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In *Texas v. Brown*, a plurality decision announced April 19, 1983, Justice Rehnquist "clarified" the fourth amendment’s plain view exception. An opinion of the Texas

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1. 103 S. Ct. 1535 (1983). The Chief Justice and Justices White and O'Connor joined in Justice Rehnquist's "announcement of the 'judgment of the Court.'" *Id.* at 1537. Justice White also filed a short concurrence. *Id.* at 1544. Justices Powell and Blackmun concurred, as did Justices Stevens, Brennan, and Marshall. *Id.* at 1544, 1545.

The hairline distinctions separating this Court on this issue raise serious questions about the value and viability of plurality opinions. *See, e.g.*, *Note, The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 774-75 (1980) (discussing *Coolidge* "inadvertence" requirement). Such distinctions also concern and frustrate fourth amendment scholars, to say nothing of defense counsel and prosecutors:

[Cops] always call me up at 3:00 in the morning and say they want me to give them a precise answer to the Fourth Amendment, and I can't do it. It's so encrusted with constitutional subtleties and the crafting of legal technicians that we've totally confused not only the lawyers and judges but also the police officers who are supposed to be constitutional lawyers in the street and make 15-second decisions about what the Constitution means.


[T]he law of search and seizure . . . is intolerably confusing. The Court apparently cannot agree even on what it has held previously, let alone on how these cases should be decided. Much of this difficulty comes from the necessity of applying the general command of the Fourth Amendment to ever-varying facts; more may stem from the often unpalatable consequences of the exclusionary rule, which spur the Court to reduce its analysis to simple mechanical rules so that the constable has a fighting chance not to blunder.


This divisiveness becomes most particularly noxious where an opinion seeks to refine a previous plurality opinion. *See* *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (Stewart, J., plurality opinion). However, critical commentary on this Court's fractious "decision-making" is beyond the scope of this Note. For further discussion, see *Justices Expand Meaning of 'Plain View,'* NAT'L L.J., May 2, 1983, at 5, col. 1.

2. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.
The initial interpretations of this amendment were premised upon common-law property rights. See, e.g., Weeks v. United States, 232 U.S. 383 (1914). Thus, fourth amendment protections were determined by a “trespass and tangibles only” rule. The amendment concerned itself with and guarded against trespass searches of material objects only. Olmstead v. United States, 277 U.S. 438 (1928); Hester v. United States, 265 U.S. 57 (1924).

More recently, however, the Court’s decisions accepted a test recognizing “a right to privacy.” See Warden v. Hayden, 387 U.S. 294 (1967); Jones v. United States, 362 U.S. 257 (1960). “We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers resting on property concepts.” Hayden, 387 U.S. at 304.

This recognition of a “right to privacy” took on direct constitutional significance later that Term. The defendant in Katz v. United States, 389 U.S. 347 (1967) was convicted of violating a federal law prohibiting the interstate transmission of gambling information. The FBI had attached an electric monitoring device to the outside of a telephone booth where the defendant transmitted his gambling information. Ultimately, the defendant was found guilty, and the Court of Appeals for the Ninth Circuit affirmed, finding no fourth amendment violation because there had been no physical entrance to the defendant’s area when the device had been attached to the outside of the booth. The Supreme Court overturned the conviction.

Katz represented a philosophical shift in the Court’s approach to governmental intrusions into citizens’ lives. It moved the focus from the location and structure (components) of the area to a more flexible and somewhat subjective standard that requires an examination of circumstances in which an individual may justifiably rely on an expectation of privacy. Id. at 352-53. The Court found no general right to privacy secured by the fourth amendment; any rights to privacy which may be protected under the fourth amendment are — literally — incidental to its primary focus: the protection against arbitrary governmental intrusions. The Katz Court made clear that what one seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. However, what one knowingly exposes to the public, even in his own home, is not within the fourth amendment’s protections. Id. at 351-52. But see Payton v. New York, 445 U.S. 573 (1980), which describes in detail the traditional sanctity of one’s own dwelling. Accord State v. McGovern, 77 Wis. 2d 203, 214, 252 N.W.2d 365, 370 (1977).

The Katz Court declared that “the Fourth Amendment protects people, not places.” 389 U.S. at 351. The determination must now be whether a person has a reasonable expectation of privacy in the areas or item searched or seized. Justice Harlan’s concurrence in Katz sets forth what is now the accepted test: (1) a person must exhibit an actual [subjective] expectation of privacy; and (2) that expectation must be one that society is prepared to recognize as reasonable. Id. at 361 (Harlan, J., concurring). A majority adopted this test in Smith v. Maryland, 442 U.S. 735, 740 (1979) and Rakas v. Illinois, 439 U.S. 128, 148-49 (1978). For a consideration of its application to various incidents of search and seizure, see W. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (1978 & Supp. 1984).

evidence seized within a police officer's "plain view" must be "known" to him. This, the Justice said, misconstrues a criterion from Coolidge v. New Hampshire. That plurality


However, three discrete situations touch upon the plain view doctrine, and different jurisdictions have handled them differently. See, e.g., State v. Rickard, 420 So. 2d 303, 305 (Fla. 1982); People v. Myshock, 116 Mich. App. 77, 321 N.W.2d 849, 850-51 (1982) (citing W. Ringel, Searches & Seizures, Arrests and Confessions § 8.2(a) (1979 & Supp. 1983)); State v. O'Herron, 153 N.J. Super. 570, 380 A.2d 728, 730-33 (1977). See also Moylan, The "Plain View Doctrine": Unexpected Child of the Great "Search Incident" Geography Battle, 26 MERCER L. REV. 1047, 1096-1101 (1975). The first is the true "plain view." It occurs only where the officer is already within the zone of privacy and the object he seeks to seize is also in that zone. An example is the instance where a police officer is invited into a house (consent) and during his visit, he spots a marijuana plant on the coffee table in front of him. See, e.g., Commonwealth v. Hartford, 459 A.2d 815 (Pa. Super. 1983). See also La Fournier v. State, 91 Wis. 2d 61, 280 N.W.2d 746 (1979) (emergency); State v. Gums, 69 Wis. 2d 513, 230 N.W.2d 813 (1975) (possible consent; "exigent circumstances").

The second occurs when both the officer and the seizable item are outside the zone of privacy. Here, for example, the officer comes upon the marijuana plant on a sidewalk. That plant is in open view, and in what one knowingly exposes to public view, one has no reasonable expectation of privacy. Katz, 389 U.S. at 351-52. See supra note 2. Such an "open view" offends no fourth amendment proscriptions. See, e.g., G.M. Leasing Corp. v. United States, 429 U.S. 338, 354 (1977) (distinguishing seizures in "open areas" from those on "private premises").

The most vexatious situation for law enforcement occurs where the officer is outside a zone of privacy, gazng in at what is presumptively seizable. Here, for example, the officer stands on the sidewalk and sees the marijuana plant through a picture window. Unfortunately for the officer, he still needs a constitutionally valid reason other than plain view to intrude upon that zone of privacy. For an interesting discussion of views from the sidewalk and other avenues available to the public, and the proper procedure a police officer should follow, see State v. Dickerson, 313 N.W.2d 526, 530-32 (Iowa 1981).

