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# Student Comments

## *Colorado v. Bertine*: An Expansion of the Inventory Doctrine as Applied to Vehicles and its Impact on Illinois Law

### I. INTRODUCTION

When a police officer lawfully impounds a vehicle,<sup>1</sup> that officer may conduct an inventory search to secure the contents of the vehicle, and may seize any contraband or evidence of a crime found during the search.<sup>2</sup> Inventory searches are reasonable under the fourth amendment<sup>3</sup> if made pursuant to standardized police regu-

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1. The United States Supreme Court has stated that vehicles may be impounded when they interrupt traffic and when they violate parking ordinances. *South Dakota v. Opperman*, 428 U.S. 364, 368-69 (1976). See *infra* note 14 and accompanying text (discussing when the need to impound arises). For a discussion of when the police may impound a vehicle, and a criticism of the Supreme Court's failure to fully address that issue, see Reamey, *Reevaluating the Vehicle Inventory*, 19 Crim. L. Bull. 325 (1983). See also 3 W. LAFAVE, *SEARCH AND SEIZURE* 7.3(c)-(e), at 85-95 (1978) [hereinafter LAFAVE] (discussing the impoundment of vehicles for safekeeping, illegal parking, and unsafe condition).

The Illinois courts have followed *Opperman* by holding that vehicles can be impounded when they impede traffic or threaten public safety and convenience. *People v. Schultz*, 93 Ill. App. 3d 1071, 1075-76, 418 N.E.2d 6, 9 (1st Dist. 1981). A vehicle cannot be impounded, however, simply because it will be left unattended by the arrestee. *Id.* at 1076, 418 N.E.2d at 9. Additionally, a police regulation authorizing the impounding of a vehicle does not determine the lawfulness of the impounding under the fourth amendment. *Id.* See also *People v. Brown*, 100 Ill. App. 3d 57, 426 N.E.2d 575 (2d Dist. 1981) (police could not impound a lawfully parked automobile); *People v. Valdez*, 81 Ill. App. 3d 25, 400 N.E.2d 1096 (2d Dist. 1980) (police had no authority to take vehicle from private parking lot); *People v. Von Hatten*, 52 Ill. App. 3d 338, 367 N.E.2d 556 (4th Dist. 1977) (automobile owner has right to maintain his vehicle where it was legally parked).

2. See *Colorado v. Bertine*, 107 S. Ct. 738 (1987); *South Dakota v. Opperman*, 428 U.S. 364 (1976). See also 3 LAFAVE, *supra* note, 1 at 7.4(a), at 98-116. For a discussion of inventory searches of automobiles before *Opperman*, see Miles & Wefing, *The Automobile Search and the Fourth Amendment: A Troubled Relationship*, 4 SETON HALL 105, 108, 133-44 (1972); Stroud, *The Inventory Search and the Fourth Amendment*, IND. LEG. FORUM 471 (1971); Note, *The Inventory Search of an Impounded Vehicle*, 48 CHI. KENT L. REV. 48 (1971); Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835, 845-53 (1974); Comment, *Police Inventories of the Contents of Vehicles and the Exclusionary Rule*, 29 WASH. & LEE L. REV. 197 (1972). For a discussion of inventory searches after *Opperman*, see Reamey, *supra* note 1, at 325; Ruebner, *Automobile Stops and Searches*, 19 LOY. U. CHI. L.J. 1045 (1988); Comment, *Automobile Inventories and the Fourth Amendment: South Dakota v. Opperman*, 38 OHIO ST. L.J. 177 (1977).

3. The fourth amendment to the United States Constitution states:

lations.<sup>4</sup> The fourth amendment requirements of a warrant, probable cause, or articulable suspicion are inapplicable to the inventory search.<sup>5</sup>

In *Colorado v. Bertine*,<sup>6</sup> the United States Supreme Court extended inventory searches to containers found in an impounded vehicle. This decision rejects the approach taken by the Illinois Supreme Court in *People v. Bayles*,<sup>7</sup> which held that an inventory search could not extend to closed containers in a vehicle. The *Bayles* court followed the reasoning and language of *South Dakota v. Opperman*,<sup>8</sup> which upheld an inventory search of an impounded vehicle.

