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Horton v. California: The Plain View Doctrine Loses Its Inadvertency, 24 J. Marshall L. Rev. 891 (1991)

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*HORTON V. CALIFORNIA**:* THE PLAIN VIEW DOCTRINE LOSES ITS INADVERTENCY

Under the fourth amendment[1] of the United States Constitution, police must conduct searches and seizures pursuant to search warrants which specifically describe the place to be searched and the items to be seized.[2] One exception to the fourth amendment's warrant requirement is the plain view doctrine.[3] In *Coolidge v.*

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* 110 S. Ct. 2301 (1990).

1. The fourth amendment provides:

> 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

2. Horton v. California, 110 S. Ct. 2301, 2305-06 (1990). The Supreme Court has long considered general searches to be a violation of an individual's fundamental privacy rights. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978) ("the general warrant was a recurring point of contention in the Colonies immediately preceding the Revolution"); Stanford v. Texas, 379 U.S. 476, 481 (1965) (the "hated" writs of assistance gave customs officials blanket authority to search anywhere they pleased); Marcus v. Search Warrant, 367 U.S. 717, 724 (1961) (a government with the power of search and seizure is a prelude to a system of suppression); Boyd v. United States, 116 U.S. 616, 625 (1886) (debate over general searches led to the colonial resistance of Great Britain). In *Boyd*, Justice Bradley wrote:

> 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 principles 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. See generally Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DE PAUL L. REV. 817 (1989) (analysis of Framers' intent concerning the fourth amendment); Comment, *Constitutional Law-Fourth Amendment-Plain View Exception to the Warrant Requirement-Exigent Circumstances-*Washington v. Chrisman, 29 N.Y.L. SCH. L. REV. 125, 126-127 (1984) (same).

3. *Horton*, 110 S. Ct. at 2306. Commentators generally refer to United States v. Lee, 274 U.S. 559 (1927) as the first plain view case, although the Court never actually used the phrase "plain view." Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 MERCER L. REV. 1047 n.2 (1975); Comment, *Constitutional Standards for Applying the Plain View Doctrine*, 6 ST. MARY'S L.J. 725, 734 (1974). In *Lee*, revenue officers aboard a Coast Guard cutter looked, with the aid of a searchlight, onto the deck of the defendant's motorboat and saw cases of contraband whiskey. *Lee*, 274 U.S. at 561. In the opinion, Justice Brandeis concluded that this observation was not a search, and therefore, was not protected by the fourth amendment. *Id.* at 563.

Subsequent to *Lee*, the plain view doctrine developed as a marginal factor in the search incident to arrest exception to the warrant requirement. Moylan,

supra, at 1048. The permissible extent of a search incident to arrest had alternated over a long period between broad and limited scopes. The Supreme Court first applied the search incident to arrest exception in Marron v. United States, 275 U.S. 192 (1927), although the exception had been articulated earlier as dictum in Weeks v. United States, 232 U.S. 383 (1914); Carroll v. United States, 267 U.S. 132 (1925); and Agnello v. United States, 269 U.S. 20 (1925). In *Marron*, the Court upheld the seizure of a ledger taken from a closet in which police officers were searching for contraband liquor incident to a lawful arrest. *Marron*, 275 U.S. at 199. The Court established a virtually unlimited scope to a search incident to arrest by concluding that "[t]he authority of officers to search and seize the things by which the nuisance was being maintained extended to all parts of the premises used for the unlawful purpose." *Id.* The Court did not discuss a plain view exception, perhaps because plain view was moot due to the broad scope given to the search incident to arrest. However, the Court did rule that only items particularly described in a warrant could be seized so that "nothing is left to the discretion of the officer executing the warrant." *Id.* at 196.

The Supreme Court later limited the scope of *Marron* in Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) and United States v. Lefkowitz, 285 U.S. 452 (1932). In both cases the Court held unlawful the searches of office desks and cabinets, despite the fact that the searches had accompanied lawful arrests. *Go-Bart*, 285 U.S. at 467; *Lefkowitz*, 282 U.S. at 358. The Court distinguished *Marron* by stating that the items seized in *Marron* were in plain view and were seized as an incident of the arrest rather than in a general search. *Go-Bart*, 285 U.S. at 465; *Lefkowitz*, 282 U.S. at 358.

Fifteen years later, in Harris v. United States, 331 U.S. 145 (1947), *overruled*, Chimel v. California, 395 U.S. 752 (1969), the Court virtually ignored *Go-Bart* and *Lefkowitz* by holding that a search may extend to the entire premises where the arrest is made. *Id.* at 153. As in *Marron*, the Court did not mention plain view since the broad scope given to searches incident to arrest made any discussion unnecessary. However, Justice Murphy's dissent predicted the plain view doctrine by referring to a "plain sight" seizure. Justice Murphy explained that a "[s]eizure may be made of articles and papers on the person of the one arrested." In so doing, Justice Murphy indicated that "the arresting officer is free to look around and seize those fruits and evidences of crime which are in plain sight and in his immediate and discernible presence." *Id.* at 186 (citations omitted).

Shortly thereafter, the Court reversed itself again in Trupiano v. United States, 334 U.S. 699 (1948), *overruled*, United States v. Rabinowitz, 339 U.S. 56 (1950) by holding that the arrest of a defendant operating an illegal distillery was valid because the agents actually saw the defendant operating the distillery. However, the search of the premises and the seizure of the still were held unlawful since the agents had ample time to procure a search warrant but failed to do so. *Id.* at 705. The government argued that an arresting officer may look around at the time of arrest and seize items of crime or contraband which are in "plain sight." *Id.* at 704. However, the Court concluded that the government failed to explain why the agents could not have obtained a search warrant. *Id.* at 708. Thus, *Trupiano* was the first case which stated the requirement of "inadvertence" in fourth amendment law. See *infra* note 60 for a discussion of the inadvertence requirement.

In United States v. Rabinowitz, 339 U.S. 56, 66 (1950) the Court rejected the rule of *Trupiano* and held that the test was "not whether it is reasonable to procure a search warrant, but whether the search was reasonable." The *Rabinowitz* Court allowed in evidence, despite the fact that government agents searched an office for over an hour as incident to arrest, and subsequently seized 573 stamps with forged overprints. *Id.* at 59.

The Supreme Court finally defined the parameters of a search incident to arrest in Chimel v. California, 395 U.S. 752 (1969). In *Chimel*, the Court addressed the issue of whether the warrantless search of the petitioner's entire house could be constitutionally justified as incident to an arrest. *Id.* at 755. The

New Hampshire,[4] the United States Supreme Court formally recognized this exception by delineating the elements of the plain view doctrine, which included the requirement that the discovery of items seized must be inadvertent.[5] In *Horton v. California*,[6] the United States Supreme Court addressed the specific issue of whether the fourth amendment prohibits the warrantless seizure of evidence in plain view if the discovery of the evidence is not inadvertent.[7] The *Horton* Court held that inadvertence is not required

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Court held that a search incident to arrest was justified for an area within the arrestee's immediate control, which was defined as the area from within which the arrestee might gain possession of a weapon or destructible evidence. *Id.* at 763. In *Chimel*, the Court established the scope of a search incident to arrest, but failed to define the proper scope of the plain view doctrine.

