1993).
  \item[	extsuperscript{23}] Id. at 403 (holding that hide-a-key magnetic box, in addition to other circumstances, indicated suspect was dealing drugs).
  \item[	extsuperscript{25}] Id. at *2 (upholding seizure of crack pipe with cocaine residue); see also T.P. v. State, 585 So. 2d 1020, 1021 (Fla. Dist. Ct. App. 1991) (holding that vial of cocaine was properly seized because it felt like “new unconventional weapon”); State v. Stubbs, 892 P.2d 547, 552 (Mont. 1995) (upholding seizure of brass pipe that felt like “deadly weapon such as a knife or derringer”); James v. Commonwealth, 473 S.E.2d 90, 92-93 (Va. Ct. App. 1996) (upholding seizure of glass smoking device containing cocaine residue because officer believed it to be weapon).
\end{itemize}
weapon-like to justify the seizure.\textsuperscript{26} For example, in \textit{Allen v. State},\textsuperscript{27} the prosecution successfully argued that the police officer was justified in moving his hand repeatedly over an envelope containing marijuana because he wanted to verify it did not contain a razor blade.\textsuperscript{28} In \textit{Williams v. Commonwealth},\textsuperscript{29} the court upheld the seizure of currency (a roll of eleven bills) because the officer could reasonably have believed it was a weapon.\textsuperscript{30} Of course, if courts accept these arguments, the \textit{Terry} frisk becomes more expansive, increasing the likelihood that an officer conducting a frisk will acquire tactile information justifying a seizure under the plain feel doctrine.

\textbf{B. Search Incident to Arrest}

Incident to a lawful arrest, the police have authority to search an arrestee's person and the surrounding area, including containers.\textsuperscript{31} When the police arrest a defendant, they are entitled to conduct a thorough search, regardless of whether they have any basis to believe they will find contraband or evidence. The key to a valid search incident to arrest is probable cause to arrest. Courts sometimes recognize authority to conduct a search incident to arrest even before the police effect a formal arrest, provided they have probable cause.\textsuperscript{32}

\begin{itemize}
  \item 26. See United States v. Strahan, 984 F.2d 155, 158 (6th Cir. 1993) (holding seizure of money clip and cocaine valid); State v. Morrow, 603 A.2d 835, 836-38 (Del. 1992) (upholding seizure of tightly wrapped plastic bags containing vials of cocaine); Jackson v. State, 669 N.E.2d 744, 748 (Ind. Ct. App. 1996) (allowing seizure of medicine container on grounds that it could contain razor blades); Shinault v. State, 668 N.E.2d 274, 278 (Ind. Ct. App. 1996) (upholding seizure of tightly rolled plastic bag of marijuana); see also Stubbs, 892 F.2d at 555 (Trieweiler, J., dissenting) (noting that officer who conducted in-court demonstration of pat down did not seize brass pipe that was subject of suppression motion and allegedly felt like possible weapon).
  \item 27. 689 So. 2d 212 (Ala. Crim. App. 1995).
  \item 28. \textit{Id.} at 216 (moving hands over pocket was not intrusive because officer was justified in making sure envelope did not contain razor blade).
  \item 30. \textit{Id.} at 87 (noting that officer testified roll of bills felt hard and was not "soft like a piece of cotton").
  \item 31. See United States v. Robinson, 414 U.S. 218, 236 (1973) (holding that search of arrestee includes person and containers found on person such as "crumpled cigarette package"); Chimel v. California, 395 U.S. 752, 763 (1969) (holding that arresting officer may reasonably search person arrested and area within person's "immediate control"); United States v. Maldonado-Espinosa, 968 F.2d 101, 104 (1st Cir. 1992) (upholding search of carry-on luggage within arrestee's reach); State v. LeBlanc, 347 A.2d 590, 593 (Me. 1975) (upholding search of arrestee's jacket located eight to ten feet from suspect).
  \item 32. See Rawlings v. Kentucky, 448 U.S. 98, 111 (1980) ("Where the formal arrest followed quickly on the heels of the challenged search of petitioner's per-
In some cases, the court has bypassed the government's plain feel argument and held instead that the seizure of the evidence in question occurred in the course of a valid search incident to arrest.33 In State v. Hayes,34 for example, the court held that the seizure of drugs from the defendant's pocket, while not justified by the plain feel doctrine, was justified incident to arrest.35 Information concerning the defendant from other sources gave the police probable cause to arrest him.36 Similarly, in Speight v. United States,37 the court held that, although the officer was not authorized to seize keys from the defendant's pocket during a frisk, the police would inevitably have discovered the keys incident to the defend-}


35. Id. at 720 (finding that suspect refused to consent to search following pat down so police obtained search warrant and found 3.5 ounces of cocaine valued at $2000 per ounce).

36. See id. at 721 (finding that previously reliable informant said suspect had large amounts of cocaine and was "actively selling"—facts that were corroborated by law enforcement officers).

C. The Relationship Between Search Incident to Arrest and Plain Feel

Most plain feel cases would be better evaluated as searches incident to arrest. A majority of the cases involve detection and seizure of drugs carried on the person who is patted down. The prosecution’s plain feel argument is that the tactile information obtained by patting the defendant provided probable cause to believe the felt object was drugs and that the seizure was therefore justified. If a police officer has probable cause to believe a defendant has drugs on his or her person, however, the officer has probable cause to effect an arrest for possession of a controlled substance. In many plain feel cases, then, the officer could have arrested the defendant without seizing the drugs if the pat down yielded probable cause. Some judges have recognized the relationship between the two doctrines, arguing that the prosecution should prevail in plain view cases only if the search withstands scrutiny as a search incident to arrest.

In Dickerson, however, the Supreme Court disregarded this relationship, treating plain feel as closely related to the plain view doctrine. The basic holding that an officer can acquire information contributing to probable cause through the sense of touch applies

38. Id. at 445 (holding that keys were admissible because they would have been discovered incident to arrest); see State v. Matthews, 654 So. 2d 868, 871-72 (La. Ct. App. 1995) (appearing to confuse search incident to arrest and pat down for weapons when court properly upheld search but relied on Dickerson even though officer had probable cause to arrest before searching defendant).

39. See Speight, 671 A.2d at 453 (holding that informant’s detailed tip together with report of weapons and smell of PCP constituted probable cause).


equally to arrest or to plain view. A quick review of the plain view doctrine, however, reveals how poorly it fits the facts of *Dickerson* and similar cases. The plain view doctrine justifies seizure of an object only if the officer is lawfully present in a position to seize the object in question without further invasion of privacy.\(^4\) In plain feel cases, by contrast, the officer is never in a position to seize without the additional privacy intrusion of reaching inside the clothing or container through which the officer felt the evidence.\(^4\) The better approach would have been to recognize that once the officer acquires probable cause to believe that the defendant’s pocket contains contraband, the officer can arrest the defendant and search the pocket incident to arrest.

D. *The Role of Dickerson*

The plain feel doctrine occupies a narrow place in Fourth Amendment jurisprudence because the government can often justify seizing felt evidence without invoking the doctrine.\(^4\) The plain feel doctrine is essential only to justify seizing a nonweapon-like item recognizable by feel from a defendant whom the police do not have probable cause to arrest. Thus, in the context of a pat-down search or consent frisk, plain feel is a tool for an officer with a hunch who is looking for evidence.

*Dickerson* merely holds that a law enforcement officer authorized to touch clothing or a container may thereby gather information and if the information gives the officer probable cause to believe the felt object is contraband or evidence, the officer can justify a further intrusion.\(^4\) Because few seizable items other than weapons can be identified by feel, one might expect plain feel to be a tool of limited utility. On the contrary, many cases report prosecution reliance on *Dickerson* and plain feel to justify seizures.

\(^4\) See *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971) (noting that plain view doctrine operates on premise that police officer “had a prior justification for [the] intrusion [during] which he came inadvertently across a piece of evidence incriminating the accused”).

\(^4\) See *Diaz*, 612 N.E.2d at 302 (stating that even if intrusion inherent in initial act of touching is entirely authorized, discovery and seizure of items will entail further intrusion).

\(^4\) See, e.g., *Terry v. Ohio*, 392 U.S. 1, 9-11 (1968) (allowing officer to seize weapon-like evidence found in protective pat-down search).

\(^4\) See *Dickerson*, 508 U.S. at 374 (holding that if officer acquires probable cause to believe defendant possesses contraband, then officer has probable cause to arrest and can seize object in course of search incident to arrest); see also Robert Fraser Miller, “I Want To Stop This Guy!” Some “Touchy” Issues Arising From Minnesota v. Dickerson, 71 N.D. L. Rev. 211, 246-47 (1995) (presenting hypothetical demonstrating how police officers may make further intrusion).
In some cases, the prosecution has invoked plain feel to justify seizing something that was not on the defendant’s person. For example, in *United States v. MacCready*, an officer who was handing the defendant his backpack felt an object in the backpack that felt like, and turned out to be, a gun. The officer had no authority to pat down the backpack, but was authorized to handle it briefly. Having felt the gun during this brief contact, the officer could lawfully act on the tactile information. In cases like *MacCready*, the prosecution must not only persuade the court that the officer recognized the concealed object from its tactile characteristics, but must also justify the contact with the container. For example, in *Commonwealth v. Robinson*, the court easily concluded that the officer who seized a bag from a window sill could use his sense of touch to detect the cocaine in the bag. The pivotal question in

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49. *Id.* at 978 (stating that officer believed object was gun and not “tattooing pen” as suspect claimed). The authority to search the backpack did not come from the officer’s search of the vehicle. *See id.* at 980. The court stated that “it would not be a Fourth Amendment violation to remove the backpack and hand it to the Defendant during the course of an otherwise valid search of the car.” *Id.* The court also noted that “the officer would have felt the gun from a ‘lawful vantage point’ and the rationale behind the plain view doctrine would apply.” *Id.*

50. *See id.* (finding that officer did not squeeze or manipulate backpack to determine identity of object). The court took testimony from the defendant and from the officers about whether the item was immediately recognized as contraband. *See id.* “After evaluating the credibility and demeanor of the witnesses,” the court found that the weapon was immediately recognized by the officers as contraband. *Id.*

51. *See id.* (finding that consensual search did not extend to backpack, but did permit officer to touch backpack).


53. *Id.* at 1124 (determining that “firm and kind of crumbly” feel of object together with officer’s extensive experience justified conclusion that object contained narcotics); *see also MacCready*, 878 F. Supp. at 980 (holding that officer had authority to handle backpack in which gun was detected); *Pitman v. Commonwealth*, 896 S.W.2d 19, 20-21 (Ky. Ct. App. 1995) (holding that marijuana contained in garbage bags and sitting near defendant on roadside must be suppressed because police acted without authority when they “picked up and felt” bags); *State v. Johnson*, 522 N.W.2d 588, 589 (Wis. Ct. App. 1994) (holding that warden exceeded scope of consent when he picked up and shook film canister he observed in defendant’s glove compartment).
the case was whether the police had a basis to seize the bag in the first instance.\textsuperscript{54}

More often, however, plain feel cases fall into a predictable pattern. The prosecution most often invokes the doctrine to uphold a seizure of drugs, drug paraphernalia or evidence of drug trafficking from the defendant's person.\textsuperscript{55} The touching typically occurs during a \textit{Terry} frisk or a consensual pat down following an authorized stop.