This third situation, unfortunately, is often referred to as "plain view," and the officer is permitted to seize what he sees. See Scales v. State, 13 Md. App. 546, 284 A.2d 45, 47 n.1 (1971). As an illustration of one state's difficulties with this distinction, see Blackburn v. State, 575 P.2d 638 (Okla. Crim. App. 1978) and Clayton v. State, 555 P.2d 1310 (Okla. Crim. App. 1976). One comment declares "[t]he Clayton and Blackburn holdings are contradictory; they cannot co-exist." Comment, Oklahoma's Plain View Rule: Licensing Unreasonable Searches and Seizures, 18 TULSA L.J. 674, 690 (1983). However, the author insists on describing one situation as "pre-intrusive", the other as "post-intrusive" plain view. The only constitutional "plain view" is — by definition — post-intrusive. Furthermore, he cites Moylan, supra, at 1100, in which the loose use of language is decried ("The phrase 'plain view' . . . continues to possess its chameleon-like quality because of its loose employment to describe . . . visually similar but legally distinct situations.").

5. 403 U.S. 443 (1971).
decreed that the incrimination from such objects must be "immediately apparent" to those seeking a warrantless seizure. That phrase was declared "an unhappy choice of words," as it "can be taken to imply that an 'unduly high degree of certainty' as to the incriminatory character of the evidence is necessary for an application of the 'plain view' doctrine." Not so, said the plurality, only "probable cause to associate the property with criminal activity" is necessary for constitutional congruity.

The concurrences in Brown took only a certain niggling umbrage with the plurality. Mr. Justice White, for example, noted in a paragraph his continued disagreement with the Coolidge plurality's suggestion that plain view seizures can be justified only when the evidence is come upon "inadvertently." Justices Powell and Blackmun, on the other hand, would place more emphasis on the "warrant clause." They criticized the Court's opinion as going "well beyond the application of the [plain view] exception." Lastly, Justices Stevens, Brennan, and Marshall combined in concurrence to question the efficacy of the Court's judgment, saying that

6. Id. at 466. "Of course, the extension of the original justification [to search] is legitimate only where it is immediately apparent to police that they have evidence before them . . . ." Id. (emphasis added).
8. Id.
11. 103 S. Ct. at 1544-45 (Powell, J., concurring). See the warrant clause, supra note 2. The Justices also reiterated that exceptions to the warrant requirement ought to be "few in number and carefully delineated." 103 S. Ct. at 1544 (quoting United States v. United States District Court, 407 U.S. 297, 318 (1972) (Powell, J., concurring)).
12. 103 S. Ct. at 1545 (Powell, J., concurring).
"[t]he plurality's explanation . . . is . . . incomplete."13 They would place more emphasis on a recent line of "container" cases.14

I. THE CASE

A. At the Checkpoint

On a hot summer night in East Fort Worth in June, 1979, police officer Harold Maples15 was routinely checking drivers' licenses on East Allen Street.16 Around midnight, he stopped a brown, four-door 1970 Buick.17 The driver, Clifford James Brown, was alone. Maples asked for his license. Brown said nothing, reached into his righthand pants pocket, and then hesitated.18

Officer Maples was alarmed by Brown's actions19 and shone his flashlight into the car. In this illumination, the patrolman saw Brown withdraw his hand from his pants pocket.20 Maples could now see two objects in Brown's hand.21 A folded dollar bill was pinched between his thumb and index finger,22 and an opaque, green party balloon, knotted
one-half inch from its tip, was caught between the two middle fingers of his right hand.\textsuperscript{23}

Now suspicious, the officer observed that Brown was keeping his hand close to his pants pocket. The officer then saw the balloon drop down alongside Brown's right leg.\textsuperscript{24} Brown then reached across his dashboard and opened his glove compartment.\textsuperscript{25} Maples shifted his position outside the car in order to watch Brown and to get a better view of the interior of the glove compartment.\textsuperscript{26} Maples' actions were prompted, he later testified, by his previous experience with narcotics arrests; he was aware that narcotics frequently were packaged in balloons similar to the one near Brown's leg.\textsuperscript{27}

Maples noticed that Brown's lighted glove compartment contained several small plastic vials, quantities of loose white powder, and an opened bag of party balloons.\textsuperscript{28} When Brown finished rummaging through his glove compartment, he announced to Maples that he had no driver's license in his possession.\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{23} State's Brief, \textit{supra} note 15, at 3. \textit{See also} Brown v. State, 617 S.W.2d 196, 199 (Tex. Crim. App. 1981), which provides both direct and cross-examination of Officer Maples and contains this colloquy:
\begin{itemize}
\item Q[Dist. Atty]: All right, and he pulled his hand partially out of his pocket. Was there anything in his hand?
\item A[Maples]: There were two items. There was a, what I believe was a dollar bill that was partially folded and there was a small green balloon stuck between his fingers.
\end{itemize}

\begin{itemize}
\item Q[Defense Counsel]: Could you describe the size of the balloon for us, Officer?
\item A[Maples]: It was a tip end of a — I can't — well, it was a balloon, probably would be about as large, you know — not filled with anything — just my little finger and it was just about that much (indicating) of the tip end of a balloon.
\item Q[Defense Counsel]: When you say that much, could you give . . . an estimate of the size and length that you are talking about?
\item A[Maples]: Probably mashed down the balloon was maybe, probably less than an eighth of an inch, but it was probably half an inch long, maybe, from the tip to where it's tied.
\end{itemize}
\item \textsuperscript{24} State's Brief, \textit{supra} note 15, at 3.
\item \textsuperscript{25} Texas v. Brown, 103 S. Ct. 1535, 1538 (1983).
\item \textsuperscript{26} \textit{Id}.
\item \textsuperscript{27} \textit{Id}.
\item \textsuperscript{28} \textit{Id}.
\item \textsuperscript{29} \textit{Id}.
\end{itemize}
Maples told Brown to get out of his car and to stand at its back end. Brown complied.

Maples then reached into the car and picked up the balloon. There seemed to be a powdery substance within the tied-off portion. When shown the balloon, Maples' partner indicated silently that he "understood" the situation. Brown was then arrested. The powder in the balloon was subsequently analyzed and determined to be heroin.

B. In the 213th Judicial District Court

An indictment was returned charging Brown with possession of heroin in violation of state law. He moved to suppress the heroin as the product of an illegal search and seizure. The district court denied the motion at an evidentiary hearing. Following that, Brown pled nolo contendere to the charge. In accord with the terms of a plea bargain, he received four years imprisonment while preserving his right to appeal.

C. At the Texas Court of Criminal Appeals

A three-judge panel of the Texas Court of Criminal Appeals heard Brown's appeal. That court reversed the district court's evidentiary decision, holding that the balloon should have been suppressed. The panel decided that the

30. Id.
33. Id. at 1539. See also Brown, 617 S.W.2d at 198.
34. See 1973 Tex. Gen. Laws, ch. 429, §§ 4.02(b)(2)(J), .04(a), .04(b)(1) ("Texas Controlled Substances Act"). Such possession was a second-degree felony at the time of Brown's arrest. Cf. TEX. REV. CIV. STAT. ANN. art. 4476-15, §§ 4.02(b)(2)(K), .04(a), .04(b) (Vernon Supp. 1982).
38. 103 S. Ct. at 1539.
"plain view" doctrine did not support Maples' seizure of the green party balloon.\textsuperscript{39} The panel declared that in order for that seizure to be constitutional, and "[f]or the plain view doctrine to apply, not only must the officer legitimately be in a position to view the object, but it must be immediately apparent to the police that they have evidence before them."\textsuperscript{40}

In short, Officer Maples had to know that "incriminatory evidence was before him when he seized the balloon."\textsuperscript{41} Because a party balloon is not "inherently suspicious" or "in fact contraband," the criterion set forth in \textit{Coolidge v. New Hampshire}\textsuperscript{42} and followed in a series of Texas cases\textsuperscript{43} was not met, and the decision was reversed.

