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Criminal Law: Search and Seizure: Fruits of Warrantless Automobile Inventory Search Admissible. (South Dakota v. Operman)

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RECENT DECISIONS

Criminal Law—Search and Seizure—Fruits of Warrantless Automobile Inventory Search Admissible—Last Term the United States Supreme Court in *South Dakota v. Opperman*¹ ruled that evidence seized during a warrantless automobile inventory is admissible in a criminal prosecution. This decision will have a substantial impact because it legitimizes the routine police inventory of impounded vehicles. Police departments throughout the United States inventory the contents of impounded vehicles ostensibly to protect the owner's interest in the vehicle and to protect the police from false property claims.² The inventory usually consists of a detailed examination and listing of all items within the car, including the contents of the trunk and glove compartment.³ The examination sometimes extends to the engine, locked suitcases or sealed containers.⁴ Because of the potentially unlimited scope of the inventory search, some courts have labeled it a police ploy for discovering evidence of crime where probable cause for obtaining a search warrant does not exist.⁵ *Opperman* rejects this view and finds that the fourth amendment's prohibition of unreasonable search and seizure is not violated by a warrantless inventory of an impounded automobile which is conducted according to standard police procedure.

1. 96 S. Ct. 3092 (1976).

2. *Cooper v. California*, 386 U.S. 58 (1967); *United States v. Kelehar*, 470 F.2d 176 (5th Cir. 1972); *United States v. Mitchell*, 458 F.2d 960 (9th Cir. 1972); *Cabbler v. Commonwealth*, 212 Va. 520, 184 S.E.2d 781 (1971), cert. denied, 405 U.S. 1073 (1972); *Warrix v. State*, 50 Wis. 2d 368, 184 N.W.2d 189 (1971).

3. For a general discussion of warrantless automobile inventory searches, see Comment, *Warrantless Searches & Seizures of Automobiles*, 87 HARV. L. REV. 835 (1974); Comment, *The Automobile Inventory Search and Cady v. Dombrowski*, 20 VILL. L. REV. 147 (1974); 1 OHIO N. L. REV. 344 (1974); 53 URBAN L.J. 347 (1975). See also Cleary, *Recent Developments in the Law of Search and Seizure*, 1 NAT'L J. OF CRIM. DEF. 21 (1975); Lamb, *Making of a Chief Justice: Warren Burger on Criminal Procedure*, 60 CORNELL L. REV. 743 (1975); Irons, *Burger Court; Discord in Search and Seizure*, 8 U. RICH. L. REV. 433 (1974).

4. *Lowe v. Caldwell*, 367 F. Supp. 46 (S.D. Ga. 1973); *People v. Sullivan*, 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S.2d 945 (1971); *Jackson v. State*, 243 So. 2d 396 (Miss. 1970). In *Caldwell* the court found that the police were justified in opening an envelope and reading a letter inside in order to protect the defendant's property interest. See also note 93 *infra*.

5. The first case to question the reasonableness of the inventory search and to limit the permissible scope of the warrantless automobile inventory was *Mozzetti v. Superior Court*, 4 Cal. 3d 699, 484 P.2d 84, 44 Cal. Repr. 412 (1971). Accord, *United States v. Lawson*, 487 F.2d 468 (8th Cir. 1973); *State v. McDougal*, 68 Wis. 2d 399, 228 N.W.2d 671 (1975); *State v. Keller*, 265 Or. 622, 510 P.2d 568 (1973); *State v. Gwinn*, 301 A.2d 291 (Del. Super. Ct. 1972).

The police impounded Opperman's car because he parked it in a restricted zone overnight. He left it locked with all windows closed. At the city impound lot, the police ordered the tow truck operator to break into the vehicle. An officer then seized a number of articles within the car including a watch on the dashboard and other items of personal property in the back seat of the car. After securing all articles of value within the area of his vision, the officer opened the unlocked glove compartment and found a plastic bag of marijuana. Opperman was then charged with and convicted of possession of marijuana.⁶ The South Dakota Supreme Court reversed the conviction,⁷ holding that the warrantless search of the glove compartment was unreasonable.⁸ On appeal to the United States Supreme Court, Opperman argued that because the police had no reason to believe that the car contained anything which posed a potential threat to public safety, the warrantless search of the contents of the closed glove compartment was unreasonable and violated the fourth amendment. The Supreme Court reversed the South Dakota court,⁹ holding that warrantless police inventories conducted pursuant to standard police procedures are reasonable and constitutionally permissible as to belongings left in plain view and in unlocked glove compartments.

It is the position of these writers that supporting precedent for the *Opperman* decision is slim. In addition, *Opperman* fails to discuss the central element in the analysis of the reasonableness of any search — the scope of the inventory. This article will examine *Opperman's* consistency with the fourth amendment reasonableness standard and with prior search and seizure law. It will also discuss the scope question left undecided in *Opperman* in light of the recent Wisconsin case of *State v. McDougal*.¹⁰ Finally, this article will attempt to predict the impact of *Opperman* on related automobile search situations.

6. Opperman was convicted of possession of less than one ounce of marijuana in violation of S.D. COMPILED LAWS ANN. § 39-17-95 (1967).

7. *State v. Opperman*, ____ S.D. ____, 228 N.W.2d 152 (1975).

8. The Supreme Court of South Dakota reasoned that: (a) where defendant's car was parked in a designated parking space and was towed for violating a mere parking ordinance, (b) where there was no indication that defendant could not have arranged for safekeeping of his car at the time or after it was towed, and (c) where there was no reason to believe that the car contained anything which posed a potential threat to public safety, the warrantless search of the car's closed glove compartment was unreasonable.

9. Burger, C.J., delivered the plurality opinion, joined by Blackmun, Rehnquist and Stevens, J.J.; Powell, J., filed a concurring opinion; Marshall, J., filed a dissenting opinion joined by Brennan and Stewart, J.J.; White, J., filed a separate dissent.

10. 68 Wis. 2d 399, 228 N.W.2d 671 (1975).

I. THE FOURTH AMENDMENT REASONABLENESS STANDARD

The fourth amendment to the United States Constitution provides that people have a right to be free from unreasonable searches and seizures of their persons, houses, papers and effects.¹¹ This language has been generally interpreted to mean that a search conducted without a warrant is unreasonable per se.¹² However, there are exceptions to this general rule. The most commonly invoked exception to the search warrant requirement is the exigent circumstances justification.¹³ The Court has recognized that in situations where obtaining a search warrant is impractical or impossible, sound public policy requires dispensing with the search warrant requirement and applying the reasonableness standard.¹⁴ Thus, the test to determine the constitutionality of a search is not whether a search warrant was procured, but whether the search was reasonable.¹⁵

11. U.S. CONST. amend. IV states:

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.

The fourth amendment was made applicable to the states under the due process clause of the fourteenth amendment in *Wolf v. Colorado*, 338 U.S. 25 (1949); the exclusionary rule has been explicitly applied to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961).

