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Fourth Amendment--Requiring Probable Cause for Searches and Seizures under the Plain View Doctrine

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FOURTH AMENDMENT—REQUIRING PROBABLE CAUSE FOR SEARCHES AND SEIZURES UNDER THE PLAIN VIEW DOCTRINE

Arizona v. Hicks, 107 S. Ct. 1149 (1987).

I. INTRODUCTION

The fourth amendment to the United States Constitution protects individuals against arbitrary and unreasonable searches and seizures.¹ Fourth amendment protection has repeatedly been found to include a general requirement of a warrant based on probable cause for any search or seizure by a law enforcement agent.² However, there exist a limited number of "specifically established and well delineated exceptions"³ to the warrant requirement. In *Coolidge v. New Hampshire*,⁴ the Supreme Court established the plain view doctrine which, under certain circumstances, permits police seizure of evidence in plain view without a warrant.⁵ Although the Court had previously addressed some of the ambiguities created by the

¹ The fourth amendment to the United States Constitution 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 person or things to be seized.

U.S. CONST. amend. IV.

The fourth amendment is applied to the states through incorporation in the Due Process Clause of the fourteenth amendment. *Ker v. California*, 374 U.S. 23, 33 (1963).

² See, e.g., Project, *Sixteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1985-1986*, 75 GEO. L.J. 713, 722-23 (1987).

³ *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote omitted) (holding that electronic surveillance of a telephone booth constituted a fourth amendment search). For a discussion of the recognized exceptions to the warrant requirement see generally 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.1(a), at 118 (2d ed. 1987).

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

⁵ *Id.* at 464-71. In *Coolidge* the Court held that although the police can, in some instances, seize evidence in plain view without a warrant, seizure of petitioner's car was not justified because the police had adequate time to obtain a warrant, were aware of the car's description and location, intended to seize it when they entered petitioner's property, and no contraband or dangerous objects were involved. *Id.* at 472. See *infra* note 27 for an explanation of the plain view doctrine.

Coolidge holding,⁶ not until this term, had it specifically determined what standard of suspicion is prerequisite to the invocation of the plain view doctrine.⁷ In *Arizona v. Hicks*,⁸ the Supreme Court held that probable cause was required to invoke the plain view doctrine.⁹ Moreover, the *Hicks* Court also held that even the slight movement of an object by a police officer in order to record a serial number constituted a search.¹⁰ The *Hicks* decision, in expanding individual due process rights, is uncharacteristic in an era in which most Court decisions have manifested a trend toward enlarging the number of exceptions to the warrant requirement.¹¹

This Note argues that the *Hicks* majority's bright line rule for distinguishing between "cursory examinations" and searches is a proper distinction which provides law enforcement agencies with much needed guidance. This Note also asserts that it is appropriate to require probable cause when utilizing the plain view doctrine to justify a search. Finally, this Note concludes that the *Hicks* decision should be commended for protecting individual rights while recognizing the valid concerns of law enforcement officials.

II. FACTS OF *HICKS*

On April 18, 1984, police officers arrived at the scene of a shooting.¹² A bullet had been fired through the floor of James Hicks' apartment, injuring a man in the apartment below.¹³ Upon their arrival, the officers entered Hicks' apartment to search for other possible victims, the assailant, and weapons.¹⁴ Although the officers found no one in the apartment, they did find and seize three

⁶ See, e.g., *Payton v. New York*, 445 U.S. 573, 587 (1980) (suggesting that probable cause is necessary for seizure of property in plain view); *Texas v. Brown*, 460 U.S. 730, 742 n.7 (1983) (plurality opinion)(regarding as unresolved the question of whether probable cause is necessary for a plain view seizure).

⁷ *Arizona v. Hicks*, 107 S. Ct. at 1153. See *supra* note 6.

⁸ 107 S. Ct. 1149 (1987).

⁹ *Id.* at 1153.

¹⁰ *Id.* at 1152.

¹¹ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 733 (1985) (holding that school officials do not need a warrant or probable cause to search a student, if they have a reasonable suspicion that the search will produce evidence of violation of a law or a school rule); *United States v. Leon*, 468 U.S. 897 (1984) (creating a "good faith" exception to the exclusionary rule); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) (broadly interpreting the *Leon* "good faith" exception); *United States v. Ross*, 456 U.S. 798 (1982) (holding that a container discovered during the warrantless search of an automobile may be searched without a warrant).

¹² *Hicks*, 107 S. Ct. at 1151-52.

¹³ *Id.*

¹⁴ *Id.*

weapons.¹⁵

During this initial search, one of the officers, Officer Nelson, observed two sets of expensive stereo components which stood out in the sparsely furnished, run-down apartment.¹⁶ Suspecting that the components were stolen, Officer Nelson manipulated some of the components and recorded their serial numbers.¹⁷ He then telephoned his departmental headquarters to request that they run a check on the numbers.¹⁸

Officer Nelson immediately seized one of the components which headquarters identified as stolen property.¹⁹ Further departmental investigation subsequently confirmed that several of the serial numbers Officer Nelson had recorded corresponded to other stereo equipment taken in an armed robbery.²⁰ That equipment was later seized pursuant to a warrant and Hicks was indicted for the robbery.²¹

At trial, both parties conceded that no warrant was necessary for the initial entry and search because these actions were justified by the exigent circumstances of the shooting.²² The trial court granted Hicks' motion to suppress the evidence seized, and the Arizona Court of Appeals affirmed.²³ The court of appeals found that the recording of the serial numbers constituted an additional search unrelated to the purpose of the original entry.²⁴

Furthermore, the court of appeals held that such an additional

¹⁵ *Id.* The police found and seized a .25-caliber automatic, a .45-caliber automatic, and a sawed-off .22-caliber rifle. Brief for Petitioner at 2, *Arizona v. Hicks*, 107 S. Ct. 1149 (1987) (No. 85-1027). The police also seized a stocking-cap mask. *Hicks*, 107 S. Ct. at 1152.

¹⁶ *Hicks*, 107 S. Ct. at 1152.

¹⁷ *Id.* One of the components Officer Nelson moved was a Bang and Olufsen turntable, which his departmental headquarters identified as stolen. *Id.* Referring to his manipulation of the turntable, Officer Nelson stated that he "had to turn it around or turn it upside down," but he could not remember which. Joint Appendix at 19-20, *Arizona v. Hicks*, 107 S. Ct. 1149 (1987) (No. 85-1027).

¹⁸ *Hicks*, 107 S. Ct. at 1152.

¹⁹ *Id.*

²⁰ *Hicks*, 107 S. Ct. at 1152. This stereo equipment and the Bang and Olufsen turntable were taken in the same armed robbery. *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* The Arizona Court of Appeals held that the initial warrantless search for other victims, the assailant, and weapons was justified by the exigencies of the situation. However, the court of appeals found that the recording of the serial numbers was an unlawful additional search unrelated to the exigency justifying the initial search. *Id.* Additionally, the court of appeals held that the evidence seized could not be admitted under the "good faith" exception to the exclusionary rule. *State v. Hicks*, 146 Ariz. 533, 535, 707 P.2d 331, 333 (Ariz. Ct. App. 1985).

²⁴ *Hicks*, 107 S. Ct. at 1152.

search was "plainly unlawful"²⁵ and that evidence derived from this police violation of the fourth amendment was inadmissible.²⁶ Neither the trial court nor the court of appeals accepted the State's contention that the "additional" search was justified under the plain view doctrine espoused in *Coolidge v. New Hampshire*.²⁷ After the Arizona Supreme Court denied review, the United States Supreme Court granted certiorari to hear the question of whether the "'plain view' doctrine may be invoked when the police have less than probable cause to believe that the item in question is evidence of a crime

²⁵ *Hicks*, 146 Ariz. at 534, 707 P.2d at 332.

²⁶ 107 S. Ct. at 1152. The court of appeals reasoned that a "warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'" *Id.* (quoting *Mincey v. Arizona*, 437 U.S. 385 (1978) and citations therein).

²⁷ *Hicks*, 107 S. Ct. at 1152. In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plurality opinion), the Court held that, under the plain view doctrine, the police could, in certain situations, seize items in plain view without a warrant. *Id.* at 465. Elaborating on what circumstances would justify plain view seizures, the Court noted:

What the "plain view" cases have in common is that the police 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 . . . and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

Id. at 466. The plain view doctrine, as set forth in *Coolidge*, has three basic requirements: (1) the "initial intrusion" bringing the police officer within plain view of the incriminating evidence must be lawful; (2) the police officer's discovery of the incriminating evidence must be inadvertent; and (3) it must be "immediately apparent" to the police that the observed objects may be evidence of a crime or contraband. *Texas v. Brown*, 460 U.S. 730, 736-37 (1983) (plurality opinion) (summarizing the *Coolidge* plain view doctrine) (citations omitted).

