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Constitutional Standards for Applying the Plain View Doctrine.

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CONSTITUTIONAL STANDARDS FOR APPLYING THE PLAIN VIEW DOCTRINE

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In the course of judicial interpretation of the fourth amendment five exceptions to its requirement of a warrant prior to any search or seizure have developed.[1] Plain view is actually the simplest of these; yet its history has been characterized by confusion, particularly concerning the distinctions between plain view searches and searches incident to arrest.[2]

The plain view doctrine was recognized as a separate fourth amendment exception in the seminal case *United States v. Lee*[3] in which the Supreme Court identified the rule by holding that no search had occurred where illegal cases of liquor were plainly visible.[4] This rule that it is not a search to observe what is in plain view failed to answer the most troubling questions about the application of the plain view exception—in what manner may the police obtain the position from which to view the evidence, and what conditions must be present in order to justify seizing objects found in plain view without first applying for a search warrant?[5]

These questions remained entirely unsettled until 1968, in which year the Supreme Court began to clarify the plain view doctrine in *Harris v. United States*:[6] "It 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 and may be introduced in evidence."[7]

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1. *See* Chimel v. California, 395 U.S. 752 (1969) (search incident to lawful arrest); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk); Harris v. United States, 390 U.S. 234 (1968) (plain view); Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit); Preston v. United States, 376 U.S. 364 (1964) (automobile searches).

2. *See, e.g.*, Ker v. California, 374 U.S. 23, 34, 43 (1963); United States v. Lefkowitz, 285 U.S. 452, 465 (1932); GoBart Importing Co. v. United States, 282 U.S. 344, 358 (1931); Marron v. United States, 275 U.S. 192, 199 (1927).

3. 274 U.S. 559 (1927).

4. *Id.* at 563; *see* United States v. Leal, 460 F.2d 385, 389 (9th Cir.), *cert. denied*, 409 U.S. 889 (1972); United States v. Bourassa, 411 F.2d 69, 71-72 (10th Cir.), *cert. denied*, 396 U.S. 915 (1969).

5. *See* Taylor v. United States, 286 U.S. 1 (1932), *overruled*, Harris v. United States, 390 U.S. 234 (1968); Trupiano v. United States, 334 U.S. 699 (1948), *overruled*, United States v. Rabinowitz, 339 U.S. 56 (1950).

In United States v. Rabinowitz, 339 U.S. 56, 65-66 (1950) the Court stated that "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

6. 390 U.S. 234 (1968).

7. *Id.* at 236. In support of its rule in *Harris* the Supreme Court only cited Ker v. California, 374 U.S. 23, 34-35 (1963), United States v. Lee, 274 U.S. 559, 563

The greatest impact of *Harris* was that it created a separate constitutional standard for plain view searches, distinguishing them from searches incident to arrest.[8] The standards for plain view searches and seizures set forth in *Harris* were simple for the courts and the police to follow: all that needed to be shown was that the officer was legally in a position from which he was able to obtain a clear view of the incriminating evidence.[9]

THE INADVERTENCY REQUIREMENT

Unfortunately, the simple standards governing plain view searches and seizures set forth by *Harris* were abruptly ended by *Coolidge v. New Hampshire*[10] in which the majority announced:

> What the plain view cases have in common is that the officer in each of them had a prior justification for an intrusion in the course of which he came *inadvertently* across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure.[11]

It thus became clear that plain view alone would no longer be enough to justify a warrantless seizure of evidence—the discovery must also have been made inadvertently.[12] The Court felt that without this requirement the fourth amendment would be subverted;[13] on the other hand, by imposing the "inadvertence" requirement, the police would be encouraged to use the

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(1927), and Hester v. United States, 265 U.S. 57, 58 (1924). Of these cases only *Lee* supported the position of the Supreme Court. *Ker* dealt with a search incident to an arrest, and *Hester* concerned only the right of police to seize abandoned property. The Supreme Court failed to mention other plain view cases such as McDonald v. United States, 335 U.S. 451 (1948), Trupiano v. United States, 334 U.S. 699 (1948), and Taylor v. United States, 286 U.S. 1 (1932). In each of these cases the officer was rightfully positioned and obtained a clear view of the evidence from that location. Nevertheless, the evidence was suppressed since the officers could have obtained search warrants prior to making the seizures.

8. *See, e.g.*, United States v. Briddle, 436 F.2d 4, 7-8 (8th Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); Alcorn v. State, 265 N.E.2d 413, 416 (Ind. 1970); State v. Moretz, 520 P.2d 1260, 1261-62 (Kan. 1974).

9. *See, e.g.*, United States v. Knight, 451 F.2d 275, 278 (5th Cir. 1971), *cert. denied*, 405 U.S. 965 (1972); United States v. Bourassa, 411 F.2d 69, 71-72 (10th Cir.), *cert. denied*, 396 U.S. 915 (1969); Lefler v. United States, 409 F.2d 44, 49 (8th Cir. 1969); Warrix v. State, 184 N.W.2d 189, 193 (Wis. 1971).

10. 403 U.S. 443 (1971).

11. *Id.* at 466 (emphasis added). The majority opinion was written by Justice Stewart who was joined by Justices Brennan, Douglas, and Marshall. The fifth member of the majority was Justice Harlan who did not specifically concur in that portion of the opinion dealing with the new requirements for the plain view doctrine, but did concur in one section of the opinion which furthered the argument that police could not seize objects in plain view of which they had advance knowledge. *Id.* at 478.

12. *Id.* at 468-69.

13. *Id.* at 467.

warrant process.[14] Thus a "neutral and detached" magistrate would be interposed between the police and the accused to ensure that the search would be a limited one based on probable cause.[15] In effect the inadvertency requirement eliminated plain view seizures when the police had prior knowledge that the evidence sought was in the possession of the defendant. Thus, only *planned* warrantless seizures of evidence would be affected by the requirement.