12. See also *Dombrowski v. Cady*, 471 F.2d 280 (7th Cir. 1972), *rev'd sub nom. Cady v. Dombrowski*, 413 U.S. 433 (1973).

13. See Comment, 87 HARV. L. REV. 835, 836 (1974). Exceptions to the search warrant requirement which previously have been classified as "exigent circumstances" include pursuit, plain view, consent, search incident to arrest, administrative searches, caretaking searches and automobile emergency. See Player, *Warrantless Searches & Seizures*, 5 GA. L. REV. 269 (1971), for a list of cases delineating the scope of each exception; see also concurring opinion of Mr. Justice Powell, 96 S. Ct. at 3103 n. 10.

14. Warrantless searches based on exigent circumstances must nevertheless be reasonable. *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967); *United States v. Rabinowitz*, 330 U.S. 56 (1950); see note 15 *infra* and accompanying text.

15. *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950). Note, however, that *Rabinowitz* was overruled by *Chimel v. California*, 395 U.S. 752 (1969). The *Chimel* Court rejected *Rabinowitz's* reasonableness standard, stating that the *Rabinowitz* argument was "founded on little more than a subjective view regarding the acceptability of police conduct and not on considerations relevant to Fourth Amendment interests." 395 U.S. at 764-65. This rejection was acknowledged in *United States v. United States Dist. Court*, 407 U.S. 297 (1972), where the Court stated:

Though the Fourth Amendment speaks broadly of "unreasonable searches and seizures" the definition of "reasonableness" turns, at least in part, on the more specific commands of the warrant clause. . . . The warrant clause of the Fourth Amendment is not dead language. . . .

It is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly

The *Opperman* majority found that the search warrant requirement is obviated by exigent circumstances in an automobile inventory situation. The Court reasoned that the inherent mobility of an automobile creates exigent circumstances which make enforcement of the search warrant requirement impractical and often impossible.¹⁶ The Court also concluded that less rigorous search warrant requirements for automobile searches are necessary because "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."¹⁷ In determining the reasonableness of the automobile inventory search, the Court placed great emphasis on the fact that "local police departments generally follow a routine practice of securing and inventorying automobiles' contents."¹⁸

However, the Court failed to explain why the fact that the inventory was conducted according to routine police procedure should tend to make the search reasonable. Lower courts have pointed out that the question of whether a search is made according to police regulations should have no bearing on the question of whether the search is reasonable under the circumstances.¹⁹ According to the

overzealous executive officers" who are a part of any system of law enforcement. *Id.* at 315 (footnote omitted).

See also *United States v. Edwards*, 415 U.S. 800, 807 (1974); *Coolidge v. New Hampshire*, 403 U.S. 443, 522 (1971) (White, J., dissenting).

Despite *Chimel v. California*, the Supreme Court reaffirmed its position that reasonableness is the only general standard with which to test searches and seizures in *Gustafson v. Florida*, 414 U.S. 260 (1973), and *United States v. Robinson*, 414 U.S. 218 (1973).

16. 96 S. Ct. at 3095. In support of its "mobility" argument, the Court cited *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), and *Carroll v. United States*, 267 U.S. 132 (1925).

17. 96 S. Ct. at 3096. In support of its "lesser expectation of privacy" argument, the Court cited *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974), where the Court declared:

One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view . . . This is not to say that no part of the interior of an automobile has Fourth Amendment protection; the exercise of a desire to be mobile does not, of course, waive one's right to be free of unreasonable government intrusion.

18. 96 S. Ct. at 3096. Although situations in which vehicles may be impounded are sometimes legislatively specified, the inventory procedure is rarely required by statute or ordinance. Additionally, it is unclear when an inventory becomes standard. See *United States v. Kelehar*, 470 F.2d 176 (5th Cir. 1972); *State v. Montague*, 73 Wash. 2d 381, 438 P.2d 571 (1968).

19. *United States v. Lawson*, 487 F.2d 468 (8th Cir. 1973). In *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Supreme Court found suspect the argument that housing inspections were routine administrative procedures under local law. Cf. Comment, *The Fourth Amendment and Housing Inspections*, 77 YALE L.J. 521 (1968).

court in *United States v. Lawson*,²⁰ "the essential test of the validity of a search is reasonableness; yet the standard of reasonableness must be evaluated in light of the Fourth Amendment — not in light of what [the Court's] view of reasonable police procedure might be." A search which is an unreasonable intrusion under the circumstances is not made reasonable by repetition. In fact, repetition and routineness should make the intrusion even more suspect in the Court's eyes because too often both victim and perpetrator alike begin to assume validity from general practice.²¹ Nevertheless, the *Opperman* majority deduced reasonableness from the mere fact that the police used a routine procedure.

Many courts that have addressed the inventory question prior to *Opperman* applied a sounder reasonableness test,²² first enunciated by the California Supreme Court in *Mozzetti v. Superior Court*.²³ In *Mozzetti*, the court found a general inventory search of items not in plain view to be a random search which is "the precise invasion of privacy which the Fourth Amendment was intended to prohibit."²⁴ *Mozzetti* and other cases which hold inventory searches to be unreasonable as to any articles not in plain view²⁵ generally determine reasonableness by balancing the individual's right to privacy against the police department's need to search. Police departments assert that the inventory serves three legitimate police needs: (1) protection of the owner's interest in the contents of the car, (2) protection of the police from harm, and (3) protection of the police from false claims. However, the courts have generally found this argument unpersuasive when balanced against the individual's right to privacy.²⁶

20. 487 F.2d 468, 475 (8th Cir. 1973).

21. See *Cabbler v. Superintendent, Virginia State Penitentiary*, 374 F. Supp. 690, 698 n. 7 (E.D. Va. 1970).

22. See, e.g., *Mozzetti v. Superior Court*, 4 Cal. 3d 699, 484 p.2d 84, 94 Cal. Rptr. 412 (1971); *State v. Gwinn*, 301 A.2d 291 (Del. Super. Ct. 1972); *State v. McDougal*, 68 Wis. 2d 399, 228 N.W.2d 671 (1975).

23. 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971).

24. *Id.* at 710, 484 P.2d at 91, 94 Cal. Rptr. 419.

25. The plain view exception provides that articles falling within plain view of an officer who has a right to be in a position to have that view are subject to seizure and may be admitted into evidence in a criminal prosecution, even if the officer proceeds without a search warrant. For a general discussion of the plain view doctrine see Moylan, *Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 MERCER L. REV. 1046 (1975).

26. *State v. McDougal*, 68 Wis. 2d 399, 228 N.W.2d 671 (1975). For a general discussion of *McDougal* see text accompanying note 97 *infra*; *Mozzetti v. Superior Court*, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971).