Three reasons can be proffered for the disproportionate use of plain feel in drug cases. First, courts often hold that authority to frisk follows virtually automatically when the police stop a defendant on suspicion of drug-related activity, reasoning that drug trafficking is violent and drug use may precipitate violence.\textsuperscript{56} Second, when the police frisk a defendant suspected of illegal drug activity, the police expect (or hope) to find drug-related evidence and will

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Robinson}, 651 A.2d at 1125. In his dissenting opinion, however, Judge Olszewski argued that in addition to determining whether probable cause existed to believe that the bag contained drugs, the court must also determine whether the officer's conduct following the establishment of probable cause was proper. See \textit{id.} at 1126 (Olszewski, J., dissenting). Addressing this question, Judge Olszewski found that, although probable cause to search the bag existed, the officers should have procured a warrant before searching the bag. See \textit{id.} (Olszewski, J., dissenting). Judge Olszewski reasoned that because no exigent circumstances were present, there was nothing preventing the police from merely detaining the bag and procuring a search warrant in order to ensure the defendant's privacy rights. See \textit{id.} (Olszewski, J., dissenting).
\item See, e.g., \textit{United States v. Rivers}, 121 F.3d 1043, 1046 (7th Cir. 1997) (rejecting argument by defendant that police officer exceeded boundaries outlined in \textit{Dickerson} when lump of crack cocaine was discovered after pat down).
\item See \textit{United States v. Clark}, 24 F.3d 299, 304 (D.C. Cir. 1994) (finding that it is "not uncommon for drugs and guns to be associated"); \textit{State v. Curtis}, 681 So. 2d 1287, 1292 (La. Ct. App. 1996) (holding that stop was authorized because "drug traffickers and users have a violent lifestyle"); \textit{Williams v. Commonwealth}, 354 S.E.2d 79, 87 (Va. Ct. App. 1987) (remarking that narcotic deal is kind of transaction that may give rise to "sudden violence or frantic efforts to conceal or destroy evidence"). But see \textit{Howard v. State}, 623 So. 2d 1240, 1241 (Fla. Dist. Ct. App. 1993) (holding that search of suspect observed giving money in exchange for small object was not justified); \textit{State v. White}, 856 P.2d 656, 665 (Utah Ct. App. 1993) (holding that drug use is not crime of violence comparable to drug dealing). See generally Wayne R. LaFave, \textit{Search \& Seizure: A TREATISE ON THE FOURTH AMENDMENT} § 9.5(a), at 256 (1996) (commenting that dangerous propensities of drug traffickers may form basis for police officer's reasonable belief that suspect is armed and dangerous); Miller, supra note 46, at 264-70 (justifying suspicion that suspects are armed and dangerous "given the violent nature of drug trafficking").
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interpret their tactile sensations accordingly.\textsuperscript{57} Particularly in post-
\textit{Dickerson} cases, law enforcement officers often claim to recognize
drugs by feeling them through clothing or other containers.\textsuperscript{58} Third, because we devote so many resources to the war on drugs
and because physical evidence is critical in drug prosecutions, a
disproportionate number of cases addressing Fourth Amendment concerns
are drug cases.\textsuperscript{59} As a result of these three related factors, the
plain feel doctrine has its greatest significance as a weapon in the war
on drugs. Consequently, the fervor to win that war pressures both the
law enforcement community and the judiciary to expand the plain feel doctrine just as it exerts pressure to erode Fourth Amendment protection in other ways.\textsuperscript{60} When the plain feel doctrine is applied expansively (whether as a result of this pressure or

\textsuperscript{57} See, e.g., Agati, \textit{supra} note 17, at 937-39 (finding that officer’s perception in one case was “especially remarkable because this lump weighed 0.2 grams and
was no bigger than a marble”).

\textsuperscript{58} See id. at 938 (“We are led to surmise that the officer’s sense of touch must
compare with that of the fabled princess who couldn’t sleep when a pea was hidden beneath her pile of mattresses.”).

\textsuperscript{59} See Douglas O. Linder, \textit{Trends in Constitution-Based Litigation in Federal
Courts}, 63 UMKC L. Rev. 41, 59 (1994) (“Increasingly, the typical fourth amendment case considers the constitutionality of a search or seizure of drugs made in
anticipation of prosecution under federal drug laws. In 1968 and 1969, about 29% of
fourth amendment cases involved drug offenses. By 1980, the percentage of
drug-related cases rose to 51%. “); David Rudovsky, \textit{The Impact of the War on Drugs on
on use of Fourth Amendment in war on drugs). In his article, Rudovsky states:

The heavy reliance we place on the criminal sanction side of drug policy
places a premium on police seizures of controlled substances and the
apprehension and arrest of those involved in their distribution and
possession. Accordingly, just as the First Amendment became the battle-
ground for laws restricting free speech during the First World War and
the Cold War with the Soviet Union, the Fourth Amendment has become the focal point for resolving issues of governmental power in implement-
ing the War on Drugs.

\textit{Id.; see also} John B. Owens, Note, \textit{Judge Baer and the Politics of the Fourth Amendment:
An Alternative to Bad Man Jurisprudence}, 8 STAN. L. & POL’Y Rev. 189, 190 (1997)
(discussing cases involving Fourth Amendment and drugs).

\textsuperscript{60} See Larry E. Holtz, \textit{The “Plain Touch” Corollary: A Natural and Foreseeable
Consequence of the Plain View Doctrine}, 95 DICK. L. Rev. 521, 552-55 (1991) (arguing
that growing difficulty of detecting drugs and “narcotic cancer” destroying nation’s
families requires increase of police searches and use of plain feel exception); Law-
rence J. Wadsack, \textit{The Plain Touch Doctrine and Confusion Following} United States v.
(1995) (arguing that \textit{Terry frisks} should be expanded in light of strong government interest in “combating illegal drugs”); \textit{see also} Florida v. Royer, 460 U.S. 491, 519
(1983) (Blackmun, J., dissenting) (“The special need for flexibility in uncovering illicit drug couriers is hardly debatable.”). Interestingly, in 1968, commenting on
\textit{Terry} and \textit{Sibron}, Professor LaFave remarked that the intrusions allowed by \textit{Terry}
might be appropriate in cases of serious crimes, but not for less serious offenses
such as possession of narcotics. \textit{See} LaFave, \textit{supra} note 5, at 57-58.
for other reasons), Fourth Amendment protection is effectively reduced.

IV. IMPACT ON LAW ENFORCEMENT BEHAVIOR

The Fourth Amendment seeks to restrict law enforcement conduct. As a result, any decision interpreting the Fourth Amendment should have some impact—either desirable or undesirable—on police behavior. The desirable impact of a decision would be increased compliance with the Constitution. By contrast, an undesirable impact would be increased disregard for constitutional restrictions and consequent police violation of individual rights. Dickerson's two seemingly contradictory aspects make its impact difficult to predict. On one hand, it reaffirms the strict limits on Terry frisks. On the other hand, it recognizes that the police may use their sense of touch to detect contraband and evidence and justify seizing it. Thus, the net effect on law enforcement could be either to discourage expansion of frisks into more general searches or to encourage unconstitutional exploration of palpable evidence. The police conduct reflected in the reported cases suggests that the latter effect has predominated.

Dickerson may affect law enforcement behavior in two different settings. First, on the street, Dickerson may encourage the police to be cautious in searching suspects; or, as appears more likely, Dickerson may tempt police to search more broadly, hoping to exploit any opportunity to feel what is hidden in a subject's clothing or container. The decision may also lead the police to invade a subject's privacy more broadly during a search by probing more aggressively for any identifiable object. Second, in the courtroom, Dickerson may encourage law enforcement witnesses to conform their testimony to the most helpful legal standard by making exaggerated claims of tactile sensitivity or even committing perjury.

In People v. Mitchell, Justice Heiple recognized these dual concerns. He opposed adoption of the plain feel doctrine and argued in dissent:

The "plain touch" doctrine will encourage officers to investigate any lump or bulge in a person's clothing or pock-

61. See U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ."); see also Davis v. Mississippi, 394 U.S. 721, 726 (1969) ("Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry . . . .").

62. 650 N.E.2d 1014 (Ill. 1995).
ets that arouses their curiosity during the course of a patdown search. If the item turns out to be contraband, then its seizure can be retrospectively justified. If it turns out to be something else, then there is no case and the matter ends there. In the interim, a citizen is subject to an unwarranted intrusion into his personal privacy far beyond the intrusion contemplated by the weapons patdown search.63

The law enforcement community enhances the likely impact of a decision by publishing reports about the case and its practical significance. Law enforcement publications address, and therefore may influence, police behavior in both settings. The publications detail the parameters of police authority.64 In addition, the publications describe testimony that satisfies, or fails to satisfy, the courts' requirements.65 For example, the National District Attorney's Association distributes Case Commentaries & Briefs several times a year. The publication reaches prosecutors and is passed on to police officers.66 The publication regularly summarizes recent decisions bearing on police practices and in some instances presents samples of successful testimony.

63. Id. at 1025 (Heiple, J., dissenting). This language was quoted approvingly by Justice Berdon of the Connecticut Supreme Court in his dissenting opinion opposing adoption of the plain view doctrine in State v. Trine, 673 A.2d 1098, 1115 (Conn. 1996) (Berdon, J., dissenting).


65. See STOP AND FRISK: PLAIN VIEW SEIZURE, PLAIN TOUCH AND ROCK COCAINE, CASE COMMENTARIES & BRIEFS (Nat'l District Atty's Ass'n, Alexandria, VA.), Jan. 1995, at 8 (reporting details of testimony which had satisfied Alabama court in plain feel case); see also DiPietro, supra note 64, at 29-30 (quoting court's paraphrase of officer's testimony in successful plain feel case).

A. On the Street

The law enforcement community may construe Dickerson as granting permission to investigate any suspicious bulge. Even though Dickerson emphasizes the limited scope of the frisk, it nevertheless opens the possibility that officers will seize interesting objects knowing that Dickerson supplies a supporting argument to raise in court if the defense moves to suppress the evidence.

The law enforcement literature communicates the utility of plain feel as well as its limitations, and officers may receive that message. In Jones v. State,67 for example, the court noted that the officer testified that "he had proceeded to seize the substance based on his vague knowledge of Minnesota v. Dickerson."68 The officer stated that "[t]he vagueness of his knowledge . . . also caused him to think it wiser not to arrest the petitioner immediately and to get a second opinion regarding the legality of his actions."69

It appears that the officer in Jones was not unusual. A number of decisions applying Dickerson report searches in which the police failed to stay within permissible bounds. In some cases, the police probed or manipulated without authority.70 In others, the police seized objects, later offered as evidence by prosecutors, that had no special characteristics identifiable by touch.71 For example, in various cases, the prosecution has offered items described as: hard, soft, powdery, granular, square, round, flat and tubular.72 One officer testified that he felt "a tubular object" and thought it was "a Life Saver Hole candy container, which is a common container used by

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68. Id. at 257 n.12.
69. Id.
70. For a further discussion of cases in which contraband only became apparent after it was probed and manipulated during a Terry protective search, see infra notes 161-85 and accompanying text.
72. See, e.g., Roberts v. State, 386 S.E.2d 921, 925 (Ga. Ct. App. 1989) (finding seizure of plastic bag containing four plastic baggies of cocaine valid because officer thought small bulge might be pocketknife); Drake v. State, 655 N.E.2d 574, 577 (Ind. Ct. App. 1995) (upholding seizure of cocaine inside roll of cash because officer thought it might be can of mace); State v. Evans, 618 N.E.2d 162, 171-72 (Ohio 1993) (holding seizure of wad of cash and packet of crack cocaine valid because officer could not discount possibility that object was knife or other weapon); State v. Johnson, 522 N.W.2d 588, 589 (Wis. Ct. App. 1994) (holding seizure of film canister invalid because officer shook canister and determined contents were "light in weight" and might be marijuana seeds).
crack dealers to carry their crack cocaine in”; the object turned out to be a brown medicine bottle containing crack cocaine.73 Another officer testified that the object he seized felt “like it may have been a bundle of drugs” and felt “like a small gumball”; it turned out to be a fraction of an ounce of cocaine wrapped in plastic.74 The range of descriptions of the tactile information that prompt seizure suggest that the police are fishing for evidence, and when they make a catch, the prosecution is trying to use the plain feel doctrine to avoid suppression.