4. 403 U.S. 443 (1971).

5. *Id.* at 469. In *Coolidge*, the Court attempted to establish guidelines for the plain view doctrine which would answer any lingering questions left by the Supreme Court's inconsistent rulings on search incident to arrest and plain view exceptions. The *Coolidge* Court held that a warrantless seizure of items in plain view was lawful if the officers are in a position to observe the items lawfully, the discovery of the items is "inadvertent," and the incriminating nature of the items is immediately apparent. *Id.* at 465-70.

Justice Stewart, in *Coolidge*, stated that the rationale for the inadvertence requirement was to prevent limited, lawful searches from turning into general, unconstitutional searches. *Id.* at 469-70. Justice Stewart concluded that the plain view exception was justified when there was a great inconvenience to police officers in procuring a warrant to cover an inadvertent discovery. *Id.* However, Justice Stewart went on to say "where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different." *Id.* Finally, Justice Stewart indicated that "[t]he requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable." *Id.* at 470.

Coolidge involved the seizure of two cars parked in plain view in defendant's driveway during his arrest. *Id.* at 447. The *Coolidge* Court held that the police officer's warrantless seizure and subsequent vacuuming of these cars violated the fourth amendment. *Id.* at 473. The Court based its holding on the conclusion that the police had sufficient time to obtain a search warrant for the cars and they intended to seize the cars when they went to the defendant's property. *Id.* at 472. Consequently, the prosecution could not introduce at trial any evidence that the police obtained in the illegal vacuuming of the cars. *Id.* at 473.

For significant Supreme Court plain view cases since *Coolidge*, see Arizona v. Hicks, 480 U.S. 321 (1987) (holding that officers must have probable cause to believe that items are related to criminal activity in order to seize them under plain view); Texas v. Brown, 460 U.S. 730 (1983) (plain view doctrine applied to automobile search); Washington v. Chrisman, 455 U.S. 1 (1982) (officers may accompany arrested individuals to private areas after arrest and seize items under the plain view doctrine).

6. 110 S. Ct. 2301 (1990).

7. *Id.* at 2304. In *Horton*, the Court considered the unresolved issue of what requirements were necessary for lawful seizure of evidence under the plain view doctrine because the *Coolidge* Court failed to obtain a majority opinion on the plain view issue. *Id.* at 2305. In the *Coolidge* plurality opinion, only four members of the court (Stewart, J., Douglas, J., Brennan, J., and Marshall, J.) signed the portion of Justice Stewart's opinion which proposed the adoption of new restrictions to the plain view doctrine. *Coolidge*, 403 U.S. at 444-45. Although Justice Harlan concurred in the judgment, he did not join in the por-

for lawful plain view seizures, despite its acknowledgment that inadvertence is a common characteristic of most legitimate plain view seizures.[8] In so ruling, the Supreme Court took another step towards eliminating the possessory interest which the fourth amendment protects.[9]

In *Horton*, two masked men robbed the treasurer of the San Jose Coin Club.[10] Following an investigation of the armed robbery, the police officers determined that there was probable cause to search the defendant's residence.[11] In submitting their application for the search warrant, the officers incorporated police reports detailing the stolen property and the weapons used by the robbers into their affidavit.[12] However, the magistrate issued a warrant authorizing the police to search solely for three specifically described rings.[13] During the course of the search of the defendant's home

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tion of the opinion dealing with the plain view restrictions. *Id.* at 490-92 (Harlan, J., concurring). The four remaining justices (Black, J., Burger, J., Blackmun, J., and White, J.) expressly disagreed with Justice Stewart's opinion regarding the plain view issue. *Id.* at 492-527.

Lower courts have argued that the plain view issue raised by the plurality opinions was considered by an equally divided Court, and, therefore, was not actually decided; nevertheless, the Court ordered suppression of the evidence obtained. *See* Wallin, *The Uncertain Scope of the Plain View Doctrine*, 16 U. BALT. L. REV. 266 (1987) (analysis of confusion in state courts concerning plain view doctrine); 2 W LAFAVE, SEARCH AND SEIZURE § 4.11 (2d ed. 1987) (same). For a discussion of the lower courts' split on the inadvertence requirement following *Coolidge*, see *infra* note 24.

8. *Horton*, 110 S. Ct. at 2304.

9. For a discussion of the fourth amendment's protection of an individual's possessory interest, see *infra* notes 98-101 and accompanying text.

10. *Horton*, 110 S. Ct. at 2304. The treasurer's duties included collecting the revenues from the San Jose Coin Club annual show. Respondent's Response in Opposition to Petition for Writ of Certiorari at 3, Horton v. California, 110 S. Ct. 2301 (1990) (No. 88-7164). On the night of the robbery, the treasurer arrived home at the end of the final day of the coin show with approximately $10,000 in cash and currency in a briefcase, approximately $20,000 in collector coins of his own, and approximately $1,200 cash in his own pocket. *Id.*

11. *Horton*, 110 S. Ct. at 2304. Subsequent to the robbery, the treasurer recognized the voice of one of the attackers as the defendant, a fellow coin collector. *Id.* At trial, the prosecution explained the voice identification: "Wallacker [the robbery victim] was an ex-Air Force pilot. As a pilot he had been trained in voice identification. He had a practiced ear and was used to listening carefully to people's voices." Respondent's Response in Opposition to Petition for Writ of Certiorari at 7, Horton v. California, 110 S. Ct. 2301 (1990) (No. 88-7164). The victim's identification of the defendant was partially corroborated by a witness who saw the robbers fleeing from the scene. *Id.* at 7-8.

12. *Horton*, 110 S. Ct. at 2304. In addition to the coins and cash carried by the treasurer, the robbers took three rings, a billfold, a credit card case, and the contents of a garage safe which contained several more rings, some uncut rubies, and a wristwatch. Petitioner's Joint Appendix to Petition for Writ of Certiorari at 6, Horton v. California, 110 S. Ct. 2301 (1990) (No. 88-7164). The weapons used in the crime were an Uzi machine gun, an electrical prod [stun gun] and a revolver. *Id.*

13. *Horton*, 110 S. Ct. at 2304. At trial, the prosecutor admitted that "the deputy district attorney who drafted this particular search warrant did less than

pursuant to the search warrant, the police officers failed to locate any stolen property.[14] Upon finding weapons in plain view, however, the officers seized them along with other items.[15] At trial, an officer testified that he was searching for and intended to seize any evidence that could be connected with the robbery, including items not listed in the search warrant.[16]

Under the plain view doctrine, the trial court held that the seizure was lawful and refused to suppress the evidence.[17] The jury convicted the defendant of armed robbery.[18] In affirming the trial court's decision, the California Court of Appeal rejected the defendant's argument that the plain view doctrine[19] barred the evidentiary use of items which were not particularly described in the search warrant because discovery of the items was not inadvertent.[20] The appellate court held that the *Coolidge* inadvertence requirement was not binding[21] since only four members of the

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a superlative job in listing what was normally sought in our county." Brief for Respondent at 6 n.3, Horton v. California, 110 S. Ct. 2301 (1990) (No. 88-7164).