This Comment will trace the development of the vehicle inventory search doctrine. First, the *Opperman* opinion will be discussed. The Comment will then discuss the application of *Opperman* by the Illinois Supreme Court to *Bayles*. Finally, this Comment will consider the ramifications of the *Bertine* opinion on Illinois law.

## II. BACKGROUND

### A. Opperman v. South Dakota

In *Opperman v. South Dakota*, the defendant's car was cited twice for illegal parking.<sup>9</sup> Pursuant to standard procedures, police officers impounded the car and conducted an inventory of its contents. During the search, a police officer found a container of marijuana in the glove compartment.<sup>10</sup> The South Dakota Supreme

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

U.S. CONST. amend. IV.

4. The plurality in *Opperman* stated that "[t]he decisions of this Court point unmistakably to the conclusion reached by both federal and state courts that inventories pursuant to standard police procedures are reasonable." *Opperman*, 428 U.S. at 372. The *Opperman* Court gave no clear indication of what constituted "standard procedures." The concurring opinion, however, stressed that the police officer's discretion had to be limited because if the police make a nondiscretionary determination to search, there are no special facts for a neutral magistrate to evaluate. *Id.* at 383 (Powell, J., concurring). But see *Bertine*, 107 S. Ct. at 744-46.

5. See Reamey, *supra* note 1, at 325; Ruebner, *supra* note 2, at 1046.

6. 107 S. Ct. 738 (1987).

7. 82 Ill. 2d 128, 411 N.E.2d 1346 (1980), *cert. denied*, 453 U.S. 923 (1981).

8. 428 U.S. 364 (1976). See *infra* notes 35-39 and accompanying text.

9. *Opperman*, 428 U.S. at 365-66.

10. *Id.* at 366.

Court held that the search was unreasonable under the fourth amendment because it involved a substantial invasion of privacy.<sup>11</sup>

The United States Supreme Court reversed, holding that the inventory did not violate the fourth amendment.<sup>12</sup> The Court first noted that automobiles frequently are searched without a warrant under the automobile exception to the warrant requirement.<sup>13</sup> The Court explained that the police have greater freedom when dealing with automobiles because they are frequently in contact with automobiles when performing regulatory and safety functions.<sup>14</sup>

The Court refused to rely on a probable cause analysis when determining the validity of the inventory search because the probable cause standard relates to criminal investigations and an inventory search is not conducted for an investigatory purpose.<sup>15</sup> Rather, after the vehicle is impounded, the analysis focuses on whether the inventory search was reasonable under the fourth amendment.<sup>16</sup> Enunciating a standard of reasonableness, the

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11. *State v. Opperman*, 89 S.D. 25, 228 N.W.2d 152 (1975). The court first concluded that the inventory was a search under the fourth amendment because it was a substantial invasion of privacy. *Id.* at 29, 31, 228 N.W. 2d at 154-55. The court then held the search unreasonable, distinguishing the three cases subsequently relied upon by the United States Supreme Court to uphold the search. *Id.* at 33-36, 228 N.W.2d at 156-58. See *infra* note 24 and accompanying text for a discussion of the South Dakota Supreme Court's reasoning.

12. *Opperman*, 428 U.S. at 376.

13. The automobile exception is justified because cars are mobile and there is a lesser expectation of privacy in an automobile than in a home or office. *Id.* at 367. The Supreme Court stated: "The expectation of privacy is further diminished by the obviously public nature of automobile travel." *Id.* at 368. See *Cradwell v. Lewis*, 417 U.S. 583, 589-90 (1974); *Coolidge v. New Hampshire*, 403 U.S. 443, 458-64 (1971); *Chambers v. Maroney*, 399 U.S. 42, 46-52 (1970); *Carroll v. United States*, 267 U.S. 132 (1925).