It is important to note, however, that in the great majority of cases reaching the Supreme Court the officers who have obtained the clear view of the incriminating evidence have come upon that view inadvertently.[16] In those cases, however, where it must be determined whether the discovery was inadvertent[17] the problem is that although the underlying policy of encouraging officers to use search warrants whenever practical is easy to understand, the doctrine is hard to apply in practice. The requirement that the discovery be inadvertent suggests little more than the seizure of the evidence not be planned. Thus, the officer must show that he did not know of the existence of the evidence before he obtained his "plain view" of it. The question then arises of whether the officer may have at some time possessed enough probable cause to have tried to procure a search warrant. To answer this question the court must look at the seizure *ex post facto*, trying to determine how the officers, who did not have the benefit of the court's hindsight, should reasonably have proceeded at the time of the seizure. This is a far cry from the easily applied rule in *Harris* that the officer must only have been lawfully present and have seen the object in plain view.[18] Thus the courts, as well as the police, often have difficulty determining, even on a case by case basis, exactly when the doctrine should be invoked.

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14. *Id.* at 471-72.

15. *Id.* at 467.

16. *See, e.g.*, United States v. Hersh, 464 F.2d 228, 230 (9th Cir.), *cert. denied*, 409 U.S. 1008 (1972) (Officers approached defendant's home in broad daylight not expecting to be able to see an illegal laboratory through an open window); Marshall v. United States, 422 F.2d 185, 189 (5th Cir. 1970) (Sheriff walked to defendant's car in order to see if he could help the defendant not expecting to find a sawed-off shotgun in plain view); Alcorn v. State, 265 N.E.2d 413, 414 (Ind. 1970) (Defendant was stopped for running a stop sign, the officer did not expect to find stolen goods in the car).

17. *See, e.g.*, United States v. Wagner, 497 F.2d 249, 251 (10th Cir. 1974) (Officer had information prior to seizure of the evidence that a stolen car might be at a particular address); United States v. Rollerson, 491 F.2d 1209, 1210-11 (5th Cir. 1974) (While police were taking a statement as to an attempted assault, defendant drove by, was arrested, and his illegal weapon seized); Martinez v. Turner, 461 F.2d 261, 264-65 (10th Cir. 1972) (Officers could not seize a coat from defendant without a warrant if they had gone to his home for that purpose); Blincoe v. People, 494 P.2d 1285, 1286 (Colo. 1972) (Police wanted to talk to the defendant about a robbery when they saw the stolen cash register and seized it); State v. Moretz, 520 P.2d 1260, 1261 (Kan. 1974) (Police suspected the defendant had stolen tools when they went to talk with him).

18. Harris v. United States, 390 U.S. 234, 236 (1968).

Decisions Since Coolidge

Even though in the great majority of plain view cases the officers who obtained the clear view of the incriminating evidence did so inadvertently, many cases still arise where the view can not be said to be the result of an inadvertent discovery.[19] One method of avoiding the results of imposing the inadvertence requirement is to differentiate between instrumentalities, fruits of crime, and contraband on the one hand, and mere evidence on the other.[20] Such a distinction seems to have been approved by the Supreme Court when it stated in *Coolidge* that the inadvertence requirement would apply only "to the seizure of objects—not contraband nor stolen nor dangerous in themselves—which the police know in advance they will find in plain view and intend to seize."[21] Thus in *United States v. Smollar*[22] it was determined that no warrant was needed to search the defendant's car when a stolen credit card was found in plain view there even though the postal inspectors had suspected the defendant of stealing credit cards from the mail. The Court interpreted *Coolidge* as having established the rule that the inadvertence requirement did not apply to stolen property.[23]

Such a selective reading of *Coolidge* is dangerous, however, because in another part of the opinion the Court, relying on *Trupiano v. United States*,[24] remarked that plain view alone would not justify even a seizure of contraband.[25] Considering the opinion as a whole, it appears that the inadvertence requirement was meant to apply to all plain view searches and seizures since the Court noted that a characteristic of all plain view cases was that the officers had come upon the evidence inadvertently.[26]

The inadvertence rule has sometimes been judicially avoided by findings that exigent circumstances presented the officers with no time in which to obtain a search warrant.[27] Other cases have relied on validation of a search

19. *See, e.g.*, United States v. Lisznyai, 470 F.2d 707, 710 (2d Cir. 1972), *cert. denied*, 410 U.S. 987 (1973) (Federal agents had defendant's home under observation for several days before moving in to make a warrantless seizure of the illegal laboratory); Martinez v. Turner, 461 F.2d 261, 264-65 (10th Cir. 1972) (Officers went to defendant's home to talk to him about a coat worn in a robbery and found the coat in plain view).

20. In Warden v. Hayden, 387 U.S. 294, 310 (1967) the Court stated that "there is no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits, instrumentalities, or contraband."

21. Coolidge v. New Hampshire, 403 U.S. 443, 471 (1971).

22. 357 F. Supp. 628 (S.D.N.Y. 1972).

23. *Id.* at 632-33; *see* People v. Spinelli, 345 N.Y.S.2d 87 (Sup. Ct. 1973); State v. Murray, 509 P.2d 1003, 1008 (Wash. Ct. App. 1973).

24. 334 U.S. 699 (1948).

25. Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971).

26. *Id.* at 466; State v. Alexander, 495 P.2d 51, 56 (Ore. Ct. App. 1972) (dissenting opinion).

27. United States v. Lisznyai, 470 F.2d 707, 710 (2d Cir. 1972), *cert. denied*, 410 U.S. 987 (1973) (Agents seized illegal equipment when defendant began removing it

incident to an arrest to uphold the plain view seizure.[28]

An even more frequently applied method to avoid the inadvertence requirement is simply to engage in semantics. For example, in *Thompson v. Stynchombe*[29] officers obtained a warrant to search the defendant's home where they expected to find stolen alcohol. The illegal spirits, however, were found in plain view in the defendant's car parked outside his home. The court upheld the seizure because, even though the officers expected to find the stolen property, they did not expect to find it in the defendant's car; therefore, the observation was made inadvertently.[30] The end result of this type of judicial interpretation would seem to be a complete lack of any common standard other than the whim of each individual court. This is readily seen in *State v. Bell*[31] where police arrested the petitioner for burglary and began to search for his car which they suspected contained stolen property. The car was located and the stolen goods were seized, and the seizure was upheld as a valid plain view seizure of incriminating evidence.[32] The court held the seizure was inadvertent, possibly because the officers were unsure of the exact location of the car and whether it actually contained the stolen property. A search warrant could have been obtained, however, and there were no exigent circumstances present which would normally eliminate the necessity of a warrant. This was in fact a planned plain view seizure and was not the inadvertent discovery of an incriminating object. Similarly, the Federal District Court for the Eastern District of Michigan found still another way to avoid the suppression of evidence which was not discovered inadvertently, holding that when the act of possession of an article is itself a crime, and the crime is being committed in the presence of the officers, the inadvertence requirement does not apply.[33]

Other courts have simply refused altogether to follow the inadvertence re-

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from the premises); *accord*, United States v. Lopez-Ortiz, 492 F.2d 109, 110-11 (5th Cir. 1974) (marijuana taken into a garage); State v. Hills, 283 So. 2d 220, 222 (La. 1973) (Officer entered defendant's apartment in response to a cry for help).