The state's motion for rehearing was denied.\textsuperscript{44} Texas appealed to the United States Supreme Court, and the Court granted certiorari.\textsuperscript{45}

\begin{itemize}
\item \textsuperscript{39} Brown v. State, 617 S.W.2d 196, 200 (Tex. Crim. App. 1981). "What we do question is the sole argument advanced by the State that the green balloon seized was in 'plain view' incident to a lawful arrest." \textit{Id.}
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} \textit{Id.} (citing DeLao v. State, 550 S.W.2d 289, 291 (Tex. Crim. App. 1977) (substance inside a red balloon on a window sill not in plain view)).
\item \textsuperscript{42} 403 U.S. 443, 464-76 (1971) (Stewart, J., plurality opinion).
\item \textsuperscript{44} Brown v. State, 617 S.W.2d 196, 200 (Tex. Crim. App. 1981). \textit{See} State's Brief, \textit{supra} note 15, at 6. "The en banc court denied the State's motion for rehearing over a dissent by three of the nine judges." \textit{Id.} Interestingly, "[i]t was the theory of the dissenters that, when proper regard was given to the inference that the experienced officer was able to draw when he saw the tied-off balloon, Officer Maples did have probable cause to believe that the balloon contained narcotics." \textit{Id.} This would then justify warrantless seizure of the balloon. \textit{See also} Brown, 617 S.W.2d at 200 (McCormick, J., dissenting from denial of state's motion for rehearing).
\item \textsuperscript{45} 457 U.S. 1116 (1982). For those not familiar with Texas judicature, the final in-state appeal in a criminal case is to the Court of Criminal Appeals of Texas, not the Supreme Court of Texas. \textit{See} TEX. CONST. art. V, §§ 5-6 (as amended in 1980) (Vernon Supp. 1982-83); TEX. CODE CRIM. PROC. ANN. art. 4.04 (Vernon 1982-83). Thus, as here, the jurisdiction invoked under 28 U.S.C. § 1257(3) (1976) is on writ of certiorari to the Texas Court of Criminal Appeals.
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II. THE "PLAIN VIEW" DOCTRINE

A. Pre-Coolidge: "Hints," "Suggestions," "Dicta"

The "plain view" doctrine has reached constitutional credibility after an inauspicious beginning. In fact, its history proves Justice Frankfurter's wry observation on the "progressive distortions" of the law: "[A] hint becomes a suggestion, is loosely turned into dictim and finally elevated to a decision."47

At its very first mention, the plain view doctrine was merely a descriptive phrase on the outer perimeter of the "search incident to arrest" law.48 In that area, the question has always been one of scope, of course, where the policeman's right to search incidentally after the arrest ends. In the period from 1927 through 1969, that scope took wide swings between an expansive right to search49 and a severely limited right.50 Ultimately, Chime! v. California51 declared


48. The right to "search incident to a lawful arrest" has been recognized for years. See Weeks v. United States, 232 U.S. 383, 392 (1914) (dictum). See also Moylan, supra note 4, at 1050 and cases cited therein.

49. See, e.g., United States v. Rabinowitz, 339 U.S. 56 (1950) (search of an office for an hour and a half and seizure of stamps found buried in desk permitted as incident to arrest for forgery and altering stamps); Harris v. United States, 331 U.S. 145 (1947) (five hour search of four room apartment for two cancelled checks ultimately found in sealed envelope upheld as incident to arrest for mail fraud); Marron v. United States, 275 U.S. 192, 199 (1927) ("The authority of officers to search and seize the things by which the nuisance [intoxicating liquors and articles for their manufacture] was being maintained extended to all parts of the premises used for the unlawful purpose."). See also Note, Scope of Search Incident to Arrest — Not Restricted by Officer's Seizure of Article to be Searched, 13 CUM. L. Rev. 431, 437-45 (1982).

50. See, e.g., United States v. Lefkowitz, 285 U.S. 452, 465 (1932) (while condemning the instant search as "exploratory" and "general," the Court distinguished Marron on the ground that "[t]he ledger and bills [were] in plain view [and] were
that "[t]here is ample justification . . . for a search of the arrestee's person and that area 'within his immediate control' — construing that phrase to mean the area within which he might gain possession of a weapon or destructible evidence."\(^{52}\)

However, once the outside perimeter of "search incident" is clearly defined, a gray area emerges between that which is within the arrested person's reach or grasp and the remainder of the surrounding area. Here, then, a seizure and a search are two different things.\(^{53}\)

Justice Frankfurter, in a stinging series of prescient dissents,\(^{54}\) indicated that such a dichotomy existed between "searches" and "seizures," and that the melding of the two was a result of result of misread, misapplied, and misused prece-
In other words, while the fourth amendment clearly proscribed rummaging and ransacking, that is, "general and exploratory searches," it did not prohibit the seizure of evidence made obvious in the course of a policeman's lawful activities. While searching incident to a lawful arrest, then, a police officer could seize contraband outside that perimeter. He could not search for it; it had to be within his eyesight.

Additional cases expanded this idea of justifiable seizure without search. The Court in *Warden v. Hayden* held that "hot pursuit" justified a warrantless entry and concomitant building search for a fleeing felon and his weapon. Subsequent discovery of incriminatory clothing was justified as found after a valid intrusion and while in the plain view of the officers searching for the felon. In *Harris v. United States*,

*Id.* See also United States v. Rabinowitz, 339 U.S. 56, 75 (Frankfurter, J., dissenting), in which Justice Frankfurter pointed out:

This progressive distortion is due to an uncritical confusion of (1) the right to search the person arrested and articles in his immediate physical control and (2) the right to seize visible instruments or fruits of crime at the scene of the arrest with (3) an alleged right to search the place of arrest. It is necessary in this connection to distinguish clearly between prohibited searches and improper seizures. It is unconstitutional to make an improper search even for articles that are appropriately subject to seizure when found by legal means.

. . . . Thus, the seizure of items properly subject to seizure because in open view at the time of arrest does not carry with it the right to search for such items.

*Id.* (emphasis added) (citations omitted).


General searches have long been deemed to violate fundamental rights. It is plain that the Amendment forbids them. In *Boyd v. United States*, 116 U.S. 616, 624, Mr. Justice Bradley, writing for the Court, said: "In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures' it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principle of law, that ever was found in an English law book,' since they placed 'the liberty of every man in the hands of every petty officer.'"

*Id.* (citations omitted). *See also* *Warden v. Hayden*, 387 U.S. 294, 301-03 (1967).

57. *See supra* note 55 and highlighted material.

58. 387 U.S. 294, 301 (1967) (distinction between "mere evidence" and instrumentalities, fruits of crime, and contraband untenable in light of privacy — not property — protections of the fourth amendment.).

59. *Id.* at 299-300.
States the Court validated the discovery of an inculpatory draft card as an officer was closing a defendant's car window in anticipation of precipitation, declaring that "[i]t has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure . . . ." Three years later, the seminal case of Coolidge v. New Hampshire was decided. The plain view doctrine became — more or less — an exception to the fourth amendment's warrant requirement.

60. 390 U.S. 234 (1968) (per curiam).
61. Id. at 236.
62. 403 U.S. 443 (1971). This decision and its multiple concurrences and dissents consume some eighty-five pages of that United States Report. The portion with which we are dealing is II(C), at 464-73, which contains Stewart's plain view formulation.