14. *Opperman*, 428 U.S. at 368. One such function is the impounding of vehicles that are interrupting traffic. *Id.* Vehicles can also be impounded for violations of parking ordinances. *Id.* at 369. The *Opperman* Court stated that automobiles violating parking ordinances "jeopardized both the public and the efficient movement of vehicular traffic." *Id.* The Court added that "[t]he authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge." *Id.*

15. *Id.* at 370, n.5. The Court stated: "The standard of probable cause is peculiarly related to criminal investigations, not routine, non-criminal procedures." *Id.* The Court nonetheless looked to the expectation of privacy to determine the reasonableness of the intrusion. See *supra* notes 13-14 (where the court looked to the expectation of privacy in an automobile).

16. *Id.* at 370-73. The Court noted that state courts had concluded that even if an inventory is a search governed by the fourth amendment, it is a constitutionally permissible intrusion. In the present case, South Dakota conceded that the inventory was a search under the fourth amendment. *Id.* at 370 n.6. Justice Powell stated that "despite their benign purpose, when conducted by government officials [inventory searches] constitute 'searches' for the purposes of the Fourth Amendment." *Id.* at 377 n.1. The leading case before *Opperman*, *Mozetti v. Superior Court of Sacramento County*, 4 Cal. 3d

Court relied on three cases which concluded that inventory searches were reasonable. In *Cooper v. California*,<sup>17</sup> the Court allowed an inventory of a car that the police held for forfeiture proceedings.<sup>18</sup> The *Cooper* Court noted that because the car was in police possession for a considerable time, the police had reason to search it for their own protection.<sup>19</sup> In *Harris v. United States*,<sup>20</sup> the Court held a search reasonable because evidence was found in plain view while the police performed the narrow function of locking a vehicle.<sup>21</sup> Lastly, the *Opperman* Court cited *Cady v. Dombrowski*,<sup>22</sup> which upheld an inventory search because the police suspected that the vehicle contained a weapon.<sup>23</sup>

Although *Opperman* differed factually<sup>24</sup> from *Cooper*, *Harris*, and *Cady*, the United States Supreme Court held that the cited cases were controlling. The Court reasoned that the inventory search in *Opperman* was prompted by the "needs" that the prior cases recognized: the protection of the owner's property; the protection of the police from claims of lost or stolen property; and the protection of the police against potential dangers.<sup>25</sup>

Although the only interest that the state had in inventorying the contents of *Opperman's* car was to protect his property,<sup>26</sup> the

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699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971), held that inventory searches of vehicles were searches under the fourth amendment. See LAFAYE, *supra* note 1, at 96 (the better view is that inventories are searches for the purposes of the fourth amendment).

17. 386 U.S. 58 (1967).

18. *Id.* at 61. The *Opperman* Court noted that in *Cooper* no warrant was issued for the search, nor was there probable cause to search for contraband. *Opperman*, 428 U.S. at 373. Furthermore, the search was not limited to a forfeiture proceeding because there "was no reason for the police to assume automatically that the automobile would eventually be forfeited to the state." *Id.* at 373, n.8.

19. *Cooper*, 386 U.S. at 61-62.

20. 390 U.S. 234 (1968).

21. *Id.* The Court noted that in *Harris*, a warrant was unnecessary because the intrusion was justifiable to protect the car while in police custody. *Opperman*, 428 U.S. at 374.

22. 413 U.S. 433 (1973).

23. *Id.* at 436-37, 447. The warrantless intrusion was justifiable in *Cady* because it "was incident to the caretaking function of the local police to protect the community's safety." *Opperman*, 428 U.S. at 374.

24. The South Dakota Supreme Court had found that *Cooper*, *Harris*, and *Cady* were not on point. The court found *Cooper* inapposite because forfeiture proceedings had not commenced. *Opperman*, 89 S.D. at 33, 228 N.W.2d at 157. *Cady* was distinguished because the vehicle was not a public nuisance, nor were there exigent circumstances like a hidden gun as in *Cady*. *Id.* at 33-34, 228 N.W.2d at 157. Finally, *Harris* was limited to items found in plain view. *Id.* at 34-35, 228 N.W.2d at 157-58. None of those situations were present in *Opperman*. Justice Powell also noted that the cases used by the Court "each relied in part on significant factors not found [in *Opperman*]." *Opperman*, 428 U.S. at 377 n.2. (Powell, J., concurring).