28. United States v. Allende, 486 F.2d 1351, 1352-53 (9th Cir. 1973) (Evidence admitted when produced in a search incident to the arrest even though search warrant was invalid).

29. 494 F.2d 48 (5th Cir. 1974).

30. *Id.* at 48-49.

31. 215 N.W.2d 535 (Wis. 1974).

32. *Id.* at 538-40; *see* United States v. Bright, 471 F.2d 723, 725-26 (5th Cir. 1973) (Although officer had been warned defendant was armed, discovery of a pistol was inadvertent since he did not know it would be partially concealed under the seat of the car); State v. Young, 204 S.E.2d 556, 558-59 (N.C. Ct. App. 1974) (Evidence seized inadvertently when officers went to defendant's home to question him about a murder, not search for evidence). *But see* Martinez v. Turner, 461 F.2d 261, 265 (10th Cir. 1972) (Discovery of a coat was not inadvertent since officers went to defendant's home to question him about it).

33. United States v. Esters, 336 F. Supp. 214, 221-22 (E.D. Mich. 1972).

quirement.[34] One such case was *North v. Superior Court*[35] where the Supreme Court of California allowed the plain view seizure of a car used in the commission of a crime, even though this was a planned warrantless seizure. The court refused to apply the inadvertence standard imposed by *Coolidge* in the belief that a majority of the United States Supreme Court had not joined in requiring inadvertency in "plain view" cases.[36] It was felt that Justice Harlan had concurred only in the result and had not supported the inadvertence requirement and, therefore, the standard should not be given effect.[37] An interesting facet of *North* is that only one dissenting judge argued that *Coolidge* did impose the inadvertence requirement.[38] Two other judges dissented on the ground that while no one was sure of the status of the inadvertence requirement set forth in *Coolidge*, the result reached in *Coolidge* should be controlling since the fact situations were closely related.[39]

Following California's lead the Supreme Court of Idaho, in *State v. Pontier*,[40] rejected the inadvertence requirement in favor of the requirements governing plain view searches set forth in *Harris v. United States*.[41] Thus in Idaho the officer who observes an object in plain view need only have had a right to be in that position to have obtained the clear view of the incriminating evidence.[42]

California and Idaho are not alone in questioning whether there was in fact a majority holding in favor of the inadvertence requirement enunciated in *Coolidge*.[43] Such attacks on the inadvertence requirement are actually misdirected since the members of the Court themselves are of the opinion that there is a majority decision in the case. Justice White in his dissent in *Coolidge*, in which he was joined by Chief Justice Burger, spoke of the requirement as an accomplished fact and lamented that it would continue to create confusion in the lower courts.[44] Also, while Justice Harlan's concurring opinion is not clear on his position concerning the inadvertence requirement, he did specifically concur in that section of the majority opinion[45] directed to Justice White's dissent which "marshalls the arguments that can be

34. North v. Superior Court, 104 Cal. Rptr. 833 (1972); State v. Pontier, 518 P.2d 969 (Idaho 1974).
35. 104 Cal. Rptr. 833 (1972).
36. *Id.* at 836-37.
37. *Id.* at 836-37.
38. *Id.* at 842-43.
39. *Id.* at 841.
40. 518 P.2d 969 (Idaho 1974).
41. 390 U.S. 243 (1968).
42. State v. Pontier, 518 P.2d 969, 974 (Idaho 1974).
43. United States v. Bradshaw, 490 F.2d 1097, 1101 n.3 (4th Cir. 1974); Brisendine v. State, 203 S.E.2d 308, 309 (Ga. Ct. App. 1973).
44. Coolidge v. New Hampshire, 403 U.S. 443, 520-21 (1971).
45. *Id.* at 491. Section II-D of the majority opinion is directed at Justice White's dissent which attacked the majority's position on the necessity that the plain view seizure of evidence must be inadvertent. *Id.* at 516.

made against our [the majority's] interpretations of the 'automobile' and 'plain view' exceptions to the warrant requirement."[46]

Whether a new majority view will emerge from the present Supreme Court is difficult to hypothesize since the Court continues to deny certiorari to all plain view cases.[47] A hint that change may be eminent, however, can be found in *Cady v. Dombrowski,*[48] a 1973 Supreme Court case which dealt primarily with two separate automobile searches. The evidence uncovered in the first car led officers to the second car. Although the police had a warrant to search the second car, while searching they inadvertently came across and seized incriminating evidence not described in the warrant. The five member majority, consisting of the Chief Justice and Justices Blackmun, Powell, Rehnquist, and White, held the seizure to be lawful under the plain view exception, but did not mention that the discovery of the evidence necessarily had to be inadvertent.[49] By contrast, the four dissenting Justices argued that the discovery of the evidence must necessarily have been inadvertent.[50] This case may indicate that the law of plain view searches and seizures might undergo a reversion to the simple standards set forth in *Harris* if the new Court elects to decide a plain view case.[51]

Withdrawal of the inadvertence requirement and substitution of the *Harris* standards with the modification that there must also exist exigent circumstances which dictate the need for a warrantless seizure of evidence would serve to alleviate much of the current confusion. "Exigent circumstances" are those in which the evidence must be seized immediately in order to prevent its being destroyed, concealed, or transported to another location where

46. *Id.* at 473.