Still, we cannot determine with certainty the impact Dickerson will have on police behavior on the street. Police officers do not always conform their conduct to the Constitution,75 and cases report similar seizures predating Dickerson. For example, In re Coleman76 evaluates the constitutionality of a seizure of items including small packets of marijuana and a plastic bag containing crack cocaine rocks.77 The officer who felt the objects testified that they “could [have been] anything” and that “anytime I feel something that’s in the pocket I am going to check it out.”78 Although the Coleman case was decided after Dickerson, the search occurred in October 1992 and, thus, provides an example of how police officers were performing these type of seizures prior to the Supreme Court decision in Dickerson.79

73. State v. Rushing, 935 S.W.2d 30, 32 (Mo. 1996). In this case, the officers knew of previous incidents involving drugs and the defendants. See id. at 31. In fact, one officer previously executed search warrants at the address where the defendant was found. See id. This officer testified that he believed the container held crack cocaine and that “[h]e based this belief on the information received from Rhodes, the area they were in, and his previous training and experience.” Id.

74. Commonwealth v. Crowder, 884 S.W.2d 649, 650 (Ky. 1994). A “bundle” of drugs is defined as “a small package, envelope or paper containing a narcotic (as morphine, heroin, or cocaine)” Webster’s Third New International Dictionary 217 (5d ed. 1976); see also Guy v. Wisconsin, 509 U.S. 914 (1993) (involving seizure of baggie containing bindles of cocaine); Tuitavake v. I.N.S., 85 F.3d 638, n.3 (9th Cir. 1996) (stating that there is no great difference between “bindles” and “bundles”); Hood v. Lewis, No. 94-15755, 1994 WL 551475, at *3 (9th Cir. Oct. 6, 1994) (involving “bundle” of white powder assumed to be cocaine).

75. See, e.g., State v. Denis, 691 So. 2d 1295, 1298-99 (La. Ct. App. 1997) (noting that officer testified that he was trained to pat down every pedestrian he stopped, reflecting no awareness of requirement that he have reasonable suspicion that individual is armed and dangerous).


77. Id. at *3-7.

78. Id. at *5.

79. See id. at *1; see also People v. Wilson, 784 P.2d 325, 326-27 (Colo. 1989) (holding officer violated defendant’s rights by removing plastic bag containing “several small rocks of crack cocaine which were about the size of four peas” from defendant’s pocket during weapons frisk); E.H. v. State, 593 So. 2d 245, 244 (Fla. Dist. Ct. App. 1991) (holding search invalid where officer reached into suspect’s
While the plain touch doctrine clearly invites the police to engage in tactile exploration and to seize whatever feels interesting, reported cases will never provide an accurate picture of on-the-street practice. Tactile exploration yields evidence—admissible or suppressible—in some instances, but undoubtedly yields nothing of interest in a number of cases. Although the reported cases rarely describe seizures that proved baseless, one must assume they occur. The police officer who seizes what feels like a Life Saver Hole container or a gumball will, at least occasionally, find herself with a handful of candy. Because the intrusive action yields no evidence, no legal action is likely to follow, so judges will not hear of the seizure and no decision will record it. Thus, the reported cases portray only a pattern of accurate tactile detection of contraband. They do not reflect the instances in which the officer was mistaken.

Whenever an officer seizes an object based on slim information obtained in the course of a pat down, the officer risks violating the constitutionally protected privacy of the subject. If those violations are not discouraged by judicial resistance to plain feel arguments, Fourth Amendment protection will be persistently eroded.

80. See Kimbrew v. Evansville Police Dep’t, 867 F. Supp. 818, 823-25 (S.D. Ind. 1994) (holding that officer violated complainant’s constitutional rights when he emptied complainant’s pockets because he felt two “large clumps”); Hoey v. State, 689 A.2d 1177, 1180 (Del. 1997) (affirming ruling excluding testimony of witness subjected to fruitless police search under circumstances similar to those under which defendant was searched and found to have allegedly drug-related cash on his person); see also Clark D. Cunningham, The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse, 77 CORNELL L. REV. 1298, 1361 (1992) (“[I]t is the totally innocent person, who neither committed a traffic violation or petty crime nor carried evidence of a crime, who is least likely to receive vindication for violated Fourth Amendment rights.”); Joe Metcalf, Anonymous Tips, Investigatory Stops and Inarticulate Hunches—Alabama v. White, 26 HARV. C.R.-C.L. L. REV. 219, 299 (1991) (arguing that potentially large number of innocent men and women will suffer privacy intrusions of investigatory stops and protective frisks); Miller, supra note 46, at 211 (hypothesizing fruitless but invasive application of plain feel); William J. Stuntz, Privacy’s Problem and the Law of Criminal Procedure, 95 MICH. L. REV. 1016, 1064-65 (1995) (stating that it is stigmatizing to innocent suspect to be stopped and searched by police); Cecere, supra note 19, at 125 (discussing invasive nature of plain feel).
B. In the Courtroom

Regardless of whether on-the-street conduct has changed as a result of Dickerson, in-court testimony clearly has. The decision offers the government a new after-the-fact justification for an additional range of intrusions, and one danger of Dickerson is this invitation to retrospectively justify questionable seizures. If an officer can testify with sufficient confidence that the nature of the item seized was immediately apparent from touching, the court is likely to admit the evidence. Once the police have evidence, they have a strong incentive to protect against suppression. That incentive can precipitate exaggerated testimony or even perjury.

Some officers display laudable candor in describing the information obtained through a frisk. For example, in Howard v. State, 81 the officer testified that he felt "a bulge, 'a hard object in [defendant's] groin,’” and he “‘didn’t know what [he] was dealing with . . . [but] knew there was an object down there that shouldn’t be there.” 82 Similarly, in C.D.T. v. State, 83 the officer testified that he felt a "crumbled plastic baggie”; however, he could not tell whether it was full or empty. 84 Generally, such candid testimony will not sustain the challenged seizure.

As a result, police officers’ testimony often appears calculated to meet the legal standard. In case after case, officers testify it was

82. Id. at 748 (alterations in original). The testimony, taken with other evidence in the case, persuaded the court that the seizure was constitutional. See id. at 749. This conclusion is questionable. Although the defendant was acting nervous when the police approached the car in which he was a passenger for a driving infraction, nothing except defendant’s demeanor and the fact he was traveling to Georgia after a short stay in Florida suggested drug involvement. It appears that the court may have upheld the seizure because the bulge could have been a weapon. See In re Pima County Juvenile Delinquency Action, 891 P.2d 243, 246 (Ariz. Ct. App. 1995) (noting that officer who seized drugs from juvenile did not claim that he immediately recognized object as drugs when he patted juvenile down); Boatright v. State, 483 S.E.2d 659, 661 (Ga. Ct. App. 1997) (finding that testimony was insufficient where officer testified that object, which turned out to be marijuana, felt like “some type of plastic”); State v. Williams, 469 S.E.2d 261, 262-63 (Ga. Ct. App. 1996) (holding testimony insufficient where officer testified, in part, “I knew it was not a knife or a gun. I didn’t know what it was” and “I could pretty well tell that it was not crack cocaine or the feel of crack cocaine, that it was a bag and that there was something in it. I did not know if it would be marijuana or cocaine or heroin or what it might be”); People v. Massey, 558 N.W.2d 253, 255 (Mich. Ct. App. 1997) (noting officer testified only “[w]hen I touched it, I had some idea what it was”); State v. Chitty, 559 N.W.2d 511, 518 (Neb. Ct. App. 1997) (stating that officer testified that he couldn’t tell what object, later discovered to be methamphetamine, was by feel).
84. Id. at 1046.
"immediately apparent" that the object felt during the pat down was contraband.85 Law enforcement literature encourages this practice. For example, a January 1995 article summarizing Huffman v. State86 quoted key passages from the witness' successful plain feel testimony.87 The publication reported that:

A police officer who was able to articulate clearly on the witness stand . . . that when he patted the defendant down for a weapon's frisk (reasonable suspicion) he was able—based on his experience—to immediately tell that a lump in the defendant's pocket was rock cocaine, successfully qualified for a plain feel seizure.88

This type of publication apprises both the police and the prosecutors who prepare them to testify at trial of the words that have previously convinced or failed to convince other courts that the nature of the felt object was immediately apparent.

The prosecutor's questioning can be designed to lead the law enforcement witness to a satisfactory answer. For example, in State v. Edwards,89 the prosecutor asked the officer: "When you felt that hard object did it take a while did [sic] you have to feel it move it around in his pocket to determine what it was or was it immediately apparent to you on your first touch what the item was?"90

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85. See, e.g., United States v. MacCready, 878 F. Supp. 976, 980 (W.D. Tex. 1995) (stating that two officers involved in stop both testified that gun was "immediately apparent"); United States v. Mitchell, 832 F. Supp. 1073, 1078 (N.D. Miss. 1993) (noting that officers invoked their extensive law enforcement experience and testified "that the crack cocaine was 'immediately apparent' upon feeling the outer pocket of the jacket"); Allen v. State, 689 So. 2d 212, 213 (Ala. Crim. App. 1995) (believing officer who testified that he felt leafy substance through appellant's clothes that he "believed" to be marijuana while dissenting opinion argued that contents of envelope could not have been "immediately apparent"); State v. Wonders, 929 P.2d 792, 798 (Kan. Ct. App. 1996) (stating that officer testified "it was 'immediately apparent' to him that the pocket contained a baggie of marijuana"); State v. Johnson, 660 So. 2d 942, 948 (La. Ct. App. 1995) (noting that officer testified that when he felt rock-like substance during pat-down frisk, he "immediately believed" substance to be crack cocaine).

87. See Stop and Frisk: Plain View Seizure, Plain Touch; Rock Cocaine, supra note 65, at 8 (summarizing testimony of witness in Alabama plain feel case).
88. Id. In addition, it reported that the officer testified: "From my pat down, I could tell the outline of the rock without wiggling it around or anything like that." Id. The officer also stated: "I have made several other arrests in which crack cocaine was taken from the subject or crack cocaine was found on the subject. So I can tell the general outline of what a crack cocaine rock is." Id.
90. Id. at *3. Remarkably, this question did not draw an objection on grounds of leading, and despite the prosecutor's suggestion, the officer testified that it was not immediately apparent. See id.
Revisiting pre-Dickerson cases in which the testimony was deficient, one can easily discern the potential for satisfying Dickerson by altering the presentation at trial only slightly. For example, in Commonwealth v. Marconi, the officer stated that he felt something in the defendant's back pocket that "felt like a rock or a pebble." Given his knowledge of the defendant's arrest for methamphetamine manufacture and his experience with prior drug seizures, the officer could easily have claimed that he immediately recognized the object as methamphetamine. In Granger v. State, the officer discovered cocaine at the defendant's waistline during a frisk. He did not testify that he immediately recognized it as cocaine. Instead, the state relied on the totality of circumstances to justify the intrusion and seizure.

V. Evaluation of Plain Feel Seizures: The Burden on the Courts

Some commentators criticize Dickerson for failing to provide sufficient guidance. Unfortunately, detailed guidance is rarely feasible in Fourth Amendment jurisprudence, and Dickerson could not easily detail its constitutional rule. Determining the propriety of a search or seizure entails a fact-specific inquiry into the circumstances. One cannot expect the Supreme Court to catalogue every item that may feel like a weapon or to describe the tactile sensations that may establish probable cause to believe an object is seizable. The Dickerson Court gave broad guidance while seeking to reinforce limitations on governmental authority. First, while determining that law enforcement may gather information through the sense of

92. Id. at 618 n.5.
94. Id. at 21.
95. See id. at 21-22; see also People v. Spann, 604 N.E.2d 1138, 1142 (Ill. App. Ct. 1992) (excluding evidence where officer testified that object "felt as if it had a powdery consistency"); People v. Goodey, 584 N.E.2d 1021, 1023-24 (Ill. App. Ct. 1991) (finding evidence inadmissible where officer testified that he felt "mushy package in one of defendant's coat pockets . . . [and] could tell it was not a weapon"); State v. Cartledge, 601 N.E.2d 157, 158 (Ohio Ct. App. 1991) (noting that officer who seized pill vial during frisk provided no testimony concerning what his tactile impressions suggested vial was).
96. See Barbara A. Doty, Minnesota v. Dickerson: Plain Touch Doctrine—Authorizing a Terry Stop and Search For Drugs?, 1994 Wis. L. Rev. 1303, 1304 (1994) (stating that decision fails to provide clear boundaries for subsequent applications of plain touch exception); Rappaport, supra note 19, at 2318-19 ("[T]he Court has instead engaged in irrational, piecemeal decisionmaking that has provided little guidance.").
touch, the Court required probable cause before a seizure.97 Second, the Court reaffirmed the limitations on Terry frisks, holding that the officer had overstepped his authority when he manipulated the object in Dickerson’s pocket.98 Third, it approached with skepticism the officer’s claim that the nature of the object was immediately apparent.99 Thus, while accepting the plain feel doctrine, the Court outlined a cautious approach to its implementation.