14. Horton v. California, 110 S. Ct. 2301, 2305 (1990).

15. *Id.* at 2304-05. "Specifically he [Officer LaRault] seized an Uzi machine gun, a .38 caliber, two stun guns, a handcuff key, a San Jose Coin Club advertising program, and a few items of clothing identified by the victim." *Id.* at 2305. The officer discovered other weapons but did not seize them because he believed that they were not connected to the robbery. *Id.* at 2305 n.1.

16. *Id.* at 2305. The absence of inadvertence in this seizure was obvious. At trial, Officer LaRault testified:

> I was looking for some type of a mask that covers one's head; I was looking for gloves; I was looking for a weapon, both the weapon described to me by the victim in my interview, and also the one held by one suspect as he [was] described by Mr. Wallacker [the robbery victim] and the other weapon being the small handgun being held by the second suspect. I was looking for some kind of device that would produce a shock or burning sensation; I was looking for handcuffs or similar handcuffs that indicate more handcuffs could be found or keys for the handcuffs to unlock same; I was looking for some evidence of the San Jose Coin Show and to find out if in fact Mr. Horton [defendant] was at the coin show.

Petitioner's Joint Appendix to Petition for Writ of Certiorari at 22-23, Horton v. California, 110 S. Ct. 2301 (1990) (No. 88-7164).

17. *Horton*, 110 S. Ct. at 2305. After a preliminary examination heard on August 23, 1985, in the California Municipal Court, Santa Clara County, Judicial District, the magistrate granted the defendant's motion to suppress the evidence seized. Brief for Petitioner at 2-3, Horton v. California, 110 S. Ct. 2301 (1990) (No. 88-7164). On September 23, 1985, the trial court reversed the magistrate's order suppressing the evidence. *Id.* at 3.

18. The jury found the defendant guilty of armed robbery and he was sentenced to prison for eight years and eight months. *Id.*

19. For a discussion of the development of the plain view doctrine see *supra* note 3.

20. People v. Horton, No. H004177 (Cal. Ct. App. Nov. 30, 1988).

21. *Id.* In North v. Superior Court of Riverside County, 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972), the California Supreme Court observed that the portion of the *Coolidge* opinion which proposed the inadvertence requirement on the plain view doctrine was signed by only four members of the Court, with four expressly disagreeing. *Id.* at 307, 502 P.2d at 1308, 104 Cal. Rptr. at

Supreme Court endorsed the requirement.[22]

The United States Supreme Court granted certiorari[23] to address the unresolved issue[24] of whether the fourth amendment prohibits the warrantless seizure of evidence in plain view if the discovery of the evidence was not inadvertent.[25] In affirming the California Court of Appeals,[26] the *Horton* Court eliminated the *Coolidge* plurality opinion's inadvertence requirement for the plain view doctrine.[27] The *Horton* Court held that inadvertence is not a necessary requirement for a plain view seizure, even though inadvertence is a common element of most legitimate plain view seizures.[28]

Initially, the Court outlined the scope of its analysis.[29] The *Horton* Court differentiated between the individual's privacy and possessory interests protected by the fourth amendment[30] and de-

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836. As a result, the issue was not actually decided and *Coolidge* had no precedential value on the inadvertence issue. *Id.* at 308, 502 P.2d at 1308, 104 Cal. Rptr. at 837. The California Supreme Court later followed the *North* decision in People v. Miller, 196 Cal. App. 3d 846, 242 Cal. Rptr. 179 (1987). In *Miller*, the court was persuaded that the inadvertence requirement had been specifically rejected in *North*, and, consequently, they were "bound by stare decisis" to follow the earlier decision on the inadvertence issue. *Id.* at 851, 242 Cal. Rptr. at 182. For a discussion of the *Coolidge* plurality opinion, see *supra* note 5.

22. Horton v. California, 110 S. Ct. 2301, 2305 (1990). On March 15, 1989, the California Supreme Court denied the defendant's petition for review. Brief for Petitioner at 4, Horton v. California, 110 S. Ct. 2301 (1990) (No. 88-7164).

23. Horton v. California, 110 S. Ct. 231 (1989).

24. Since *Coolidge*, three states (California, Utah, and Idaho) have rejected the inadvertent discovery requirement. *See* People v. Bittaker, 48 Cal. 3d 1046, 1075-76, 774 P.2d 659, 673-74, 259 Cal. Rptr. 630, 644-45 (1989) (inadvertent requirement not binding as precedent since no majority reached in *Coolidge*), *cert. denied*, 110 S. Ct. 2632 (1990); State v. Kelly, 718 P.2d 385, 389-90 (Utah 1986) (same); State v. Pontier, 95 Idaho 707, 712-14, 518 P.2d 969, 973-74 (1974) (same). The status of the inadvertence requirement in Delaware is unclear. *See, e.g.*, Wicks v. State, 552 A.2d 462, 466 (Del. Supr. 1988) (seizure held valid although police had knowledge that defendant had previously offered to sell illegal cameras to undercover agent).

On the other hand, forty-six states and the District of Columbia require plain view seizures to be inadvertent. *See Horton*, 110 S. Ct. at 2314-16 (list of cases accepting the inadvertence requirement in state and United States Court of Appeals jurisdictions). In addition, twelve United States Courts of Appeals also accept the inadvertence requirement. *Id.*

This wide acceptance prompted Justice Powell to state "[w]hatever my view might have been when *Coolidge* was decided, I see no reason at this late date to imply criticism of its articulation of this exception. It has been accepted generally for over a decade." Texas v. Brown, 460 U.S. 730, 746 (1983) (Powell, J., concurring in judgment).

25. *Horton*, 110 S. Ct. at 2304.

26. *Id.* at 2311.

27. *Id.* at 2308. For a discussion of the *Coolidge* decision, see *supra* note 5.

28. *Horton*, 110 S. Ct. at 2304.

29. *Id.* at 2306.

30. *Id.* A search involves an infringement on an individual's privacy interest while a seizure is an interference with an individual's possessory interest in

termined that its analysis would only concern the defendant's possessory interest associated with the officer's seizure of his property.[31] Once an item comes into plain view, the Court adduced that the governmental search has already compromised the individual's privacy interest.[32] Further, the *Horton* Court stated that, although its analysis would focus on *Coolidge's* plurality opinion, the *Coolidge* discussion of plain view was not binding precedent.[33] The Court found, however, that the *Coolidge* holding which suppressed the unlawfully seized evidence was itself binding.[34]

After defining the scope of its analysis, the *Horton* Court identified two flaws in the *Coolidge* rationale which established the plain view inadvertence requirement.[35] First, the Court found that objective standards should be used to effectuate "evenhanded law enforcement," rather than an inadvertence standard which focuses on the subjective state of mind[36] of an officer.[37] The Court reasoned that the state of mind of an officer is irrelevant under the plain view exception since an officer with "knowledge approaching certainty" that an item would be found in a search would have no

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property. United States v. Jacobsen, 466 U.S. 109, 113 (1984); United States v. Place, 462 U.S. 696, 716 (1983). Because the "seizure" of property concept is rarely discussed in Supreme Court cases, the definition of "seizure" of property comes from the definition of "seizure" of a person under the fourth amendment. *Jacobsen*, 466 U.S. at 113 n.5 (1984). Thus, the Court defines seizure of property as meaningful interference with an individual's possessory interests in property. *Id. Cf.* Michigan v. Summers, 452 U.S. 692, 696 n.5 (1981) (a police officer has seized a person whenever freedom to walk away has been restrained); Reid v. Georgia, 448 U.S. 438, 440 (1980) (without probable cause, a police officer must have a reasonable and articulable suspicion that the person seized is involved in criminal activity); United States v. Mendenhall, 446 U.S. 544, 551-554 (1980) (discusses definition of "seizure of a person").