47. *See, e.g.*, United States v. Santana, 485 F.2d 365, 366-67 (2d Cir. 1973), *cert. denied*, 43 U.S.L.W. 3469 (U.S. Jan. 19, 1974) (Major narcotic violator in New York City was stopped and questioned; narcotics were observed in plain view); United States v. Liszynai, 470 F.2d 707 (2d Cir. 1972), *cert. denied*, 410 U.S. 987 (1973) (Exigent circumstances required officers to conduct a planned warrantless plain view seizure); United States v. Knight, 451 F.2d 275 (5th Cir. 1971), *cert. denied*, 405 U.S. 965 (1972) (Reliable informant told officer that defendant had stolen property in his possession, and the officer made a plain view seizure).

48. 413 U.S. 433 (1973).

49. *Id.* at 448-49.

50. Cady v. Dombrowski, 413 U.S. 433 (1973). The dissenting Justices, Brennan, Douglas, Marshall and Stewart, voted to suppress the evidence seized in the search of the second vehicle, not because the evidence seized in plain view was not discovered inadvertently, but because the antecedent search which led to the discovery of the evidence in plain view was felt to be unconstitutional. *Id.* at 452.

51. The Court should consider the confusion which has occurred because of the inadvertence requirement. *Compare* Thompson v. Stynchcombe, 494 F.2d 48, 49 (5th Cir. 1974); United States v. Bright, 471 F.2d 723, 725-26 (5th Cir. 1973); Martinez v. Turner, 461 F.2d 261, 265 (10th Cir. 1972); State v. Young, 204 S.E.2d 556, 558-59 (N.C. Ct. App. 1974); State v. Bell, 215 N.W.2d 535, 538-40 (Wis. 1974) *with* United States v. Wagner, 497 F.2d 249 (10th Cir. 1974); United States v. Rollerson, 491 F.2d 1209 (5th Cir. 1974); Blincoe v. People, 494 P.2d 1285 (Colo. 1974); State v. Moretz, 520 P.2d 1260 (Kan. 1974).

it could not easily be discovered. Such a test would require the officer to show that he was rightfully in a place from which he was able to obtain a clear view of the incriminating evidence and that circumstances existed which made immediate seizure imperative. This is a simple test which can be applied easily by officers and judges alike to determine the constitutionality of a seizure. It also avoids the problems of trying to determine whether or not the discovery was actually inadvertent and whether the officer should have first tried to procure a search warrant. Thus the police would still be encouraged to make use of search warrants whenever possible and thereby to limit valid warrantless intrusions to those which can be shown by the circumstances to be necessary.

KATZ V. PLAIN VIEW: REASONABLE EXPECTATION OF PRIVACY

It is clear that the plain view doctrine and the right to privacy, as established by *Katz v. United States*,[52] may conflict. *Katz* was initially concerned with the legality of wiretaps placed without the protection of judicial supervision.[53] The Supreme Court went beyond this discussion and considered the individual's right to privacy, setting out in historic language that

> the Fourth Amendment protects people not places. What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection . . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[54]

Thus *Katz* considerably weakened the previous theory that an individual's right to privacy should often be held subordinate to the public's right to be protected from crime.[55]

When Katz and "Plain View" Conflict: Place From Which The View May be Obtained

It is generally required only that the officer making a plain view observation be lawfully positioned when obtaining the view.[56] Where the plain view

52. 389 U.S. 347 (1967).

53. *Id.* at 354-55.

54. *Id.* at 351-52. Justice Harlan's concurring opinion has become the recognized method by which to gauge whether the person's right of privacy was violated. "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361; *see, e.g.*, Ponce v. Craven, 409 F.2d 621, 625 (9th Cir. 1969); Dean v. Superior Court, 110 Cal. Rptr. 585, 589-90 (Ct. App. 1973).

55. *See* Smayda v. United States, 352 F.2d 251, 257 (9th Cir. 1965). *Contra,* State v. Bryant, 177 N.W.2d 800 (Minn. Ct. App. 1968); *cf.* Brown v. State, 238 A.2d 147, 149 (Md. Ct. App. 1968).

56. Harris v. United States, 390 U.S. 234, 236 (1968); *see* United States v. Green, 474 F.2d 1385, 1390 (5th Cir. 1973) (If the intrusion is lawful "the invasion of privacy is not increased by an additional officer"); United States v. Hersh, 464 F.2d 228, 230 (9th Cir. 1972) (Officers were not prohibited from entering the premises).

discovery is made on public land such as a street, it is clear that the officer had a right to be present to obtain that view.[57] Where the view occurs on quasi-public land, the police may generally enter without requesting permission since these areas are usually open to the public. On this basis, most courts have upheld plain view seizures when, for example, the officer obtained the clear view from a front porch,[58] a parking lot[59] or an open field.[60]

When the plain view search and seizure occurs in a private place, the officer must somehow legitimize his presence before the evidence may be validly seized. The most obvious way to justify the officer's presence is for him to have been invited onto the premises,[61] while other methods of validating the observation are by securing a search warrant,[62] executing a valid arrest,[63] responding to an emergency call for help,[64] hot pursuit,[65] investigation of a fire,[66] and reasonable inspection.[67]

Mode of Observation

As early as 1927 the United States Supreme Court determined that no unreasonable search had occurred where a search light was used to illuminate the deck of a boat thereby revealing cases of illegal liquor.[68] This reasoning

57. *See, e.g.*, Harris v. United States, 390 U.S. 234, 235 (1968) (police garage); United States v. Avey, 428 F.2d 1159, 1164 (9th Cir.), *cert. denied*, 400 U.S. 903 (1970) (highway check point).

58. People v. Hill, 107 Cal. Rptr. 791, 802 (Ct. App. 1973); *cf.* Fixel v. Wainwright, 492 F.2d 480, 484 (5th Cir. 1974) (common fenced back yard could be used only by tenants of the apartments).

59. Marshall v. United States, 422 F.2d 185, 189 (5th Cir. 1970), *accord*, United States v. Resnick, 455 F.2d 1127, 1133 (5th Cir. 1972), *cert. denied*, 409 U.S. 875 (1972).

60. *See, e.g.*, United States v. Hollon, 420 F.2d 302, 303 (5th Cir. 1969); Hodges v. United States, 243 F.2d 281, 283 (5th Cir. 1957). The "open fields" doctrine holds that it is not an unreasonable search for an officer to trespass on land beyond the curtilage of a home and its immediate outbuildings since this area is not protected by the fourth amendment.