Once the Supreme Court defines the broad rule, other courts bear the burden of adhering to Dickerson’s approach and enforcing the Fourth Amendment to restrict governmental abuse of plain feel. Evolution of the Fourth Amendment depends on how these courts execute their obligation. Trial courts have the front line duty of gathering the facts and assessing the credibility of law enforcement officers who seek the benefit of plain feel. Appellate courts play a critical role overseeing the application of the plain view doctrine, insisting that the trial courts demand full governmental compliance with Fourth Amendment restrictions.

Unfortunately, some courts are too relaxed in their evaluation of seizures when the government relies on the plain feel doctrine. While most courts appear responsive to the specific line drawn in Dickerson between the permissible weapons frisk and unpermitted manipulation, a number of courts are too lax in enforcing the “immediately apparent” requirement.100 The courts should recognize that in-court testimony may not accurately reflect out-of-court events. If the courts do not adhere to the cautious spirit of Dickerson, prosecutors may employ the plain feel doctrine to create inroads into Fourth Amendment protection.

A. Limited Touching

The plain feel doctrine does not provide authority to touch. It merely permits the officer to interpret tactile sensations to identify the felt object. Authority to feel the object in the first instance must

97. See Minnesota v. Dickerson, 508 U.S. 366, 376 (1993) (“Regardless of whether the officer detects the contraband by sight or by touch, however, the Fourth Amendment’s requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures.”).

98. See id. at 378.

99. See id. But see Miller, supra note 46, at 212 (criticizing Dickerson Court for accepting, without criticizing, officer’s assertion that building which Dickerson had left just before search was “crack house”).

100. See, e.g., Allen v. State, 689 So. 2d 212, 213 (Ala. Crim. App. 1995) (finding seizure valid where officer testified that “he felt a package containing a leafy substance he believed to be marijuana” through defendant’s clothes).
be found elsewhere. In many cases, as in Dickerson, the police officer derives authority from stop-and-frisk principles that allow the officer to pat down the defendant for weapons. In many other plain touch cases, the touching is justified by consent.\textsuperscript{101} Occasionally, authority to touch rests on the officer’s need to move an object or other permitted police conduct that leads to inadvertent contact with the object.\textsuperscript{102} In every case, the officer’s authority to engage in tactile exploration is limited and it is critical that the courts enforce those limitations. Given the limitations on the authority to search, the court should ask in each case not only whether the felt object could be recognized by touch, but also whether its tactile characteristics are so pronounced that it could be recognized within the scope of the permitted search. If the courts too readily accept plain feel arguments, they may unintentionally expand the scope of tactile exploration.

1. \textit{Defining the Scope of the Weapons Search}

In Dickerson, the Court enforced strict limitations on the scope of a Terry frisk.\textsuperscript{103} The Court held that the officer’s manipulation of the object went beyond the authorized pat down and, therefore, violated the Fourth Amendment.\textsuperscript{104} Applying Dickerson, courts have respected that limitation and have grappled with the scope of the Terry weapons frisk.\textsuperscript{105}


\textsuperscript{103} Dickerson, 508 U.S. at 378.

\textsuperscript{104} See id.

In some cases, as in *Dickerson*, the officer manipulates an object even though it does not have the tactile characteristics of a weapon. When that occurs, the court should hold that the officer exceeded the authority to search for weapons and should decline to permit the prosecution to justify the seizure under the plain feel doctrine. For example, in *People v. Blake*, the court rejected the plain feel argument, remarking that "the tactile sensations involved here could only have been the result of a grope, not a pat down," and thus held the seizure unconstitutional. Occasionally, however, the courts have failed to enforce that limitation, eroding Fourth Amendment protection.

Frequently, the pivotal question is whether the weapons search ended before the officer gathered the tactile information on which the plain feel claim is made. Some courts appear to define the end of the weapons search by referring to the officer's state of mind, examining whether the officer was satisfied that the defendant had no weapons. Given the Court's reluctance to employ intent tests to draw Fourth Amendment lines, this approach is unlikely to prevail.

106. See *Howard*, 645 So. 2d at 159 (holding officers did not have authority to shake or open canister).
108. Id. at 583.
109. See, e.g., *Allen v. State*, 689 So. 2d 212, 215 (Ala. Crim. App. 1995) (holding that officer stayed within *Terry* frisk when he passed his hand repeatedly over envelope to ensure it did not contain razor blade and ultimately "simultaneously recognized" that object was not weapon, but envelope of marijuana); *Andrews v. State*, 471 S.E.2d 567, 568-69 (Ga. Ct. App. 1996) (holding seizure valid even though officer squeezed object to affirm his initial belief that item was large piece of crack cocaine); *In re Carlton S. C.-B.*, No. 95-2252-FT, 1995 WL 737219, at *1 (Wis. Ct. App. Nov. 21, 1995) (affirming trial court's decision to admit package of cocaine rocks about "one-quarter inch" around, although officer testified that, having felt something he "believed to be contraband" in defendant's pocket, he "opened the jacket and pressed his open hand on it again").
110. See, e.g., *Allen*, 689 So. 2d at 215 (distinguishing *Dickerson* on grounds that officer in this case discovered evidence before "he was convinced that what he felt was not a weapon"); *C.D.T. v. State*, 653 N.E.2d 1041, 1046 (Ind. Ct. App. 1995) (condemning officer's seizure of cocaine in part because "he had already satisfied himself" that the defendant possessed no weapons); *State v. Abrams*, 471 S.E.2d 716, 718 (S.C. Ct. App. 1996) (stating that search should end when officer believes defendant has no weapons); *State v. Hudson*, 874 P.2d 160, 167 (Wash. 1994) (remanding to trial court, in part, because trial court failed to determine whether detective discovered drugs "before he knew the [d]efendant was unarmed").
111. See *Whren v. United States*, 116 S. Ct. 1769 (1996) (rejecting Fourth Amendment test based on officer's motives). In *Whren*, the Supreme Court rejected the contention that a stop violated the Fourth Amendment if it was pretextual (i.e., motivated by the officer's desire to investigate a different violation). *Id.* at 1774. The Court stated: "Not only have we never held, outside the context of inventory search or administrative inspection . . . that an officer's motive invali-
More often, the courts permit the officer a thorough once-over for weapons under *Terry*. The courts should not uphold a second feel of any area unless the officer felt a possible weapon in the first pass. Any additional patting down or any manipulation of an object that does not have the characteristics of a weapon is beyond the authorized weapon frisk and anything discovered as a result should not justify a seizure. In *State v. Hayes*, for example, the court recognized the limitation on repeated touching and acknowledged that the officer’s second feel of the defendant to “confirm his suspicion of the presence of a controlled substance” went beyond his limited authority to pat down for weapons.\(^{112}\) Even though the suspect wore a long leather jacket, the officer did not feel a weapon-like object and was, therefore, prohibited from groping or manipulating to determine whether the object was contraband.\(^ {113}\)

2. **Defining the Scope of Consent**

A number of plain feel cases arise from consent searches. When police stop a suspect, but have no basis for searching, they often seek and obtain consent. Plain feel cases most often involve either consent to search for weapons or consent to search for weapons and drugs.

When the authority to touch rests on the defendant’s consent, the limits of the authority likewise depend on the consent. In *Florida v. Jimeno*,\(^ {114}\) the Supreme Court held that the scope of consent is determined by a reasonableness standard; the critical question is what the officer could reasonably conclude was within the scope of the consent.\(^ {115}\) Applying this standard, courts may restrict application of the plain feel doctrine in consent searches. For example, in *Howard v. State*,\(^ {116}\) the defendant’s consent to a weapons search circumscribed the officer’s authority and did not extend to the film canister that the officer removed and shook.\(^ {117}\)

\(^{112}\) See State v. Hayes, 535 N.W.2d 715, 719-20 (Neb. Ct. App. 1995). The court nevertheless upheld the seizure because the officer had probable cause to arrest. See *id.* at 725. Therefore, the search and seizure were justified under the search incident to arrest exception. See *id.* at 723-24. For a previous discussion of *Hayes*, see *supra* notes 34-36 and accompanying text.

\(^{113}\) See *Hayes*, 535 N.W. 2d at 719.


\(^{115}\) *Id.* at 249.

\(^{116}\) 645 So. 2d 156 (Fla. Dist. Ct. App. 1994).

\(^{117}\) *Id.* at 157-58.
In some instances, however, the defendant's consent is broad enough to support extensive tactile investigation and resulting seizures. For example, in State v. Jones, the court concluded that the defendant had consented to be checked for weapons and drugs. The court noted that this consent search was less restricted than a Terry frisk, and, therefore, when the officer felt an object in the defendant's pocket, he was not foreclosed from squeezing it to get better tactile information.

**B. Immediately Apparent**

Determining whether the nature or identity of the seized item was immediately apparent to the feeling officer is critical to enforcing the limitations on Dickerson. Interpreting the plain view requirement in Arizona v. Hicks, the Court held that probable cause is required to justify a warrantless seizure, eliminating debate over whether "immediately apparent" defined an independent standard. Thus, although Dickerson reverted to the use of "immediately apparent" to describe the standard for seizure, it is clear that, like plain view, plain touch requires probable cause. In Dickerson, the officer's continued manipulation not only went beyond the authorized intrusion, but also belied any claim that it was immediately apparent that the lump was crack. Testifying in cases relying on

119. Id. at 1042.
120. See id. at 1043 ("[A] consensual 'check' for drugs could just as reasonably have been interpreted by the officer to confer permission to go into the pockets.").
122. Id. at 326; see also Denise Marie Cloutier, Arizona v. Hicks: The Failure to Recognize Limited Inspections as Reasonable in Fourth Amendment Jurisprudence, 24 COLUM. J. L. & SOC. PROBS. 351, 359 (1991) (arguing that "the plain touch doctrine and Hicks are theoretically compatible"); Elsie Romero, Fourth Amendment-Requiring Probable Cause for Searches and Seizures Under the Plain View Doctrine, 78 J. CRIM. L. & CRIMINOLOGY 763, 791 (1988) (arguing that Court's establishment of bright-line rule of probable cause for nonwarrant search and seizures is traditional benchmark for determining reasonable police conduct); David M. Seid, The Aftermath of Arizona v. Hicks: An Expectation of Privacy at Home, 17 AM. J. CRIM. L. 81, 92-93 (1989) ("[A]ny judicial carve-outs to the [F]ourth [A]mendment [i.e. plain touch] must contain the same safeguards of individual liberty interests as the warrant requirement.").
123. See generally United States v. Rogers, No. 95-CR-1136, 1996 WL 422260, at *6 (S.D.N.Y. July 29, 1996) (stating that officer is not required to recognize "precise identity" of object, but that there must be "probable cause to believe that the item is contraband or evidence of a crime"); State v. Curtis, 681 So. 2d 1287, 1292 (La. Ct. App. 1996) (noting that "immediately apparent" in this context means only that the officer must have probable cause"); People v. Champion, 549 N.W.2d 849, 856, (Mich. 1996) (stating that "immediately apparent" is equivalent to probable cause standard), cert. denied, 117 S. Ct. 747 (1997).
Dickerson, however, officers are generally aware that their testimony must establish that the object was immediately recognizable when felt in the authorized manner. Consequently, courts must enforce the requirement with care.