63. As Justice Rehnquist's plurality opinion notes, section II(C) may or may not be the "law of the land"; as he put it, "it has never been expressly adopted by a majority of this Court." Texas v. Brown, 103 S. Ct. 1535, 1540 (1983). See supra note 10 and accompanying text as well as cases cited therein. See also Kurpiers, Suspicious Objects, Probable Cause, and the Law of Search and Seizure, 21 Drake L. Rev. 252, 263-64 (1972); Landynski, The Supreme Court's Search for Fourth Amendment Standards: The Extraordinary Case of Coolidge v. New Hampshire, 45 Conn. B.J. 330, 330-31 (1972); Rintamaki, Plain View Searching, 60 Mil. L. Rev. 25, 27 (1971).


In Wisconsin, see State v. Prober, 98 Wis. 2d 345, 297 N.W.2d 1 (1980); State v. Flynn, 92 Wis. 2d 427, 285 N.W.2d 710 (1979), cert. denied, 449 U.S. 846 (1980); La Fournier v. State, 91 Wis. 2d 61, 280 N.W.2d 746 (1979); Laasch v. State, 84 Wis. 2d 587, 267 N.W.2d 278 (1978); State v. McGovern, 77 Wis. 2d 203, 252 N.W.2d 365 (1977); Bies v. State, 76 Wis. 2d 457, 251 N.W.2d 461 (1977); State v. Donovan, 91 Wis. 2d 401, 283 N.W.2d 431 ( Ct. App. 1979); State v. Kraimer, 91 Wis. 2d 418, 283 N.W.2d 438 ( Ct. App. 1979). The courts of this state require:
B. Coolidge v. New Hampshire

In *Coolidge v. New Hampshire*, a plurality defined the plain view doctrine as requiring the coalescence of three ele-

1. a prior justification for intruding upon a constitutionally-protected zone of privacy;
2. that the evidence be in plain view [which is to say, no search can be undertaken to find it];
3. its discovery must be inadvertent;
4. the item seized, in itself or in itself with facts known to the officer at the time of the seizure, provides probable cause to believe there is a connection between the evidence and criminal activity.

*State v. McGovern, 77 Wis. 2d 203, 210, 252 N.W.2d 365. 369 (1977).*

See *supra* note 43 for a collection of Texas cases on the plain view doctrine.

*64. 403 U.S. 443 (1971).* Suffice to say, summarizing such a lengthy opinion provides a stilted view. A fourteen-year-old girl was murdered in Manchester, New Hampshire, in January, 1964. Questioning of Edward Coolidge led to an examination of his guns and a lie-detector test. While Coolidge was at that test, a separate team of police questioned Mrs. Coolidge, and again examined her husband's weaponry. Ultimately, probable cause was accumulated for Coolidge's arrest and for a search of his car. The Attorney General of New Hampshire — chief prosecutor on the case — issued warrants under his co-extant power as a justice of the peace [N.H. REV. STAT. ANN. § 595:1 (repealed 1969)]. Officers then arrested Coolidge, asked Mrs. Coolidge to leave the house, and impounded the car. It was then vacuumed three times. At trial, these sweepings were introduced to support the State's contention that the victim had been in Coolidge's car. Additionally, a Mossberg rifle and microscopic particles from Coolidge's clothing suggested contact with the victim; they were introduced over motions to suppress. Denial of the motions was appealed and upheld. *State v. Coolidge, 106 N.H. 186, 208 A.2d 322, 330-31 (1965) (searches reasonable under *Ker v. California*, 374 U.S. 23, 33 (1963) “facts and circumstances” test).*

Coolidge was convicted of murder, and appealed. That conviction was upheld. *State v. Coolidge, 109 N.H. 403, —, 260 A.2d 547, 554 (1969)* (“[a]cting lawfully to enforce a valid warrant, the police were free to seize evidence other than that specified by the search warrant.”).

However, the United States Supreme Court held:

1. The warrant for the search and seizure of the automobile did not satisfy the requirements of the Fourth Amendment as made applicable to the States by the Fourteenth because it was not issued by a “neutral and detached magistrate.”
2. The basic constitutional rule is that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-defined exceptions,” and, on the facts of this case, a warrantless search and seizure of the car cannot be justified under these exceptions.
   a. The seizure of the car in the driveway cannot be justified as incidental to the arrest, which took place inside the house . . . .
   b. Under the circumstances present here . . . there were no exigent circumstances justifying the warrantless search even had it been made before the car was taken to the police station, and the special exceptions for automobile searches in *Carroll v. United States*, 267 U.S. 132 (1927) (citations omitted)
ments. First, there must be a "prior justification for an intrusion."65 "The doctrine serves to supplement the prior justification — whether it be a warrant for another object, hot pursuit, search incident to a lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused — and permits the warrantless seizure."

Second, it must be "immediately apparent" that what is before the police is, indeed, evidence.67 "[T]he 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."

Last, the police officer must come upon the evidence "inadvertently."69 "[T]o extend the scope . . . to the seizure of objectives . . . which the police know in advance they will find in plain view and intend to seize, would fly in the face of

and Chambers v. Maroney, 399 U.S. 42 (1970) (citations omitted), are clearly inapplicable . . .

c. Under certain circumstances the police may without warrant seize evidence in "plain view", though not for that reason alone and only when the discovery is inadvertent . . .

3. No search and seizure were implicated . . . when the police obtained the guns and clothing from petitioner's wife, and hence they needed no warrant. Coolidge, 403 U.S. at 443-44 (syllabus).


65. 403 U.S. at 466.
66. Id.
67. Id.
68. Id. (citing Stanley v. Georgia, 394 U.S. 557, 571-72 (1969) (Stewart, J, concurring)). That opinion involved the seizure of adult films. The majority did not reach any fourth amendment issue. However, Justice Stewart declared:

This is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence in plain view. For the record makes clear that the contents of the films could not be determined by mere inspection. And this is not a case that presents any questions as to the permissible scope of a search made incident to a lawful arrest. For the appellant had not been arrested when the agents found the films. After finding them, the agents spent some 50 minutes exhibiting them by means of the appellant's projector in another upstairs room. Only then did the agents return downstairs and arrest the appellant.

Id. at 571 (footnote omitted).

69. 403 U.S. at 466.
the basic rule that no amount of probable cause [alone] can justify a warrantless seizure.\(^{70}\)

"Two distinct constitutional protections" underlie the plain view exception.\(^{71}\) First, the magistrate’s scrutiny required for a warrant seeks to eliminate all searches and seizures not based on probable cause. "The premise here is that any intrusion in the way of a search or seizure is an evil, so that no intrusion . . . is justified without a careful prior determination of necessity."\(^{72}\) Obviously, this protection is not disturbed: the initial intrusion is already valid, already justified. In cases with a warrant, the "magistrate’s scrutiny" has already surveyed and approved the initial action; in cases without a warrant, a valid constitutional exception is necessary to validate any would-be plain view seizure.

Second, searches must be as limited in scope as possible. General explorations are prohibited.\(^{73}\) The seizure of an item in plain view does not offend this criterion either. Plain view, after all, does not extend the search; it merely permits seizure of what can be seen in the course of that search or other intrusion. Additionally, when an already validated search inadvertently presents an opportunity to seize useable evidence, "it would often be a needless inconvenience, and sometimes dangerous . . . to require [police] to ignore it until they have obtained a warrant particularly describing it."\(^{74}\)

Additionally, "plain view alone is never enough to justify a warrantless seizure of evidence."\(^{75}\) Where an item sits within a recognized zone of privacy, the fact that it is within the policeman’s view does not ipso facto make it seizable. When no "prior valid intrusion" to this zone has occurred, the officer is never constitutionally justified in seizing the desired object.\(^{76}\) Such a "pre-intrusive" sighting might provide


\(^{71}\) 403 U.S. at 467.