25. *Opperman*, 428 U.S. at 369.

26. *Id.* at 377-79, nn. 2-3 (Powell, J., concurring).

Court held the search reasonable.<sup>27</sup> The Court stated that the police searched the car because valuable items were in plain view.<sup>28</sup> Moreover, the police conducted the search pursuant to standard procedures.<sup>29</sup> Finally, the Court noted that the search was not a pretext for an investigatory search.<sup>30</sup>

Although the plurality did not define the scope of a permissible inventory search, restrictive language in *Opperman* indicates that the search should be limited to areas of the vehicle in which valuables may be stored.<sup>31</sup> Further, the plurality seemed to adopt a less intrusive means<sup>32</sup> approach when determining whether the police could impound the vehicle if the owner was unable to make other arrangements for its care.<sup>33</sup> Justice Powell's concurrence indicated that, although the state may have an interest in conducting inventories, this interest was not a "general license" to search.<sup>34</sup>

### B. *People v. Bayles*

The Illinois Supreme Court in *People v. Bayles* relied on the restrictive language in *Opperman* to invalidate an inventory search of

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27. *Id.* at 376.

28. *Id.* at 375-76. This justification has been criticized since the South Dakota Supreme Court interpreted its state law as limiting police liability to items in plain view. *Id.* at 391. (Marshall, J., dissenting). Therefore, although the extensive search is "prompted" by those items, the need to protect the police from liability is not present beyond items in plain view. *Id.* at 378 n.3 (Powell, J., concurring).

29. *Id.* at 365-66.

30. *Id.* at 376.

31. The plurality stated that "standard inventories often include an examination of the glove compartment, since it is a customary place for documents of ownership and registration . . . as well as a place for the temporary storage of valuables." *Id.* at 372. This language implies that areas of the vehicle in which valuables are not stored cannot be searched. LAFAVE, *supra* note 1, at 111.

32. "Less intrusive means" is an approach that seeks to achieve desired goals with minimal intrusion into the expectations of privacy. For example, in the inventory search context, a less intrusive means than an inventory search to protect an arrestee's property would be to allow the arrestee to make arrangements for its care. *Id.* at 375. In *Opperman*, Justice Marshall would require the police to exhaust "reasonable efforts under the circumstances to identify and reach the owner of the property in order to facilitate alternate means of securing" the owners consent to the search. *Id.* at 394 (Marshall, J., dissenting). Obtaining consent would be less intrusive than an inventory search. *Id.* In *People v. Hamilton*, 74 Ill. 2d 457, 386 N.E.2d 53 (1979), the Illinois Supreme Court adopted a less intrusive means approach by holding that the objectives of protecting the arrestee's property and protecting the police from danger could be fulfilled by sealing the container with tape and placing it in a locker or storage room. *Id.* at 469-70, 386 N.E.2d at 59.

33. *Opperman*, 428 U.S. at 375. See LAFAVE, *supra* note 1, at 89-90 (there is a growing body of law that arrestee must be allowed to make alternate arrangements).

34. *Opperman*, 428 U.S. at 380 (Powell, J., concurring). Justice Powell added that the police officer has no discretion as to the scope or the subject of the search. *Id.* at 384.

a closed container.<sup>35</sup> The *Bayles* court determined that, although the *Opperman* Court allowed the police to inventory the contents of the vehicle, it "did not involve the opening of closed containers transported in the vehicle."<sup>36</sup> The *Bayles* court concluded that *Opperman* did not authorize the search of closed containers. Further, the court ruled that a search is not necessarily reasonable merely because it is conducted according to established police procedure.<sup>37</sup>