The first part of the *Coolidge* test is satisfied if the initial intrusion is based on either a warrant or one of the recognized exceptions to the warrant requirement. Project, *supra* note 2, at 756. The "inadvertent discovery" prong of the *Coolidge* test is satisfied if the officer does not "know in advance the location of the evidence and intend to seize it." *Coolidge*, 403 U.S. at 470 (plurality opinion). However, the Supreme Court is divided as to whether "inadvertent discovery" is a necessary element of the plain view doctrine. Compare *Brown*, 460 U.S. at 743 (plurality opinion) ("Whatever may be the final disposition of the 'inadvertence' element of 'plain view,' it clearly was no bar to the seizure here.") and *id.* at 744 (White, J., concurring) ("I continue to disagree with the views of four Justices in *Coolidge v. New Hampshire*, that plain view seizures are valid only if the viewing is 'inadvertent.'") (citation omitted) with *id.* at 746 (Powell, J., concurring) (no reason to criticize the *Coolidge* articulation of the plain view doctrine which has been generally accepted for over ten years). See also *Hicks*, 107 S. Ct. at 1155 (White, J., concurring) (pointing out that the "inadvertent discovery" requirement has never been accepted by a majority of the Court). The third prong of the *Coolidge* test, the "immediately apparent" requirement, is also surrounded in controversy. In *Payton v. New York*, 445 U.S. 573, (1980), the Court suggested that probable cause was necessary for seizure of property in plain view. *Id.* at 587. Three years later, the *Brown* plurality regarded the issue as unresolved. *Brown*, 445 U.S. at 742 n.7 (plurality opinion). In *Hicks*, the Court expressly held that probable cause was necessary for the invocation of the plain view doctrine. *Hicks*, 107 S. Ct. at 1153.

or contraband.”²⁸

III. THE SUPREME COURT OPINIONS

A. THE MAJORITY

In an opinion written by Justice Scalia, the Supreme Court affirmed the Arizona Court of Appeals' holding that the recording of the serial numbers constituted an additional search unrelated to the exigency justifying the initial search.²⁹ The Court held that such additional searches and seizures could be justified under the plain view doctrine³⁰ only if the police had probable cause to believe the object of the intrusion was contraband or evidence of a crime.³¹

The majority first decided that the recording of the serial numbers constituted a search, but not a seizure, for fourth amendment purposes.³² While noting that Officer Nelson's actions led to the eventual seizure of the stereo equipment, Justice Scalia stated that such actions alone did not amount to a seizure because they “did not ‘meaningfully interfere’ with respondent's possessory interest in either the serial numbers or the equipment.”³³ Justice Scalia concluded that Officer Nelson's actions did, however, constitute an additional search independent of the original lawful search for the assailant, victims, and weapons.³⁴

Justice Scalia distinguished the facts of this case from the simple copying of an already visible serial number because Officer Nelson physically maneuvered an object to expose its serial number.³⁵ According to Justice Scalia, the copying of an already visible serial number would not involve an additional search because the mere inspection of parts of an object coming into view during a lawful search would produce no additional invasion of respondent's privacy interest.³⁶ Justice Scalia reasoned, however, that Officer Nelson's movement of the turntable was a new invasion of respondent's

²⁸ *Hicks*, 107 S. Ct. at 1151.

²⁹ *Id.* at 1152. Justice Scalia wrote the opinion for the majority in which Justices Brennan, White, Marshall, Blackmun, and Stevens joined. Justice White also filed a concurring opinion.

³⁰ See generally, *supra* note 27 for an explication of the development of this doctrine.

³¹ *Hicks*, 107 S. Ct. at 1153.

³² *Id.* at 1152.

³³ *Id.* Justice Scalia relied on the definition of seizure set forth in *Maryland v. Macon*, 472 U.S. 463, 469 (1984). In *Macon*, the purchase of obscene material by an undercover officer did not constitute a seizure because “[a] seizure occurs when ‘there is some meaningful interference with an individual's possessory interests’ in the property seized.” *Id.* (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).

³⁴ *Hicks*, 107 S. Ct. at 1152.

³⁵ *Id.*

³⁶ *Id.* Justice Scalia relied on *Illinois v. Andreas*, 463 U.S. 765 (1983), in which the

privacy interest which was unjustified by the exigency authorizing the entry.³⁷ The Court stressed that this new invasion of respondent's privacy constituted a separate and additional search.³⁸

Justice Scalia asserted that the majority's distinction between "looking" at an object in plain view and "moving" that same object, albeit a few inches, was not trivial under the fourth amendment.³⁹ He emphasized that it was irrelevant that, in this case, the search uncovered nothing of great personal value to the respondent.⁴⁰ Summarizing the majority position, Justice Scalia stated that "[a] search is a search, even if it happens to disclose nothing but the bottom of a turntable."⁴¹

After concluding that Officer Nelson's actions constituted a search and, therefore, implicated a fourth amendment right, Justice Scalia then identified the remaining question as "whether the search was 'reasonable' under the Fourth Amendment."⁴² He began his analysis by explicitly stating that Officer Nelson's actions were not, *ipso facto*, unreasonable simply because they were unrelated to the justification authorizing entry into respondent's apartment.⁴³ Justice Scalia noted that acts justified under the plain view doctrine are always unrelated to the initial lawful entry.⁴⁴ Furthermore, Justice Scalia explained that the limitation on the scope of warrantless searches set forth in *Mincey v. Arizona*⁴⁵ was meant to apply exclusively to the scope of the primary search itself.⁴⁶

Court stated: "If the inspection by police does not intrude upon a legitimate expectation of privacy, there is 'no search' subject to the Warrant Clause." *Id.* at 771.

³⁷ *Hicks*, 107 S. Ct. at 1152.

³⁸ *Id.*

³⁹ *Id.* Justice Scalia was defending the majority's position against Justice Powell's claim that the majority's "distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few inches trivializes the Fourth Amendment." *Id.* at 1157 (Powell, J., dissenting). See *infra* note 101. But see *supra* note 17 (it is not clear whether Officer Nelson merely moved the turntable a few inches).

⁴⁰ *Hicks*, 107 S. Ct. at 1152-53.

⁴¹ *Id.* at 1153.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* Justice Scalia explained that if an act was taken in furtherance of the purposes justifying the original entry, invocation of the plain view doctrine would be superfluous. *Id.*

⁴⁵ 437 U.S. 385 (1978). In *Mincey*, the Court stated that "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'" *Id.* at 393 (quoting *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968)).

⁴⁶ *Hicks*, 107 S. Ct. at 1153. In *Hicks*, the limitation set forth in *Mincey* on the scope of warrantless searches applied to the initial search for the assailant, victims, and weapons. Both parties had already conceded that this initial search was justified. See *supra* text accompanying note 22.

Justice Scalia also noted that *Mincey* was not overruling by implication the cases

Next, Justice Scalia set forth the parameters of the plain view doctrine. He began with the *Coolidge* plurality's statement: "It is well established that under certain circumstances the police may *seize* evidence in plain view without a warrant."⁴⁷ The majority then extended the applicability of the *Coolidge* plain view doctrine⁴⁸ to include searches as well as seizures.⁴⁹ Justice Scalia declared that "[i]t would be absurd to say that an object could lawfully be seized and taken from the premises, but could not be moved for closer examination."⁵⁰ Justice Scalia therefore reasoned that the search in this case was valid if the plain view doctrine would have justified a seizure of the equipment.⁵¹

Initially, Justice Scalia pointed out that if Officer Nelson had probable cause to believe the stereo components were stolen, his actions would have definitely been justified under the plain view doctrine.⁵² Justice Scalia then noted that the State had already conceded that Officer Nelson had only a "reasonable suspicion," not probable cause, to believe the items were stolen.⁵³ Justice Scalia next addressed the confusion as to what standard of suspicion must be met before the plain view doctrine may be invoked to justify a seizure. While stating that dicta in *Payton v. New York*⁵⁴ implied that the standard of probable cause must be met, Justice Scalia pointed out that the *Texas v. Brown*⁵⁵ plurality subsequently noted that the issue remained unresolved.⁵⁶

stating that the plain view doctrine can legitimate action beyond the scope announced in *Mincey*. *Hicks*, 107 S. Ct. at 1153.

⁴⁷ *Hicks*, 107 S. Ct. at 1153. (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (plurality opinion)(emphasis added)). See *supra* note 27 for the *Coolidge* requirements. Justice Scalia noted that such circumstances include situations in which, as in this case, the initial intrusion bringing the police in plain view of the object is valid under a recognized exception to the warrant requirement. *Hicks*, 107 S. Ct. at 1153. For a discussion of the recognized exceptions to the warrant requirement, see generally 2 LAFAYE, *supra* note 3, § 4.1(a) at 118.

⁴⁸ See *supra* note 27 for an explication of the plain view doctrine.

⁴⁹ *Hicks*, 107 S. Ct. at 1153.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* (citing Brief for Petitioner at 18, *Arizona v. Hicks*, 107 S. Ct. 1149 (No. 85-1027)). Justice Scalia also noted that a "reasonable suspicion" means "something less than probable cause." *Id.*

⁵⁴ 445 U.S. 573 (1980).

⁵⁵ 460 U.S. 730 (1983) (plurality opinion).

⁵⁶ *Hicks*, 107 S. Ct. at 1153. The *Payton* Court stated that "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." *Payton*, 445 U.S. at 587. Three years later, the *Brown* plurality reaffirmed the *Payton* rule, but qualified its position by stating that the Court "need not address whether, in some circum-

Next, the majority explicitly held that probable cause was required to justify a seizure under the plain view doctrine.⁵⁷ "To say otherwise," noted Justice Scalia, "would be to cut the 'plain view' doctrine loose from its theoretical and practical moorings."⁵⁸ Justice Scalia explained that the purpose of the plain view doctrine was to extend to nonpublic places the police's authority to make warrantless seizures of such items as weapons or contraband.⁵⁹ According to Justice Scalia, the reason for the extension was to grant the police permission to seize, without a warrant, evidence which they had legitimately seen, thus sparing them the inconvenience and the risk of securing a warrant.⁶⁰ The majority emphasized that "[d]ispensing with the need for a warrant is worlds apart from permitting a lesser standard of *cause* for the seizure than a warrant would require, *i.e.* the standard of probable cause."⁶¹ The majority then declared that an object viewed during an unrelated search and seizure should not routinely be seizable on lesser grounds than would be necessary for the procurement of a warrant to seize that same object.⁶²

The Court, however, recognized that seizures could be justified on less than probable cause if the "seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime."⁶³ Noting that no operational necessities were relied upon in this case, Justice Scalia emphasized that Officer Nelson's lawful viewing of the objects in plain view could not supplant the requirement of probable cause.⁶⁴

Next, the majority extended the probable cause requirement

stances, a degree of suspicion lower than probable cause would be sufficient basis for a seizure in certain cases." *Brown*, 460 U.S. at 742 n.7 (plurality opinion).