61. *E.g.*, Davis v. United States, 327 F.2d 301, 305 (9th Cir. 1964).

62. *See, e.g.*, Marron v. United States, 275 U.S. 192, 199 (1927) (seizure of a ledger not described in the search warrant); United States v. Pacelli, 470 F.2d 67, 701-71 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973) (warrant authorized to search for heroin, boric acid was discovered).

63. Ker v. California, 374 U.S. 23, 28 (1963).

64. State v. Pires, 201 N.W.2d 153, 159 (Wis. 1972). When police officers responded to a call for emergency aid, they were justified in entering the home, and conducting a search to locate whoever might have needed assistance. Although evidence immediately incriminating on its face could be seized, it was not apparent that the letter was incriminating.

65. Warden v. Hayden, 387 U.S. 294, 298-99 (1967).

66. United States v. Green, 474 F.2d 1385, 1389-90 (5th Cir. 1973).

67. State v. Hoffman, 14 N.W.2d 146, 148 (Wis. 1944) (officers on the premises to check the defendant's liquor license).

68. United States v. Lee, 274 U.S. 559, 563 (1927). In Marshall v. United States, 422 F.2d 185 (5th Cir. 1970) the court stated:

Regardless of the time of day or night, the plain view rule must be upheld where

has now even been extended to the use of a flashlight during the day to observe the interior of a building.[69]

Generally, no illegal seizure occurs where police officers are in a position where they have a right to be and overhear incriminating conversations.[70] According to the reasoning in *Katz*, when a person knowingly exposes his activities and conversations to public view and hearing, his actions are not constitutionally protected. If he makes an objective reliance on privacy, however, and the reliance is reasonable and justified, the invasion of privacy and seizure of evidence is illegal.[71]

In *United States v. Lee*[72] the Supreme Court, upholding the use of a searchlight to obtain a clear view of a boatdeck, held the use of the artificial light to be no more objectionable than the use of a "marine glass or a field glass:" neither was prohibited by the constitution.[73] This rule was even applied in *Commonwealth v. Hernly*[74] where the Superior Court of Pennsylvania determined that no unconstitutional search or seizure occurred when an FBI agent mounted a 4-foot ladder and through the use of binoculars was able to see the defendants printing illegal gambling sheets. The court felt the defendants had not exhibited a reasonable expectation of privacy since they had not curtained the windows.[75]

Stooping and Peering

Whenever the conduct of the officers in obtaining the clear view of the incriminating evidence can be equated to that of a curious passerby, the observation will be held not to have violated the defendant's reasonable expectation of privacy.[76] For example, in *United States v. McMillon*[77] an officer

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the viewer is rightfully positioned, seeing through eyes that are neither accusatory nor criminally investigatory. The plain view rule does not go into hibernation at sunset.

Id. at 189; *accord*, Davis v. United States, 327 F.2d 301, 305 (9th Cir. 1964); State v. Roker, 290 So. 2d 525, 526 (Fla. Ct. App. 1974); Warrix v. State, 184 N.W.2d 189, 193 (Wis. 1971).

69. People v. Hill, 107 Cal. Rptr. 791, 802 (Ct. App. 1973).

Although odor as well as appearance may be indicative of a possible crime, its presence alone would not allow an intrusion without a search warrant. Taylor v. United States, 286 U.S. 1, 6 (1932); *see* Johnson v. United States, 333 U.S. 10, 15 (1948) (odor of opium); United States v. Bradshaw, 490 F.2d 1097, 1100-01 (4th Cir. 1974) (odor of moonshine).

70. *See, e.g.*, Ponce v. Craven, 409 F.2d 621, 625 (9th Cir. 1969).

71. *See* Katz v. United States, 389 U.S. 347, 352 (1967); Ponce v. Craven, 409 F.2d 621, 625 (9th Cir. 1969).

72. 274 U.S. 559 (1927).

73. *Id.* at 563.

74. 263 A.2d 904 (Pa. Super. Ct.), *cert. denied*, 401 U.S. 914 (1970).

75. *Id.* at 905, 907; *see* Johnson v. State, 234 A.2d 464 (Md. Ct. App. 1967) (binocular observation of defendant in his home); Annot., 48 A.L.R.3d 1178 (1968).

76. United States v. Hersh, 464 F.2d 228, 230 (9th Cir.), *cert. denied*, 409 U.S. 1008 (1972) (Officers saw illicit laboratory through an uncurtained window); Kindred

photographed growing marijuana plants in a back yard enclosed by a 6-foot stake fence overgrown with vines. The only way that the officer was able to obtain a clear view of the back yard was to stand on a neighbor's porch on his tiptoes. The court held no unlawful search had occurred since the officer was able to obtain a clear view of the marijuana plants from a place where he had a right to be.[78] If, on the other hand, the court determines that the measures adopted by the officers to obtain the plain view are too extreme, the search will be held invalid.[79]

Trespassing

Where law enforcement officers commit a trespass in order to obtain an unobstructed view of the incriminating evidence, the courts will generally ignore the trespass provided that it was confined to an area beyond the curtilage of the primary dwelling and its adjacent structures.[80] This rule is a result of the "open fields" doctrine first announced in *Hester v. United States.*[81]

Wattenburg v. United States[82] *and State v. Caldwell*[83] held that the "open fields" doctrine was modified by *Katz's* sweeping language. Both cases determined that the governing factor was not whether the seizure occurred within the curtilage of the house but was whether the defendant had exhibited

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v. State, 312 N.E.2d 100, 103 (Ind. Ct. App. 1974) (Photographs of the underside of the defendant's car showed no more than could be seen by a person walking up to the car, stopping, and looking under it); People v. Hill, 107 Cal. Rptr. 791, 802 (Ct. App. 1973) (Officers stood on the front porch of the house and peered through a window).

77. 350 F. Supp. 593 (D.D.C. 1972).

78. *Id.* at 595-96; *see* George v. State, 509 S.W.2d 347, 348 (Tex. Crim. App. 1974) (8-foot fence).

79. Recznik v. City of Lorain, 393 U.S. 166, 167 (1968) (Officers entered private home through a rear entrance to obtain a clear view of illegal gambling activities); United States v. Resnick, 455 F.2d 1127, 1131 (5th Cir.), *cert. denied*, 409 U.S. 875 (1972) (Officers climbed a ladder and peered through a crack in an overhanging eave with a flashlight).