The *Bayles* court considered the expectation of privacy in a closed container to determine the reasonableness of the inventory search.<sup>38</sup> This analysis mirrors the *Opperman* Court's focus on the expectation of privacy in a vehicle when determining the reasonableness of the inventory.<sup>39</sup> The *Bayles* court noted that *United States v. Chadwick*<sup>40</sup> recognized a greater expectation of privacy in luggage because it is a "repository of personal effects."<sup>41</sup> Furthermore, under *Arkansas v. Sanders*,<sup>42</sup> if personal luggage is searched

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35. *People v. Bayles*, 82 Ill. 2d 128, 411 N.E.2d 1346 (1980), *cert. denied*, 453 U.S. 923 (1981). In *Bayles*, the defendant was involved in a one car accident in which a suitcase and string sack were thrown out of the car. The police, pursuant to established procedures, opened the containers and inventoried the contents, finding marijuana and methaulone. *Id.* at 131-34, 411 N.E.2d at 1347-48. See *People v. Salter*, 91 Ill. App. 3d 831, 414 N.E.2d 1252 (1980) (following *Bayles*, holding that an inventory search of a closed container found in an impounded vehicle is unconstitutional under the fourth amendment). See Ruebner, *supra* note 2, at 1056.

36. *Bayles*, 82 Ill. 2d at 136, 411 N.E.2d at 1350. The court quoted Justice Powell's "general license" statement, as well as Justice Marshall's statement interpreting the plurality opinion as not authorizing the search of closed containers. *Id.* Justice Marshall stated that "the Court's opinion does not authorize the inspection of suitcases, boxes, or other containers which might themselves be sealed, removed, and searched without further intrusion." *Opperman*, 428 U.S. at 388 n.6 (Marshall, J., dissenting).

37. *Bayles*, 82 Ill. 2d at 142, 411 N.E.2d at 1353.

38. *Id.* at 135-41, 411 N.E.2d at 1349-52.

39. See *supra* notes 13-14 and accompanying text (discussing the Supreme Court's analysis of expectation of privacy in a vehicle).

40. 433 U.S. 1 (1977). In *Chadwick*, federal agents arrested the defendants at a Boston train station. The agents searched the defendants' padlocked footlocker about an hour and a half after the arrest and found marijuana. *Id.* at 3-5. The Court held that, although the federal agents had probable cause, the agents still needed a warrant. *Id.* at 11. The Court refused to extend the automobile search exception to closed containers because the factors that diminished the privacy interest in an automobile (registration, licensing, inspection, use as a means of transportation) were inapplicable to closed containers. *Id.* at 13.

41. *Bayles*, 82 Ill. 2d at 138, 411 N.E.2d at 1350 (quoting *Chadwick*, 433 U.S. at 13).

42. 442 U.S. 753 (1979). In *Sanders*, the police, acting on an informant's tip, arrested the defendant shortly after his arrival by plane in Little Rock, Arkansas. The police retrieved a suitcase from the taxi in which the defendant was to leave the airport. The officers searched the suitcase without a warrant or the defendant's consent. *Id.* at 755-56. The Court refused to extend the automobile exception to closed containers in a vehicle. *Id.* at 762-65. The Court held that, when "the police without endangering themselves or

without a warrant, there must be exigent circumstances present.<sup>43</sup>

After noting the high privacy interest afforded to closed containers, the Illinois Supreme Court applied the reasonableness test recognized in *Opperman*. The *Bayles* court held that the police violated the fourth amendment protection against intrusive inventory searches of closed containers in an impounded vehicle.<sup>44</sup> In considering the intrusiveness of the search, the court determined that the need to protect the police from danger did not justify the search because the police failed to demonstrate that the contents of the container posed a danger.<sup>45</sup> The court also concluded that protection of the owner's property and protection of the police from claims of lost or stolen property could have been achieved in a less intrusive manner.<sup>46</sup>

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risking loss of the evidence, lawfully have detained one suspected of criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained." *Id.* at 766.