\(^{73}\) Coolidge, 403 U.S. at 467. See supra note 56.

\(^{74}\) Coolidge, 403 U.S. at 468.

\(^{75}\) Id. (emphasis added).

\(^{76}\) Id. Under the plain view doctrine, that is. See supra note 4.
probable cause to get a warrant, however.\textsuperscript{77}

\textbf{C. Post-Coolidge: Payton, Bannister, Chrisman}

The Supreme Court had only one major "plain view" case before 1983. It did have, however, two other cases in which language, if not law, had an implication for the doctrine. In the course of overturning a warrantless, nonconsensual entry to arrest for a "routine felony," the Court in \textit{Payton v. New York}\textsuperscript{78} indicated that "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity."\textsuperscript{79} However, this revelation occurs amid differentiating a warrantless seizure in an open area from such a seizure on private premises. The question here was the propriety of an in-home arrest for murder or armed robbery; not the seizure of evidence, but the seizure of felons.\textsuperscript{80}

In a case similar to \textit{Texas v. Brown},\textsuperscript{81} the Court upheld the warrantless seizure of evidence from a car. In \textit{Colorado v. Bannister},\textsuperscript{82} an officer stopped a speeding car. While talking to the driver, he observed chrome lug nuts in the car's glove compartment and wrenches on the rug. The car's occupants fit the reported description of individuals wanted for the theft of motor vehicle parts. The officer arrested them and seized the items.\textsuperscript{83} In wording that echoes plain view rationale, the Court justified the warrantless seizure because "the reason for the stop was wholly unconnected with the reason for the subsequent seizure . . . [I]t would be especially unreasonable to require a detour to a magistrate

\textsuperscript{77.} \textit{Coolidge}, 403 U.S. at 468.
\textsuperscript{78.} 445 U.S. 573 (1980).
\textsuperscript{79.} \textit{Id.} at 587.
\textsuperscript{80.} \textit{Payton}, 445 U.S. 573 (1980). The \textit{entire} question in \textit{Payton} is a lack of a "prior justification" for an entry to arrest a felon in his house. There, the police did not have the constitutionally-necessary "exigent circumstances" which would have enabled them to go into the suspect's house and seize him. If they had had such a valid reason, they could have then invoked the plain view doctrine. In \textit{Payton}, the Court once again reaffirmed the hoary adage that "a man's house is his castle" — at least in the absence of exigent circumstances or consent.
\textsuperscript{81.} 103 S. Ct. 1535 (1983) (plurality opinion).
\textsuperscript{82.} 449 U.S. 1 (1980) (per curiam).
\textsuperscript{83.} \textit{Id.} at 2.
before the unanticipated evidence could be lawfully seized.\(^{84}\)

In its 1982 Term, the Court upheld a warrantless seizure of drug paraphernalia when a college police officer was monitoring a recent arrestee’s actions. In *Washington v. Chrisman*\(^ {85}\) a campus police officer arrested Carl Overdahl as he left a college dormitory carrying a half-gallon of gin. Overdahl appeared to be underage. The officer accompanied Overdahl back to his room in search of the student’s identification card. Neil Chrisman, Overdahl’s roommate, was in the room when they arrived. The officer stationed himself in the doorway and watched the roommates.\(^ {86}\) Chrisman appeared nervous. From the doorway, the officer noticed seeds and a small seashell pipe lying on a desk. Believing the seeds marijuana, the officer entered, seized the pipe and seeds, and arrested the pair.\(^ {87}\) They were charged with possession of a controlled substance. In the hearings that followed, the officer testified that he entered with the sole purpose of seizing the pipe and seeds after he observed them from the doorway.\(^ {88}\) The *Chrisman* Court held that the intrusion preceded the plain view observation and upheld the seizure.\(^ {89}\)

To reach this conclusion under the plain view doctrine, the Court gave an expanded meaning to “intrusion.” The Court reasoned that from the moment the officer stopped Overdahl, he had a right to accompany him back into zones of privacy in order to monitor him.\(^ {90}\) Thus, when Overdahl

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84. *Id.* at 3 n.2. *See also supra* note 74 & *infra* note 145.
86. *Id.* at 3. The case hinged on whether or not accompanying the student back to his dorm room while he sought identification provided a valid intrusion.
87. *Id.* at 4. After their arrest, Chrisman and Overdahl voluntarily produced a box containing marijuana. They also consented to a search, which disclosed more marijuana and a cache of LSD. *Id.*
88. *Id.* at 10 n.1 (White, J., dissenting).
89. 455 U.S. at 9.
90. *Id.* at 7.

We hold, therefore, that it is not “unreasonable” under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer’s need to ensure his own safety — as well as the integrity of the arrest — is compelling. Such surveillance is not an impermissible invasion of privacy or personal liberty of an individual who has been arrested. *Id.* at 8 (footnote omitted).
went back to retrieve his identification card, he granted to the officer the right to enter his room. The intrusion occurred, then, when that right was granted. Intrusion became a matter of legal right, not of exercise or actual physical intrusion.91 The zone of privacy was punctured when Overdahl entered the room, not when the officer entered to seize the seeds and the pipe.92 With this definition of intrusion, the plain view observation came after the intrusion, and thus it passes constitutional muster. Once defined, this "intrusion" restates Coolidge's first criterion for the proper application of the doctrine.93 The Chrisman Court agreed; evidence must be "discovered in a place where the officer has a right to be."94

III. THE OPINIONS: TEXAS v. BROWN

A. The Plurality

After reciting the facts mentioned above, Justice Rehnquist attacked the lower court's opinion as far too restrictive an application of the plain view doctrine. He summarized the Texas court's opinion in three sections:

At the suppression hearing conducted by the District Court, a police department chemist testified that he had examined the substance in the balloon seized by Maples and determined that it was heroin. He also testified that narcotics frequently were packaged in ordinary party balloons.

The Court of Criminal Appeals, discussing the Fourth Amendment issues, observed that "plain view alone is

91. Id. at 8. "It is of no legal significance whether the officer was in the room, on the threshold, or in the hallway, since he had a right to be in any of these places as an incident of a valid arrest." Id. Note that this idea of plain view as an extension of a search incident to arrest is in line with its history. See supra notes 48-63.


The intrusion ... occurred when the officer, quite properly, followed Overdahl into a private area to a point from which he had an unimpeded view of and access to the area's contents and its occupants ... [T]his is a classic instance of incriminating evidence found in plain view when a police officer, for unrelated but entirely legitimate reasons, obtains lawful access to an individual's area of privacy. The Fourth Amendment does not prohibit the seizure of evidence of criminal conduct found in these circumstances.

Id. (footnote omitted).

93. Id.

94. Id. at 6.
never enough to justify the warrantless seizure of evidence."

It further concluded that "Officer Maples had to know that 'incriminatory evidence was before him when he seized the balloon.'"

On the state's petition for rehearing, three judges dissented, stating their view that "[t]he issue turns on whether an officer, relying on years of practical experience and knowledge commonly accepted, has probable cause to seize the balloon in plain view."

Additionally, the Justice attempted to put the plain view doctrine in its fourth amendment context. It "provides


[O]ur original decision rested squarely on the interpretation of the Fourth Amendment in Coolidge . . . and Texas cases interpreting that decision, e.g., Howard, . . . DeLao, . . . Duncan, . . . and Nicholas . . . .

We also answer [Brown's] second inquiry in the negative and decline his invitation to attach to Article I, section 9 of our Texas Constitution a more restrictive standard of protection than that provided by the Fourth Amendment.