The balancing test developed in *Mozzetti* is the basis of the concurring and dissenting opinions in *Opperman*. Justice Powell, concurring, approved the warrantless automobile inventory search, but suggested that the resolution of the question requires "a weighing of the governmental and societal interests advanced to justify such intrusion against the constitutionally protected interest of the individual citizen in the privacy of his effects."²⁷ Applying this balancing test to *Opperman*, Powell found the inventory search reasonable because it was limited to an inventory of an unoccupied automobile and was conducted according to standard police procedures.

Justice Marshall, writing a vigorous dissent,²⁸ also balanced the governmental interests against the individual interests at stake in automobile inventory situations. Marshall concluded that the three purposes of an inventory search, *i.e.*, protection of the owner's property while in police custody, protection of the police from false claims and protection of the police from danger, do not justify relinquishment of the individual's privacy expectations.²⁹ While Justice Marshall acknowledged that privacy expectations associated with automobile travel are in some regards less than those associated with home or office, he found it equally well-established that a search, even of an automobile, is a substantial invasion of privacy. Thus Justice Marshall considered a glove compartment to be a private area of an automobile which the police had no legitimate right to search.³⁰ The dissent would require specific consent³¹ of the owner before an inventory could be conducted. Absent specific consent, such a search should be permissible only in exceptional circumstances, where the need to search a particular car outweighs the invasion

27. 96 S. Ct. at 3101. The majority disagreed with Mr. Justice Powell's search warrant analysis and found the policies underlying the warrant requirement inapplicable to non-investigative police inventories of automobiles lawfully within governmental custody. "The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations." *Id.* at 3097 n. 5.

28. Justices Brennan and Stewart also joined in Mr. Justice Marshall's dissent. Mr. Justice White also dissented and concurred with most of the analysis of the dissenting opinion.

29. 96 S. Ct. at 3106.

30. *Id.* at 3105. See also *Pigford v. United States*, 273 A.2d 837 (D.C. 1971). In *Pigford*, the court found the inventory of the glove compartment, seats and trunk explanatory in nature and for the purpose of discovering evidence of crime and therefore unreasonable.

31. See *Schneckloth v. Busamonte*, 412 U.S. 218 (1973); *Zap v. United States*, 328 U.S. 624 (1946). Arguably, if protection of the owner's property interest is a legitimate purpose of the inventory, it is only reasonable that the owner be asked whether or not he wants his automobile to be impounded.

of the owner's right to privacy. To meet this requirement of the test, Justice Marshall argued, the police must show specific cause to believe that a search is necessary to preserve property threatened by impoundment and that the police have exhausted all reasonable efforts to obtain the owner's consent.³² Justice Marshall contended that the majority's position incorrectly elevated the conservation of property interests above the "privacy and security interests protected by the Fourth Amendment."³³ Thus, the dissent in *Opperman* concluded, as did the California court in *Mozzetti*, that the inventory failed to meet the reasonableness standard of the fourth amendment because the needs of the state failed to outweigh the right of the individual to privacy.

The majority in *Opperman* did not set up a balancing test to determine the validity of warrantless automobile searches. Instead, the Court singled out two factors as dispositive of the issue: (1) the distinction between automobiles and homes, and (2) the caretaking purposes of the inventory. The well-established law of search and seizure under the fourth amendment has long recognized the distinction between automobiles and homes or offices.³⁴ Warrantless examinations of automobiles have been upheld in circumstances which would not justify a search of a home or office.³⁵ The *Opperman* Court cited two factors as the basis for this disparate treatment of automobiles and homes — the mobility of the automobile and the more limited public expectations of privacy relating to the automobile.

According to the Court, the inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible.³⁶ This mobility exception to the warrant requirement was first enunciated in *Carroll v. United States*.³⁷ In that case, federal prohibition officers, acting without a warrant, stopped and searched a car being operated on the highway because they had probable cause to believe the car contained contraband. Although the Court upheld this warrantless search, the Court also emphasized that while the mobility factor justified the failure to obtain a warrant, the requirement of

32. 96 S. Ct. at 3109.

33. *Id.*

34. *Id.* at 3095.

35. See, e.g., *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Cady v. Dombrowski*, 413 U.S. 433 (1973).

36. 96 S. Ct. at 3095.

37. 267 U.S. 132 (1925).

probable cause defined the circumstances in which such a warrantless search would be reasonable.³⁸

Carroll established a rule allowing warrantless searches of automobiles that are being operated on the highway. *Opperman* further pointed out that the Court "has also upheld warrantless searches where no immediate danger was presented that the car would be removed from the jurisdiction."³⁹ However, as authority for this proposition the Court cited *Chambers v. Maroney*⁴⁰ and *Cooper v. California*,⁴¹ cases which do not entirely support that proposition.

In *Chambers*, four men were arrested when their car was stopped in connection with a filling station robbery. The car was then taken to the police station where a search revealed incriminating evidence. In upholding the warrantless search, the *Chambers* Court stated:

On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car.⁴²

Thus the Court in *Chambers* extended the mobility exception to a car no longer in operation and already impounded. Nevertheless, the *Carroll-Chambers* doctrine does not apply unless the car was initially stopped on a road or highway.⁴³

*Cooper v. California*⁴⁴ so expanded the *Carroll-Chambers* doctrine as to lose sight of its original justification — exigency resulting from mobility. In *Cooper*, defendant was arrested on a narcotics charge as he was about to enter his car. The car was impounded pursuant to a state statute⁴⁵ and searched without a warrant one week later. Narcotics were found and led to Cooper's conviction. Relying on *Carroll*, the Court upheld the constitutionality of the

38. The *Carroll* Court stated: "Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made." *Id.* at 153.

39. 96 S. Ct. at 3096.

40. 399 U.S. 42 (1970).

41. 386 U.S. 58 (1967).

42. 399 U.S. at 52.

43. *Coolidge v. New Hampshire*, 403 U.S. 443, 460 (1971).

44. 386 U.S. 58 (1967).

45. CAL. HEALTH & SAFETY CODE § 116 (West) (repealed by 1969 Cal. Stats. ch 280, § 1) authorized any officer making a narcotics arrest to seize any vehicle used to conceal, transport, sell or facilitate the possession of narcotics and that such vehicle be held as evidence until forfeiture or release.

search despite the ease with which a warrant could have been obtained.⁴⁶ This result ignores the fact that the *Carroll* doctrine arose due to the impracticability of obtaining a warrant.⁴⁷ Nevertheless, the Court in *Cooper* did hold that a search is reasonable if conducted for purposes relevant to the offense for which the defendant was arrested (narcotics), the grounds upon which the car was impounded (transporting narcotics), and the purpose for which it was being held (as evidence in a forfeiture proceeding).⁴⁸ Thus in *Cooper* the Supreme Court did sanction a warrantless search of an immobilized vehicle conducted in the absence of probable cause.

However, *Cooper* is not authority for the result that the Court reached in *Opperman*. In *Cooper* the search involved a state forfeiture statute which gave the police a possessory interest in the car.⁴⁹ It is clear that even an expansive reading of *Cooper* cannot extend its rationale to cases where the police do not have a right to deny possession to the car's owner.⁵⁰ It is equally clear that in *Opperman* the reason for the impoundment was not in any way related to the defendant's subsequent arrest. Thus, the circumstances in *Cooper* differ qualitatively from those in *Opperman*.