31. Horton v. California, 110 S. Ct. 2301, 2306 (1990).

32. *Id.*

33. *Id.* at 2307. The Supreme Court ruled that the *Coolidge* plurality opinion was not binding precedent prior to *Horton*. Texas v. Brown, 460 U.S. 730, 737 (1983).

34. *Horton*, 110 S. Ct. at 2307. With an increase in non-majority opinions such as *Coolidge*, lower courts are unsure whether these opinions have any precedential value. Comment, *Supreme Court No-Clear-Majority Decision: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99 (1956) (no standard for lower courts facing non-majority decisions). *Compare* Manning v. Palmer, 381 F Supp. 713, 715 (D. Ariz. 1974) (court follows the Supreme Court's four to three decision as law); *with* Roofing Wholesale Co., Inc. v. Palmer, 108 Ariz. 508, 512, 502 P.2d 1327, 1331 (1972) (court will not declare statute unconstitutional until United States Supreme Court reaches a clear majority).

35. *Horton*, 110 S. Ct. at 2308.

36. One author has noted that "[t]he most serious problem with the plurality's approach to plain view [in *Coolidge*] is that Justice Stewart nowhere defined the degree of expectation required to make a discovery by the police inadvertent." *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 244 (1971). See *infra* note 59 for a discussion of the difficulty in defining inadvertence.

37. Horton v. California, 110 S. Ct. 2301, 2308-09 (1990).

reason to leave that item off the warrant application.[38] In support of this holding, the Court reasoned that an officer actually has an incentive to list items in the warrant application because once the item is in the warrant, an officer has the lawful authority to search anywhere in which there is probable cause to believe that an item may be found.[39] In addition, the *Horton* Court concluded that seizure of an item which is not listed in the search warrant but is discovered during a lawful search for a listed item, would put an individual's fourth amendment rights in only "minor peril" because the individual's possessory interest would have been compromised with a seizure of an item listed in the search warrant.[40]

Second, the *Horton* Court determined the *Coolidge* reasoning, that an inadvertence requirement prevents limited lawful searches, from becoming general illegal searches, was unpersuasive.[41] The *Horton* Court found that the fourth amendment already prevents general searches by its requirement that items must be particularly described within the warrant.[42] The Court pointed out that once an officer is lawfully in a position to see an item in plain view, the inadvertence requirement is unnecessary because "no additional Fourth Amendment interest is furthered."[43] The Court added that the inadvertence requirement's purpose of protecting against general searches is already served by strict adherence to the warrant requirement, which limits the area and duration of a search conducted under the authority of a valid warrant.[44] The Court concluded, however, that any evidence seized in a search that goes beyond the bounds of a valid search warrant,[45] or an established exception to a warrant, violates the fourth amendment and renders

38. *Id.* at 2309. Police officers would have no reason to intentionally leave items they intend to seize off a warrant, and "[o]nly oversight or careless mistake would explain an omission in the warrant application." Coolidge v. New Hampshire, 403 U.S. 443, 517 (1971) (White, J., dissenting).

39. *Horton*, 110 S. Ct. at 2309; United States v. Ross, 456 U.S. 798, 824 (1982).

40. *Horton*, 110 S. Ct. at 2309 (quoting *Coolidge*, 403 U.S. at 516 (White, J., dissenting)).

41. *Horton*, 110 S. Ct. at 2309.

42. *Id.*

43. *Id.* at 2309-10. Justifications for an officer to be present lawfully include: (1) a warrant for another object, (2) hot pursuit, (3) search incident to lawful arrest, or (4) any other lawful reason. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971). For further discussion of justifications for lawful police presence, see *infra* notes 79-86 and accompanying text.

44. *Horton*, 110 S. Ct. at 2309-10.

45. The scope of a search conducted under the authority of a properly issued search warrant is limited to those areas in which a reasonable person is likely to find the items listed in the warrant. *Id.* at 2311 n.1 (Brennan, J., dissenting); United States v. Ross, 456 U.S. 798, 824 (1982). Thus, "a police officer cannot search for a lawnmower in a bedroom, or for an undocumented alien in a suitcase." *Horton*, 110 S. Ct. at 2311 n.1 (Brennan, J., dissenting).

the evidence invalid.[46]

The *Horton* decision is flawed for three reasons. First, the Court's elimination of the plain view doctrine's inadvertence requirement renders the fourth amendment's warrant and probable cause requirements meaningless.[47] If inadvertence is not required, then, under the plain view doctrine, officers can intend to and lawfully seize items without first obtaining a search warrant for these particular items from a neutral magistrate based on probable cause.[48] Second, the Court erred in applying the plain view doctrine to the facts under *Horton*.[49] The plain view doctrine does not apply to the facts in *Horton* because the warrant clause's particularity requirement[50] mandates that if an officer intends to seize certain items at the time of his application for a search warrant, as was the case in *Horton*, the warrant must "particularly describe the things to be seized," otherwise the seizure of those items is unlawful.[51] Finally, the Court erroneously devalued the fourth amendment's constitutional protection of an individual's possessory interests by eliminating the inadvertence requirement.[52]

First, the Court's elimination of the inadvertence requirement renders the fourth amendment's warrant and probable cause requirements[53] meaningless. Without the inadvertence requirement, officers can intend to and lawfully seize items without a search warrant issued by a neutral magistrate[54] based on probable cause.[55] In

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46. *Id.* at 2310. Once items listed in a search warrant have been found, the search must terminate. United States v. Ross, 456 U.S. 798, 824 (1982); Coolidge v. New Hampshire, 403 U.S. 443, 517 (1971) (White, J., dissenting).

47. For a discussion of the fourth amendment's probable cause requirement, see *infra* note 55 and accompanying text.

48. For a discussion of possible police misconduct under the plain view doctrine without the inadvertence requirement, see *infra* notes 61-64 and accompanying text.

49. For a discussion of the inapplicability of the plain view doctrine under *Horton*, see *infra* notes 66-73 and accompanying text.