43. *Bayles*, 82 Ill. 2d at 139, 411 N.E.2d at 1351-52. The court noted that exigent circumstances such as "danger to the officers or the destruction or mobility of the evidence" may justify opening a closed container. *Id.* at 143, 411 N.E.2d at 1353.

44. *Id.* at 144, 411 N.E.2d at 1353.

45. *Id.* at 143, 411 N.E.2d at 1353.

46. *Id.* The court stated: "These two objectives could have been fulfilled by sealing the suitcase with tape and placing it in a locked locker or a storage room." *Id.* (citing *People v. Hamilton*, 74 Ill. 2d 457, 386 N.E.2d 59 (1979)). In delineating the acceptable scope of an inventory, the *Bayles* court held that the vehicle's "integral part[s]" could be searched, but less intrusive means were required when the police sought to inventory the closed containers in the car. The *Bayles* court noted that *Opperman* involved only an integral part of the automobile—the glove compartment—and not a container. According to *Bayles*, therefore, the *Opperman* holding was limited to that situation. *Id.* at 136, 411 N.E.2d at 1351-52.

This less intrusive means requirement subsequently has been applied by an Illinois appellate court in *People v. Velleff*, 94 Ill. App. 3d 820, 419 N.E.2d 89 (2d Dist. 1981). The court in *Velleff* held that the police did not exhaust less intrusive means when they inventoried the contents of a car that had been legally parked on the street. *Id.* at 823-24, 419 N.E.2d at 92. In *Velleff*, police officers stopped the defendant for driving a vehicle with a cracked windshield and only one license plate. The defendant followed the police to the station and parked the car on a nearby street. The police brought the car to their lot and searched it. They found a gun in a plastic bag in the trunk. *Id.* at 822, 419 N.E.2d at 91. The court held that, because the defendant had a companion who could have driven the car, the police failed to exhaust less intrusive means to protect his property. *Id.* at 823-24, 419 N.E.2d at 92. The *Velleff* court also cited *Bayles* for the proposition that closed containers in a vehicle could not be searched absent exigent circumstances. *Id.* at 824, 419 N.E.2d at 92 (citing *Bayles*, 82 Ill. 2d at 143, 411 N.E.2d at 1353).

See also *People v. Salter*, 91 Ill. App. 3d 831, 414 N.E.2d 1252 (1st Dist. 1980). In *Salter*, police officers stopped the defendant for having a bent license plate. Following police procedure, the officers inventoried the contents of the vehicle, including a bag in the car which contained a gun, marijuana, and cocaine. *Id.* at 832-33, 414 N.E.2d at 1254. The court held that there was no danger to the officer and, further, that the objectives of protecting property and protecting the police against false claims could have been



# COLORADO V. BERTINE

## A. The Facts

In *Colorado v. Bertine*,<sup>47</sup> a police officer stopped the defendant because the officer observed the defendant speeding and making frequent lane changes. After conducting a field sobriety test, the officer arrested the defendant for driving under the influence.<sup>48</sup> Subsequently, another officer inventoried the contents of the defendant's van, including a zippered backpack located behind the front seat.<sup>49</sup> The backpack contained three coffee cans in which the officer found cocaine, related paraphernalia, and seven hundred dollars in cash.<sup>50</sup>

The trial court, basing its decision on *Illinois v. Lafayette*,<sup>51</sup> denied the defendant's motion, on fourth amendment grounds, to suppress the items found in the backpack.<sup>52</sup> The court, however, did grant the motion under article II, section 7 of the Colorado Constitution.<sup>53</sup> In an interlocutory appeal, the Supreme Court of