The "immediately apparent" requirement for seizing an item that does not feel like a weapon should be distinguished from the Terry basis for seizing an item that feels like a weapon. A Terry frisk is justified by the strong interest in protecting the officer. The frisk is permitted to protect the officer from weapons that may be used by a detained person whom the officer reasonably believes to be armed and dangerous. Its purpose is to detect any weapons, giving the officer the opportunity to remove them. The Terry frisk is therefore biased toward further exploration of objects that feel as if they could be weapons. Generally, any object of sufficient

124. See Terry v. Ohio, 392 U.S. 1, 27 (1968) (holding that officer may stop and frisk for weapons if "he has reason to believe that he is dealing with an armed and dangerous individual"); People v. Moore, 343 N.Y.S.2d 107, 111-12 (N.Y. 1973) (holding that officer's reasonable belief that defendant had concealed weapon provided adequate basis to frisk); State v. Schneider, 389 N.W.2d 604, 605 (N.D. 1986) (holding that officer's awareness of defendant's reputation combined with circumstances to provide adequate basis to conclude defendant was armed and dangerous); see also Michael D. Platt, The Limits of Stop and Frisk: Questions Unanswered By Terry, 10 Ariz. L. REV. 419, 435-37 (1968) (suggesting that reasonable suspicion standard to make Terry stop is too subjective and may result in disproportionate frisks of minority groups).

125. See Champion, 549 N.W.2d at 853 (stating that scope of pat-down search is to discover guns, knives, clubs or other hidden instruments that could be used to assault officer); State v. Alesso, 328 N.W.2d 685, 688-89 (Minn. 1982) (discussing scope of frisk); see also Shinault v. State, 668 N.E.2d 274, 277 (Ind. Ct. App. 1996) (stating that officer may search outer clothing to discover weapons).

126. See LaFAve, supra note 56, § 9.5(b), at 276 (noting that, under Terry, officer may conduct search if he or she reasonably believes object could be dangerous weapon); see also United States v. Quarles, 955 F.2d 498, 502 (8th Cir. 1992) (holding that officer properly seized "hard lump that might have been a firearm"); Rogers, 1996 WL 422260, at *7 (holding that officer was justified in removing object that he could not rule out as weapon rather than "playing blind man's [bluff]" with defendant's coat); People v. Ratcliff, 778 P.2d 1371, 1380 (Colo. 1989) ("When a pat-down search provides a police officer with an indication that the suspect has on his person an object that might be a weapon, the officer has the right to remove the object . . . ."); State v. Hunter, 615 So. 2d 727, 733-34 (Fla. Dist. Ct. App. 1993) (upholding seizure of syringe in frisk mistakenly believed to be weapon and noting that "law enforcement officers should not be required to expose themselves and the public to the possibility of injury" while they gather further information); State v. Evans, 618 N.E.2d 162, 171 (Ohio 1993) (stating that "proper question is whether the officer reasonably believed, due to the object's 'size or density,' that it could be a weapon"); Philips v. Commonwealth, 434 S.E.2d 918, 920-21 (Va. Ct. App. 1993) (holding that where pouch large enough to hold knife or gun contained hard cylindrical object, officer acted accordingly under Terry in opening pouch and discovering hypodermic needles, spoon with burnt residue, and "baggie" containing residue); Williams v. Commonwealth, 354 S.E.2d 79, 87 (Va. Ct. App. 1987) (upholding seizure because court could not 'say as a matter of law that [the officer] could not have believed the rolled up bills consti-
hardness and size can be explored, even though its shape does not advertise it as a gun or knife.\textsuperscript{127} If the defendant's clothing obscures the contents from tactile detection, courts often will allow the officer to investigate the object.\textsuperscript{128} The interest in the officer's safety tilts the balance toward the government.

In contrast, the plain feel doctrine is not biased to permit exploration of objects that might be evidence.\textsuperscript{129} The \textit{Dickerson} Court...
emphasized that the information obtained by feeling the item during the authorized touching must immediately raise probable cause to believe the object is seizable.\textsuperscript{130} Mere reasonable suspicion that an object is contraband does not support any further intrusion. In this setting, the Fourth Amendment balance lies on the side of the defendant, whose privacy interests are at risk if the pat down or other touching is extended beyond the permitted scope. The only government interest is the general interest in acquiring evidence. While acquiring evidence is an important interest, it must fall to the defendant’s Fourth Amendment interest. Therefore, only probable cause to believe the item is evidence or contraband, rendering a warrant superfluous, justifies its seizure.

When courts do not sufficiently differentiate the two standards, the less demanding standard for weapon-like objects will seep into the immediately apparent standard and dilute it in application. If that occurs, Terry frisks will evolve into searches for evidence. \textit{Howard v. State} illustrates the hazard of imprecise application. In \textit{Howard}, the court held that the police had properly seized powder cocaine in a plastic bag from the defendant’s groin area.\textsuperscript{131} The court concluded neither that the officer had probable cause to believe the object was cocaine nor that the officer had reason to believe the object was a weapon.\textsuperscript{132} The officer’s testimony provided an insufficient basis for either type of seizure; indeed the court acknowledged that the officer “never expressly testified whether he thought the bulge in defendant’s pants was a weapon or whether he thought it was contraband.”\textsuperscript{133} Nevertheless, the court concluded that the evidence “was properly admitted under the Fourth Amendment’s ‘plain feel’ or ‘plain touch’ exception.”\textsuperscript{134} Failing to focus

\textit{Id.} at 852. He felt something inside that was large enough to be a weapon, although through the purse he could not feel what it was exactly. See \textit{id}. The officer opened the purse and found drugs. See \textit{id}. The court held the officer could search the purse to resolve uncertainty about whether the purse concealed a weapon. See \textit{id}. at 853; see also Liebman, supra note 19, at 202 (arguing that government interest in seizing contraband is insufficient to outweigh protected privacy interest).

\textsuperscript{130} Minnesota v. Dickerson, 508 U.S. 366, 376 (1993). The \textit{Dickerson} Court stated that “[r]egardless of whether the officer detects the contraband by sight or by touch . . . the Fourth Amendment require[s] that the officer have probable cause to believe that the item is contraband before seizing it.” \textit{Id.}


\textsuperscript{132} \textit{Id.}

\textsuperscript{133} \textit{Id.} at 748-49. The officer testified that he “knew there was an object down there that shouldn’t be there.” \textit{Id.} at 748.

\textsuperscript{134} \textit{Id.; see People v. Massey, 558 N.W.2d 253, 256 (Mich. Ct. App. 1997) (O’Connell, J., dissenting) (arguing that seizure of paper bag containing drugs should be upheld under plain feel by specifically relying on analogy to pat down in
clearly on the different constitutional standards for *Terry* and plain feel, the court approved a violation of the defendant's Fourth Amendment rights.

1. *Casual Evaluation of Prosecution Claims*

As the Washington Supreme Court noted in *State v. Hudson*,

\[135\]

"it is the trial court which must make the determination whether the nature of the particular object at issue is such that there can be a credible claim of recognition by touch."\[136\] Aware that officers know the requirements of plain feel and have a strong incentive to mold their testimony accordingly, courts should weigh this testimony carefully. Courts must not accept uncritically the assertion that an object's nature was "immediately apparent" to the officer who felt it. Instead, each court must draw on all the evidence presented as well as the court's own common sense to determine whether the government has established its claim of immediate recognition.

In some instances, courts defer to governmental plain touch claims even though the testimony that the object's nature was immediately apparent seems incredible. When courts engage in deferential fact finding, *Dickerson* becomes a license to seize any item of interest large enough to create a palpable bulge. Unfortunately, some courts have been willing to accept the officer's claim at face value and conclude that the object's nature was immediately apparent. In *State v. Wonders*,\[137\] the appellate court set out the trial court's explanation of its ruling:

> In order for the Court to grant the motion to suppress, I would have to find that the testimony of the officer lacked credibility when he stated that it was immediately apparent to him when he was patting down the defendant that the bulge in his front pocket was a baggie of marijuana. I would likewise have to discredit his testimony that a baggie of marijuana in this situation has a "consistent feel."

which officer feels and removes gun). The dissent in *Massey* failed to distinguish between detection of weapons and detection of other types of evidence and criticized the majority for applying an "immediately apparent" standard that would require suppression of gun. *Id.* (O'Connell, J., dissenting).

\[135\] 874 P.2d 160 (Wash. 1994).

\[136\] *Id.* at 167.

Given the training and experience of the officer, the Court cannot do this.  

Other trial courts may share this court's reluctance to discredit police testimony. Two Indiana cases illustrate the risk that both trial and appellate courts will defer uncritically to the police officers. In Bratcher v. State, the court upheld a seizure on the basis of the testimonial claim from the officer who conducted the pat down that he felt a "soft item" and "right away . . . figured it was a bag containing marijuana." Similarly, in Walker v. State, the court upheld a plain feel seizure on the basis of the officer's testimony that, "I felt the object in his pocket was consistent to what I've felt many times before to be marijuana . . . I believed it to be marijuana when I felt it the first time." In each of these cases, the authority to stop the defendant was unrelated to drug activity and nothing else in the circumstances supported an expectation that the defendant would have drugs. Therefore, the seizure rested exclusively on the information gathered through the pat-down touch. In each case, the marijuana was in a plastic bag and not a distinctive form of packaging. In neither case did the officer describe any tactile characteristics that permitted him to identify the drugs. Instead, the conclusion that the felt object was a container of marijuana may have been based on a hunch or prejudice rather than objective evidence.

138. Id. at 798. Interestingly, the trial court failed to address several of the other surrounding circumstances. See id. For example, the appellate court points out that the trial court disregarded the officer's testimony that "he was searching for weapons as well as drugs and paraphernalia." Id. Additionally, the trial court ignored the fact that the officer initiated a second search after determining that the defendant was unarmed. See id.

139. See State v. Mitchell, 692 So. 2d 1251, 1254 (La. Ct. App. 1997) (reversing trial court's denial of defendant's motion to suppress, which rested on officer's testimony that felt item was "possibly contraband" despite concession that it could have been aspirin or candy). But see Jones v. State, 682 A.2d 248, 251-52 (Md. 1996) (quoting trial court's explanation of its ruling in favor of defendant). In Jones, the Maryland Court of Appeals stated:

Officer Ottey testified, and I'm quoting, he immediately recognized [the bulge] to be crack cocaine . . . . Now, the problem is, and the Officer testified as an expert, and I accept him as an expert, but . . . it's not just a question of being an expert and coming in and saying the magic words like it was readily apparent would be the words from the Supreme Court . . . . I have to make my determination as to whether I'm going to accept the expert's opinion based upon the facts upon which his opinion was based. And there are insufficient facts for me to accept that opinion [in] the record.