This Court has opted to interpret our constitution in harmony with the Supreme Court's opinions interpreting the Fourth Amendment. We shall continue on this path until such time as we are statutorily or constitutionally mandated to do otherwise.


96. See 103 S. Ct. at 1539.

Because the "plain view" doctrine generally is invoked in conjunction with other Fourth Amendment principles, such as those relating to warrants, probable cause, and search incident to arrest, we rehearse briefly these better understood principles of Fourth Amendment law . . . . Our cases hold that procedure by way of a warrant is preferred, although in a wide range of di-
grounds for the seizure of an item when an officer’s access to an object has some prior justification under the Fourth Amendment.”

It is best understood as “an extension of whatever the prior justification for an officer’s ‘access to an object’ may be.”

He would see it, then, as more an extension of a right to search, and not as an “exception” to the warrant clause.

For this extension, the Coolidge v. New Hampshire plurality listed three requirements. First, “the police officer must lawfully make an ‘initial intrusion’ or otherwise properly be in position from which he can view a particular area.”

Second, “the officer must discover incriminating evidence ‘inadvertently,’ which is to say, he may not ‘know in advance the location of [certain] evidence and intend to seize it,’ relying on the plain view doctrine only as pretext.”

The last requirement is that “it must be ‘immediately apparent’ to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure.”

Rehnquist also noted that this formulation has “never been expressly adopted by a majority of this Court” but that “it should obviously be the point of reference for further discussion of the issue.”

Rehnquist found the first two prongs of the test met. The “routine driver’s license checkpoint” provided Officer Ma-


Id.

97. 103 S. Ct. at 1540 n.1.
98. Id. at 1541.
100. 103 S. Ct. at 1540 (quoting Coolidge, 403 U.S. at 465-68).
101. 103 S. Ct. at 1540. This so-called “inadverence prong” continues to receive the heaviest criticism. Compare Justice White’s Coolidge dissent, 403 U.S. at 516-21 with his dissent in Washington v. Chrisman, 455 U.S. 1, 9-11 (1982) and his concurrence here, 103 S. Ct. at 1544.
102. 103 S. Ct. at 1540.
103. Id. But see supra note 63.
ples with his valid "initial intrusion." The illuminating flashlight did not taint it. His movements also did no constitutional damage. Secondly, Maples came upon the balloon inadvertently, that is, "the circumstances . . . give no suggestion that the roadblock was a pretext whereby evidence of narcotics violations might be uncovered in 'plain view' . . . ." The ground for reversing the lower court, Justice Rehnquist felt, lay in its construction of the requirement that the incriminating nature of the items be "immediately apparent." "To the Court of [Criminal] Appeals, this apparently meant that the officer must be possessed of near certainty as to the seizable nature of the items." It was "very likely an unhappy choice of words" as "it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary . . . ."


105. Traditionally, the use of flashlights and similar devices did not intrude upon the fourth amendment. "[U]se of a search light is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution." United States v. Lee, 274 U.S. 559, 563 (1927). Accord cases cited at 103 S. Ct. 1541-42 n.5; State v. Sanders, 69 Wis. 2d 242, 256, 230 N.W.2d 845, 852 (1975). See also 1 W. LAFAVE, supra note 2, at § 2.2(b) (1978).

106. 103 S. Ct. at 1542. The general public could peer into the interior of Brown's automobile from any number of angles; there is no reason Maples should be precluded from observing as an officer what would be entirely visible to him as a private citizen. There is no legitimate expectation of privacy, Katz v. United States, 389 U.S. at 361 (1967) (Harlan, J., concurring); Smith v. Maryland, 442 U.S. 735, 739-45 (1979) shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers. In short, the conduct that enabled Maples to observe the interior of Brown's car and of his open glove compartment was not a search within the meaning of the Fourth Amendment.


107. Id. at 1543.
108. Id. at 1542.
109. Id.
110. Id.
An officer is not required to know that certain items are contraband or evidence. Justice Rehnquist quoted Payton v. New York\textsuperscript{111} for the rule that "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming there is probable cause to associate the property with criminal activity."\textsuperscript{112} This probable cause to seize "merely requires that the facts available . . . would 'warrant a man of reasonable caution in the belief' that certain items may be contraband or stolen property or useful as evidence of crime; it does not demand any showing that such a belief be correct or more likely true than false."\textsuperscript{113} Ultimately, "the evidence . . . collected must be seen and weighed not in terms of library analysis . . . but as understood by those versed in the field of law enforcement."\textsuperscript{114} Thus, the officer in the field is allowed to draw upon experience when he calculates whether what is before him is evidence of crime.\textsuperscript{115}

Officer Maples' seizure was proper. His previous arrests had provided him with the knowledge that narcotics frequently were packaged in balloons. The contents of the glove compartment served as buttress to Maples' belief that the driver "was engaged in activities that might involve possession of illicit substances."\textsuperscript{116}

B. Justice Powell in Concurrence

Justice Powell took exception to the expansive language the plurality employed. He suggested that the plurality is thereby denigrating the importance of the warrant clause. The "language and purpose" of the amendment will not justify this.\textsuperscript{117} He reiterates that "exceptions" should be "few in number and carefully delineated."\textsuperscript{118}

\begin{itemize}
  \item \textsuperscript{111} 445 U.S. 573 (1980).
  \item \textsuperscript{112} Id. at 587.
  \item \textsuperscript{113} 103 S. Ct. at 1543 (quoting Carroll v. United States, 267 U.S. 132, 162 (1925), and Brinegar v. United States, 338 U.S. 160, 176 (1949)).
  \item \textsuperscript{114} Id. (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)).
  \item \textsuperscript{116} 103 S. Ct. at 1543.
  \item \textsuperscript{117} Id. at 1544 (Powell, J. concurring).
  \item \textsuperscript{118} Id. (quoting United States v. United States District Court, 407 U.S. 297, 318 (1972)).
\end{itemize}
Additionally, the plurality's comment that the *Coolidge* criteria have "never been expressly adopted by a majority of this Court"\(^{119}\) is an unnecessary criticism. They have been, after all, "generally accepted for over a decade."\(^{120}\) Ultimately, "[i]ts plurality formulation is dispositive of the question . . . "\(^{121}\) After acknowledging that the first two prongs had been met, the Justice evinced the clear belief that probable cause to seize existed, and that in establishing that probable cause, Officer Maples was allowed to use the generally known fact that a balloon is a common narcotics container.\(^{122}\)

### C. Justice Stevens in Concurrence

Justice Stevens, on the other hand, felt the plurality decision was "incomplete." The "container" cases should have been considered.\(^{123}\) Such a consideration, however, requires remanding to the trial court for fact-finding. Additionally, he felt that the plain view doctrine should be focused more sharply. "Searches" should be cleaved from "seizures." Justice Stevens also wondered whether both the seizure of the balloon and its subsequent examination would not be open to challenge.\(^{124}\) "Separate inquiries are necessary, taking

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119. 103 S. Ct. at 1543 (quoting 103 S. Ct. at 1540).
120. 103 S. Ct. at 1545 & n.2.
121. *Id.* at 1545.
122. *Id.*

Officer Maples testified that he previously had made an arrest in a case where narcotics were carried in tied off balloons similar to the one at issue here. Other officers had told him of such cases. Even if it were not generally known that a balloon is a common container for carrying illegal narcotics, we have recognized that a law enforcement officer may rely on his training and experience to draw inferences and make deductions that might well elude an untrained person . . . . We are not advised of any innocent item that is commonly carried in uninflated, tied off balloons such as the one Officer Maples seized. *Id.*

123. *Id.* at 1545 (Stevens, J., concurring). "It gives inadequate consideration to our cases holding that a closed container may not be opened without a warrant, even when the container is in plain view and the officer has probable cause to believe contraband is concealed within." *Id.* For a discussion of "container" cases see Note, *Criminal Procedure* — United States v. Ross, 66 MARQ. L. REV. 161 (1982).
124. *Id.* at 1546.