50. See *infra* note 67 for a discussion of the particularity requirement.

51. See *infra* notes 70-73 and accompanying text for a discussion of seizures held unlawful due to invalid warrants.

52. See *infra* notes 98-101 and accompanying text for a discussion of the infringement of possessory rights.

53. The warrant clause states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation. " U.S. CONST. amend. IV

54. The traditional fourth amendment requirement of a neutral and detached magistrate issuing the warrant comes from the basic constitutional doctrine that separation of powers among the different branches of government will best preserve individual rights. United States v. United States Dist. Ct., 407 U.S. 297, 317 (1972). A search and seizure should be a combined effort of the police gathering evidence of wrongful acts and a neutral magistrate's determination that the evidence is sufficient to justify an invasion of an individual's privacy rights. *Id.* at 316. Through this process, the existence of the probable cause necessary for a constitutional search and seizure is determined by "a neutral and detached magistrate instead of being judged by the officers engaged in the often competitive enterprise of ferreting out crime." Johnson v. United

Horton, the officer seized only items not particularly described or even listed in the search warrant.[56] Thus, the magistrate did not make a probable cause determination for any of the items seized.[57] This is a direct violation of the express language of the fourth amendment.[58]

In *Horton*, the Court's conclusion that "evenhanded law enforcement" would best be achieved through objective standards rather than the subjective standards used with "inadvertence" is

States, 333 U.S. 10, 14 (1948). *See* Arkansas v. Sanders, 442 U.S. 753, 759 (1979) (magistrate issuing a warrant minimizes the risk of unreasonable assertions of executive authority); Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326 (1979) (warrants must describe items to be seized so nothing is left to the discretion of the officers); United States v. Lefkowitz, 285 U.S. 452, 464 (1932) (protection against unlawful searches best achieved through neutral magistrates rather than "petty officers acting under the excitement that attends the capture of persons accused of crime"). *See generally* 2 W LAFAVE, SEARCH AND SEIZURE § 4.2 (2d ed. 1987) (discussion of the neutral and detached magistrate requirement).

55. Probable cause for a search warrant exists "where 'the facts and circumstances within [an officer's] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution that' an offense has been or is being committed." Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (quoting from Carroll v. United States, 267 U.S. 132, 162 (1925)). Probable cause "does not demand any showing that such a belief be correct or more likely true than false." Texas v. Brown, 460 U.S. 730, 742 (1983). Therefore, belief beyond a reasonable doubt is not required. *Id.* Probable cause does, however, require a stronger belief than a mere suspicion. *See, e.g.*, Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (person's spatial closeness to others suspected of crime does not alone give rise to probable cause).

56. Horton v. California, 110 S. Ct. 2301, 2304-05 (1990).

57. In *Horton*, the officer's subsequent testimony about the existence of probable cause for the items seized would not correct the insufficiency of the warrant application. *Id.* The officer failed to disclose this information to the issuing magistrate for a detached determination of probable cause. *Id.* A rule allowing subsequent testimony to correct an insufficient warrant application would "render the warrant requirements of the Fourth Amendment meaningless." Whiteley v. Warden, 401 U.S. 560, 565 n.8 (1971).

58. The Supreme Court has held that exceptions to the warrant requirement which violate the language of the fourth amendment should be carefully scrutinized. Katz v. United States, 389 U.S. 347, 357 (1967). In *Katz*, the Court held that the government's electronic eavesdropping on the defendant's conversation from a public telephone booth violated the defendant's privacy rights under the fourth amendment. *Id.* at 359. The Court concluded 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-delineated exceptions." *Id.* at 357. Because exceptions to the warrant requirement invariably compromise interests protected by the fourth amendment, the few situations in which a warrantless search may be conducted have been carefully delineated, and the burden is on those seeking the exception to show the need for it. Arkansas v. Sanders, 442 U.S. 753, 760 (1979). *See also* United States v. Place, 462 U.S. 696, 701 (1983) (warrantless seizures "per se unreasonable"); United States v. Ross, 456 U.S. 798, 825 (1982) (same); United States v. United States Dist. Ct., 407 U.S. 297, 318 (1972) (warrant requirement exceptions are "few in number and carefully delineated").

more practical,[59] but it jeopardizes the individual rights protected by the inadvertence requirement.[60] In reaching its decision, the Court failed to consider the possible misconduct of police officers that could result from the elimination of the inadvertence from the plain view doctrine. Without a magistrate's probable cause determination, police officers could delay arrests,[61] deliberately time arrests,[62] leave specific items off search warrant applications,[63] or engage in "pretextual" searches.[64] Thus, the consequence of elimi-

59. Courts are having difficulty in applying the inadvertence requirement because the *Coolidge* decision failed to give any exact definition of "inadvertent"; thus, the degree of expectation required to make a discovery inadvertent has not been resolved. Comment, *"Plain View" — Anything But Plain:* Coolidge *Divides the Lower Courts*, 7 LOY. L.A.L. REV. 489, 507-14 (1974); Comment, *Criminal Procedure-"Inadvertence": The Increasingly Vestigial Prong of the Plain View Doctrine*, 10 MEM. ST. U.L. REV. 399, 401 (1980). However, commentators generally agree that courts are following the definition which holds that a discovery is inadvertent if the police are without probable cause to believe that the evidence will be found. Moylan, *supra* note 3, at 1083; *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 244 (1971). Thus, under the plain view doctrine, the inadvertence requirement prevents planned warrantless seizures.

60. The *Coolidge* Court added the inadvertence requirement to the plain view doctrine so that the scope of searches incident to arrest would not be extended. Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment*, 22 BUFFALO L. REV. 419, 422 (1973). See *supra* note 3 for a discussion of the relationship between the plain view doctrine and search incident to arrest. In *Horton*, Justice Brennan stated that, with the inclusion of the inadvertence requirement in the plain view doctrine, police officers will be held to the warrant requirement to seize items if the officers know the location of the items, have probable cause to seize the items, intend to seize the items, and fail to get a search warrant particularly describing the items. *Horton*, 110 S. Ct. at 2312 (Brennan, J., dissenting). If officers were not held to follow this requirement, their acts would violate the express constitutional requirement of the particularity clause and would "fly in the face of the basic rule that no amount of probable cause can justify a warrantless search." *Id.* (quoting Justice Stewart in Coolidge v. New Hampshire, 403 U.S. 443, 471 (1971)). *See also* Berger v. New York, 388 U.S. 41, 62 (1967) (Court cannot "forgive the requirements of the Fourth Amendment in the name of law enforcement").

61. Police officers could delay arrests until suspects are in their residences, with the hope of seizing evidence which they would not have been able to obtain with a warrant. Lewis & Mannle, *Warrantless Searches and the "Plain View" Doctrine: Current Perspective*, 12 CRIM. L. BULL. 5, 19 (1976).