⁵⁷ *Hicks*, 107 S. Ct. at 1153.

⁵⁸ *Id.*

⁵⁹ *Id.* See *Payton*, 445 U.S. 573, 586-87 (1980).

⁶⁰ *Hicks*, 107 S. Ct. at 1153. See *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971) (plurality opinion).

⁶¹ *Hicks*, 107 S. Ct. at 1153-54 (emphasis in original).

⁶² *Id.* at 1154.

⁶³ *Id.* The *Hicks* Court then cited some examples of seizures which were justifiable on less than probable cause because of their minimal intrusiveness and the operational necessities involved. The examples cited were: *United States v. Cortez*, 449 U.S. 411 (1981) (upholding an investigative stop by border agents of vehicle suspected to be transporting illegal aliens); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (stating that officers, upon a reasonable suspicion, could stop a vehicle suspected of containing illegal aliens); *United States v. Place*, 462 U.S. 696, 709 (1983) (dictum)(stating that authorities could temporarily detain a traveler's luggage to expose it to a trained narcotics detection dog). *Hicks*, 107 S. Ct. at 1154.

⁶⁴ *Hicks*, 107 S. Ct. at 1154 (citing *Coolidge*, 403 U.S. at 466 (plurality opinion)).

necessary for plain view seizures to plain view searches.⁶⁵ Justice Scalia stated that “[t]he same considerations preclude us from holding that, even though probable cause would have been necessary for a seizure, the search of objects in plain view that occurred here could be sustained on lesser grounds.”⁶⁶ Acknowledging that the fourth amendment’s injunction against unreasonable searches protected an interest quite different from its injunction against unreasonable seizures, the majority noted that both interests deserved the same degree of protection.⁶⁷ Because the Court had not previously drawn a categorical distinction between the two interests regarding “the degree of justification needed to establish the reasonableness of police action,”⁶⁸ the majority saw no reason to do so here. Justice Scalia explained that by requiring probable cause for searches, the Court was preserving its earlier mandate that “the ‘plain view’ doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.”⁶⁹

Justice Scalia next defended the majority’s position against the dissents of Justices Powell and O’Connor. He disagreed with Justice O’Connor’s view that Officer Nelson’s conduct should have been upheld because it was a “cursory inspection” rather than a “full-blown search” and could, thus, be justified by a reasonable suspicion.⁷⁰ The majority defined a “cursory inspection” as merely “looking at what is already exposed to view, without disturbing it.”⁷¹ Such an inspection, reasoned the majority, does not constitute a search and does not require even a reasonable suspicion.⁷² Justice Scalia declared that the majority was “unwilling to send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a plain-view inspection nor yet a ‘full-blown search.’ ”⁷³

⁶⁵ *Id.*

⁶⁶ *Id.* (emphasis in original).

⁶⁷ *Id.* The fourth amendment’s injunction against unreasonable searches protects an individual’s privacy interest, while its injunction against unreasonable seizures protects an individual’s possessory interest. *Texas v. Brown*, 460 U.S. 730, 747-48 (1983) (Stevens, J., concurring).

⁶⁸ *Hicks*, 107 S. Ct. at 1154.

⁶⁹ *Id.* (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971) (plurality opinion)).

⁷⁰ *Id.* See *infra* notes 104-107 and accompanying text for an explanation of Justice O’Connor’s view.

⁷¹ *Hicks*, 107 S. Ct. at 1154.

⁷² *Id.*

⁷³ *Id.* Justice Scalia added that “[n]othing in the prior opinions of this Court supports such a distinction, not even the dictum from Justice Stewart’s concurrence in *Stanley v. Georgia*, whose reference to a ‘mere inspection’ describes, in our view, close

Justice Scalia then responded to Justice Powell's question as to what Officer Nelson should have done under such circumstances.⁷⁴ Justice Scalia noted that the reply to Justice Powell's query turned on the existence of probable cause, a question which was not preserved on appeal.⁷⁵ Justice Scalia then stated that, if Officer Nelson had probable cause, he should have done exactly what he did, namely, move the turntable and record its serial number.⁷⁶ If Officer Nelson did not have probable cause, Justice Scalia advised that he should have investigated his suspicions by any available method other than a search.⁷⁷

While recognizing that sometimes no effective means other than a search will suffice, Justice Scalia stated "there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all."⁷⁸ Justice Scalia described the majority's disagreement with the dissenters as a conflict about where the proper balance should be struck.⁷⁹ He asserted that the majority's position adhered to the "textual and traditional standard of probable cause."⁸⁰

Finally, the Court declined to consider the state's contention that the court below should have admitted the evidence under the "good faith" exception to the exclusionary rule, even if Officer Nelson's search was in violation of the fourth amendment.⁸¹ Justice Scalia reiterated that certiorari was not granted on that issue and refused to consider it.⁸² The majority then affirmed the judgment of the Arizona Court of Appeals.⁸³

observation of what lies in plain sight." *Id.* (quoting *Stanley v. Georgia*, 394 U.S. 557, 571 (1969) (Stewart, J., concurring)(citation omitted)). See *infra* note 120 for a discussion of *Stanley*.

⁷⁴ *Id.* at 1155.

⁷⁵ *Hicks*, 107 S. Ct. at 1155.

⁷⁶ *Id.*

⁷⁷ *Id.* Justice Scalia stated: "If [Officer Nelson had no probable cause], then he should have followed up his suspicions, if possible, by means other than a search—just as he would have had to do if, while walking along the street, he had noticed the same suspicious stereo equipment sitting inside a home a few feet away from him, beneath an open window." *Id.* However, Justice Scalia did not suggest what lawful investigative techniques, if any, Officer Nelson could have employed to determine if the stereo equipment was stolen.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

B. JUSTICE WHITE'S CONCURRENCE

Although he agreed with the majority, Justice White reiterated his view that "inadvertent discovery" was not necessarily an element of the plain-view doctrine.⁸⁴ Noting that this "requirement" has never been accepted by a majority of the Court, Justice White joined the majority opinion "without regard to the inadvertence of the officers' discovery of the stereo components' serial numbers."⁸⁵

C. JUSTICE POWELL'S DISSENT

Justice Powell dissented in order to emphasize what he regarded as the unfortunate consequences of the majority's decision.⁸⁶ Justice Powell interpreted the *Coolidge*⁸⁷ plurality opinion as requiring "only that it be 'immediately apparent to the police that they have evidence before them; the "plain-view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.'"⁸⁸ Claiming that in the instant case there was no such general exploratory search, Justice Powell agreed with Justice O'Connor's dissenting opinion that the moving of a suspicious object in plain view produces a minimal invasion of privacy.⁸⁹ Justice Powell characterized the majority's distinction between "merely looking at" and "moving" or "disturbing" an object in plain view as unreasonable.⁹⁰

According to Justice Powell, the facts of *Hicks* evidenced the unreasonableness of the majority's distinction.⁹¹ He asserted that the officer's suspicion that the stereo equipment was stolen was "both reasonable and based on specific articulable facts."⁹² Furthermore, he concluded that the state should not have conceded the absence

⁸⁴ *Id.* (White, J., concurring). See *Texas v. Brown*, 460 U.S. 730, 744 (1983) (White, J., concurring) (disagreeing with the statement of the plurality in *Coolidge*, 403 U.S. 443 (1971), that items seized under the plain view doctrine must be inadvertently discovered). See generally *supra* note 27 for an explanation of the plain view doctrine.

⁸⁵ *Hicks*, 107 S. Ct. at 1155. (White, J., concurring).

⁸⁶ *Id.* (Powell, J. dissenting). Both Chief Justice Rehnquist and Justice O'Connor joined with Justice Powell in dissent.

⁸⁷ *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plurality opinion).

⁸⁸ *Hicks*, 107 S. Ct. at 1155-56 (quoting *Coolidge*, 403 U.S. at 466 (plurality opinion) (citation omitted)).

⁸⁹ *Id.* (Powell, J., dissenting). See *Hicks*, 107 S. Ct. at 1159 (O'Connor, J., dissenting) ("The additional intrusion caused by an inspection of an item in plain view for its serial number is miniscule.").

⁹⁰ *Id.* at 1156 (Powell, J. dissenting). See *supra* notes 35-41 and accompanying text for a discussion of the majority's view.

⁹¹ *Hicks*, 107 S. Ct. at 1156.