80. United States v. Conner, 478 F.2d 1320, 1323 (7th Cir. 1973); McDowell v. United States, 383 F.2d 599, 603 (8th Cir. 1967); Hodges v. United States, 243 F.2d 281, 283 (5th Cir. 1957); Care v. United States, 231 F.2d 22, 25 (10th Cir.), *cert. denied*, 351 U.S. 932 (1956); State v. Caldwell, 512 P.2d 863, 867 (Ariz. Ct. App. 1973); Dean v. Superior Court, 110 Cal. Rptr. 585, 589-90 (Ct. App. 1973).

81. 265 U.S. 57 (1924). The fourth amendment is directed at people in their "persons, homes, papers and effects," and does not extend to open fields. "The distinction between the . . . [two] is as old as the common law." *Id.* at 59; *accord*, United States v. Hollon, 420 F.2d 302, 303 (5th Cir. 1969).

A search beyond the curtilage will generally be upheld regardless of the grossness of the trespass. Conrad v. State, 218 N.W.2d 252, 256 (Wis. 1974). Any evidence obtained as a result of the trespass will not be admitted, however, if the search was conducted within the curtilage. Fixel v. Wainwright, 492 F.2d 480, 483 (5th Cir. 1974); United States v. Davis, 423 F.2d 974, 976-77 (5th Cir.), *cert. denied*, 400 U.S. 836 (1970); Vidaurri v. Superior Court, 91 Cal. Rptr. 704, 706 (Ct. App. 1970).

82. 388 F.2d 853 (9th Cir. 1968).

83. 512 P.2d 863 (Ariz. Ct. App. 1973).

a reasonable expectation of privacy.[84] This appears to be the minority position, but it seems nevertheless to be the better view. Constitutional protection is expanded by the adoption of this standard because the test centers around the reasonable expectation of privacy rather than the technical nature of the searching officers' acts and thus modifies the harshness of the "open fields" doctrine. Nevertheless, the "open fields" doctrine remains the dominant position in the law today.[85]

Conflict between the reasonable expectation of privacy rule and the plain view doctrine is inevitable since both are based on sweeping generalizations.[86] Under the plain view doctrine, if the conduct of police officers can be equated to that of curious passersby, then courts will usually dismiss the reasonable expectations of privacy which the defendants may have actually exhibited. Curious passersby, however, are not bound by the fourth amendment while the police are, and the two should not be equated.

Any rule which forces individuals in private places to resort to guarded, furtive behavior in order to preserve such a basic right as privacy is clearly wrong. A person exhibits a reasonable expectation of privacy when he puts up a privacy fence, or puts up curtains, and to hold he must cover all knotholes[87] and be sure the curtains fit evenly at all times[88] or else lose his right to privacy is to give the plain view doctrine too free an interpretation. Individuals should be protected from warrantless intrusions by the police where they show a valid attempt to protect their privacy.

When is Open View "Plain View": Intensity of the Search

The question often arises of when evidence may be seized under the plain view doctrine.[89] The concurring opinion in *Stanley v. Georgia*[90] was noted with favor in *Coolidge* for its position that evidence may only be seized under the plain view doctrine when it is immediately apparent to the officers that the object in front of them is incriminating.[91] After *Stanley* this limitation

84. Wattenburg v. United States, 388 F.2d 853, 857 (9th Cir. 1968) (illegally cut fir trees piled 40 feet from appellant's lodge and next to a public parking lot); State v. Caldwell, 512 P.2d 863, 867 (Ariz. Ct. App. 1973) (marijuana 100 yards behind the house).

85. *See, e.g.*, Cady v. Dombrowski, 413 U.S. 433, 450 (1973); United States v. Hollon, 420 F.2d 302, 303 (5th Cir. 1969); Care v. United States, 231 F.2d 22, 25 (10th Cir.), *cert. denied,* 351 U.S. 932 (1956); Conrad v. State, 218 N.W.2d 252, 257 (Wis. 1974).

86. *See* Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971); Commonwealth v. Hernley, 263 A.2d 904, 907 (Pa. Super. Ct. 1970), *cert. denied,* 401 U.S. 914 (1971); George v. State, 509 S.W.2d 347, 348 (Tex. Crim. App. 1974).

87. George v. State, 509 S.W.2d 347, 347-48 (Tex. Crim. App. 1974).

88. People v. Hill, 107 Cal. Rptr. 791, 802 (Ct. App. 1973).

89. It is assumed in this discussion that all condition precedents necessary for a plain view seizure of evidence as set out in *Coolidge* are present.

90. 394 U.S. 557, 571 (1969).

91. Coolidge v. New Hampshire, 403 U.S. 443, 466-67 (1971).

was generally applied.[92] An example of a pre-*Stanley* case in accord with the position is *People v. Hurst*,[93] in which officers seized a brown paper package which was seen under a house. The seizure was held to be invalid since the object seized was not of such a nature that its incriminating character could be observed before the seizure.[94] In contrast is the type of object which reveals its incriminating character on its face and may be seized on sight.[95] Examples of such objects include photographs,[96] stolen credit cards,[97] a stolen driver's license,[98] and a sawed-off shotgun.[99] Things which must be examined closely before their incriminating nature is revealed include films,[100] letters,[101] negatives,[102] drugs,[103] and stolen property.[104]

Drugs and stolen property deserve special attention because while neither is incriminating on its face, exceptions are rapidly appearing to allow seizures of these items based on probable cause.[105] If a police officer notices a drug and can point to other factors which lead him to conclude immediately that the drug is illegal, the plain view seizure generally will be upheld,[106] but failing any such surrounding factors, the evidence will be suppressed.[107]

In nearly all cases involving stolen property it has been held that a search

92. *See, e.g.*, People v. Childs, 84 Cal. Rptr. 378, 381-82 (Ct. App. 1970); People v. Ware, 484 P.2d 103, 104 (Colo. 1971).

93. 325 F.2d 891 (9th Cir. 1963), *rev'd on other grounds*, 381 U.S. 760 (1965).