62. Without the inadvertence requirement, officers having probable cause for one offense, may make a deliberately timed arrest in order to discover evidence of another crime. *Id.*

63. Police officers may purposely leave certain items off a search warrant application which they have probable cause to seize, know the location of, and intend to seize, and list only hard to find items in order to expand the scope of the search. Horton v. California, 110 S. Ct. 2301, 2313 (1990) (Brennan, J., dissenting). The warrant application process can take a long time, especially when the police intend to seize many items. By listing only hard to find items, an officer might find the "risk of immediately discovering items listed in the warrant. outweighed by the time saved in the application process." *Id.*

64. A police officer conducts a pretextual search when that officer enters a house under a search warrant to seize items of one crime when the officer really is interested in seizing items from another crime. *Id. See, e.g.*, State v. Lair, 95 Wash. 2d 706, 713, 630 P.2d 427, 434 (1981) (search for marijuana used as "pretext" to search for other drugs may be invalidated). The United States

nating the inadvertence requirement is the increased infringements on the fundamental rights guaranteed by the fourth amendment.[65]

Second, under the facts in *Horton*, the Court erroneously applied the plain view doctrine in upholding the seizure of items resulting from an unconstitutional search of the defendant's residence.[66] The fourth amendment's particularity requirement mandates that search warrants must "particularly describe" all items the police officers intend to seize at the time of the application for a search warrant.[67] The *Horton* Court did not address the fact that the police officer fully intended, at the time of the application for the search warrant, to seize various items which were not listed in the search warrant.[68] Thus, in *Horton*, the magistrate issued a search warrant in violation of the particularity requirement,

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Supreme Court has not yet ruled on "pretextual" searches. Horton v. California, 110 S. Ct. 2301, 2314 (1990) (Brennan, J., dissenting). However, state courts that have rejected the inadvertence requirement have held that the fourth amendment prohibits pretextual searches. *See* State v. Bussard, 114 Idaho 781, 788 n.2, 760 P.2d 1197, 1204 n.2 (1988) (police may not use warrant as "pretext" to look for additional items); State v. Kelly, 718 P.2d 385, 389 n.1 (Utah 1986) (same). In addition, law enforcement associations such as Americans for Effective Law Enforcement, Inc., the International Association of Chiefs of Police, Inc., the National District Attorneys Association, Inc., and the National Sheriff's Association, Inc., believe that the Supreme Court should make a rule protecting individuals against pretextual searches. Brief Amicus Curiae of the Americans for Effective Law Enforcement in support of the Respondent at 8, Horton v. California, 110 S. Ct. 2301 (1990) (No. 88-7164). These organizations believe two elements should be established for inadvertency in the plain view doctrine including: "(1) lack of pretext in the police conduct regarding their presence at the place where the observation is made, and (2) objective reasonableness in their conduct." *Id.* For thorough discussions of pretextual searches, see Burkoff, *The Pretext Search Doctrine: Now You See it, Now You Don't*, 17 U. MICH. J.L. REF. 523 (1984); 2 W LAFAVE, SEARCH AND SEIZURE § 4.11(e) (1987).

65. Inconvenience to the police officers and some slight delay necessary to prepare adequate papers to present to a magistrate are never convincing reasons to bypass the warrant requirement. Trupiano v. United States, 334 U.S. 699, 706 (1948), *overruled*, United States v. Rabinowitz, 339 U.S. 56 (1950).

66. In *Horton*, there was no discussion of the validity of the warrant. The Court mentioned only that the police officer determined that there was probable cause to believe the defendant may have been the robber, and the magistrate issued the warrant authorizing a search for three specifically described rings. *Horton*, 110 S. Ct. at 2304. The *Horton* Court disregarded Justice Stewart's statement in *Coolidge* that "plain view is never enough for a warrantless search because any evidence seized will be in plain view, at least at the very moment of seizure." *Id.* at 2307 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971)).

67. The specificity mandated by the particularity requirement limits the discretion of the executing officers and gives notice to the party being searched. Maryland v. Garrison, 480 U.S. 79, 84 (1987); United States v. Leon, 468 U.S. 897, 916 (1984). Allowing police officers to seize items not listed in the warrant, and not inadvertently found, will reduce police officer's professional incentives to comply with the fourth amendment, and encourage them to repeat their mistakes. United States v. Leon, 468 U.S. 897, 918 (1984).

68. See *supra* note 16 for Officer LaRault's testimony concerning his intent to seize various items not listed in the warrant. The majority's opinion in *Hor-*

and the police officer was acting under the authority of this invalid search warrant when he seized items in the defendant's home. Consequently, the Court should have suppressed the illegally obtained evidence.[69]

In *Horton*, the search warrant's invalidity at the time of its issuance is analogous to warrants which contain incorrect addresses[70] or descriptions of items in generic terms.[71] Courts have held these warrants invalid because they violate the particularity requirement, and any items seized under the authority of these invalid warrants are inadmissible as evidence.[72] In fact, the Supreme Court has up-

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ton holds that this is constitutional. Horton v. California, 110 S. Ct. 2301, 2305 (1990).

69. Following the exclusionary rule, the *Horton* Court should have suppressed the items seized under the invalid warrant. The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search. Weeks v. United States, 232 U.S. 383, 398 (1914). The Court has repeatedly emphasized that the central purpose of the exclusionary rule is to deter police misconduct. *See* United States v. Leon, 468 U.S. 879, 906 (1984) (exclusionary rule to safeguard fourth amendment rights through deterrence of police misconduct); Stone v. Powell, 428 U.S. 465, 486 (1976) (same); United States v. Janis, 428 U.S. 433, 446 (1976) (same); United States v. Peltier, 422 U.S. 531, 536 (1975) (same); Michigan v. Tucker, 417 U.S. 433, 447 (1974) (same); United States v. Calandra, 414 U.S. 338, 347 (1974) (same).

70. Courts have held that incorrect addresses listed in search warrants violate the particularity requirement because they fail to specifically describe the place to be searched. *See, e.g.*, Wanger v. Bonner, 621 F.2d 675, 681 (5th Cir. 1980) (search conducted under authority of warrant listing incorrect address constituted severe invasion of privacy); United States v. Kaye, 432 F.2d 647, 649 (D.C. Cir. 1970) (search of an apartment located above the address listed in the warrant rendered the warrant invalid). *See also* Whiteley v. Warden, 401 U.S. 560, 568 (1971) (validity of warrant appraised by facts given to the magistrate, not facts later found to exist by officers).

71. Warrants which contain vague descriptions of items to be seized do not satisfy the particularity requirement of the fourth amendment, and, consequently, any evidence seized under these invalid warrants is inadmissible. *See, e.g.*, Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 325 (1979) (open-ended warrant held invalid where items to be seized were listed as those items "similar" to films which were already in police custody); United States v. Roche, 614 F.2d 6, 8 (1st Cir. 1980) (warrant authorizing seizure of a broad class of documents ruled invalid); United States v. Klein, 565 F.2d 183, 189 (1st Cir. 1977) (warrant describing items as "stolen," "pirate," or "illegal" held invalid); United States v. Owen, 621 F.Supp. 1498, 1505 (D.C.Mich. 1985) ("instrumentalities relating to the distribution of controlled substance" too vague to uphold under particularity requirement); United States v. Perez, 562 F.Supp. 574, 576 (D.N.J. 1982) ("controlled substances" impermissibly vague where government knew that heroin was the object of the search); United States v. Townsend, 394 F.Supp. 736, 746 (E.D.Mich. 1975) (warrant listing "stolen firearms, app. ten (10), which are stored in the above location" held invalid).

In *Horton*, the warrant contained an inaccurate description of the items the officer intended to seize because these items were not listed. *Horton*, 110 S. Ct. at 2304-05. Following the established rule stated in the cases above, the *Horton* Court should have ruled that the warrant was invalid, and, consequently, that the items seized were obtained unlawfully.