Chambers and *Carroll* permitted certain probable cause searches to be carried out without warrants due to the exigencies created by the mobility of automobiles. It is significant to note the fact that both decisions reaffirmed that the standard of probable cause necessary to authorize such a search is no less than the standard applicable to the search of a home or office.⁵¹ *Opperman* has substantially broadened the distinction between automobiles and homes or offices by making clear that the fourth amendment stan-

46. 386 U.S. at 60.

47. See 7 *LOV. OF L.A. L. REV.* 550, 553 (1974). See *Chimel v. California*, 395 U.S. 752 (1969), which affirmed the continued validity of the practicability principle delineated in *Carroll*.

48. 386 U.S. at 62.

49. *Cooper* has been so interpreted in *United States v. Shye*, 473 F.2d 1061, 1065-66 (6th Cir. 1975). In *Opperman*, Justice Powell, concurring, shared that view: "In *Cooper* the Court validated an automobile search that took place one week after the vehicle was impounded on the theory that the police had a possessory interest in the car based on a state forfeiture statute . . ." 96 S. Ct. at 3100 n. 2. But see the *Opperman* majority opinion: "There was of course, no certainty at the time of the search that forfeiture proceedings would ever be held. Accordingly, there was no reason for the police to assume automatically that the automobile would eventually be forfeited to the State." 96 S. Ct. at 3099 n. 8.

50. Comment, 87 *HARV. L. REV.* 835, 848 (1974).

51. *South Dakota v. Opperman*, 96 S. Ct. at 3105 (dissenting opinion), citing *Chambers*, 399 U.S. at 51 and *Carroll*, 267 U.S. at 155-56. This is, of course, "probable cause in the sense of specific knowledge about a particular automobile." *Almeida-Sanchez v. United States*, 413 U.S. 266, 281 (1973) (Powell, J., concurring).

dard of probable cause is somehow less when applied to automobiles. An automobile is now different per se, regardless of its immediate mobility.

The second reason cited by the *Opperman* majority for the distinction between automobiles and homes or offices was that "the expectation of privacy with respect to one's automobile is less than that relating to one's home or office."⁵² The majority listed two reasons for this diminished expectation of privacy. First, law enforcement officials are necessarily brought into frequent contact with automobiles.⁵³ Secondly, the public nature of automobile travel diminishes the expectation of privacy.⁵⁴

The only case cited by the *Opperman* majority in support of this view, *Cardwell v. Lewis*,⁵⁵ recognized that automobile travel sacrifices some privacy interests as to things in plain view. However, as noted in the *Opperman* dissent, "there is no question of plain view in this case."⁵⁶

In addition, a search, even of an automobile, is a substantial invasion of privacy.⁵⁷ The *Opperman* Court accurately indicated that distinctions have been drawn between automobiles and homes or offices in relation to the fourth amendment. But the Court did not adequately explain how or why these distinctions should be applied in the case of a closed glove compartment. The Court instead seemed to regard the word "automobile" as a "talisman in whose presence the Fourth Amendment fades away."⁵⁸

The second dispositive factor which justifies the automobile inventory is the custodial rather than the investigatory purposes of the search. As a part of the "community caretaking functions" of the police, officers frequently impound automobiles.⁵⁹ Once impounded, local police generally follow a routine practice of securing and inventorying the car's contents. Such procedures, the Court indicated, were prompted by three distinct needs: the protection of the owner's property while it remains in police custody; the protection of the police against claims or disputes over lost or stolen property; the protection of the police from potential danger.⁶⁰

52. 96 S. Ct. at 3096; *accord*, *Camara v. Municipal Court*, 387 U.S. 523 (1967).

53. Comment, 87 HARV. L. REV. at 848-49 (1974).

54. *Id.*

55. 417 U.S. 583, 590 (1974).

56. 96 S. Ct. at 3105 (Marshall, J., dissenting).

57. *United States v. Ortiz*, 422 U.S. 891, 896 (1975).

58. *Coolidge v. New Hampshire*, 403 U.S. 443, 461 (1971).

59. 96 S. Ct. at 3096, *quoting* *Cady v. Dombrowski*, 413 U.S. 433 (1973).

60. *Id.*

The validity of an inventory, as with any search, depends upon the reasonableness of the intrusion in light of all the circumstances.⁶¹ The purported reasons for an inventory must be justified in light of the particular facts of the case. The majority decision failed to show how the three cited reasons justifying an inventory applied to the specific factual circumstances of *Opperman*.

The Court asserted that inventorying is necessary to protect the owner's property. However, it is difficult to understand why leaving a locked car in a police impound lot is not in and of itself sufficient.⁶² The car and its contents should be as safe in the police impound lot as it is on the street or wherever it was left illegally parked:

[I]tems of value left in an automobile to be stored by the police may be adequately protected merely by rolling up the windows, locking the vehicle doors and returning the keys to the owner. The owner himself, if required to leave his car temporarily, could do no more to protect his property.⁶³

Further, if the impounding is in fact done in order to protect the owner's property, it is logical to require that the owner choose whether or not he wants an inventory taken. This is essentially the position adopted by Justice Marshall in dissent: "It is at least clear that any owner might prohibit the police from executing a protective search of his impounded car, since by hypothesis the inventory is conducted for the owner's benefit."⁶⁴

The second "distinct need" for warrantless inventory searches, to protect the police against claims of lost or stolen property, is even

61. *Preston v. United States*, 376 U.S. 364, 367 (1964); *Terry v. Ohio*, 392 U.S. 1, 17-18 n. 15 (1968), wherein the Court said:

In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in the light of all the exigencies of the case, a central element in the analysis of reasonableness.

62. *People v. Sullivan*, 29 N.Y.2d 69, 80, 272 N.E.2d 464, 470, 323 N.Y.S.2d 945, 954 (1971). Chief Justice Fuld, dissenting, stated:

In the present case, all the precautions necessary had been pursued: the defendant's automobile was towed from where it had been parked directly to a guarded police facility and there it remained — undoubtedly with its doors and windows locked — under the sole custody and control of the police. It seems quite obvious that nothing was to be gained by the further tactic of a police inventory of its contents.

But see Comment, 87 HARV. L. REV. 835, 853 (1974).

63. *Mozzetti v. Superior Court*, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971). *Accord*, *United States v. Lawson*, 487 F.2d 468 (8th Cir. 1973); *Boulet v. State*, 17 Ariz. App. 64, 495 P.2d 504 (1972).