The Amendment protects two different interests of the citizen — the interest in retaining possession of property and the interest in maintaining personal pri-
into account the separate interests at stake."\textsuperscript{125} In short, even if the antecedent seizure were constitutional, the search of the balloon's contents might not be.

**IV. Analysis**

The plurality opinion in *Texas v. Brown*\textsuperscript{126} is a commendable attempt to clarify a remarkably convoluted passage from a more remarkably convoluted case, *Coolidge v. New Hampshire*.\textsuperscript{127} The principle for which *Brown* will stand — that the "immediately apparent" criterion in *Coolidge* requires that a police officer seizing evidence in his plain view have at that time probable cause to associate it with criminal activity — is a sound one, and is in line with both the weight of lower court opinions and the enlightened reason of various commentators on the subject.\textsuperscript{128}

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\textsuperscript{125} *Id.* at 1547.

\textsuperscript{126} 103 S. Ct. 1535 (1983).

\textsuperscript{127} 403 U.S. 443 (1971).

\textsuperscript{128} See, e.g., *Bies v. State*, 76 Wis. 2d 457, 474, 251 N.W.2d 461, 464-65 (1977) ("The plain view doctrine excuses the requirement of a warrant, but it does not permit the police to effect a seizure without probable cause."). A particularly apt opinion came from the Maryland Court of Special Appeals:

It is beyond cavil that a prior valid intrusion will not in and of itself justify an indiscriminate seizure of all items that happen to be visually in plain view, but that probable cause must exist to believe that the items ultimately seized are, indeed, contraband or other evidence of crime.

An excellent summary of the cases and authorities on this point is found in the opinion of Justice James N. Bloodworth for the Supreme Court of Alabama in *Shipman v. State*, 282 So. 2d 700. In that case, several individuals were detained by the police because of the complaint of a store owner that they had been acting toward him essentially in an obstreperous manner. As one of the individuals was being accosted by the police, he was observed to transfer an object (clearly not a weapon) from one part of his person into the top of his boot. The object was seized, under a plain view rationale, and ultimately determined to be heroin. The conviction was reversed because there was no probable cause to believe that the object seized, although sighted in plain view, was indeed contraband. The Court held, at 282 So. 2d 704:
Additionally, at least one decision, *Warden v. Hayden*, clearly establishes as necessary "a nexus — automatically provided in the case of fruits, instrumentalities, or contraband — between the item to be seized and criminal behavior." Other decisions, such as *United States v. Cortez*,

"The reason for this rule is apparent. If the rule were otherwise, an officer, acting on mere groundless suspicion, could seize anything and everything belonging to an individual which happened to be in plain view on the prospect that on further investigation some of it might prove to have been stolen or to be contraband. It would open the door to unreasonable confiscation of a person's property while a minute examination of it is made in an effort to find something criminal. Such a practice would amount to the 'general exploratory search from one object to another until something incriminating at last emerges' which was condemned in *Coolidge* . . . . 

"For an item in plain view to be validly seized, the officer must possess some judgment at the time that the object to be seized is contraband and that judgment must be grounded upon probable cause."

In *United States v. Thomas*, 16 U.S.C.M.A. 306, 36 C.M.R. 462 (1966), the Court of Military Appeals reversed a conviction for possession of a bottle of narcotics. The authorities had relied upon a plain view seizure . . . . "Whether a seizure is reasonable depends upon the existence of probable cause for that action. There must be facts and circumstances from which the probability of the item's contraband nature may be inferred — 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'"

C. Moylan, *supra* note 45, at 77-78, (quoting Dixon v. State, 23 Md. App. 19, 327 A.2d 516, 521-22 (citations omitted)). See also United States v. Heldt, 668 F.2d 1238 (D.C. Cir. 1981); United States v. Charest, 602 F.2d 1015 (1st Cir. 1979); People v. Hill, 12 Cal. 3d 731, 528 F.2d 1, 117 Cal. Rptr. 731 (1974); People v. Guillebeau, 107 Cal. App. 3d 531, 166 Cal. Rptr. 45 (1980); People v. Miller, 60 Cal. App. 3d 849, 131 Cal. Rptr. 863 (1976) (supporting general rule that nexus between item and criminal activity provides "seizability"). See generally 2 W. LaFave, *supra* note 2, at § 7.5(b) and cases there collected.

130. *Id.* at 307.

[T]he essence of all that has been written is that the totality of the circumstances — the whole picture — must be taken into account . . . .

First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and deductions that might well elude an untrained person. The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same — so are law enforcement officers.
indicate that the calculation of probable cause necessarily takes into account the training and experience of the law enforcement officer. Indeed, what is not "immediately apparent" to the untrained eye may yield a plethora of useful evidence to the legal foot soldier. Consider, for example, the various indicia of the drug trade utterly indecipherable to the "man on the street" and the concomitant difficulties attendant to slowing, if never halting, drug trafficking.

It would seem quite obvious to the reasoned observer that any retrospective analysis of a seizure must take into account what the seizing officer learned from his days on the beat. This would seem especially compelling in cases such

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Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement. *Id.* at 417-18.

132. See, e.g., People v. Hill, 32 Cal. App. 3d 18, 107 Cal. Rptr. 791, 808 (1973), rev'g, 12 Cal. 3d 731, 528 P.2d 1, 117 Cal. Rptr. 393 (1974) (probable cause established that cellophane-wrapped brick was marijuana when, after police attempted to halt car for traffic violation, there followed a "high speed chase" which made it "reasonable to conclude that they were trying to escape apprehension for a serious offense or hide something."); State v. Achter, 512 S.W.2d 894 (Mo. App. 1974) (parked car drove off at high rate of speed as police car approached; this contributed to probable cause that odd assortment of items observed in car of known burglar were from a yet-unreported burglary). See also 2 W. LaFave, *supra* note 2, at § 7.5(b) & n.23 (1978).

133. The pervasive nature of drug trafficking seems a particular concern to this Court in this Term. See, e.g., United States v. Place, 103 S. Ct. 2637, 2639 (1983) ("Given the enforcement problems associated with the detection of drug trafficking," stopping an airline traveller and allowing a trained dog to sniff his luggage for drugs is not a "search" within fourth amendment constraints); Illinois v. Lafayette, 103 S. Ct. 2605, 2608 (1983) (no warrant necessary to search arrestee's shoulder bag as "routine administrative procedure at police station incident to booking and jailing suspect"); United States v. Villamonte-Marquez, 103 S. Ct. 2573 (1983) (no suspicion, no warrant needed for "document-check" by customs officials on boat in channel leading to open sea); Illinois v. Gates, 103 S. Ct. 2317 (1983) (easing Aguilar-Spinelli standards for judging when an informant's tip can support probable cause for a warrant); Florida v. Royer, 103 S. Ct. 1319, 1325 (1983) (plurality decision) (dictum) (temporary detention for dispelling doubts about "drug courier" not unconstitutional where it "[does] not exceed the limits of an investigative detention."). Groups such as the National Organization for the Reform of Marijuana Laws (NORML) are concerned that these recent rulings "reflect the Supreme Court's 'clear feeling [that] drugs have such a negative impact on society that any change in constitutional provisions [favoring the Government] is acceptable.'" Kevin Zeese, NORML's chief counsel, quoted in Elsasser, "Search and Seizure" Rules Facing Review, Chicago Tribune, June 26, 1983, § 4 (Perspective) at 1, col. 1. Drug Enforcement Administration officials, on the other hand, find no fault in these recent Court trends. *Id.* at 5, col. 1.
as Brown, in which evidence adduced at trial indicated Officer Maples had dealt with narcotics arrests in the near past,\textsuperscript{134} and that he was fully cognizant of the use of balloons as a means of transporting narcotics and dangerous drugs.\textsuperscript{135} Parenthetically, it is interesting to note that the cases upon which the lower court relied indicate that the question is not whether the officer knew that the substance before him was inculpatory.\textsuperscript{136} Those Texas cases turn on whether "the officer's testimony indicated he was cognizant of the fact [that balloons] are used to transport narcotics and are thus ipso facto contraband."\textsuperscript{137}