141. Id. at 832.
143. Id. at 871.
than perceived facts supporting relevant inferences. By demanding nothing more than conclusory assertions, the courts abdicated their responsibility to enforce the Fourth Amendment.\footnote{144. See also State v. Jackson, 684 So. 2d 1046, 1049 (La. Ct. App. 1996) (upholding seizure of cocaine). In \textit{Jackson}, the court upheld the officer’s seizure of 19 pieces of plastic containing cocaine. See \textit{id.} The officer frisked the defendant because a reliable informant had reported that the defendant had a weapon. See \textit{id.} Although he found no weapon, the officer felt a “golf-ball shaped object in the defendant’s pocket.” \textit{Id.} Based on the “size, shape, and texture of the object and the nervous behavior of the defendant,” the officer was led to believe it was contraband. \textit{Id.} Nothing in the circumstances or the palpable characteristics of the drugs supports a claim that the officer had probable cause to believe the object was cocaine.}

Drug cases frequently present the temptation to apply a relaxed version of plain feel. Officers suspecting drug activity often employ pat downs not only to discover weapons, but also to discover contraband. The prosecution then advances plain feel to justify the seizure. Too often, the courts fail to enforce the immediately apparent requirement of \textit{Dickerson}. In \textit{State v. Hunter},\footnote{145. 649 N.E.2d 289 (Ohio Ct. App. 1994).} for example, the police observed the defendant and another man in “a location known for high drug activity.”\footnote{146. \textit{Id.} at 291.} On a hunch, the police approached the two men.\footnote{147. \textit{See id.}} Observing this, the other man placed a small “wadded up” plastic bag inside defendant’s coat.\footnote{148. \textit{See id.}} Upon stopping the defendant and frisking him for weapons, the officer felt an object that he concluded was the wadded up bag and seized it; it contained crack cocaine.\footnote{149. \textit{Id.} The court held that:}

\begin{quote}
\textsc{U}nder the totality of the circumstances, . . . it was immediately apparent to the officer (1) that the small package he felt inside appellant’s coat was the wadded up plastic bag the officers had witnessed the other man place inside appellant’s coat, and (2) that the incriminating nature of the wadded up plastic bag was immediately apparent to the officer.\footnote{150. \textit{Id.} at 292.}
\end{quote}

Assuming the stop and frisk were valid, the police nevertheless did not have probable cause to seize the bag.\footnote{151. \textit{See id.} (arguing that police officers conduct offends fundamental values of Fourth Amendment) (Blackmon, J., dissenting). The dissenting justice argued that the stop and frisk were not valid, criticizing the entire procedure as an unjustified pretextual intrusion searching for drugs. \textit{See id.} (Blackmon, J., dissenting).} The tactile informa-
tion gathered in the course of the frisk amounted to nothing more than confirmation of what the police had observed visually: that the defendant had a plastic bag in his pocket. The frisk garnered the police no additional information about the nature of the bag and its contents. If the presence of the bag in defendant’s pocket gave rise to probable cause to believe the bag was contraband, then, even before they frisked, the police had probable cause to believe the defendant was in possession of contraband and could have arrested him. Obviously, that proposition is so preposterous that it was not advanced to support the intrusion in the case. The officers’ observations, both visual and tactile, established reasonable suspicion and nothing more. Failing to acquire probable cause, the police were required to end the contact with the defendant. By seemingly equating “immediately apparent” with reasonable suspicion, the court invoked plain feel to uphold an unconstitutional seizure of evidence.

The decision of the Arkansas Court of Appeals in Dickerson v. State also demonstrates unexacting application of plain feel. The court relied on the Supreme Court’s decision in Minnesota v. Dickerson to uphold the seizure of drugs during a frisk. The officers in Dickerson v. State had more information than those in Hunter. They had observed the defendant in his car on the wrong side of the street, with a man leaning against the car. When the man walked away, he informed the officers that the defendant had tried to sell him cocaine. When an officer then approached the car, the defendant rolled up the windows and locked the door. When he eventually emerged from the car, the defendant made repeated attempts to put his hand in his left coat pocket. Patting down the

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154. See id. at 656. The court stated:
[W]e find no error in the officer’s seizure of the cocaine. The United States Supreme Court held in Minnesota v. Dickerson that police officers may seize nonthreatening contraband during a protective pat down search . . . .
Here, the officers were justified in stopping and frisking the appellant . . . . [I]t was apparent to [the officer] that what he felt . . . was a bag of cocaine. Thus, the seizure did not invade the appellant’s privacy.

Id.
155. See id. at 655.
156. See id.
157. See id.
158. See id.
defendant, the officer felt a large bulge in that pocket and seized a plastic bag of cocaine.\textsuperscript{159}

The combination of the observed facts and the other man’s report may have given the police probable cause to believe the defendant was engaged in drug distribution. The court did not, however, assess whether they had probable cause. Instead, the court held that the officer’s claim that “it was apparent to him that what he felt in the appellant’s pocket was a bag of cocaine” established adequate basis for the seizure.\textsuperscript{160} The case was a poor one for plain feel. The tactile information garnered in the pat down added little to the officers’ knowledge; if the other information did not constitute probable cause, the fact that the defendant had a lumpy object in his pocket would not tip the balance. By treating the case as a plain feel seizure rather than a search incident to arrest, the court invited future application of the plain feel doctrine to uphold seizures even though the felt object possesses no identifying features.

2. \textit{A Healthy Skepticism}

One criticism of the plain feel doctrine is that tactile information is too uncertain to provide probable cause.\textsuperscript{161} In \textit{Dickerson}, the Court declined to reject tactile information categorically.\textsuperscript{162} Nevertheless, awareness of the inherent uncertainty of tactile data must inform the application of the plain feel doctrine. The courts must ensure that the doctrine only benefits the prosecution when the vagueness of tactile information has somehow been overcome.

As discussed above, an officer who acquires probable cause to believe a defendant is carrying contraband has probable cause to arrest. Tellingly, however, the government invokes plain feel only when the officer (who now claims to have immediately recognized the contraband by its distinctive feel) did not arrest, but investigated further. If the officer acted on the claimed immediate recognition and arrested the defendant, the case would raise an issue of probable cause to arrest, but not plain feel seizure.\textsuperscript{163} Instead, in

\textsuperscript{159} \textit{See id.}

\textsuperscript{160} \textit{Id.} at 656.

\textsuperscript{161} \textit{See} Miller, \textit{supra} note 46, at 256 (discussing question of whether tactile information is sufficiently reliable to support probable cause).

\textsuperscript{162} \textit{See} Minnesota v. Dickerson, 508 U.S. 366, 375 (1993) (applying plain view doctrine “by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search”).

\textsuperscript{163} The prosecution could also seek to justify the search prior to arrest as a search incident to arrest. That argument, however, rarely appears. One could infer that the prosecution sees the “immediately apparent” plain feel standard as
the plain feel cases, the officer did not arrest, but reached into the place where the object lay concealed from sight and removed the object. This course of action almost compels the conclusion that the officer did not believe he or she had probable cause that the felt object was contraband. Instead, it suggests that the officer felt the need to explore further, seeking visual confirmation of suspicion (but not probable cause) fueled by the tactile information. Although the officer's subjective belief is not critical to the determination of probable cause, the pattern in these cases raises concern about the truthfulness of the later claim that the evidence was immediately recognizable from its tactile characteristics.

Viewing the relationship between plain feel and search incident to arrest, the courts should assess probable cause to seize with care. The courts should reject plain feel arguments unless convinced that the tactile information gave the officer probable cause to arrest. When the information suggesting that the defendant is committing or has committed a crime is sufficiently strong, the police may have probable cause to arrest the defendant either without gathering any additional information through plain feel or despite gathering only minimal information as a result of a permitted touching.\(^{164}\) When tactile information is the principal basis for claiming probable cause, however, the court should adopt a skeptical attitude and rigorously enforce the standard of probable cause.

Dickerson provides a model of healthy skepticism. As noted by the Court, the Minnesota Supreme Court examined the record closely and concluded that "the officer's own testimony 'believes any notion that he "immediately" recognized the lump as crack cocaine.'"\(^{165}\) The Minnesota court recognized that the officer continued to probe the contents of the pocket after he had determined


\(^{165}\) Minnesota v. Dickerson, 508 U.S. 366, 378 (1993) (quoting State v. Dickerson, 481 N.W.2d 840, 844 (Minn. 1992), rev'd, 508 U.S. 366 (1993)); see also State v. Dickerson, 481 N.W.2d 840, 844 (Minn. 1992) (holding that officer was not privileged to continue manipulating object after discovering it could not possibly be weapon), rev'd, 508 U.S. 366 (1993). In declining to recognize a plain feel doctrine, the Minnesota Supreme Court reasoned that the sense of touch is less immediate and reliable than the sense of sight, and the sense of touch is more intrusive into an individual's Fourth Amendment right to privacy. See id. at 845.
the pocket did not contain a weapon.\textsuperscript{166} Some courts have followed the example and have approached officers’ claims skeptically. For example, in \textit{Jordan v. State},\textsuperscript{167} the appellate court concluded that the prosecution had not established a sufficient factual basis for plain feel.\textsuperscript{168} Although the officer testified that he felt a “hard rocky-like substance” in defendant’s pocket, his experience provided no basis for his conclusion that it was crack cocaine.\textsuperscript{169} Similarly, in \textit{People v. Blake}, the court rejected the state’s plain feel argument because “there was no explanation of how a tightly rolled mass could distinctively feel like marijuana to the exclusion of other legitimate substances.”\textsuperscript{170} In \textit{State v. Tzintzun-Jimenez},\textsuperscript{171} the court held that the officer who merely felt a “slippery material” did not have probable cause to believe there was a baggie of cocaine in the defendant’s pocket.\textsuperscript{172} In each of these three cases, the trial court had held the testimony sufficient and admitted the seized evidence.\textsuperscript{173} Only the appellate courts’ careful application of the constitutional standards vindicated the defendants’ Fourth Amendment rights.\textsuperscript{174}

\textsuperscript{166} See \textit{Dickerson}, 508 U.S. at 378 (discussing Minnesota Supreme Court’s analysis of police officer’s conduct). In its opinion, the Minnesota Supreme Court noted that the officer determined that the object was contraband only after “squeezing, sliding and otherwise manipulating the contents of the defendant’s pocket.” \textit{Dickerson}, 481 N.W.2d at 844.

\textsuperscript{167} 664 So. 2d 272 (Fla. Dist. Ct. App. 1995).

\textsuperscript{168} \textit{Id.} at 273 (reversing judgment because “the trial court heard no testimony from the state to support its reliance upon the ‘plain feel’ doctrine”).

\textsuperscript{169} \textit{Id.} at 273-74. The court found that the officer never offered testimony that he had seen crack cocaine before or that he could detect it based on his tactile experience. \textit{See id.} at 274. Therefore, the court held that the defendant’s motion to suppress should have been granted based on the lack of testimony to support the officer’s ability to identify the crack cocaine before he removed it from the defendant’s pocket. \textit{See id.}.

\textsuperscript{170} People v. Blake, 645 N.W.2d 580, 583 (Ill. App. Ct. 1995). The officer’s lack of experience and the unsuspicious nature of the area also led the court to find that no probable cause existed. \textit{See id.}


\textsuperscript{172} \textit{Id.} at 668.

\textsuperscript{173} \textit{See Jordan}, 664 So. 2d at 273 (“The trial court found that the officer had probable cause to put his hand inside Jordan’s pocket based upon the plain feel doctrine.”); \textit{Blake}, 645 N.E.2d at 582 (“[T]he court found that the pat down of the bulge in defendant’s pocket gave Officer Cimaglio probable cause to believe that defendant possessed contraband.”); \textit{Tzintzun-Jimenez}, 866 P.2d at 668 (noting that trial court had allowed evidence “based in part on its conclusion that ‘Officer Demarest was not required to ignore his experience when he felt the slippery material in the [defendant’s] pocket’”).

\textsuperscript{174} See \textit{Commonwealth v. Mesa}, 683 A.2d 643, 648 (Pa. Super. Ct. 1996) (holding that officer’s testimony did not support trial court’s ruling that marijuana found in roll of money was immediately recognizable as contraband and remarking, in part, “it is difficult for us to perceive how a large amount of currency, in and of itself, and sight unseen, could have a ‘contour or mass’ that was immedi-
Unfortunately, not all courts approach plain feel with such caution. Many are deferential to prosecution claims, even when those claims appear patently incredible. Cases involving crack cocaine illustrate the challenge of assessing plain feel arguments as well as judicial approaches to that challenge. Plain feel cases involve crack cocaine more than any other type of evidence; and, courts generally defer to law enforcement claims that crack is immediately recognizable to the touch, even when wrapped in plastic and masked by a layer of clothing.