64. 96 S. Ct. at 3108.

less convincing.⁶⁵ This justification assumes that the police are under a legal duty to protect the property of the owners. The precise nature of this duty has been interpreted by several state courts. The Supreme Court of California, in *Mozzetti v. Superior Court* concluded that the police were involuntary bailees having a duty to use "slight care."⁶⁶ The Supreme Court of South Dakota termed police in possession of an impounded vehicle "gratuitous depositors" having a duty of slight care.⁶⁷ Despite the different terminology, both cases held that this duty is fulfilled by rolling up the windows and locking the doors.⁶⁸

Moreover, claims of lost or stolen property cannot be ended simply by the making of an inventory. It easily can be asserted that property was lost or stolen prior to the inventory. Additionally, if a police officer seeks to steal an item from an impounded car, all he need do is fail to list it on the inventory form. As the *Opperman* dissent pointed out, "[i]f such claims can be deterred at all, they might more effectively be deterred by sealing the doors and the trunk of the car so that an unbroken seal would certify that the car had not been opened during custody."⁶⁹

Finally, it is of considerable interest to note that protecting the police from liability was not considered relevant in *Opperman*. As indicated by Justice Powell in his concurring opinion:

65. See Szwajkowski, *The Aftermath of Cooper v. California*, 1968 U. OF ILL. L.F. 401, 407-08, for the proposition that absent a special statutory provision, the inventory would not be conclusive in a civil action for loss of property from the vehicle, since (1) an article might be stolen before the inventory or omitted from it; (2) the inventory is prepared by the police and is to some extent a self-serving document; and (3) even if the police have the arrestee acknowledge the inventory by signing the receipt, the inventory would not be binding on a third-party claimant.

See also Comment, *Chimel v. California: A Potential Roadblock to Vehicle Searches*, 17 U.C.L.A. L. REV. 626 (1970).

66. 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971).

67. *State v. Opperman*, ____ S.D. ____, 228 N.W.2d 152 (1975). See R. BROWN, *THE LAW OF PERSONAL PROPERTY* 328 (2d ed. 1955). Police who impound a vehicle have been considered gratuitous bailees. The duty of a gratuitous bailee, under the traditional view, is that he is only liable to the owner for damage or loss due to his gross negligence. *Id.* at 328-29. Another view treats police as involuntary bailees who are only obliged to use ordinary care when in possession of the goods. Liability, however, only is incurred upon negligent misdelivery. See generally, *id.* at 399-415.

68. *Mozzetti v. Superior Court*, 4 Cal. 3d at 708, 484 P.2d at 89-90, 94 Cal. Rptr. at 417-18; *State v. Opperman*, ____ S.D. at ____, 228 N.W.2d at 159; accord, *United States v. Lawson*, 487 F.2d at 475-76.

69. 96 S. Ct. at 3107-08 nn. 10 and 12; see *Cabbler v. Superintendent, Virginia State Penitentiary*, 374 F. Supp. 690 (E.D. Va. 1974).

Respondent's motion to suppress was limited to items inside the automobile not in plain view. And, the Supreme Court of South Dakota here held that the removal of objects in plain view, and the closing of windows and locking of doors, satisfied any duty the police department owed to the automobile's owner to protect property in police possession.⁷⁰

The third and final basis upon which the majority sought to justify the inventory in *Opperman* was the protection of the police from potential harm. However, in *Opperman* the safety interest is at best a make-weight argument, since, as pointed out by the dissent, "the sole purpose given by the State for the Vermillion police's inventory procedure was to secure valuables."⁷¹ Even aside from the actual basis for the police practice in *Opperman* "except in rare cases, there is little danger associated with impounding unsearched automobiles."⁷² Thus in the absence of knowledge or at least a rational belief that the car contains dangerous cargo, it would seem unreasonable to allow an infringement of fourth amendment rights.⁷³

In summary, the majority sought to justify the Vermillion police department's inventory of Opperman's car by stating that such a routine practice developed in response to three distinct needs. However, the validity of this justification in general is suspect. Moreover, it is extremely doubtful that the factors of police protection from danger and false claims are even relevant to the particular facts of the *Opperman* case. Therefore, the majority decision rests tenuously upon the ground that an inventory search of an impounded vehicle is a valid attempt to protect the owner's property. Surely the loss of valuables cannot be balanced against the forfeiture of a constitutional protection.⁷⁴

II. THE COURT'S USE OF PRECEDENT

Although decisions concerning the legality of routine inventories of impounded vehicles have resulted in an area of the law characterized as "something less than a seamless web,"⁷⁵ the *Opperman* ma-

70. *Id.* at 3101 n. 3 (Powell, J., concurring).

71. *Id.* at 3106.

72. *Id.* at 3101 (Powell, J., concurring).

73. In *Cady v. Dombrowski*, 413 U.S. 433 (1973), a belief existed that a gun might be found in the car. This is unlike *Opperman*, where the record disclosed that the search was not tailored in any way to safety concerns.

74. 96 S. Ct. at 3109 (Marshall, J., dissenting).

75. *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973).

jority suggested that its decision is supported by a line of clear precedent. The truth is somewhere in between. The last part of the majority opinion traced the prior Supreme Court decisions that point "unmistakably to the conclusion reached by both federal and state courts that inventories pursuant to standard police procedures are reasonable."⁷⁶ The three cases which "pointed the way to the correct resolution" were *Cooper v. California*,⁷⁷ *Harris v. United States*⁷⁸ and *Cady v. Dombrowski*.⁷⁹

The *Opperman* Court, in its analysis of *Cooper*, rejected the contention that *Cooper* was inapposite because the vehicle in *Opperman* was not impounded under a forfeiture statute. The Court based its position upon the fact that as of the time of the search there was no certainty that forfeiture proceedings would ever be held. Accordingly, there was no reason for the police to assume automatically that the automobile would eventually be forfeited to the state. Upon these grounds, the majority concluded that "[n]o reason would therefore appear to limit *Cooper* to an impoundment pursuant to a forfeiture statute."⁸⁰

The effect of the Court's expansive reading of *Cooper* is to cast a cloak of legitimacy over a warrantless search of an impounded vehicle one week after it has been seized. Thus, not only has the *Opperman* Court ignored the original purpose of the mobility exception⁸¹ but it has also ignored its own language in *Cooper* where the Court pointed out that the police seized the automobile

because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car — whether the State had "legal title" to it or not — was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained.⁸²

The majority also decided to ignore the fact that in *Opperman*, the reason for impoundment (a parking violation) was not in any way related to the defendant's subsequent arrest. The *Opperman* Court

76. 96 S. Ct. at 3098.

77. 386 U.S. 58 (1967).

78. 390 U.S. 234 (1968).

79. 413 U.S. 433 (1973).

80. 96 S. Ct. at 3099 n. 8.

81. 7 Loy. of L.A. L. Rev. 550 (1974). "The foundation of the *Carroll* exception is the practicability of obtaining a warrant, which is itself dependent on the presence or absence of the element of mobility." *Id.* at 551.

82. 386 U.S. at 61.

thereby eliminated many of the important distinguishing factors between *Cooper* and *Opperman*.