94. *Id.* at 898; *see* United States v. Shye, 473 F.2d 1061, 1066 (6th Cir. 1973) (brown paper bag); People v. Ware, 484 P.2d 103, 104 (Colo. 1971) (foil wrapped package); State v. Matthews, 216 N.W.2d 90, 100 (N.D. 1974) (sealed packages); *cf.*, United States v. Candella, 469 F.2d 173, 175 (2d Cir. 1972) (defendant told agents the location of the guns).

95. Stanley v. Georgia, 394 U.S. 557, 571 (1969).

96. Gilbert v. United States, 366 F.2d 923, 932 (9th Cir. 1966), *cert. denied*, 388 U.S. 922 (1967).

97. Johnson v. United States, 293 F.2d 539, 539-40 (D.C. Cir. 1961).

98. Bretti v. Wainwright, 439 F.2d 1042, 1046 (5th Cir.), *cert. denied*, 404 U.S. 943 (1971).

99. United States v. Briddle, 436 F.2d 4, 7 (8th Cir. 1970), *cert. denied*, 401 U.S. 921 (1971).

100. Stanley v. Georgia, 394 U.S. 557, 571-72 (1969).

101. State v. Pires, 201 N.W.2d 153, 159 (Wis. 1972). *Contra*, Commonwealth v. Deeran, 302 N.E.2d 912, 914 (Mass. 1973).

102. Nicholas v. State, 502 S.W.2d 169, 172 (Tex. Crim. App. 1973).

103. Shipman v. State, 282 So. 2d 700, 704 (Ala. 1973).

104. United States v. Sokolow, 450 F.2d 324, 325-36 (5th Cir. 1971).

105. United States v. Hood, 493 F.2d 677, 679 (9th Cir. 1974) (erratic driving); State v. Glasper, 523 P.2d 937, 938-39 (Wash. 1974) (unprotected television carried in trunk of the car).

106. United States v. Hood, 493 F.2d 677, 679 (9th Cir. 1974) (erratic driving); United States v. Wheeler, 459 F.2d 1228, 1229 (D.C. Cir. 1972) (plain brown envelope the size and shape usually used for heroin transactions); People v. Childs, 84 Cal. Rptr. 378, 381-82 (Ct. App. 1970) (erratic driving).

107. Eiseman v. Superior Court, 98 Cal. Rptr. 342, 346-47 (Ct. App. 1972); State v. Meichel, 290 So. 2d 878, 880 (La. 1974). *But see* Shipman v. State, 282 So. 2d 700, 705 (Ala. 1973) (evidence suppressed because officer was not sure of the contents of two packages that defendant stuffed down his boot).

warrant is required in order to seize incriminating serial numbers from a particular piece of property.[108] Stolen property is generally not incriminating on its face; however, if the officer is able to state that from surrounding facts and circumstances he was able to determine the property was probably stolen, the evidence may become admissible.[109] The officers do not need to know the goods were stolen; they need to show only probable cause to believe they were stolen.[110]

When the object in plain view is something other than drugs or stolen property, the general rule is that prior to its seizure the object must be immediately recognizable as incriminating on its face.[111] This requires the police to obtain search warrants whenever possible, and when a search warrant is obtained, the rule prevents the police from conducting general exploratory searches. Where drugs or possible stolen property are involved, the courts may require only that the officers be able to point to specific facts or circumstances which led them to believe the object in plain view was incriminating. Thus, the standard of probable cause is adopted in relation to these articles.

The treatment afforded drugs and stolen property appears to have been the result of a special policy set forth by a few courts who realized that unless the officer is allowed to make plain view seizures of these items based on probable cause, justice will often be avoided.[112] This policy is plainly discriminatory, and allows the police a relatively free hand without the guidance of a neutral and detached magistrate.

A better practice would be to apply the probable cause standard coupled with the exigent circumstances test when dealing with objects which are not incriminating on their face. The police would then not only have to show facts and surrounding circumstances which led them to believe the object in

108. United States v. Gray, 484 F.2d 352, 356 (6th Cir. 1973); United States v. Sokolow, 450 F.2d 324, 325 (5th Cir. 1971); People v. Spinelli, 354 N.Y.S.2d 77, 79 (Crim. Ct. 1974); State v. Sagner, 506 P.2d 510, 517 (Ore. Ct. App. 1973). *Contra*, United States v. Polk, 433 F.2d 644, 647-48 (5th Cir. 1970) (Officer checked vehicle identification number of the car); State v. Douglas, 507 P.2d 987, 988 (Ariz. Ct. App. 1973), *cert. denied*, 414 U.S. 1003 (1973) (Officer memorized serial number of a gun when he checked to be sure it was not loaded).

109. United States v. Twomey, 352 F. Supp. 180, 182 (N.D. Ill. 1973); *see* State v. Turner, 504 P.2d 168, 172 (Kan. 1972) (partially dismantled goods); State v. Glasper, 523 P.2d 937, 938-39 (Wash. 1974) (Driver could not identify the brand name of television set in the trunk of his car); Dugan v. State, 203 S.E.2d 722, 726 (Ga. Ct. App. 1974) (abundance of television sets, stereo equipment and other electrical appliances not being used by the occupants).

110. Dugan v. State, 203 S.E.2d 722, 726 (Ga. Ct. App. 1974).

111. *See, e.g.*, United States v. Shye, 473 F.2d 1061, 1066 (6th Cir. 1973); State v. Pires, 201 N.W.2d 153, 159 (Wis. 1972).

112. United States v. Hood, 493 F.2d 677, 681 (9th Cir. 1974); United States v. Wheeler, 459 F.2d 1228, 1229 (D.C. Cir. 1972); United States v. Polk, 433 F.2d 644, 647-48 (5th Cir. 1970); United States v. Twomey, 352 F. Supp. 180, 182 (N.D. Ill. 1973); People v. Childs, 84 Cal. Rptr. 378, 381-82 (Ct. App. 1970); State v. Turner, 504 P.2d 168, 172 (Kan. 1972); State v. Glasper, 523 P.2d 937, 939 (Wash. 1974).

front of them was contraband, but they would also have to show exigent circumstances which necessitated the immediate seizure of the evidence. By imposing this additional requirement, the police would be encouraged to make use of search warrants unless the evidence might be removed, destroyed or concealed.