⁹² *Id.* (Powell, J., dissenting). Justice Powell noted that, inside Hick's apartment, police found three weapons, a stocking-cap mask, drug paraphernalia, and expensive stereo components. *Id.* (Powell, J., dissenting).

of probable cause.⁹³

Justice Powell then asked the majority what Officer Nelson should have done upon discovering expensive and often stolen stereo equipment in a run-down apartment containing three weapons and a stocking-cap mask.⁹⁴ First, Justice Powell reasoned that if Officer Nelson lacked probable cause, he could not have secured a warrant for the seizure of the equipment.⁹⁵ He also noted that Officer Nelson could not have stayed in the apartment and forcibly prevented the equipment's removal.⁹⁶ Justice Powell then described Officer Nelson's actions in recording the serial numbers.⁹⁷

Next, Justice Powell reiterated the Court's holding that there was an unlawful search of the turntable, although there was no seizure.⁹⁸ Justice Powell reasoned that, under the Court's decision, if police headquarters had identified as stolen one of the components with a visible serial number, the evidence would have been admissible.⁹⁹ However, noted Justice Powell, the majority held that, because the turntable was moved, a search had taken place.¹⁰⁰ Justice Powell stressed that the "distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few inches trivializes the Fourth Amendment."¹⁰¹

Finally, Justice Powell predicted that the new rule announced by the Court "will cause uncertainty, and could deter conscientious police officers from lawfully obtaining evidence necessary to convict guilty persons."¹⁰² He also cautioned that the Court's rule "may handicap law enforcement without enhancing privacy interests."¹⁰³

D. JUSTICE O'CONNOR'S DISSENT

Justice O'Connor's dissent reflected her disagreement with the

⁹³ *Id.* (Powell, J., dissenting).

⁹⁴ *Id.* (Powell, J., dissenting).

⁹⁵ *Id.* (Powell, J., dissenting).

⁹⁶ *Id.* (Powell, J., dissenting).

⁹⁷ *Id.* (Powell, J., dissenting). Justice Powell noted that Officer Nelson could read some of the serial numbers without moving them, but that Officer Nelson did move the turntable in question. Justice Powell also stated that Officer Nelson checked the serial numbers against the National Crime Information Center's records, which listed the turntable as stolen. Justice Powell added that Officer Nelson then seized the turntable and procured a warrant for the rest of the equipment. *Id.* (Powell, J., dissenting).

⁹⁸ *Id.* (Powell, J., dissenting).

⁹⁹ *Id.* (Powell, J., dissenting). If the serial numbers had been visible, Officer Nelson would not have moved the turntable and his actions would not have constituted a search.

¹⁰⁰ *Id.* (Powell, J., dissenting).

¹⁰¹ *Id.* at 1157 (Powell, J., dissenting). It is not definite that the turntable was moved only a few inches. See *supra* note 17.

¹⁰² *Id.* (Powell, J., dissenting).

¹⁰³ *Id.* (Powell, J., dissenting).

majority's classification of Officer Nelson's actions as a "full-blown search."¹⁰⁴ Although she supported the majority's rule that police must have probable cause to seize or conduct a "full-blown search" of an item in plain view, Justice O'Connor did not regard Officer Nelson's actions as constituting a "full-blown search."¹⁰⁵ Justice O'Connor characterized Officer Nelson's actions as a "cursory inspection of an item in plain view."¹⁰⁶ She then concluded that such "cursory inspections" are justifiable if the police have a reasonable suspicion that the item in question is evidence of a crime.¹⁰⁷

Justice O'Connor began by explaining that *Coolidge* required, in order for a plain view search to be lawful, that (1) the initial intrusion providing the officer with an opportunity to view an area be lawful; (2) the officer "inadvertently" discover the incriminating evidence; and (3) it be "immediately apparent" to the officer that the observed items may be contraband or evidence of a crime.¹⁰⁸ Justice O'Connor then stated that, although these three requirements have never been expressly adopted by a majority of the Court, "as the considered opinion of four members of this Court [they] should obviously be the point of reference for further discussion of the issue."¹⁰⁹

Next, Justice O'Connor found that the first two *Coolidge* requirements had been satisfied in this case because the officers were in Hicks' apartment legally and their discovery of the turntable was inadvertent.¹¹⁰ "Instead," stated Justice O'Connor, "the dispute in this case focuses on the application of the 'immediately apparent' requirement; at issue is whether a police officer's reasonable suspicion is adequate to justify a cursory examination of an item in plain

¹⁰⁴ *Id.* (O'Connor, J., dissenting). Chief Justice Rehnquist and Justice Powell joined Justice O'Connor's dissent. *Id.*

¹⁰⁵ *Id.* (O'Connor, J., dissenting).

¹⁰⁶ *Id.* (O'Connor, J., dissenting). Justice O'Connor defined a cursory inspection as "including picking up or moving objects for a better view." *Id.* at 1158 (O'Connor, J., dissenting). The majority, however, defined a cursory inspection as "one that involves merely looking at what is already exposed to view, without disturbing it." *Id.* at 1154.

¹⁰⁷ *Id.* at 1158 (O'Connor, J., dissenting).

¹⁰⁸ *Id.* at 1157 (O'Connor, J., dissenting). The requirements of the plain view doctrine set forth by Justice O'Connor are found in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plurality opinion). See *supra* note 27.

¹⁰⁹ *Id.* (O'Connor, J., dissenting) (quoting *Texas v. Brown*, 460 U.S. 730, 737 (1983) (plurality opinion)). The *Brown* Court thought that the three requirements should be the reference point for further discussion because they were the *Coolidge* plurality's considered opinion. *Brown*, 460 U.S. at 737.

¹¹⁰ *Hicks*, 107 S. Ct. at 1157. Justice O'Connor noted that the officers were legally in Hicks' apartment because of exigent circumstances. She also contended that the discovery of the turntable was inadvertent because the officers did not know in advance that the evidence would be in the apartment. *Id.* (O'Connor, J., dissenting).

view.”¹¹¹

According to Justice O'Connor, the “immediately apparent” requirement protects fourth amendment rights by preventing “general, exploratory rummaging in a person’s belongings.”¹¹² She reasoned that the Court’s requirement that an item’s relevance be “immediately apparent” prevented limited searches from evolving into indiscriminate searches of any and all items in plain view.¹¹³ Thus, Justice O'Connor agreed with the majority that probable cause was necessary to justify seizures and “full-blown searches” of evidence in plain view.¹¹⁴ However, Justice O'Connor argued that probable cause was not necessary to validate a “mere inspection” of a suspicious item in plain view.¹¹⁵

Justice O'Connor asserted that a cursory inspection of a suspicious item in plain view involved no “exploratory rummaging,” affected only items “reasonably suspect[ed]” to be evidence of a crime, and was quite limited in scope.¹¹⁶ She argued that “if police officers have a reasonable, articulable suspicion that an object they come across during the course of a lawful search is evidence of crime . . . they may make a cursory examination of the object to verify their suspicion.”¹¹⁷ Justice O'Connor then concluded that officers need probable cause to examine an object only if their investigation extends beyond such a cursory inspection.¹¹⁸

Next, Justice O'Connor declared that the distinction between a “full-blown search” and a “mere inspection” of an item was first proposed by Justice Stewart in his concurrence in *Stanley v. Georgia*.¹¹⁹ She noted that Justice Stewart suggested that more liberal examinations of items in plain view would be lawful.¹²⁰

¹¹¹ *Id.* (O'Connor, J., dissenting).

¹¹² *Id.* (O'Connor, J., dissenting) (quoting *Coolidge*, 403 U.S. at 467 (1971) (plurality opinion)).

¹¹³ *Id.* at 1157-58 (O'Connor, J., dissenting).

¹¹⁴ *Id.* at 1158 (O'Connor, J., dissenting). Justice O'Connor stated that “[s]uch a requirement of probable cause will prevent the plain view doctrine from authorizing general searches.” *Id.* (O'Connor, J., dissenting).

¹¹⁵ *Id.* (O'Connor, J., dissenting).

¹¹⁶ *Id.* (O'Connor, J., dissenting).

¹¹⁷ *Id.* (O'Connor, J., dissenting).

¹¹⁸ *Id.* (O'Connor, J., dissenting).

¹¹⁹ *Id.* at 1158. *Stanley v. Georgia*, 394 U.S. 557 (1969).

¹²⁰ *Hicks*, 107 S. Ct. at 1158. In *Stanley*, police officers conducting a warranted search of appellant’s home for evidence of bookmaking found three rolls of film. *Stanley*, 394 U.S. 557. The officers viewed the films on a projector and arrested appellant for possession of obscene materials. *Id.* The Court held that it was unconstitutional under the first and fourteenth amendments to make private possession of obscene material a crime. *Id.* at 568. In his concurrence, Justice Stewart asserted that the case should have been decided on fourth amendment grounds. *Id.* at 569 (Stewart, J., concurring).

Justice O'Connor then stated that the "majority of both state and federal courts have held that probable cause is not required for a minimal inspection of an item in plain view."¹²¹ Quoting Professor LaFave, she explained that the majority of courts presumed that "the minimal additional intrusion which results from an inspection or examination of an object in plain view is reasonable if the officer was first aware of some facts and circumstances which justify a reasonable suspicion (not probable cause, in the traditional sense) that the object is or contains a fruit, instrumentality, or evidence of a crime."¹²²

Thus, Justice O'Connor concluded that courts required only a reasonable suspicion for cursory examinations and that such cursory examinations included the acts of lifting or moving an object to obtain a better view.¹²³ Justice O'Connor then pointed out that a number of state courts have employed a reasonable suspicion standard in cases very similar to this one.¹²⁴

Although he believed that the films should have been suppressed, Justice Stewart seemed to suggest that more minimally intrusive inspections would be lawful: "This is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence in plain view. For the record makes clear that the contents of the films could not be determined by mere inspection." *Id.* at 571 (Stewart, J., concurring)(footnote omitted).

¹²¹ *Id.* (O'Connor, J., dissenting).

¹²² *Id.* (O'Connor, J., dissenting)(quoting 2 LAFAVE, *supra* note 3, § 6.7(b), at 717). Justice O'Connor further noted Professor LaFave's summarization that "[i]t is generally assumed that there is nothing improper in merely picking up an unnamed article for the purpose of noting its brand name or serial number or other identifying characteristics to be found on the surface." *Id.* (O'Connor, J., dissenting)(quoting 2 LAFAVE, *supra* note 3, § 4.11(c), at 345).