The Court's reliance on *Harris v. United States*⁸³ is also misplaced. In *Harris* the Court upheld the introduction of evidence seized by an officer in the process of securing a car after an inventory search. According to the *Opperman* Court, *Harris* held "that the intrusion was justifiable since it was 'taken to protect the car while in police custody'."⁸⁴ But the "intrusion" which the *Harris* Court was referring to was the activity of the officer in securing the car. Nothing was found during the inventory, so the officer opened another door in order to roll up the windows and lock the door. It was during this procedure that the evidence was discovered. The Supreme Court in *Harris* made it clear that the "intrusion" was separate from the search: "[T]he discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances."⁸⁵ Nevertheless, the *Opperman* majority used *Harris* as authority for the proposition that warrantless inventories are justifiable when taken to protect a car while in custody.

Even assuming the validity of the Court's interpretation of *Harris*, *Harris* was predicated on and limited to the "plain view" exception to the warrant requirement:

Once the door had lawfully been opened, the registration card, with the name of the robbery victim on it, was plainly visible. It has long been settled that objects falling in the plain view of an officer who had a right to be in the position to have that view are subject to seizure and may be introduced into evidence.⁸⁶

As such it is difficult to see just how a "plain view" case can be used to legitimize a warrantless excursion into a closed glove compartment.

The majority also relied on *Cady v. Dombrowski*⁸⁷ to illustrate

83. *Harris v. United States*, 390 U.S. 234 (1968).

84. 96 S. Ct. at 3099.

85. 390 U.S. at 236.

86. *Id. Accord*, Comment, *The Automobile Inventory Search and Cady v. Dombrowski*, 20 VILL. L. REV. 147, 171 (1974):

It is submitted that had the Court intended that *Harris* be interpreted as approving the inventory search, it would not have separated the inventory from the procedure in which the evidence was found. Thus *Harris* should be read merely as the application of the plain view doctrine

87. *Cady v. Dombrowski*, 413 U.S. 433 (1973). One commentator concluded that the

that a warrantless incursion is justifiable as part of the local police caretaking function. The protective search in *Cady* was instituted solely because local police "were under the impression that the incapacitated driver, a Chicago police officer, was required to carry his service revolver at all times."⁸⁸ Thus, the police had a special reason for searching the automobile in *Cady* — a reason that did not exist in *Opperman*. It is difficult to perceive a logical transition from *Cady* to *Opperman*. The police in a typical inventory search will have no reasonable belief as to the car's contents.⁸⁹ This was the case in *Opperman*. The Vermillion police had no reason to believe there was a need to protect the community's safety and thereby bring the *Cady* rationale into application.

However, the majority appears to have latched onto the fact that in *Cady* "the protective search was carried out in accordance with standard procedures in the local police department (citation omitted), a factor tending to insure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function."⁹⁰ The Court thereby attempted to apply *Cady* by analogy to the factual situation in *Opperman*. In *Cady*, a search pursuant to standard procedures was upheld as reasonable. The *Opperman* Court, therefore, implicitly reasoned that any inventory searches pursuant to standard police procedures should also be deemed reasonable. This contention, however, ignores the fact that the routine procedure in *Cady* was only to search when there was a reasonable belief that the car contained a dangerous weapon.⁹¹

As this analysis of *Cooper*, *Harris* and *Cady* reveals, the Supreme Court attempted to leave the impression that the result in *Opperman* was simply the next logical step in a consistent progression of cases. In doing so, the Court was forced to expand *Cooper* beyond its facts, interpret *Harris* in a manner contrary to its actual rationale and broaden the *Cady* rule beyond recognition.

III. THE SCOPE OF THE SEARCH

The *Opperman* Court not only used precedent in a questionable manner, it also failed to answer the most crucial search and seizure

decision in *Cady* laid a firm basis for inventory searches if not endorsing them sub silentio. See Comment, 20 VILL. L. REV. 147 (1974).

88. 96 S. Ct. at 3099.

89. 96 S. Ct. at 3100 n. 2 (Powell, J., concurring).

90. *Id.* at 3099 (emphasis in original).

91. *Id.* at 3108 n. 13 (Marshall, J., dissenting).

question — the scope of the search. The scope of a particular intrusion is a central element in the fourth amendment reasonableness standard. Although *Opperman* legitimized the inventory of items left in plain view and in an unlocked glove compartment, the Court did not consider whether the police might open and search a locked glove compartment, a closed or locked trunk, or closed, locked or sealed packages inside the car, glove compartment or trunk.

In contrast to *Opperman*, lower courts have tackled the scope question head-on.⁹² These courts almost summarily allow the inventory of items in plain view. Under the plain view doctrine police may seize evidence or contraband encountered inadvertently during an otherwise valid intrusion.⁹³ Thus, police may seize what they observe in a car if they have a legitimate reason to be in or around the vehicle. Since the *Opperman* Court found the authority of the police to impound vehicles “beyond challenge,”⁹⁴ the police had a legitimate reason to be in or around the car. Therefore, the police may inventory and seize any evidence or contraband which falls within their field of vision.

Opperman and prior Court decisions are consistent on the plain view scope analysis. The problem arises with the majority’s questionable justification for entering the closed glove compartment. The majority asserts that the search inside the closed glove compartment “was prompted by the presence in plain view of a number of valuables inside the car.”⁹⁵ However, entry to remove articles left

92. See Annot., 48 A.L.R.3d 537 (1973), which has collected cases addressing the scope of inventory question and has catalogued those cases in terms of the area of the car searched — i.e., trunk, glove compartment, seats, engine, and containers or briefcases within the car.

93. The leading cases considering the plain view exception to the search warrant requirement are *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Harris v. United States*, 390 U.S. 234 (1968); *Ker v. California*, 374 U.S. 23 (1963). See note 13, *supra*.

94. 96 S. Ct. at 3096. In *State v. Singleton*, 9 Wash. App. 327, 332-33, 511 P.2d 1396, 1399-1400 (1973), the Washington Appellate Court considered the inventory question in depth:

Reasonable cause for impoundment may, for example, include the necessity for removing (1) an unattended-to car illegally parked or otherwise illegally obstructing traffic; (2) an unattended-to car from the scene of an accident when the driver is physically or mentally incapable of deciding upon steps to be taken to deal with his property, as in the case of the intoxicated, mentally incapacitated or seriously injured driver; (3) a car that has been stolen or used in the commission of a crime when its retention as evidence is necessary; (4) an abandoned car; (5) a car so mechanically defective as to be a menace to others using the public highway; (6) a car impoundable pursuant to ordinance or statute which provides therefor as in the case of forfeiture. The mere commission of one or more of the 27 bailable traffic offenses listed in JTR T2.03(m) does not necessarily provide reasonable cause for impoundment. . . . There is even case support for the view that if the driver cannot present his driver's license when arrested on a traffic violation, impoundment on that account is not required.