72. Unlike the case in *Horton*, items seized under an illegal but facially valid search warrant obtained in good faith are admissible. *Leon*, 468 U.S. at 914. In *Leon*, the Court stated that "[t]he Fourth Amendment contains no pro-

held the suppression of evidence in cases very similar to *Horton* where the police officers intended to seize certain items during a search, but failed to obtain a warrant listing the items.[73] Therefore, in *Horton*, once the warrant was found to be invalid, the Court should have suppressed the items seized in the defendant's home.[74]

Finally, the *Horton* Court diminished the fourth amendment's constitutional protection of an individual's possessory interest by eliminating the inadvertence requirement.[75] In drafting the fourth amendment, the framers specifically sought to prevent general searches and seizures by prohibiting searches and seizures which are not based on probable cause, and by requiring searches deemed

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visions expressly precluding the use of evidence obtained in violation of its commands. " *Id.* at 906. The *Leon* Court, however, did identify several exceptions in which illegally seized items would be suppressed regardless of "good faith." *Id.* at 914. First, a warrant based on knowledge of reckless falsehood contained in the affidavit is invalid. *Id. See also* Franks v. Delaware, 438 U.S. 154, 171 (1978) (deliberate falsehood or reckless disregard for the truth in warrant application will render warrant invalid). Second, a warrant issued by a "rubber stamp" magistrate is invalid because the requirement that the determination of probable cause be made by a neutral magistrate is essentially eliminated. *Leon*, 468 U.S. at 914. *See also* Illinois v. Gates, 462 U.S. 213, 238 (1983) (magistrates must analyze the "totality of the circumstances" to determine probable cause); Aguilar v. Texas, 378 U.S. 108, 111 (1964) (magistrate must not serve as mere "rubber stamp" for the police). Third, if the supporting affidavit for the warrant lacks any indication of probable cause so as to render the belief in its existence entirely unreasonable, then the evidence seized under the invalid warrant is inadmissible. *Leon*, 468 U.S. at 915. Finally, evidence will be suppressed if a warrant is facially deficient so that the executing officers cannot reasonably presume the warrant to be valid. *Id.* at 923. *Cf.* Massachusetts v. Sheppard, 468 U.S. 981, 988-91 (1984) (magistrate's assurances to officers of warrant's validity justified officer's good faith reliance on warrant).

The last exception detailed in *Leon* would apply to the facts under *Horton*. The officer in *Horton* acknowledged his intention to seize items which were not listed in the warrant. *Horton*, 110 S. Ct. at 2305. Officer LaRault could not have reasonably presumed the warrant to be valid because it was facially deficient. Therefore, the evidence seized should have been suppressed.

73. By allowing the items seized in *Horton* to be admitted as evidence, the Court clearly deviated from precedent. In Michigan v. Clifford, 464 U.S. 287, 298 (1984), the Court held that evidence seized by an arson investigative team was obtained unlawfully where the team searched the upstairs of a residence after finding evidence of arson in the basement. The Court concluded that after the team found a crock pot set with a timer in the basement, they went upstairs fully intending to discover items connected to the arson. *Id.* at 298-99. The investigator's failure to obtain a valid warrant in light of the fact that they had ample time to do so, rendered the evidence discovered inadmissible. *Id.* at 299.

The Court has reached similar conclusions in other cases. *See, e.g.*, Thompson v. Louisiana, 469 U.S. 17 (1984) (Court refused to allow items into evidence after two hour "exploratory search" of a murder scene); Mincey v. Arizona, 437 U.S. 385, 389-90 (1978) (four day warrantless search not justified under any exception to fourth amendment where police had opportunity to secure warrant); Vale v. Louisiana, 399 U.S. 30, 35-36 (1970) (warrantless seizure of narcotics unreasonable since police had time to obtain a warrant).

74. For a discussion of the suppression of evidence under the exclusionary rule, see *supra* note 69.

75. See *supra* note 60 for a discussion of the inadvertence requirement.

necessary to be as limited as possible.[76] The fourth amendment's warrant clause effectuates these goals by requiring a neutral magistrate to evaluate probable cause,[77] and by requiring warrants to specifically list the place and items to be searched and seized.[78]

Like most constitutional rules, the fourth amendment's warrant requirement has exceptions.[79] In addition to the plain view doctrine, the Supreme Court has upheld warrantless searches based on hot pursuit,[80] automobile searches,[81] consent,[82] search incident to arrest,[83] border searches,[84] "stop and frisk" situations,[85] and road

76. Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). For other discussions of these goals, see Lewis & Mannle, *supra* note 61, at 17; Comment, *Constitutional Law-Fourth Amendment-Plain View Exception to the Warrant Requirement-Exigent Circumstances*-Washington v. Chrisman, 29 N.Y.L. SCH. L. REV. 125, 132-33 (1984).

77. For a discussion of the neutral magistrate requirement, see *supra* note 54.

78. For a discussion of the particularity requirement, see *supra* note 67.

79. For the most part, exceptions to the fourth amendment's warrant requirements are based upon a conclusion that, under certain circumstances, the exigencies of a situation make immediate search and seizure without a warrant imperative. Schmerber v. California, 384 U.S. 757, 770-71 (1965). For discussions of the exigencies, see Texas v. Brown, 460 U.S. 730, 735-36 (1983); Lewis & Mannle, *supra* note 61, at 6; Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 HASTINGS L.J. 283 (1988); Note, Texas v. Brown: *The Plain View Doctrine Stretched Beyond the Visual*, 16 U. WEST L.A. L. REV. 151, 157 n.26 (1984).

80. Warden v. Hayden, 387 U.S. 294 (1967). The Court held that the police may enter a private place without a warrant in pursuit of a suspect in an exigent situation. *Id.* at 298-99. The Court gave the prevention of the escape of the suspect and harm to the officers as the primary rationale underlying the hot pursuit exception. *Id.* at 299. The scope of the search under this exception may be as broad as is reasonably necessary to prevent the danger of resistance or escape by the suspect. *Id.*

81. United States v. Ross, 456 U.S. 798 (1982). The Court explained that the automobile's mobility created the exigent circumstance which excused the warrant requirement. *Id.* at 806-07. In addition, the Court concluded that there is a diminished expectation surrounding an automobile, and therefore, a vehicle does not deserve the fullest level of fourth amendment protection. *Id.* at 805-09.

82. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). In *Schneckloth*, the Court held that even lacking sufficient probable cause to obtain a warrant, police could conduct a warrantless search of a suspect who voluntarily gave consent. *Id.* at 222-23.

83. Chimel v. California, 395 U.S. 752 (1969). For a discussion of the search incident to arrest exception, see *supra* note 3.

84. Almeida-Sanchez v. United States, 413 U.S. 266 (1973). In *Almeida-Sanchez*, the Court concluded that travellers may be stopped at international borders in order to ascertain whether the individual entering is entitled to enter, and whether the belongings brought in are lawful. *Id.* at 272.