¹²³ *Hicks*, 107 S. Ct. at 1158-89. In support of her observation, Justice O'Connor cited: "See, e.g., *United States v. Marbury*, 732 F.2d 390, 399 (CA5 1984) (police may inspect an item found in plain view to determine whether it is evidence of a crime if they have a reasonable suspicion to believe that the item is evidence); *United States v. Hilliard*, 677 F.2d 1336, 1342 (CA9 1982) (police may give suspicious documents brief perusal if they have a 'reasonable suspicion'); *United States v. Wright*, 667 F.2d 793, 798 (CA9 1982) ('[A]n officer may conduct such an examination if he at least has a 'reasonable suspicion' to believe that the discovered item is evidence.');" *United States v. Roberts*, 619 F.2d 379, 381 (CA5 1980) ('Police officers are not required to ignore the significance of items in plain view even when the full import of the objects cannot be positively ascertained without some examination.');" *United States v. Ochs*, 595 F.2d 1247, 1257-58, and n.8 (CA2 1979) (Friendly, J.) (same)." *Id.* (O'Connor, J., dissenting).

¹²⁴ *Hicks*, at 1159. Justice O'Connor cited: "See, e.g., *State v. Noll*, 116 Wis. 2d 443, 343 N.W.2d 391 (1984) (officer upon seeing television could check serial numbers); *State v. Riedinger*, 374 N.W.2d 866 (N.D. 1985) (police, in executing warrant for drugs, could check serial number of microwave oven); *People v. Dorris*, 110 Ill. App. 3d 660, 442 N.E.2d 951 (1982) (police may note account number of deposit slip because, when the police have a reasonable suspicion that an item in plain view is stolen property, the minimal additional intrusion of checking external identification numbers is proper); *State v. Proctor*, 12 Wash. App. 274, 529 P.2d 472 (1974) (upholding police notation of serial numbers on calculators); *People v. Eddington*, 23 Mich. App. 210, 178 N.W.2d 686 (1970) (upholding examination of the heel of shoes), *rev'd on other ground*, 387 Mich. 551, 198 N.W.2d 297 (1972)." *Id.* (O'Connor, J., dissenting).

Furthermore, Justice O'Connor maintained that distinguishing searches according to their degree of intrusiveness was consistent with the Court's fourth amendment jurisprudence.¹²⁵ She noted that the Court has recognized that the intrusiveness of searches can differ and that "some brief searches 'may be so minimally intrusive' of Fourth Amendment interests that strong countervailing governmental interests will justify a [search] based only on specific articulable facts' that the item in question is contraband or evidence of a crime."¹²⁶ Justice O'Connor pointed out that in *Delaware v. Prouse*¹²⁷ the Court held that the permissibility of a law enforcement practice should be determined by balancing its intrusion on citizens' fourth amendment rights against its advancement of legitimate governmental interests.¹²⁸ She then noted that where this balancing indicated that a standard of reasonableness that "stops short of probable cause" best effectuated the public interest, the Court has "not hesitated to adopt such a standard."¹²⁹ Justice O'Connor stressed that the test was not whether "operational necessities render [a standard less than probable cause] the only practicable means of detecting certain types of crimes."¹³⁰ Rather, Justice O'Connor declared the test to be whether the law enforcement interests are substantial enough to warrant the adoption of a reasonable suspicion standard.¹³¹

Next, Justice O'Connor concluded that a balancing of governmental and privacy interests favored the establishment of a reasonable suspicion standard for the cursory inspection of items in plain view.¹³² Comparing the police action in this case to the severe, yet lawful, intrusions in *United States v. Place*¹³³ and *Terry v. Ohio*,¹³⁴ Jus-

¹²⁵ *Hicks*, 107 S. Ct. at 1159 (O'Connor, J., dissenting).

¹²⁶ *Id.* (O'Connor, J., dissenting)(quoting *United States v. Place*, 462 U.S. 696, 706 (1983)).

¹²⁷ 440 U.S. 648 (1979) (officer cannot stop a vehicle to check for license and registration if he has no articulable and reasonable suspicion to suspect that the driver is unlicensed or the vehicle is unregistered).

¹²⁸ *Hicks*, 107 S. Ct. at 1159 (O'Connor, J., dissenting)(citing *Prouse*, 440 U.S. at 654).

¹²⁹ *Id.* (O'Connor, J., dissenting)(quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)).

¹³⁰ *Id.* (O'Connor, J., dissenting)(quoting *Hicks*, 107 S. Ct. at 1154). *But see supra* notes 63-64 and accompanying text for the majority's view.

¹³¹ *Hicks*, 107 S. Ct. at 1159 (O'Connor, J., dissenting). Justice O'Connor noted that the governmental interests involved in *Hicks* included crime prevention and detection. *Id.* (O'Connor, J., dissenting)(citation omitted).

¹³² *Id.* (O'Connor, J., dissenting).

¹³³ 462 U.S. 696 (1983) (Although ninety-minute detention of respondent's luggage was unreasonable, the Court stated that a properly limited investigative detention of traveler's luggage to expose it to a trained narcotics detection dog would be permissible).

tice O'Connor regarded the recording of the serial numbers in *Hicks* as a "miniscule" intrusion.¹³⁵

Furthermore, Justice O'Connor asserted that this minor invasion of privacy must be weighed against substantial gains in law enforcement.¹³⁶ Noting that serial numbers were a powerful law enforcement mechanism,¹³⁷ Justice O'Connor reasoned that the weighing of governmental interests against private interests supported the view that fourth amendment requirements were satisfied by a reasonable suspicion standard.¹³⁸

Justice O'Connor then declared that, in its attempt to set out a bright line rule, the majority had "ignore[d] a substantial body of precedent and . . . [placed] serious roadblocks to reasonable law enforcement practices."¹³⁹ She pointed out that, in this particular case, the officers could not have secured a search warrant on the basis of reasonable suspicion nor, under the Court's position, could they have moved the turntable to record the serial number.¹⁴⁰ Justice O'Connor found that the "theoretical advantages of the 'search is a search' approach adopted by the Court . . . are simply too remote to justify the tangible and profound damage it inflicts on legitimate and effective law enforcement."¹⁴¹

Moreover, Justice O'Connor asserted that even if the proper standard in this case was probable cause, it would have been satisfied.¹⁴² She reasoned that when police officers, conducting a lawful search, come across the "tools of a thief" and observe expensive stereo equipment which seem incongruous with their surroundings, "the 'flexible commonsense standard' of probable cause has been satisfied."¹⁴³

¹³⁴ 392 U.S. 1 (1968) (permitting a reasonable search for weapons for the police officer's protection if he has reason to believe an individual is armed and dangerous, regardless of whether officer has probable cause to arrest the individual for a crime).

¹³⁵ *Hicks*, 107 S. Ct. at 1159-60 (O'Connor, J., dissenting).

¹³⁶ *Id.* at 1160 (O'Connor, J., dissenting).

¹³⁷ *Id.* (O'Connor, J., dissenting).

¹³⁸ *Id.* (O'Connor, J., dissenting).

¹³⁹ *Id.* (O'Connor, J., dissenting).

¹⁴⁰ *Id.* (O'Connor, J., dissenting).

¹⁴¹ *Id.* (O'Connor, J., dissenting) (quoting *Hicks*, 107 S. Ct. at 1153).

¹⁴² *Id.* (O'Connor, J., dissenting).

¹⁴³ *Id.* (O'Connor, J., dissenting) (citation omitted). Justice O'Connor's full statement reads:

When police officers, during the course of a search inquiring into a grievously unlawful activity, discover the tools of a thief (a sawed-off rifle and a stocking mask) and observe in a small apartment *two* sets of stereo equipment that are both inordinately expensive in relation to their surroundings and known to be favored targets of larcenous activity, the 'flexible commonsense standard' of probable cause has been satisfied.

Id. (O'Connor, J., dissenting) (emphasis in original) (citation omitted).

Finally, Justice O'Connor concluded by stating that she dissented with the Court's opinion because it "ignores the existence of probable cause and in doing so upsets a widely accepted body of precedent on the standard of reasonableness for the cursory examination of evidence in plain view."¹⁴⁴

IV. ANALYSIS

Although the Court has previously attempted to delineate ground rules governing the applicability of the plain view doctrine, ambiguity remains concerning the degree of cause necessary for the doctrine's invocation.¹⁴⁵ Lower courts, both federal and state, have yet to decide conclusively whether probable cause or reasonable suspicion is needed in order to invoke the plain view doctrine.¹⁴⁶ In *Hicks*, the Court explicitly set out the minimum standard by holding that probable cause was required to justify searches and seizures of items in plain view.¹⁴⁷

The majority's decision went much further than simply establishing a bright line rule for determining the applicability of the plain view doctrine. In order to reach this issue, the Court initially decided that a fourth amendment interest had been implicated.¹⁴⁸ The Court's holding that the police action in *Hicks* constituted a search will have an extensive impact upon future police conduct. Absent probable cause, the police cannot search or seize an item in plain view.¹⁴⁹ Moreover, a fourth amendment search includes the manipulation of an item in order to record its serial number when that serial number is not plainly visible.¹⁵⁰ Although the dissenting Justices agreed with the majority that probable cause was required for plain view searches and seizures, the Court was divided on the

¹⁴⁴ *Id.* (O'Connor, J., dissenting).

¹⁴⁵ See *supra* notes 5-9 and accompanying text.