95. 96 S. Ct. at 3099-3100.

in plain view from the car does not justify a further search into the car's closed areas. Moreover, it is apparent from the record in *Opperman* that every vehicle taken into the impound lot by Vermillion police was inventoried and that as a standard procedure every inventory would involve entry into the car's closed glove compartment notwithstanding the presence of valuables in plain view.⁹⁶ The true reason for sustaining the search of the closed glove compartment appears to be that standard inventories often include an examination of the glove compartment, since it is a customary place for documents of ownership. In his dissent, Justice Marshall argued that the majority's "standard police procedure" rationale allowed intrusions into the car and glove compartment even in the absence of articles in plain view. Thus the presence or absence of articles in plain view is really of only slight consequence to the majority.

In a decision a few months prior to *Opperman* the Wisconsin Supreme Court considered the scope question in greater depth than did *Opperman*. In *State v. McDougal*, the court upheld a warrantless inventory of items found in plain view, but held that the scope of the inventory did not include examination of closed or locked suitcases or containers found inside the car, glove compartment or trunk.⁹⁷

As did *Opperman*, *McDougal* arose out of a traffic offense. Defendant McDougal was stopped for speeding and was subsequently charged with failure to carry a driver's license and with operating a motor vehicle without the owner's consent. McDougal was jailed and the car he was driving was impounded. While making a detailed inventory of the car, the police discovered two suitcases in the trunk of the car and unlocked them with keys taken from the glove compartment. Inside the suitcases, police found a substantial quantity of marijuana. The suitcases were seized and formed the basis for McDougal's arrest for possession of marijuana with intent to sell. The trial court granted the defendant's motion to suppress the evidence discovered in the locked suitcases, holding that the search of

96. A complete inventory report is required of all vehicles impounded by the Vermillion Police Department. The standard inventory consists of a survey of the vehicles exterior — windows, fenders, trunk and hood — apparently for damage and its interior to locate valuables for storage. As part of each inventory, a standard report form is completed. The report in this case listed the items discovered in both the automobile's interior and the unlocked glove compartment. The only notation regarding the trunk was that it was locked. A police officer testified that all impounded vehicles are searched, that the search always includes the glove compartment, and that the trunk had not been searched in this case because it was locked. 96 S. Ct. at 3105 n. 4 (Marshall, J., dissenting).

97. 68 Wis. 2d 399, 228 N.W.2d 671 (1975).

the closed suitcases without a search warrant was unreasonable.⁹⁸ In affirming the trial court's decision, the Wisconsin court ruled that during a routine automobile inventory, the search of a closed, locked suitcase is unreasonable and violated the defendant's constitutional right to be free from unreasonable searches and seizures.

In *McDougal* the Wisconsin court adopted the balancing test illustrated by the *Opperman* concurrence and dissent in determining the permissible scope of the routine, warrantless police inventory. As a result of this balancing of the state's need to search against the individual's right to be free from intrusion, the court specifically limited the scope of the inventory search to items found in plain view.⁹⁹ The objectives of the inventory — "protection of the public from claims of theft and protection of the defendant's property" do not require examination of locked or closed suitcases or containers. For example, the court offered various alternatives to the inventorying of closed contents or containers. The police can simply inventory "two suitcases."¹⁰⁰ Similarly, "[t]he police would be just as well protected against false claims of theft by inventorying and sealing the closed suitcases as by inventorying their contents."¹⁰¹ The police may also ask the defendant to consent to an inventory of the contents of the two suitcases.¹⁰²

In support of its position the court relied upon *Mozzetti v. Superior Court*,¹⁰³ *State v. Keller*,¹⁰⁴ and *State v. Gwinn*.¹⁰⁵ In *Mozzetti v. Superior Court*, the California Supreme Court limited the scope of automobile inventories to items found in plain view: "The inventory by its nature involves a random search of the articles left in an automobile taken into police custody; the police looking for nothing in particular and everything in general."¹⁰⁶ When balanced against

98. *Id.* at 403, 228 N.W.2d at 673 (1975).

99. *Id.* at 413-14, 229 N.W.2d at 678 (1975); see note 93 *supra*.

100. *Id.* at 413, 229 N.W.2d at 678 (1975). The use of infiltrators and spot checks, in addition to citizen complaints, would also seem to be a reasonable alternative. Perhaps electronic equipment like that used to impede hijacking at airports could be considered. To avoid tort claims for items left in impounded automobiles, the court in *Cabbler v. Superintendent*, Virginia State Penitentiary, 374 F. Supp. 690, 700 (E.D. Va. 1974) suggested seals upon the trunks and doors.

101. *Id.* at 413-14, 228 N.W.2d at 678 (1975).

102. *Id.* at 413, 228 N.W.2d at 678 (1975).

103. 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971).

104. 265 Or. 622, 510 P.2d 568 (1973). See 10 WILLAMETTE L.J. 272 (1974).

105. 301 A.2d 291 (Del. Super. Ct. 1972).

106. 4 Cal. 3d 699, 711, 484 P.2d 84, 92, 94 Cal. Rptr. 412, 420 (1971); See Baker & Khourie, *Improbable Cause — The Poisonous Fruits of a Search After Arrest for a Traffic Violation*, 25 OKLA. L. REV. 54 (1972).

a person's right to privacy, the police interests in searching the car beyond the plain view exception were considered minimal. Thus, the California court limited the permissible scope of inventory searches in California to items found in plain view.

In *State v. Keller*,¹⁰⁷ police in Oregon found a fishing tackle box sealed with wire on the floor of the back seat during a routine inventory search. Inside the tackle box, the police found drugs which later formed the basis for defendant Keller's indictment. The trial court granted the defendant's motion to suppress the evidence discovered in the sealed tackle box. It held that the vials in the tackle box were not in plain view and, therefore, were the product of an unreasonable search. On appeal by the State, the Oregon Court of Appeals found the suppression of evidence discovered in the tackle box to be improper. Reversing the court of appeals, the Oregon Supreme Court affirmed suppression of the evidence and held the search of the closed tackle box was an unreasonable search in violation of defendant's federal and state constitutional rights.¹⁰⁸

In the Delaware case of *State v. Gwinn*,¹⁰⁹ police arrested Gwinn for drunken driving. Before his car was towed and impounded, police made an inventory pursuant to standard procedure. A closed satchel was found in the trunk; it was opened and marijuana was discovered inside. The court stated that the inventory of the interior of the automobile, including the trunk, was a reasonable search, and the seizure of the satchel was valid because it was in plain view. However, the court held that the evidence found inside was inadmissible because the search of the contents of the satchel was not necessary to the otherwise valid purpose of the inventory.¹¹⁰

After an analysis of the *Mozzetti*, *Keller* and *Gwinn* decisions, the Wisconsin court discussed the scope question in depth and stated: "The police can take reasonable steps to conduct a police inventory to protect themselves against false claims but not unreasonable ones."¹¹¹ The Wisconsin court concluded that the examination of the contents of closed or locked suitcases or containers was unreasonable and beyond the scope of the routine police inventory. As a result, only evidence seized while in plain view is admissible as evidence in a Wisconsin criminal prosecution.