The plurality is also praiseworthy for its indication that "[p]lain view is . . . better understood . . . not as an independent 'exception' . . . , but simply as an extension of . . . the prior justification . . . ."\textsuperscript{138} This clearly follows Coolidge, and it highlights for the lower courts the idea that there are criteria to be met before "plain view" will support a seizure.\textsuperscript{139} Simply seeing something will not suffice.\textsuperscript{140} That point is often lost.\textsuperscript{141}

\begin{footnotes}\footnotetext{134}{103 S. Ct. at 1538. See also supra note 27.}\footnotetext{135}{Id. See also infra note 137.}\footnotetext{136}{See supra notes 42-43.}\footnotext{137}{See Brown v. State, 617 S.W.2d 196, 202 (Tex. Crim. App. 1981): The use of balloons or similar containers has been shown to be commonly associated with the distribution, packaging, and transportation of controlled substances — usually heroin. See, e.g., State v. Washington, 117 Ariz. App. 207, 496 P.2d 633 (Ariz. App. 1972) (balloons); State v. Grady, 548 S.W.2d 601 (Mo. App. 1977) (condoms); State v. James, 169 So. 2d 89 (La. 1964) (finger stalls). Many jurisdictions have recognized the realities of the drug culture and hold that balloons are a common package for heroin . . . . Furthermore, balloons have become so well known for their relation to narcotics that they have been included in the Model Drug Paraphernalia Act (MDPA) and legislatively adopted. . . . Mid-Atlantic v. Maryland, 500 F. Supp. 834 (D. Md. 1980). See also Note, Drug Paraphernalia Laws: Clearing a Legal Haze, 13 CUM. L. REV. 273 (1982) (discussing that legislation, its origin, and its construction).}\footnotetext{138}{103 S. Ct. at 1540-41.}\footnotetext{139}{403 U.S. 443, 466 (1971). See supra note 4.}\footnotetext{140}{See Note, "Plain View" and the "Plain View Doctrine," 10 FLA. ST. U.L. REV. 290, 291 (1982), which discusses Florida's interpretations of the doctrine.}\footnotetext{141}{Unfortunately, Justice Rehnquist later phrases the distinction between an officer's view of an item and the grounds necessary for its seizure thus: "[i]t is important to distinguish 'plain view,' as used in Coolidge to justify seizure of an object, from an officer's mere observation of an item left in plain view." 103 S. Ct. at 1541 n.4. The clumsy use of language haunts again: if that is an important distinction — and it is — why is it buried in footnote 4 and why is the second "plain view" not the commonly accepted "open view"? Compare "[t]he information obtained as a result of observa-
On case result, then, one cannot quibble with the Brown plurality's opinion. However, several structural flaws diminish its otherwise effective explication of the plain view doctrine. Primary among these is the seemingly cavalier approach with which it was written. As Mr. Justice Powell noted, it does range "well beyond the application of the exception." For example, the discussion "rehears[ing] briefly [the] better understood principles of Fourth Amendment law" is very broadly written and allows exceptions to consume the rule. "Our cases hold that procedure by way of a warrant is preferred, although in a wide range of diverse situations we have recognized flexible, common sense exceptions to this requirement." Similarly dismissive language suggests the "needless inconvenience" for a warrant after "first-hand perception . . . of evidence." As employed now, Justice Stewart's more carefully drawn concerns in Coolidge are turned against their origins.

Note the plurality's "search incident" precedents. Mr. Justice Rehnquist builds the contradictory and confusing case law created in Marron v. United States, Go-Bart Importing Co. v. United States, and United States v. Lefkowitz into a faulty foundation for his argument. Unfortunately, each of these cases was in its turn overruled. Chimel v. California has preempted these precedents and set the standard for searches incident to a lawful arrest. His careless use of common law seems odd. Citation to those three cases as support for the "rule" that "if, while lawfully engaged in activity in a particular place, police officers perceive a suspicious object, they may seize it immedi-

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142. 103 S. Ct. at 1544 (Powell, J., concurring).
143. 103 S. Ct. at 1539.
144. Id. Cf. 103 S. Ct. at 1544 (Powell, J., discussing the warrant clause and its central position in fourth amendment litigation).
145. 103 S. Ct. at 1541.
146. Cf. 403 U.S. at 468.
147. 275 U.S. 192 (1927).
149. 285 U.S. 452 (1932).
150. See supra notes 49-51 and accompanying text.
ately"\textsuperscript{152} seems more odd, in light of those cases' holdings and history.\textsuperscript{153} Most peculiarly, the declaration that these cases "reflect . . . an application of the Fourth Amendment's central requirement of reasonableness to the law governing seizures of property"\textsuperscript{154} ignores or eradicates the warrant clause and its historic position as the fulcrum of the fourth amendment.\textsuperscript{155}

Finally, the plurality shows a penchant for creating "rules" from the meekest of dictum. The most glaring example of this, as mentioned above, is that Payton provides scant authority for the "rule" Justice Rehnquist extracts from it. Consider the context from which that "rule" is seized. As mentioned above,\textsuperscript{156} it is written amid a discussion of the seizure of a felon in his home. Mr. Justice Stevens declares:

\begin{quote}
It is a "basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable. Yet is also well settled that objects such as weapons or contraband found in a public place may be seized without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming there is probable cause to associate the property with criminal activity.\textsuperscript{157}
\end{quote}

Here, the distinction between that which is in open view in a public place and that which is in plain view after a valid initial intrusion to a zone of privacy has not been made. Careful reading and understanding of the language indicates that Justice Rehnquist has misappropriated Payton, and, in doing so, has weakened the argument for the obvious.

The style of the plurality is telling, as is the case result. Texas v. Brown should have been disposed of under the widely-accepted Coolidge criteria for plain view seizures. Its factual simplicity compels the result reached; probable cause determined by a trained and experienced officer's eye is clearly the necessary definition of "immediately apparent." However, the over-reaching style of the plurality unfortu-

\textsuperscript{152} 103 S. Ct. at 1541.
\textsuperscript{153} See supra notes 49-51 & 53-56.
\textsuperscript{154} 103 S. Ct. at 1541.
\textsuperscript{155} See 103 S. Ct. at 1544 (Powell, J., concurring).
\textsuperscript{156} See supra notes 78-80 & 111-12 and accompanying text.
\textsuperscript{157} 445 U.S. at 586-87 (emphasis added).
nately divides the Court when an opinion more tightly written, more reasonably researched would have gained for it the unanimous Court the judgment received. Unfortunately, divisiveness is once again the word of the day, and the successful and speedy prosecution of crime — as well as the privacy and possession protections of those from whom "evidence" is seized — once again suffers for it.

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