85. Terry v. Ohio, 392 U.S. 1 (1968). In *Terry*, the Court held that where police officers observe unusual conduct, in light of their experience they may conduct a carefully limited search of the outer clothing of an individual in an attempt to discover weapons. *Id.* at 30.

blocks.[86] The Court has ruled that each of these exceptions must be well delineated and carefully drawn in order to preserve the fundamental constitutional goals of the fourth amendment.[87]

In *Coolidge*, the Court formally established the plain view exception to the warrant clause.[88] The Court justified this exception by balancing the individual's interests against the governmental interests.[89] The *Coolidge* Court concluded that the gains in effective law enforcement[90] resulting from the plain view doctrine outweighed the minor harm inflicted on the fourth amendment.[91] After concluding that the exception was justified, the Court carefully delineated the parameters of the doctrine to protect the interests covered by the fourth amendment.[92] The Court included the inadvertence requirement as a substitute for the warrant requirements when officers conducted warrantless searches. Therefore, the *Coolidge* Court established the inadvertence requirement to protect an individual's possessory interest in the absence of the warrant requirements.[93]

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86. Delaware v. Prouse, 440 U.S. 648 (1979). In *Prouse*, the Court held that an articulable and reasonable suspicion is required for police officers to stop an automobile and detain the driver. *Id.* at 663.

87. Coolidge v. New Hampshire, 403 U.S. 443, 454 (1971); Katz v. United States, 389 U.S. 347, 357 (1967); Jones v. United States, 357 U.S. 493, 499 (1958); McDonald v. United States, 335 U.S. 451, 456 (1948).

88. *Coolidge*, 403 U.S. at 443. For a discussion of the *Coolidge* decision and the requirements of the plain view doctrine, see *supra* note 5 and accompanying text.

89. *Coolidge*, 403 U.S. at 467. Justice Stewart's use of the balancing test in *Coolidge* focuses on the area of fourth amendment law which addresses the reasonableness of the governmental intrusion. *See* United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983) (customs officers' boarding of sailboat without a warrant held reasonable under fourth amendment). The Supreme Court evaluated the permissibility of a law enforcement practice by balancing the intrusion on the individual's fourth amendment interests against the gain in law enforcement. Delaware v. Prouse, 440 U.S. 648, 654 (1979). *See also* United States v. Martinez-Fuerte, 428 U.S. 543, 560-62 (1976) (government interest in traffic spotchecks outweighs interests of private citizens); United States v. Brignoni-Ponce, 422 U.S. 873, 878-82 (1975) (government interest in preventing entry of illegal aliens outweighs interests of individuals); Terry v. Ohio, 392 U.S. 1, 26-27 (1968) (police and public safety outweigh intrusion on individual's privacy with "stop and frisk" search).

90. *Coolidge*, 403 U.S. at 468. In *Coolidge*, Justice Stewart stated that where police inadvertently discover a piece of evidence during a lawful search, it would be inconvenient, and sometimes dangerous, to require the officers to leave the evidence until they obtained a warrant. *Id.*

91. *Id.* at 467.

92. *Id.* at 465-66.

93. There is certainly no inconvenience to police officers in requiring them to obtain a search warrant from a neutral magistrate, specifically describing the items they can seize, if the police know of a particular item that they want to seize. *Id.* at 471. But, in *Horton*, the officer created the exigency which allowed him to seize items without a valid warrant by not listing all the items he intended to seize in the warrant application. Thus, the officer used the plain view

Unpersuaded by the *Coolidge* reasoning,[94] the *Horton* Court held that the inadvertence requirement was unnecessary because it failed to further any fourth amendment interests.[95] In *Horton*, the Court correctly found that when an officer seizes items under the plain view doctrine, the officer's presence on the premises under an initially valid warrant has already compromised an individual's privacy interest.[96] However, the Court incorrectly concluded that once an officer has lawful right of access "no additional Fourth Amendment interest is furthered" by the inadvertence requirement.[97] The Court's conclusion is contrary to decisions where the Court has held that the privacy interests and possessory interests protected by the fourth amendment are equally important,[98] but, at the same time, separate and distinct.[99] In *Horton*, the Court failed to separate the equally important possessory interest from the privacy interest when it eliminated the inadvertence requirement. The Court compromised an individual's possessory interest on the sole basis that an individual's privacy interest had already been compromised.[100] The Court's illogical reasoning led to the elimination of the inadvertence requirement, and, consequently, diminished the individual's possessory interest which the fourth

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doctrine to seize items without abiding by the warrant requirements of the fourth amendment.

94. Horton v. California, 110 S. Ct. 2301, 2309 (1990). See *supra* notes 35-46 and accompanying text for a discussion of the *Horton* Court's analysis of *Coolidge*.

95. *Horton*, 110 S. Ct. at 2309.

96. With an item already in plain view, neither its observation nor its seizure would involve any invasion of privacy. Arizona v. Hicks, 480 U.S. 321, 325 (1987); Illinois v. Andreas, 463 U.S. 765, 771 (1983). However, seizure of the article in plain view would obviously invade the owner's possessory interest. Maryland v. Macon, 472 U.S. 463, 469 (1985); United States v. Jacobsen, 466 U.S. 109, 113 (1984).

97. *Horton*, 110 S. Ct. at 2309.

98. The privacy interest protected by the fourth amendment injunction against unreasonable searches is uniquely different from the possessory interest protected by the prohibition against unreasonable seizures. However, they are of equal value and require the same protection. Arizona v. Hicks, 480 U.S. 321, 328 (1987). *See* Texas v. Brown, 460 U.S. 730, 748 (1983) (privacy interests and possessory interests not always present to the same extent). *But see* Welsh v. Wisconsin, 466 U.S. 740, 748 (1984) (physical entry of the home is the chief evil against which the wording of the fourth amendment is directed); United States v. United States Dist. Ct., 407 U.S. 297, 313 (1971) (same); Warden v. Hayden, 387 U.S. 294, 304 (1967) (principal object of the fourth amendment is the protection of privacy rather than property).

99. United States v. Jacobsen, 466 U.S. 109, 113 (1984); Texas v. Brown, 460 U.S. 730, 747 (1983).

100. In *Horton*, Justice Brennan was so dissatisfied with the majority's illogical reasoning that he wrote: "I cannot countenance such constitutional legerdemain." Horton v. California, 110 S. Ct. 2301, 2313 (1990) (Brennan, J., dissenting).

amendment protects.[101]

By eliminating the inadvertence requirement from the plain view doctrine, the *Horton* Court took another step towards total elimination of the possessory interest protected by the fourth amendment. With our society's current goal of reducing crime, the Court has once again increased police authority in balancing the governmental interest against individual interests the constitution protects. Fortunately, the decision's broad scope eliminates the problem of defining inadvertence, which has plagued the lower courts since the *Coolidge* decision. However, the courts now face the task of protecting possessory interests under the plain view doctrine without an important safeguard. When faced with severe police misconduct, the Supreme Court will have to reevaluate the requirements of the plain view doctrine once again. Unfortunately, in *Horton*, the Court neglected to remember that "[i]t is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any *stealthy* encroachment thereon."[102]

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101. Lawful interference with an individual's privacy and freedom of movement does not justify the automatic intrusion on an individual's possessory interest which would otherwise require a warrant. Chimel v. California, 395 U.S. 752, 766 n.12 (1969).

102. Boyd v. United States, 116 U.S. 616, 635 (1886) (emphasis added).