¹⁴⁶ See, e.g., *United States v. Wright*, 667 F.2d 793, 798-99 (9th Cir. 1982) (officer unlawfully perused a notebook he did not have at least a "reasonable suspicion" to believe was evidence of a crime); *United States v. Clark*, 531 F.2d 928, 932-33 (8th Cir. 1976) (police could not record the serial number of a pistol found in plain view because they had no "reasonable cause" to believe the pistol was evidence of a crime); *Wright v. State*, 88 Nev. 460, 465-67, 499 P.2d 1216, 1219-21 (1972) (police seizure of gun found in plain view was lawful because probable cause existed to believe it was instrumentality or evidence of a crime); *Thomas v. Superior Court*, 22 Cal. App. 3d 972, 976-80, 99 Cal. Rptr. 647, 649-52 (1972) (police seizure of a "suspicious-looking" hand-rolled cigarette found in plain view was unlawful because police had no probable cause to believe it was contraband).

¹⁴⁷ *Hicks*, 107 S. Ct. at 1153-54.

¹⁴⁸ *Id.* at 1152.

¹⁴⁹ *Id.* at 1153-54.

¹⁵⁰ *Id.* at 1152.

question of what conduct constitutes a search.¹⁵¹ The *Hicks*' majority holding that the moving of an object to record its serial number constitutes a search respects individuals' privacy interests, and by requiring probable cause for plain view searches and seizures, the Court prevents unreasonable police intrusion upon individuals' privacy interests.

A. IMPLICATION OF A FOURTH AMENDMENT INTEREST

The threshold issue in *Hicks* concerned whether an additional search or seizure occurred beyond the initial lawful search.¹⁵² The fourth amendment's proscriptions apply only to governmental acts which are searches and seizures.¹⁵³ Hence, if Officer Nelson's actions did not amount to either a search or seizure, they need not have been reasonable because they would not be governed by the fourth amendment.¹⁵⁴

The majority reasoned that Officer Nelson's movement of the turntable to record its serial numbers violated Hicks' privacy and constituted a search.¹⁵⁵ The dissenting Justices, however, regarded Officer Nelson's actions as an insignificant invasion of Hicks' privacy and vehemently objected to the majority's holding that Officer Nelson's actions constituted a search.¹⁵⁶

A search is any governmental action which intrudes upon a legitimate expectation of privacy.¹⁵⁷ Traditionally, courts have employed a two-part test to determine the existence of a legitimate expectation of privacy.¹⁵⁸ This test, proposed by Justice Harlan in

¹⁵¹ Compare *id.* at 1154 with *id.* at 1156-57 (Powell, J., dissenting) and *id.* at 1158-59 (O'Connor, J., dissenting).

¹⁵² *Id.* at 1152. Both parties conceded that the initial entry to search for the assailant, victims, and weapons was justified under the exigent circumstances exception to the warrant requirement. See *supra* note 47 and accompanying text.

¹⁵³ See *United States v. Dionisio*, 410 U.S. 1, 13-15 (1973); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 388 (1974) ("It is only 'searches' or 'seizures' that the fourth amendment requires to be reasonable: police activities of any other sort may be as unreasonable as the police please to make them."); Comment, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-Katz Jurisprudence*, 61 WASH. L. REV. 191 (1986).

¹⁵⁴ See sources cited *supra* note 153.

¹⁵⁵ *Hicks*, 107 S. Ct at 1152. See *supra* notes 32-34 and accompanying text.

¹⁵⁶ *Id.* at 1156-57 (Powell, J., dissenting); *id.* at 1158-59 (O'Connor, J., dissenting). See *supra* notes 100-01, 104-06 and accompanying text.

¹⁵⁷ See *Hicks*, 107 S. Ct. at 1152 ("Merely inspecting those parts of the turntable that came into view . . . would not have constituted an independent search, because it would have produced no additional invasion of respondent's privacy interest."); *Illinois v. Andreas*, 463 U.S. 765, 771 (1983) ("If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no search' subject to the Warrant Clause.") (citation omitted).

¹⁵⁸ Project, *supra* note 2, at 715.

his concurrence in *Katz v. United States*,¹⁵⁹ requires: "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.'" ¹⁶⁰

Courts routinely do not distinguish between the two prongs of the *Katz* test.¹⁶¹ Rather, the central point of analysis as to whether an act constitutes a search is the "reasonableness of the expectations of privacy."¹⁶² An individual's subjective expectation of privacy must be "reasonable"¹⁶³ in order to be valid. The "reasonableness" of an individual's subjective expectation is, in turn, determined by what society recognizes as reasonable.¹⁶⁴

¹⁵⁹ 389 U.S. 347, 360 (1967) (Harlan, J., concurring)(electronic surveillance of telephone booth violated petitioner's privacy expectation and, thus, constituted a fourth amendment search).

¹⁶⁰ *Id.* at 361 (Harlan, J., concurring). Justice Harlan's interpretation of the majority's opinion is set forth:

"[T]he Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. . . . My understanding. . . is that there 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." Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of the outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under these circumstances would be unreasonable.

Id. (quoting *id.* at 351). Commentators have criticized the subjective aspect of Justice Harlan's test.

An actual, subjective expectation of privacy obviously has no place in a statement of what *Katz* held or in a theory of what the fourth amendment protects. It can neither add to, nor can its absence detract from, an individual's claim to fourth amendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance.

Amsterdam, *supra* note 153, at 384. Subsequently agreeing with Professor Amsterdam, Justice Harlan advised that the Court's analysis "must . . . transcend the search for subjective expectations" for "[o]ur expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of past and present." *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

¹⁶¹ Note, *The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?*, 60 N.Y.U. L. Rev. 725, 744-45 (1985).

¹⁶² *Id.* at 753-54. An individual satisfies the first prong of the *Katz* test if his conduct demonstrates an expectation of privacy—if he does not knowingly expose his activities and things to the open view of the public. *Id.*

¹⁶³ For the purposes of this Note, a "reasonable" expectation of privacy is one that is "legitimate" or "justified"—one which society is prepared to accept. But see Comment, *supra* note 153, at 194-95, for a discussion of the difference between a "reasonable" expectation of privacy and one that is "legitimate" or "justified."

¹⁶⁴ See Note, *The Concept of Privacy and the Fourth Amendment*, 6 U. MICH. J.L. REF. 154 (1972).

Beginning with Justice Harlan's assertion in *Katz* that the standard should be what "society is prepared to recognize as 'reasonable,'" courts, when they have consid-

Accordingly, the courts look to societal mores, customs, and values to determine if a search has taken place.¹⁶⁵ These societal customs shape and define not only an individual's conception of his subjective privacy right, but also the types of expectations which "society is prepared to recognize as 'reasonable.'"¹⁶⁶

The *Hicks* Court's decision that the recording of the serial numbers constituted a search is consistent with its fourth amendment jurisprudence.¹⁶⁷ Although the Court failed to conduct a detailed analysis of the legitimacy of Hicks' privacy interest, its assumption that a privacy interest in the serial numbers was a reasonable expectation recognized by society was valid.¹⁶⁸ Society would recognize as reasonable an expectation of privacy in serial numbers on stereo equipment kept inside a private dwelling and not exposed to the plain view of the public. Moreover, Hicks' privacy interest in the serial numbers was not extinguished by the officer's presence in the apartment to search for victims, assailants, and weapons.¹⁶⁹

Having determined that Hicks had a reasonable privacy interest, the Court then addressed the issue of how far the police could extend their examinations of objects in plain view before violating Hicks' privacy interests.¹⁷⁰ The majority regarded Officer Nelson's movement of the turntable to record its serial numbers as invasive of Hicks' privacy interests.¹⁷¹

ered the matter, seem to have drawn upon the customs and sensibilities of the populace in determining what expectations of privacy are constitutionally reasonable. Secondly, the realization of privacy is itself very much a product of life in a human community, made possible through operation of socialization and social controls. The quantity and quality of seclusion available to an individual or group are socially and culturally determined, and in that sense society and culture may be said to dictate what sorts of privacy one may reasonably expect, at least in social situations. Thus the appropriate frame of reference is a collective one. The criteria for reasonable expectations must be abstracted from the flow of life, and it is the judges' task to find and articulate those societal standards.

Id. at 179-80 (emphasis in original)(footnotes omitted).

¹⁶⁵ See *United States v. White*, 401 U.S. 745, 768 (1971) (Harlan, J., dissenting); *supra* notes 160 and 164.

¹⁶⁶ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

¹⁶⁷ See *infra* notes 168-69 and accompanying text.

¹⁶⁸ In *Katz*, 389 U.S. at 360 (Harlan, J., dissenting), defendant's expectation of privacy was reasonable because, by enclosing himself in a public phone booth, defendant exhibited an expectation of privacy and because society, in general, would also expect privacy in a phone booth. *Id.* (Harlan, J., concurring). Similarly, Hicks evidenced a reasonable expectation of privacy because he kept the stereo equipment in his apartment away from the public's plain view and because society expects privacy regarding personal effects in homes.

¹⁶⁹ See *Mincey v. Arizona*, 437 U.S. 389, 391 (1978) (individual who shot police officer in his apartment did not forfeit reasonable expectation of privacy).

¹⁷⁰ *Hicks*, 107 S. Ct. at 1152.