Descriptions of crack cocaine's tactile characteristics, however, suggest that this deference is not warranted. Crack cocaine appears in many different shapes and consistencies. One witness presented a detailed description of the physical properties of various quantities of crack: "Gram-sized powder bindles and chunks of rock cocaine are the smaller units. 1/16 oz. and 1/8 oz. is a powder with flakes and 1/2 oz. is powdery with chunks. An ounce size is a chunk that flakes distinctively when pressed. A kilo is hard and compressed."\(^{175}\)

The variety of descriptive terms applied to the tactile characteristics of crack suggests that it is less recognizable than often claimed in court. For example, witnesses have variously testified that an object was immediately identifiable as crack cocaine because it felt "small and rock like"\(^{176}\) or "very large like a golf ball object."\(^{177}\) In one case, an officer felt what he described as "the distinctive feel of

\(^{175}\) State v. Hudson, 874 P.2d 160, 166 (Wash. 1994). In Hudson, the Washington Supreme Court remanded the case to the appellate court for a determination of whether the officer immediately recognized the object as contraband or if it was recognizable only after manipulation. *Id.*


a cookie of crack cocaine."\(^{178}\) In another, the officer testified that the package had a "peanut brittle type feeling."\(^{179}\)

Rather than acceding to law enforcement claims of expertise in tactile drug recognition, courts should approach the testimony skeptically. In *State v. Hudson*,\(^{180}\) for example, the trial and appellate courts held the seizure of crack invalid because the officer's description of what he felt did not correspond with his description of crack cocaine.\(^{181}\) Similarly, in *Jones v. State*, the trial court granted the defendant's motion to suppress and, although the intermediate appellate court reversed, the Maryland Court of Appeals reinstated the trial court's ruling.\(^{182}\) In *Jones*, the trial court explained its ruling as follows:

"Officer Ottey testified, and I'm quoting, he immediately recognized [the bulge] to be crack cocaine. . . . Now, the problem is, and the Officer testified as an expert, and I accept him as an expert, but . . . it's not just a question of being an expert and coming in and saying the magic words like it was readily apparent would be the words from the Supreme Court . . . . I have to make my determination as to whether I'm going to accept the expert's opinion based upon the facts upon which his opinion was based. And there are insufficient facts for me to accept that opinion [in] the record."\(^{183}\)

The trial court in *State v. Woods*,\(^{184}\) was similarly skeptical, commenting that:

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179. *Doctor v. State*, 596 So. 2d 442, 444 (Fla. 1992). The court utilized a totality of the circumstances approach in determining whether the officer had probable cause to seize the contraband. See *id.* at 445. Under this approach, the court considered the fact that the officer had previously discovered hidden cocaine on 70 different occasions. See *id.*
181. *Id.* at 220. In discussing the officer's testimony, the court noted: The officer did not testify that what he felt had small porous holes, flaked apart when he touched it or that it felt soapy. The officer stated that the substance in the baggie "crumbl[ed] a little bit." Crumbling is inconsistent with the officer's testimony that material will flake, rather than powder, off a chunk of cocaine.
183. *Id.* at 251-52. The trial judge found there was insufficient evidence as to the extent of the officer's training, experience and tactile knowledge to determine whether it would be readily apparent to the officer that the defendant's pocket contained crack cocaine. See *id.* at 252.
[I]t is simply not objectively reasonable to conclude that a quick pat-down of the defendant’s waistband for weapons permitted the officer to feel with his palm an object measurable only in tenths of a gram which he readily determined to be crack cocaine in the change pocket of the defendant’s jeans.  

3. The Importance of Context

When gathered in a suggestive context, even limited tactile information may be sufficient to raise the totality of information to probable cause. In some cases, the government has information in addition to that provided by the tactile exploration. To reinforce the limits on the plain feel doctrine, courts should clearly identify the role of nontactile information in establishing probable cause to seize. In doing so, courts should differentiate between information specific to the defendant, which may support a determination of probable cause, and general information, which may heighten police suspicion, but contributes little to probable cause.

In many cases, the context in which the officer interprets tactile sensations supports a claim that the nature of the object was immediately apparent. Cases in which the police seize a container of drugs illustrate the importance of context to the determination of probable cause. Even visual inspection of a container may not give the police probable cause to seize it. They will acquire probable cause on the basis of appearance alone only if the container is transparent or has unusual characteristics, such as tape or markings. If, however, the container is opaque and does not have characteristics that advertise illicit use, visual inspection alone will not establish a basis on which to seize the container. Tactile

185. Id. at 731.

186. See, e.g., People v. Mitchell, 650 N.E.2d 1014, 1016 (Ill. 1995) (upholding seizure when officer with extensive experience observed crack pipes and other paraphernalia and felt something “like a piece of rock inside a small baggie” in defendant’s shirt pocket); Parker v. State, 662 N.E.2d 994, 999 (Ind. Ct. App. 1996) (holding seizure of cocaine reasonable when informant’s tip and officer’s knowledge of area allowed officer to conclude that hard object he felt was cocaine); State v. Velez, No. 67595, 1995 WL 264544, *3 (Ohio Ct. App. May 4, 1995) (holding that officer who witnessed defendant exchange object for money with known drug dealer and place object in his pocket was justified in concluding that rock-like object was crack cocaine).

187. See State v. Vasquez, 815 P.2d 659, 664 (N.M. Ct. App. 1991) (concluding that diaper bag containing marijuana had no distinctive characteristics that could allow officer to identify it as drug paraphernalia through visual inspection). The court found that the unusual location of the bag was insufficient to establish probable cause. See id.
exploration, the basis for plain feel arguments, always yield limited information, and courts usually recognize that feeling the contour of a container is insufficient to raise probable cause to believe it conceals contraband. The courts, therefore, generally reject the argument that an officer can identify a container by its tactile characteristics and seize it because it is commonly used to hold drugs.\(^{188}\) In United States v. Ross,\(^ {189}\) for example, a law enforcement officer seized a matchbox of cocaine from defendant’s underwear.\(^ {190}\) The district court granted the motion to suppress because the officer, feeling only the box and not the contents, may have been suspicious, but did not have probable cause to seize.\(^ {191}\)

\(\text{\textsuperscript{188}}\) See, e.g., United States v. Ross, 827 F. Supp. 711, 720 (S.D. Ala. 1993) (granting defendant’s motion to suppress evidence obtained when officer seized matchbox containing cocaine from defendant during pat down); Howard v. State, 645 So. 2d 156, 159 (Fla. Dist. Ct. App. 1994) (holding that officer violated defendant’s rights when he seized and shook film canister during consensual weapons pat down); Commonwealth v. Stackfield, 651 A.2d 558, 562 (Pa. Super. Ct. 1994) (rejecting argument that officer could recognize contraband simply by feeling plastic baggies in defendant’s pocket); State v. White, No. 08C01-9408-CR-00277, 1995 WL 336977, at *8 (Tenn. Crim. App. June 7, 1995) (holding that officer did not have probable cause to believe film canister in defendant’s crotch area was contraband, even though informant had provided some information suggesting that defendant was dealing drugs); Campbell v. State, 864 S.W.2d 223, 226 (Tex. App. 1993) (finding seizure of canister of cocaine unconstitutional because it did not feel like weapon and incriminating character was not immediately apparent); State v. Johnson, 522 N.W.2d 588, 589 (Wis. Ct. App. 1994) (suppressing marijuana found in film canister and remarking that “[a]lthough the canister itself was in plain view, its contents were not”); see also State v. Abrams, 471 S.E.2d 716, 718 (S.C. Ct. App. 1996) (suppressing fruits of seizure of Tylenol bottle containing crack that felt like “shotgun shell or an instrument used to transport contraband”); Commonwealth v. Johnson, No. 0298-96-1, 1996 WL 343971, at *3 (Va. Ct. App. June 25, 1996) (remarking that officer conducting consent for weapons “did not have authority or consent to remove the object that he felt in the defendant’s groin area,” but that he “would have been justified in questioning the defendant” about object because he was aware of common practice of packaging cocaine in pill bottles). But see Allen v. State, 689 So. 2d 212, 216 (Ala. Crim. App. 1995) (holding that officer could recognize evidence as contraband and seize small manila envelope of marijuana); State v. Vandiver, 891 P.2d 350, 353 (Kan. 1995) (holding seizure not justified when officer candidly reported that he “removed the canister from [the defendant’s] pocket ‘to inspect it, not knowing what it was’”).


\(\text{\textsuperscript{190}}\) Id. at 715-15 (describing police officer’s pat down of defendant and seizure of matchbox).

\(\text{\textsuperscript{191}}\) See id. at 719-20. Although the defendant was approached in the parking lot of a motel where the police were investigating drug trafficking, the police had no evidence linking him to drug activity. See id. at 712-13. Therefore, the court’s suggestion that the officer could have arrested the defendant is not well founded. See id. at 719 n.17 (suggesting that police officer should have arrested or detained defendant for suspected possession of cocaine). In Commonwealth v. White, 685 A.2d 567, 570 (Pa. Super. 1996), however, the court concluded that the seizure of an opaque film cannister was permissible under the plain view doctrine. Id. The court categorized the canister as “closely akin to those rare single purpose containers which ‘by their very nature cannot support any reasonable expectation of pri-
The context, however, can provide additional facts, which, taken with the tactile information, establish probable cause. In People v. Champion,192 the court considered the admissibility of a pill bottle seized from the defendant's groin area during a pat-down search.193 Only the contextual facts supplied probable cause to believe the pill bottle was seizable.194 The intermediate appellate court disregarded the context and concluded the evidence must be excluded, reasoning that it was "impossible to conclude that the incriminating nature of a pill bottle is immediately apparent" and that visual inspection of the bottle was an additional intrusion prohibited by Dickerson.195 Nevertheless, the Michigan Supreme Court reversed, emphasizing the context of the seizure in concluding it was proper.196 The court noted a number of factors, including awareness of the defendant's prior drug arrests and the defendant's failure to comply with police orders to remove his hands from his sweatpants.197 Combined with the tactile identification of the pill bottle, these factors established probable cause to believe the bottle contained contraband.198


vac� because their contents can be inferred from their outward appearance." Id. (quoting Arkansas v. Sanders, 442 U.S. 753, 764-65 n.13 (1979)). Although the seizure upheld in White was arguably justified because of the context, the assertion that film canisters are so identified with drug storage that they are routinely seizable is fatuous. To accept the assertion, one would have to accept the proposition that any person seen with a film cannister would be arrestable because the police would have probable cause to believe the cannister contained drugs. There is no reason to believe that the White court would have pushed its assertion that far, and that the facts of the case, which included a tip concerning drug dealing, arguably supported a determination of probable cause.