SWEEP SEARCHES

Terry v. Ohio[113] announced the doctrine that police officers could conduct pat-down searches as a means of self-protection whenever they had reasonable cause to believe the person encountered was armed.[114] Therefore, a valid question may be raised as to whether police may conduct a protective sweep search of premises they enter to effect an arrest in order to ensure that no one else is present who might pose a risk to them. If police *are* allowed to make these protective sweeps, the problem then arises as to whether evidence in plain view may validly be seized.[115]

Before 1970 sweep searches were rarely encountered;[116] however, since that time, a great number of cases involving protective sweeps have arisen.[117] As the number of such sweep searches increase, the courts have become correspondingly more suspicious of them. In an effort to limit these warrantless searches, the Supreme Court of California has ruled that such searches are allowable only when "a man of reasonable caution" in the same circumstances would have undertaken the same action. The officer is entitled to make inferences reasonable in the light of his past experiences, but "he must be able to point to specific and articulable facts from which he concluded that his action was necessary."[118]

Only the Court of Appeals for the Seventh Circuit, in *United States v. Gamble*,[119] has held these protective sweep searches, and the subsequent seizure of evidence in plain view, to be unconstitutional. The court relied on *Chimel v. California*[120] which held that during an arrest police without a

113. 392 U.S. 1 (1968).
114. *Id.* at 30.
115. It is assumed in this discussion that the police have a valid arrest warrant and the condition precedents to a valid seizure of evidence in plain view are present.
116. *See, e.g.*, United States v. Lee, 308 F.2d 715, 717 (4th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963). (After arrest, officer walking towards back door noticed jars and sugar used in bottling and making moonshine whiskey).
117. *See, e.g.*, United States v. Poms, 484 F.2d 919, 922 (4th Cir. 1973); United States v. Blake, 484 F.2d 50, 57 (8th Cir. 1973); United States v. Broomfield, 336 F. Supp. 179, 184 (E.D. Mich. 1972); Guidi v. Superior Court, 109 Cal. Rptr. 684, 689 (1973); State v. Miller, 316 A.2d 16, 18-19 (N.J. Super. Ct. 1974).
118. Guidi v. Superior Court, 109 Cal. Rptr. 684, 689 (1973); *see* United States v. Broomfield, 336 F. Supp. 179, 184 (E.D. Mich. 1972) (exigent circumstances necessary for a sweep search).
119. 473 F.2d 1274 (7th Cir. 1973).
120. 395 U.S. 752 (1969).

search warrant may search only the arrested person and the area within his immediate reach to prevent him from securing a weapon or destroying evidence.[121] The *Gamble* opinion ignored *Terry v. Ohio*[122] which emphasized the need for police to take affirmative actions to protect themselves when they possessed probable cause to believe they might be endangered.[123] Furthermore, the court never mentioned *United States v. Briddle*,[124] where, by refusing certiorari, the Supreme Court refused to review the admission of evidence discovered in plain view which was seized as a result of a protective sweep. Since the court based its reasoning only on *Chimel* and did not consider the thrust of *Terry* or *Briddle*, the view that sweep searches are unconstitutional is highly suspect.

The rules set forth by the California Supreme Court in *Guidi v. Superior Court*[125] are possibly the best that could be devised for governing protective sweep searches. Recognition is taken of the right of the officer to take affirmative measures to protect himself when he enters a place to effect a valid arrest; however, before he may conduct a sweep search which could possibly reveal incriminating plain view evidence, the officer must be able to point to specific facts and circumstances which would lead a reasonable man to undertake the same actions. Such a test protects the police officers when they seek to effect a valid arrest, and at the same time forces the police to undertake such warrantless intrusions only then they have sufficient reason to do so. Such a standard based on exigent circumstances effectively interposes a neutral and detached magistrate between the police and the accused whenever possible.

CONCLUSION

Throughout the application of the plain view doctrine there runs one constant theme—exigent circumstances. If the officers are lawfully positioned and able to obtain a clear view of the incriminating object they should be allowed to make the seizure only if exigent circumstances exist. The position in *Coolidge* that the seizure may occur only when the evidence was stumbled upon inadvertently is a confusing standard that can be easily avoided by any court that wishes to do so.[126] The problem with the inadvertence requirement is that no one really knows how much suspicion that an object may be found converts a plain view observation into a planned warrantless in-

121. *Id.* at 762.
122. 392 U.S. 1 (1968).
123. *Id.* at 30.
124. 436 F.2d 4, 7 (8th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).
125. 109 Cal. Rptr. 684, 689 (1973).
126. *See* Thompson v. Stynchcombe, 494 F.2d 48, 49 (5th Cir. 1974); United States v. Davis, 461 F.2d 1026, 1034-35 (3d Cir. 1972); State v. Bell, 215 N.W.2d 535, 540 (Wis. 1974).

trusion. However, by imposing the exigent circumstances test, this problem is avoided. The police are encouraged to make use of the warrant process whenever possible, and a plain view search and seizure may occur only when the officer obtained a clear view of the incriminating object from a place where he rightfully was, and when exigent circumstances demanded immediate seizure.

The same doctrine of exigent circumstances should also be applied whenever drugs or allegedly stolen property is encountered. The officer should be allowed to seize these items whenever he can point to specific facts and circumstances which led him to believe the items were contraband and must be immediately seized in order to prevent destruction, removal or concealment. Exigent circumstances should also govern protective sweep searches and subsequent plain view seizures of evidence. Before evidence from such a search could be admitted in court, the police should have to articulate facts and circumstances showing that immediate action was called for in order to protect themselves from possible attack.

The major problem in plain view, however, is trying to reconcile an individual's right to privacy with legitimate police measures needed to protect the public from crime. The best approach to this continuing problem is to recognize that a person who exhibits a reasonable expectation of privacy is entitled to rely on it and should remain safe from warrantless police intrusions. The individual should not be forced to adopt extreme measures to protect his privacy.[127] Therefore, each "plain view" situation should be examined on its own facts in light of the question of whether the accused, in order to protect his privacy from the particular intrusion at issue, would have had to resort to extreme or unreasonable measures.

127. *See* United States v. Esters, 336 F. Supp. 214, 221 (E.D. Mich. 1972) (improperly closed draperies); George v. State, 509 S.W.2d 347, 348 (Tex. Crim. App. 1974) (knotholes in 8-foot privacy fence).