¹⁷¹ *Id.*

On the other hand, Justice Powell and Justice O'Connor¹⁷² were opposed to the majority's conclusion that the facts of this case constituted a search.¹⁷³ Both dissenting Justices failed to give due consideration to Hicks' legitimate privacy interest in the serial numbers not being exposed to plain view.¹⁷⁴ Although the movement of the turntable was slight, it was not inconsequential for fourth amendment purposes.¹⁷⁵ Such a slight invasion of privacy, as in this instance, lays the groundwork for more egregious fourth amendment violations in the future.¹⁷⁶ Thus, the Court correctly concluded that its bright-line rule was necessary to prevent evisceration of fourth amendment guarantees.¹⁷⁷

Additionally, the dissenters' approach fails to provide law enforcement agencies with clear, definitive rules to guide their conduct. Under Justice O'Connor's position,¹⁷⁸ law enforcement agencies, as well as courts, would be expected to routinely differentiate between "full blown searches" and " cursory examinations." Such fine distinctions would be inherently arbitrary and difficult to make. Conversely, the majority's decision set out definitive and workable guidelines which law enforcement agencies can effectively implement.¹⁷⁹

Furthermore, the position adopted by Justices Powell and O'Connor is not necessary to justify Officer Nelson's actions.¹⁸⁰ The majority's holding that a search occurred does not absolutely mandate exclusion of the evidence derived as a result of that

¹⁷² For a discussion of Justice Powell's dissent, see *supra* notes 86-103 and accompanying text. For a discussion of Justice O'Connor's dissent, see *supra* notes 104-144 and accompanying text.

¹⁷³ *Id.* at 1156 (Powell, J., dissenting); *id.* at 1157-58 (O'Connor, J., dissenting). Justice Powell referred to the majority's distinction between "merely looking" at and "moving" an object as a trivialization of the fourth amendment. *Id.* at 1156 (Powell, J., dissenting). Justice O'Connor categorized Officer Nelson's conduct as "cursory examination" which must be distinguished from a "full blown search" and which can be justified by a reasonable suspicion. *Id.* at 1158 (O'Connor, J., dissenting).

¹⁷⁴ See *supra* text accompanying notes 168-69.

¹⁷⁵ *Hicks*, 107 S. Ct. 1152-53.

¹⁷⁶ Over one hundred years ago, Justice Bradley stated:

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.

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

¹⁷⁷ See, *Hicks*, 107 S. Ct. at 1155.

¹⁷⁸ *Id.* at 1158 (O'Connor, J., dissenting). See *supra* note 173.

¹⁷⁹ See *Hicks*, 107 S. Ct., at 1152-53.

¹⁸⁰ See *supra* note 156 and accompanying text.

search.¹⁸¹ Warrantless searches are neither *ipso facto* unreasonable nor automatically unconstitutional.¹⁸² There are certain situations in which additional and separate searches of this type are permissible.¹⁸³

The Court's approach is forthright and avoids further complication of fourth amendment jurisprudence. The majority's rule demands that conduct amounting to a search be labeled as such. Such searches should then be analyzed to determine whether they are justifiable under established principles and doctrines.¹⁸⁴

B. PROBABLE CAUSE AND THE PLAIN VIEW DOCTRINE

In *Coolidge*, the Court declared that "under certain circumstances police may seize evidence in plain view without a warrant."¹⁸⁵ Such circumstances occur when the police come within plain view of the evidence as a result of a lawful intrusion supported by a "recognized exception(s) to the warrant requirement"; the discovery of the evidence is inadvertent; and the incriminating nature of the evidence is immediately apparent.¹⁸⁶ Before *Hicks*, it was unclear whether a reasonable suspicion, rather than probable cause, was sufficient to satisfy the "immediately apparent" prong of the plain view doctrine.¹⁸⁷

The *Hicks* Court's holding, that probable cause is necessary for searches and seizures under the plain view doctrine,¹⁸⁸ preserves essential fourth amendment rights. The Court has determined that an individual's fourth amendment right to be free from unreasonable searches and seizures is best served by a general requirement for warrants based on probable cause.¹⁸⁹ Although some warrantless searches and seizures are permissible, they must be based on probable cause.¹⁹⁰ The concept of probable cause embodies what the Court has long considered the most acceptable compromise be-

¹⁸¹ *Hicks*, 107 S. Ct. at 1153.

¹⁸² *Id.*

¹⁸³ *Id.* The *Hicks* court stated that seizures could be justified on less than probable cause if the "seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime." *Id.* at 1154. See *supra* note 63 for the cases cited by the majority in support of its observation.

¹⁸⁴ *Hicks*, 107 S. Ct. at 1153.

¹⁸⁵ *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (plurality opinion).

¹⁸⁶ *Id.* at 465. For a more extensive summary of the plain view doctrine, see *supra* note 27.

¹⁸⁷ See *supra* note 146 and accompanying text.

¹⁸⁸ *Hicks*, 107 S. Ct. at 1153.

¹⁸⁹ See, e.g., Project, *supra* note 2, at 722-23; 2 LAFAVE, *supra* note 3, § 4.1, at 118.

¹⁹⁰ 1 LAFAVE, *supra* note 3, § 3.1(a), at 542-43. But see *infra* text accompanying notes 203-05.

tween an individual's constitutional "right to be let alone"¹⁹¹ and the government's interest in enforcing its laws.¹⁹² As such, the concept of probable cause is central to the protection of fourth amendment rights.¹⁹³

The plain view doctrine should not be exempt from the probable cause requirement. The plain view doctrine's purpose is to spare police who encounter an item of evidence during the course of a legal investigation the inconvenience and possible danger involved in obtaining a warrant.¹⁹⁴ Sparing police, in certain situations, from having to procure a warrant should not, however, excuse them from meeting the standard of proof required for the obtaining of a warrant. Thus, the majority correctly reasoned that it would be illogical to permit the police to search or seize an item in plain view on a lesser standard of cause than would be necessary for them to procure a warrant.¹⁹⁵

Although she agreed with the majority that seizures and "full blown searches" of items in plain view must be justified by probable cause, Justice O'Connor proffered that less intrusive searches could be justified on lesser grounds.¹⁹⁶ Justice O'Connor stated that the majority of state and federal courts have held that probable cause is only required for extensive examinations and that cursory examinations, such as the moving of an object for a better view, can be justified on the basis of a reasonable suspicion.¹⁹⁷ The cases Justice O'Connor cited in support of her observation¹⁹⁸ stand for the proposition that, because the incriminating nature of an item is not always immediately apparent, the police may, upon a reasonable suspicion, inspect an item to determine whether it has an incriminating nature.¹⁹⁹ The circularity of Justice O'Connor's reasoning is ap-

¹⁹¹ *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting). In his frequently cited dissent in *Olmstead*, Justice Brandeis declared that the fourth amendment "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Id.* at 478 (Brandeis, J., dissenting).

¹⁹² See, *Brinegar v. United States*, 338 U.S. 160 (1949).

¹⁹³ 1 *LAFAYETTE*, *supra* note 3, § 3.1, at 540.

¹⁹⁴ See *Coolidge v. New Hampshire*, 403 U.S. 443, 467-68 (1971)(plurality opinion).

¹⁹⁵ *Hicks*, 107 S. Ct. at 1154.

¹⁹⁶ *Id.* at 1158 (O'Connor, J., dissenting).

¹⁹⁷ *Id.* (O'Connor, J., dissenting). See *supra* notes 123-24 and accompanying text for the cases Justice O'Connor cited in support of her proposition.

¹⁹⁸ See *supra* note 197 and accompanying text.

¹⁹⁹ See, e.g., *United States v. Hillyard*, 677 F.2d 1336, 1341 (9th Cir. 1982) (a notebook found in the cab of a seized truck could properly be "perused" as evidence in plain view and could have been seized once its contents were known); *United States v. Wright*, 667 F.2d 793, 798 (9th Cir. 1982) (because the incriminating nature may not be immediately apparent without closer inspection of the item, the officer may conduct such an inspec-

parent because a closer examination is necessary to determine an item's immediately apparent incriminating nature. If an item's incriminating nature is not readily apparent without a closer examination, then how can it be argued that the item's incriminating nature is immediately apparent? If the police need to inspect an item to determine whether it has an incriminating nature, then the item's incriminating nature is not immediately apparent.

Justice O'Connor further asserted that "the permissibility of a particular law enforcement practice should be judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of a legitimate government interest."²⁰⁰ Accordingly, Justice O'Connor suggested that in any situation in which the particular government interest outweighed the degree of invasiveness of a search, the search should be constitutionally permissible.²⁰¹ That is not what the Court meant when it observed, in *United States v. Place*,²⁰² that some searches "may be so 'minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a [search] based only on specific articulable facts' that the item in question is contraband or evidence of a crime."²⁰³ The *Hicks* Court declared that only under very specific circumstances will seizures based on less than probable cause be constitutionally permissible.²⁰⁴ In these circumstances, not only must the intrusion be minimal, but "operational necessities [must] render it the only practicable means of detecting certain types of crime."²⁰⁵

Justice O'Connor interpreted the Court's willingness to adopt a standard of suspicion less than probable cause in a very limited number of situations as a declaration of *carte blanche* to permit searches whenever the government interest involved outweighed

tion if he has reasonable suspicion); *United States v. Roberts*, 619 F.2d 379, 381 (5th Cir. 1980) (the incriminating character of objects seized was apparent through casual inspection; once police were alerted to the operation, they had probable cause to believe the items were evidence); *State v. Riedinger*, 374 N.W.2d 866, 875 (N.D. 1985) ("[O]fficer's reasonable suspicions that oven was stolen goods justified the very minimal intrusion on privacy to check the serial number. Upon verification of its stolen character via radio, it was 'immediately apparent' that there was probable cause to justify its seizure . . ."); *People v. Dorris*, 110 Ill. App. 3d 660, 667, 442 N.E.2d 951, 956 (1982) ("[W]hen the police have a reasonable suspicion that an item in plain view is stolen property, the minimal additional intrusion of checking external identification numbers is proper.").