193. Id. at 851-52.
194. See id. at 859-60 ("It is only under the totality of the circumstances before us . . . that we find that removal of this particular pill bottle was authorized.").
195. See People v. Champion, 518 N.W.2d 518, 522 (Mich. Ct. App. 1994), rev'd, 549 N.W.2d 849 (Mich. 1996), and cert. denied, 117 S. Ct. 747 (1997). The appellate court found that the officer's visual inspection of the pill bottle in Champion was much like the officer's manipulation of the drugs in Dickerson and, therefore, exceeded the plain feel doctrine. See id.
196. See Champion, 549 N.W.2d at 859 (applying totality of circumstances approach, which included defendant's furtive behavior, his refusal to remove his hands from his pockets and officer's knowledge of defendant's past drug involvement).
197. See id.
198. See id. at 859-60. The court cautioned that its decision was based solely on the specific facts of the case and an in-depth examination of the facts. See id. at 859.
Similarly, in *State v. Rushing*199 and *State v. Bridges*,200 the courts upheld seizures because the context supplied other information essential to probable cause.201 In *Rushing*, the court cited several factors supporting the plain feel seizure of a medicine bottle: "1) the officer's feel of the object, 2) his knowledge of the suspicious transaction observed by [another officer], 3) the reputation of the neighborhood as a drug trafficking area, and 4) his knowledge of commonly used drug containers."202 In *Bridges*, a reliable confidential informant had told the officer that the defendant was in a particular location selling drugs and had drugs on him.203 When the officer found the defendant in the predicted location and felt a pill bottle, which he knew was commonly used for drugs, in the defendant's pocket, he had probable cause to seize the bottle.204

The unusual location of an object may help bolster a claim that it was immediately recognizable as contraband. If a defendant has a bulky object inside his or her crotch area, or has bulges around his or her ankles, the police are justified in believing the object is concealed contraband.205 While the location of the bulge alone may

201. See *Rushing*, 935 S.W.2d at 33 (upholding seizure of cocaine based upon distinctive characteristics of container in which it was contained); *Bridges*, 1995 WL 764998, at *6 (concluding that officer had probable cause to seize pill bottle from defendant's jacket based on totality of circumstances).
203. See *Bridges*, 1995 WL 764998, at *1. Several years before, the informant had provided the officer with information that eventually led to an arrest and conviction. See id. In commenting upon the informant's reliability, the officer stated that "[he] had always been very straightforward and very honest and very reliable with me and has given me information in the past." Id. The officer also testified that prior to the defendant's arrest, he had received "a lot of information on [the defendant] . . . relating to drugs" from undisclosed sources. Id.
204. See id. at *5; see also *People v. Limon*, 21 Cal. Rptr. 2d 397, 404 (Ct. App. 1993) (holding that officer who found hide-a-key box in defendant's pocket had probable cause to arrest in light of defendant's suspicious conduct and container's distinctive character).
not provide probable cause to seize an item, only slight additional information may be necessary to establish probable cause. In *United States v. Craft*,206 for example, the officer who conducted the consensual pat down of the defendant had seven years of experience detecting drugs at the airport and was therefore familiar with this technique of packaging drugs for transportation.207 Similarly, in *People v. Dibb*,208 the police garnered probable cause through plain touch when, after observing that defendant had a scale that smelled of methamphetamine, two beepers and a plastic bag, the officer felt an object that was "lumpy" and "had volume and mass" on defendant's leg between his knee and calf.209 The unusual location and tactile characteristics of the object together with other evidence suggesting drug dealing established probable cause to believe the felt object was contraband.210

On the other hand, courts must not overplay the role of context. Courts should realize that context sometimes heightens law enforcement's suspicion without making a commensurate contribution to probable cause. In the dark, during the Halloween season, peeled grapes feel like eyeballs and a bowl of spaghetti feels like intestines. The child feeling these innocuous products is predisposed to believe they are frightening or gruesome, so the child's sense of touch convinces him or her that they are body parts.211 Similarly, on the street in a high-crime neighborhood or in the clothing of the wrong person, any soft bulge might feel like illegal drugs to a police officer. The object has no peculiar and palpable characteristics, but the officer feeling it is predisposed to believe it

No. 96-2232, 1997 WL 3329, at *2 (Wis. Ct. App. Jan. 7, 1997) (quoting juvenile court ruling that "if . . . a police officer observe[s] . . . a drug transaction and . . . then find[s] a package in the person who you suspect to be the dealer's underwear, it doesn't matter how big the package is. . . . you've gone beyond suspicion and have reached the level of probable cause"). *But see State v. Burton*, 556 N.W.2d 600, 602 (Minn. Ct. App. 1996) (stressing officer's vague "feel" testimony and failing to emphasize fact that cocaine was found concealed in ankle area).

206. 30 F.3d 1044 (8th Cir. 1994).

207. *Id.* at 1045 (noting that officer was familiar with drug couriers taping drugs to their bodies).

208. 43 Cal. Rptr. 2d 823 (Ct. App. 1995).

209. See *id.* at 824 (holding that "plain feel" exception was not available to officer because object was not immediately apparent as contraband, but finding that other factors established probable cause). The court believed that the surrounding circumstances made it immediately apparent to the officers that what they felt was contraband. See *id.* at 826.

210. See *id.* (reasoning that police could arrest defendant and search him incident to arrest).

211. See also Miller, *supra* note 46, at 250-56 (discussing strengths of various human senses).
is contraband. This predisposition shines through in a number of cases and, unfortunately, courts sometimes indulge it.

Instead, a court assessing a plain touch argument should cautiously weigh factors that simply increase police curiosity and insist that the testifying officer recount the specific tactile sensations that made the nature of the object immediately apparent as contraband. For example, mere presence in a high-crime or known drug-trafficking neighborhood should receive little weight. In *State v. Jones*, the dissenting justice criticized the majority for ascribing undue weight to the fact that the defendant was stopped in an “open-air drug market.” Other than his presence in that setting, the police had no specific reason to suspect the defendant of drug involvement. Nevertheless, the setting both prompted the officer to seek consent to frisk and, receiving consent, predisposed him to conclude that the felt objects were drugs. Indeed, in *State v. Dickerson*, the defendant had just left what the police described as a crack house. Yet, without more information, the police officer was not justified in assuming that the lump in the defendant’s pocket was contraband.

General factors, such as the neighborhood, contribute to reasonable suspicion, but should not act as substitutes for probable cause. The courts can stop the erosion of Fourth Amendment protection against intrusive tactile exploration and unjustified seizures only by enforcing assiduously the immediately apparent requirement. Each court must demand specific facts that establish probable cause to believe the particular item is contraband rather than accepting conclusory assertions or according weight to general cir-

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212. *See, e.g.*, Howard v. State, 645 So. 2d 156, 159 (Fla. Dist. Ct. App. 1994) (rejecting state’s argument that police had probable cause to seize film canister in part because defendant was in high-crime area).


214. *See id.* (Bloom, J. dissenting). Interestingly, in *Jones*, the officer tried to have it both ways, testifying both that “being in an open-air drug market did add to [the] conclusion” that the object was crack cocaine and that if he received consent to frisk and felt a similar object in his pocket he would have concluded it was crack cocaine. *See Jones v. State*, 682 A.2d 248, 251 (Md. 1996).

215. *See Jones*, 682 A.2d at 251. The officer testified that location was not a critical factor in the determination that the object was crack cocaine. *See id.*


217. *See id.* (describing building defendant had exited as “a 24-hour-a-day crack house” and noting that officer had previously found drugs there).
cumstances that make the officers suspicious, but do not specifically address the felt object.\textsuperscript{218}

VI. A MODEL FOR JUDICIAL EVALUATION OF PLAIN FEEL

Courts should take three steps to check the credibility of the claim that the nature of the evidence was immediately apparent. First, the court should examine the physical evidence.\textsuperscript{219} In some cases, that evidence contradicts the claim that the nature of the object was immediately apparent.\textsuperscript{220} For example, in \textit{United States v. Mitchell},\textsuperscript{221} the court rejected the assertions of two experienced officers that the crack cocaine offered against the defendant was immediately apparent in the course of a pat down for weapons.\textsuperscript{222} The court noted that “examination of the evidence had assisted the resolution” of the issue and concluded that the officer could not have recognized crack cocaine as immediately apparent when the cocaine was simultaneously insulated by layers consisting of plastic bags, a sock, a paper bag and the defendant’s heavy leather jacket.\textsuperscript{223} Although \textit{Mitchell} represents an extreme example of a claim that is implausible in light of the physical evidence, careful evaluation by the court may uncover similar exaggerated claims of tactile identification.\textsuperscript{224}

Second, the court should ask what the tactile information would convey to an unbiased observer, rather than deferring to the

\textsuperscript{218} See, \textit{e.g.}, State v. Guy, 492 N.W.2d 311, 313 (Wis. 1992) (upholding seizure because officer testified that soft bulge “[f]elt like it was drugs. It felt like a bag of—of possibly cocaine or marijuana”).

\textsuperscript{219} See People v. Mitchell, 650 N.E.2d 1014, 1022 (Ill. 1995) (noting “that tactile evidence can be preserved for trial to assure courts of an opportunity to evaluate the object the officer claims justified the seizure”); see also Commonwealth v. Marconi, 597 A.2d 616, 623 (Pa. Super. Ct. 1991) (observing seized contraband and noting “the minute amount of drugs . . . could not have been identified through sense of touch”).

\textsuperscript{220} See, \textit{e.g.}, Commonwealth v. Crowder, 884 S.W.2d 649, 652 (Ky. 1994) (involving small piece of crack cocaine in corner of plastic bag in coat pocket); State v. Woods, 680 N.E.2d 729, 752 (Ohio Ct. App. 1996) (involving “pebble” of cocaine).

\textsuperscript{221} 832 F. Supp. 1073 (N.D. Miss. 1993).

\textsuperscript{222} Id. at 1079 (noting that officers identified object “by feeling through a layer of leather, lining, paper, cloth material, and plastic”).

\textsuperscript{223} Id. Given the fact that the cocaine was insulated by layers, the court found it difficult to believe that it would be possible to identify the contraband “with a single pass of one’s hand over the outer clothing.” Id.

\textsuperscript{224} See Woods, 680 N.E.2d at 732 (deferring to trial court’s determination because trial court “had the benefit of viewing the ‘pebble’ retrieved from the appellee’s pocket and could determine whether it was reasonable to believe that Officer Daley could have concluded that the pebble was probably crack cocaine from feeling it with the palm of his hand”).
perspective of a police officer interested in locating contraband. Quite often, the tactile evidence does not definitively signal contraband and may be consistent with items other than contraband. Candy, hardware and jewelry, for example, may all feel "small and rock like" or even "like a golf ball object." In Commonwealth v. Marconi, the court recognized the ambiguity of tactile data. The court rejected the prosecution's argument that the officer accurately identified the drugs, noting that "[t]he object is as consistent in feeling with a button or aspirin as it is with methamphetamine." Other courts should be similarly cautious about accepting the claim that the tactile information established probable cause. Unless the prosecution presents additional evidence supporting the belief that the felt object is contraband, the court should conclude that they have failed to satisfy the immediately apparent requirement. In addition, the officer's claim that experience guided the interpretation of the tactile data should not be taken on faith. Instead, courts should insist that the officer explain the objective basis on which he or she concluded that the felt object was seizable.

Third, given the difficulty of assembling enough tactile information to establish the identity of the item, the court should rigorously enforce Terry's restriction on the invasion of privacy and ensure that the officer did not overstep the authority for the initial touching. In People v. Diaz, the court noted that additional probing for tactile information would be likely if plain feel could justify a seizure. When courts enforce the immediately apparent requirement, they may discover that the detailed information necessary to establish probable cause can rarely be accumulated within the limited scope of the Terry or consent search on which the officer relied. For example, in State v. Hudson, the officer, who reached into the defendant's pocket to determine whether an ob-

226. See State v. Robinson, No. 1996CA00009, 1996 WL 575978, at *3 (Ohio Ct. App. Sept. 9, 1996) (providing example of case in which courts accord too much deference to officer's experience). In Robinson, the officer testified, "I've done many searches and purchased crack cocaine numerous times and usually it's found in a plastic baggie. It felt like it could be crack cocaine. . . . I just determined that it was probably crack." Id. It appears that the court's finding of probable cause could only be based on the officer's claimed experience. The officer's experience that crack cocaine is usually in plastic bags, however, does not address the possibility that a given plastic bag will contain something else and does not inform the court of any distinctive tactile characteristics that permitted the officer to move from suspicion to probable cause.
228. Id. at 302 (rejecting plain touch doctrine because it will lead to "pinching, squeezing or probing beyond the limited intrusion allowed under Terry").
ject was a weapon and discovered a baggie of crack cocaine, testified that he “believed he was feeling a one ounce size piece of cocaine broken off a kilo size.”\textsuperscript{229} The court, remanding for further findings, remarked that “the detective described the substance in the baggie with a particularity arguably unattainable without extensive manipulation.”\textsuperscript{230} Thus, when courts execute their duties conscientiously, the prosecution may discover that relying on plain feel results in walking a fine line between unpermitted touching and insufficient information.

\textsuperscript{229} State v. Hudson, 874 P.2d 160, 166 (Wash. 1994).

\textsuperscript{230} \textit{Id.} After the Washington Court of Appeals affirmed the suppression order, the Washington Supreme Court granted the state’s request for review to determine whether a plain feel corollary to the plain view doctrine was consistent with prior decisions. \textit{See id.} at 161. Upon finding that the plain feel doctrine was not precluded as a matter of law, the court remanded the case for a factual determination of whether the object was recognized by touch or through manipulation. \textit{See id.} at 167.