107. *State v. Keller*, 9 Or. App. 613, 497 P.2d 868 (1971).

108. 265 Or. 622, 510 P.2d 568 (1973).

109. 301 A.2d 291 (Del. Super. Ct. 1972).

110. 68 Wis. 2d at 413-14, 228 N.W.2d at 678 (1975).

111. 96 S. Ct. at 3106 n. 6.

In his *Opperman* dissent, Justice Marshall cited both *McDougal* and *Mozzetti* in support of his position that the majority opinion "does not authorize the inspection of suitcases, boxes or other containers which might themselves be sealed, removed and secured without further intrusion."¹¹² Despite Justice Marshall's position, the scope question remains unanswered in light of the majority opinion in *Opperman*. However, the balancing test supplied by *McDougal* does set forth a standard with which to define further the limits of constitutional automobile inventories.

IV. THE IMPACT OF *Opperman*

In placing its imprimatur on routine police inventory searches of impounded automobiles, the *Opperman* decision left a number of questions unanswered. *Opperman* explicitly authorized the inventory of articles in plain view and in a closed glove compartment. Whether this holding is sufficient to sustain further intrusions into the closed areas of a car or of closed containers within the car has yet to be determined.¹¹³ The Court has, however, left indications that such intrusions will also be found reasonable.

The *Opperman* court placed great emphasis upon the fact that the glove compartment search was a part of standard police procedure. According to the majority this factor tended "to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function."¹¹⁴ This reasoning would seem to establish a strong presumption that intrusions into other closed areas of a car are reasonable when done as a part of routine police procedures.

Further, the Court's preoccupation with police procedure results in an inadequate treatment of the invasion of privacy issue. The fourth amendment must be viewed not only in terms of whether the search was reasonable but also whether the person's right to privacy was protected. The majority position in *Opperman* seems to simply assume that the presence of a standard procedure will protect an individual's right to privacy. This assumption leads to the conclu-

112. *Id.*

113. In his dissent, Justice Marshall stated that the Court was not considering "whether the police might open and search the glove compartment if it is locked, or whether the police might search a locked trunk or other compartment." 96 S. Ct. at 3104 n. 1.

114. The majority here was citing a conclusion reached in *Cady v. Dombrowski*, 413 U.S. 433 (1973), where the Court relied upon *United States v. Spitalieri*, 391 F. Supp. 167, 169 (N.D. Ohio 1975).

sion that as long as the police follow standard police procedure, a search — no matter how injurious to a person's right to privacy — must be rendered reasonable. Clearly, the better reasoned approach would have been to apply a balancing test which would weigh the individual's right to privacy against the government's interests in searching a car.¹¹⁵ This balancing test would not delegate the individual's right to privacy to a position of secondary importance.

The right to privacy was not the only issue evaded by the *Opperman* Court. A strong argument can be made that a standard warrantless automobile inventory is merely a "pretext concealing an investigatory motive."¹¹⁶ Whatever the motive or purpose underlying the inventory, it is conducted in the same manner and would have the same result as a search. The *Opperman* Court did not go beyond the police department's assertions of purposes for these searches. Thus, in order to surmount the "investigatory motive" argument, the police need only assert the benign purposes for the inventory. Obviously, the constitutional right to be free from unreasonable searches and seizures should not depend upon the subjective motives of the police.¹¹⁷

The *Opperman* decision suggests other possible inroads into the fourth amendment reasonableness standard. The majority emphasized "the need to protect the police from danger" as one reason for sustaining the automobile inventory.¹¹⁸ Procedures employed to effectuate this end would necessarily entail searching beyond a glove compartment. Weapons, bombs or other dangerous articles can also be found in a trunk or in a closed container. In fact, if the purpose of protecting the police is to have any legitimacy, the police will have to expand their inventory procedures in some instances to

115. See generally Note, *Reasonable Expectation of Privacy — Katz v. United States*, a *Post Scriptum*, 9 IND. L. REV. 468 (1976); 43 U.M.K.C. L. REV. 98 (1974).

116. The majority noted that there was "no suggestion that this standard procedure essentially like that followed throughout the country, was a pretext concealing an investigatory motive." 96 S. Ct. at 3100. But see *Pigford v. United States*, 273 A.2d 837 (D.C. 1971) wherein it was held that an inventory search was exploratory and therefore forbidden.

117. The court in *Boulet v. State*, 109 Ariz. 433, 435, 511 P.2d 168, 170 (1973) noted:

We believe that there has been unnecessary confusion caused by insisting upon an either/or requirement as to the motives for inventorying the contents of the automobile. It is unrealistic to require that in justifying the inventory search the police must affirm that they had no hope or expectation of finding something incriminating. What makes an inventory search reasonable under the requirements of the Fourth Amendment is not that the subjective motives of the police were simplistically pure, but whether the facts of the situation indicate that the inventory is reasonable under the circumstances.

118. 96 S. Ct. at 3096.

include a full examination of the car, its contents, the trunk, and any closed or locked containers.

Nevertheless, the impact of *Opperman* on lower court decisions is likely to be somewhat limited due to the Court's failure adequately to deal with all the issues. The majority's failure to employ a balancing test or to discuss the scope question in any depth led Justice Marshall, in his dissent, to conclude: "[I]t should be clear in any event that this Court's holding does not preclude a contrary resolution of [other cases] involving the same issues under any applicable state law."¹¹⁹

The *Opperman* decision is so incomplete that Justice Marshall perceived little chance that courts will be substantially affected. However, incompleteness is the least of *Opperman*'s weaknesses. In the effort to give to its decision an aura of consistency the Court was forced to reinterpret several cases by ignoring crucial distinctions between those cases and the facts of *Opperman*. The Court was also forced to rely upon purposes of an inventory which give little consideration to the individual's right to privacy. Finally, the *Opperman* majority refused to use a balancing test. The rationale presented by the majority results in, at best, a confused lead to follow. Instead of actually untangling the "web" of automobile search law, the majority conjured up a new one.

The better reasoned approach would have been to tackle the questions presented by automobile inventories head-on. The Court should have closely scrutinized the purposes of an inventory, analyzed the scope question by considering standard police practice as merely one among many factors, and finally, balanced the right to privacy against the need to search. This analysis would almost certainly have led to a different result in *Opperman* and a more adequate guide for lower courts. *Opperman*'s evasion of key issues such as the individual's right to privacy and the scope of the search apparently leaves the door open to the lower courts to analyze different factual inventory questions independently of the Supreme Court's holding. Nevertheless, the lower courts will still have to deal with *Opperman*'s proposition that a routine inventory of an impounded automobile constitutes a new exception to the warrant requirement.¹²⁰

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119. See Comment, 87 HARV. L. REV. 835 (1974).

120. See, e.g., *People v. Counterman*, ____ Colo. ____, 556 P.2d 481 (1976); *State v. Opperman*, 247 N.W.2d 673 (N.D. 1976).