²⁰⁰ *Hicks*, 107 S. Ct. at 1159. (O'Connor, J., dissenting).

²⁰¹ See *id.* at 1159-60 (O'Connor, J., dissenting).

²⁰² 462 U.S. 696 (1983).

²⁰³ *Id.* at 706.

²⁰⁴ See *Hicks*, 107 S. Ct. at 1154.

²⁰⁵ *Id.*

the intrusion. She failed, however, to note that the Court has set strict rules as to when governmental interests can override individuals' privacy rights.²⁰⁶ Although the governmental interests involved in this case, crime prevention and detection,²⁰⁷ are significant, no operational necessities are present, and such interests alone are insufficient to waive the requirement of probable cause.²⁰⁸

Additionally, under Justice O'Connor's interpretation,²⁰⁹ the courts and law enforcement agencies would exercise a significant amount of discretion in balancing governmental interests against invasions of privacy. In every situation involving a search or a seizure, the courts would be free to decide if the governmental interest involved was sufficient to justify the invasion of the individual's privacy. Such discretion could easily lead to an abuse of police power at the expense of individuals' rights.²¹⁰

The majority removes much of this discretion by holding that probable cause is necessary to justify a plain view search.²¹¹ An explicit rule, such as the *Hicks* probable cause requirement, decreases the number of gradations in fourth amendment law. Furthermore, the majority's rule is most consistent with the fourth amendment ideal that all governmental searches and seizures be reasonable.²¹²

C. GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE

The State urged that the Court admit the evidence in question under the "good faith" exception to the exclusionary rule²¹³ even if the Court found that Officer Nelson's conduct constituted an illegal search.²¹⁴ Noting that certiorari was not granted on this question, the Court refused to consider the issue.²¹⁵ Although the Court

²⁰⁶ See *supra* notes 204-05 and accompanying text.

²⁰⁷ *Hicks*, 107 S. Ct. at 1159 (O'Connor, J., dissenting).

²⁰⁸ See *id.* at 1154.

²⁰⁹ See *supra* text accompanying note 200.

²¹⁰ See Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127, 1141-42 (1984).

Similarly, a Fourth Amendment jurisprudence that provides for minimum protections cannot ground itself in act utilitarianism or balancing. Under balancing, governmental need to search or seize could grow so high in relation to intrusiveness that no justification at all would be necessary for choosing one target over another. Great need might outweigh even a significant amount of intrusiveness, meaning that the government neither has to justify nor significantly restrict its activities.

Id. at 1141-42.

²¹¹ *Hicks*, 107 S. Ct. at 1153-54.

²¹² See *supra* notes 188-95 and accompanying text.

²¹³ See *infra* notes 216-18 and accompanying text for an explanation of the exclusionary rule and the "good faith" exception to the exclusionary rule.

²¹⁴ *Hicks*, 107 S. Ct. at 1155.

²¹⁵ *Id.*

properly declined to consider the issue, application of the "good faith" exception in this case would frustrate rather than promote the deterrent purpose of the exclusionary rule.²¹⁶

In *United States v. Leon*,²¹⁷ the Court established the "good faith" exception to the exclusionary rule.²¹⁸ *Leon* dealt with a police officer's objectively reasonable reliance on a warrant issued by a magistrate on an improper finding of probable cause.²¹⁹ The *Leon* Court felt that punishing the police officer, by means of excluding the relevant evidence, for the magistrate's error would have no deterrent effect on future police conduct and, thus, would not further the objectives of the exclusionary rule.²²⁰ Furthermore, the *Leon* Court explicitly stated that evidence should be excluded in cases in which the officer lacked "reasonable grounds for believing that the warrant was properly issued."²²¹

The Court has not specifically ruled on the question of whether the "good faith" exception to the exclusionary rule is applicable to warrantless activity "when that activity now becomes the predicate for a warrant, so that the defendant will not necessarily prevail by showing that the evidence obtained by executing the warrant was a fruit of an earlier unconstitutional warrantless search by the police."²²² Extension of the *Leon* "good faith" exception to warrantless searches would be unwise, as it would reduce investigation into the propriety of an officer's pre-warrant investigative techniques.²²³ When a magistrate issues a warrant, he does not inquire into the

²¹⁶ Under the exclusionary rule, evidence seized in violation of an individual's fourth amendment rights must be suppressed. Project, *supra* note 2, at 713. By suppressing illegally obtained evidence, the judiciary seeks to discourage future police misconduct. *Terry v. Ohio*, 392 U.S. 1, 12 (1968). The exclusionary rule's main purpose is the deterrence of unreasonable searches and seizures. See *id.* at 12 ("[I]ts major thrust is a deterrent one . . ."); 1 LAFAVE, *supra* note 3, at § 1.1(f).

The exclusionary rule's other functions are (1) to ensure that judges do not become "accomplices in the willful disobedience of a Constitution they are sworn to uphold," 1 LAFAVE, *supra* note 3, § 1.1(f), at 16-17 (quoting *Elkins v. United States*, 364 U.S. 206, 223 (1960)) and (2) to assure the people that the government will not profit from its illegal behavior and thus instill public trust in the government. *Id.* § 1.1(f), at 17.

²¹⁷ 468 U.S. 897 (1984).

²¹⁸ *Id.* at 913. The *Leon* Court held:

[T]he Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause.

Id. at 900.

²¹⁹ *Id.* at 903.

²²⁰ *Id.* at 919-21.

²²¹ *Id.* at 922-23.

²²² 2 LAFAVE *supra* note 3, § 1.3(f), at 65.

²²³ *Id.* at 66.

legality of the officer's methods for obtaining the information contained in his affidavit.²²⁴ By admitting evidence gathered pursuant to a warrant which is based on unlawfully obtained information simply because of an officer's good faith reliance on the warrant, the courts will be admitting the "fruit of a (warrantless) poisonous tree"²²⁵ and frustrating the deterrent purpose of the exclusionary rule.²²⁶

Quite possibly, the Court's silence on this matter signifies an indirect refusal to extend *Leon* to warrantless searches. Justice White, who authored the *Leon* opinion, has previously expressed his willingness to extend the "good faith" exception to warrantless searches.²²⁷ However, other members of the Court have cautioned against such an extension of the "good faith" exception.²²⁸

Application of the "good faith" exception to warrantless searches will frustrate the deterrent purpose of the exclusionary rule.²²⁹ Additionally, law enforcement agents will not be encouraged to utilize the warrant process for all non-emergency searches and seizures.²³⁰ Moreover, if extended to warrantless searches, the "good faith" exception "would be perceived and treated by the police as a license to engage in the same conduct in the future."²³¹ Had the Court ruled on the matter, it should have upheld the Arizona Court of Appeals' refusal to admit the evidence under the "good faith" exception to the exclusionary rule.

V. CONCLUSION

In *Ariona v. Hicks*,²³² the Court held that moving a stereo com-

²²⁴ *Id.* (citing Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises In Futility*, 60 IND. L.J. 287, 302 (1985)).

²²⁵ *Id.* (quoting Bradley, *supra* note 224, at 302).

²²⁶ *Id.* (citing Bradley, *supra* note 224, at 302).

²²⁷ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1052 (1984) (White, J., dissenting). Justice White stated that if the officers making the warrantless searches were "acting in objective good faith," under *Leon* the evidence would "not be suppressed even if it is held that their conduct was illegal." *Id.* at 1056.

²²⁸ In his dissent in *Leon*, Justice Brennan stated:

I am not at all confident that the exception unleashed today will remain so confined. Indeed, the full impact of the Court's regrettable decisions will not be felt until the Court attempts to extend this rule to situations in which the police have conducted a warrantless search solely on the basis of their own judgment about the existence of probable cause and exigent circumstances. When that question is finally posed, I for one will not be surprised if my colleagues decide once again that we simply cannot afford to protect Fourth Amendment rights.

United States v. Leon, 468 U.S. 897, 959 (1984) (Brennan, J., dissenting).

²²⁹ See *supra* notes 222-26 and accompanying text.

²³⁰ 1 LAFAYE, *supra* note 3, § 1.3(g), at 78.

²³¹ *Id.*

²³² 107 S. Ct. 1149 (1987).

ponent in plain view a few inches to record its serial number constituted a search under the fourth amendment.²³³ Furthermore, the Court held that such plain view searches and seizures could only be justified by probable cause and not by reasonable suspicion.²³⁴ The Court's decision will undoubtedly be criticized for perceiving a constitutional distinction between "looking" at an item in plain view and slightly "moving" that same item to obtain a better view. *Hicks* will also be criticized for needlessly circumscribing police conduct and thus allowing criminals to go free.

However, the *Hicks* Court did not simply establish a constitutional distinction between "looking" at and "moving" an object. The Court was protecting a legitimate expectation of privacy against police intrusion. The Court's bright-line rule for distinguishing between "cursory examinations" and searches is necessary to provide police with definitive and workable guidelines. Furthermore, the Court's holding that probable cause is necessary for searches and seizures under the plain view doctrine will reduce the number of gradations in fourth amendment jurisprudence by requiring that plain view intrusions meet the same standard of cause necessary for warranted intrusions. Such a requirement bases the permissibility of plain view searches and seizures on probable cause, which is the traditional benchmark for determining reasonable police conduct. In *Hicks*, the Court adopted a firm stance in protection of fourth amendment rights. Such a stance is essential to the preservation of the Constitution's fourth amendment guarantees.

ELSIE ROMERO

²³³ *Id.* at 1152.

²³⁴ *Id.* at 1153-54.