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achieved in a less intrusive manner. *Id.* at 834, 414 N.E.2d at 1255. *But see* *People v. Braasch*, 122 Ill. App. 3d 747, 461 N.E.2d 651 (2d Dist. 1984). In *Braasch*, the court questioned the *Bayles* holding and the requirement of less intrusive means and upheld an inventory search of a closed paper bag in the defendant's trunk. *Id.* at 755-56, 461 N.E.2d at 658. The *Braasch* court relied on *Illinois v. Lafayette*, 462 U.S. 640 (1983), which held that inventory searches of closed containers carried by an arrestee at the time of arrest were reasonable. *Id.* at 755, 461 N.E.2d at 657-58. Although *Braasch* expanded the scope of the search to closed containers in the trunk, the subject of the search was still restricted by the less intrusive means test. *Id.* at 752, 461 N.E.2d at 656. The arrestee's car was impounded because the owner was unable to make other arrangements and leaving it parked on the highway would violate the Illinois Vehicle Code. *Id.* at 753, 461 N.E.2d at 656. Compare this view with that of the *Bertine* Court, which seems to indicate the less intrusive means approach does not restrict the subject of the search. *See infra* note 64 and accompanying text.

47. 107 S. Ct. 738 (1987).

48. 706 P.2d 411, 412 (Colo. 1985).

49. *Id.* at 413.

50. *Id.*

51. 462 U.S. 640 (1983). In *Lafayette*, the defendant was arrested for disturbing the peace. *Id.* at 641. At the station, the police conducted an inventory search of a "purse-type shoulder bag" the defendant had with him. *Id.* at 642-43. Ten amphetamine pills were found inside a cigarette package that the police obtained from the bag. *Id.* at 642. The Supreme Court upheld the search, concluding that it was reasonable under the fourth amendment. *Id.* at 648. The Court noted that the inventory search was necessary to protect the police against false claims and that "dangerous instrumentalities—such as razor blades, bombs, or weapons—can be concealed in innocent-looking articles taken from the arrestee's possession." *Id.* at 646. The Court also noted that the inventory search was a reasonable administrative procedure. *Id.* For a discussion of *Lafayette*, see Note, *Illinois v. Lafayette: How the Fourth Amendment Vanished in the Face of Administrative Expediency*, 21 CAL. W. L. REV. 218 (1984).

52. *People v. Bertine*, 706 P.2d at 413.

53. *Id.* at 414 (citing COL. CONST. art. III, § 7).

Colorado affirmed the trial court, but premised its holding on the fourth amendment.<sup>54</sup> The court determined that the police had failed to use less intrusive means to protect the backpack. The court reasoned that the defendant had a high expectation of privacy<sup>55</sup> in the backpack and the police could have searched it legitimately only if exigent circumstances existed.<sup>56</sup> Finally, the court noted that the police had not attempted alternate means for the care of the vehicle.<sup>57</sup>

### B. The Majority Opinion

The United States Supreme Court reversed the decision of the Supreme Court of Colorado,<sup>58</sup> holding that the inventory search did not violate the fourth amendment. Chief Justice Rehnquist, writing for the majority, rejected the state supreme court's arguments and expanded the *Lafayette* holding to include closed containers found in an impounded vehicle.<sup>59</sup> The Court concluded that reasonableness was not tested by expectation of privacy, a factor considered in a probable cause analysis, but rather by whether the inventory fulfilled the objectives articulated in *Opperman*.<sup>60</sup> The *Bertine* Court held that the governmental interests identified in *Opperman* outweighed the individual's fourth amendment interest.<sup>61</sup> Because there was no showing of investigatory motive by the

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54. *Id.* at 419.

55. The court stated that *Opperman* "established the balancing test weighing the legitimate governmental interests advanced by the search against the invasion of privacy which the search entailed." 706 P.2d at 414.

56. *Id.* at 417.

57. *Id.* at 418.

58. *Bertine*, 107 S. Ct. at 743.

59. *Id.* at 742. The majority held that reliance on *Chadwick* and *Sanders* in inventory search cases is unfounded because those cases dealt with situations involving probable cause. *Id.* at 741. Because the police lacked an investigatory motive, the majority reasoned that a probable cause analysis was "unhelpful." *Id.* For an analysis of *Chadwick* and *Sanders*, see *supra* notes 40-43 and accompanying text.

60. *Id.* Additionally, there must be "standard criteria." *Id.* at 743. See *infra* note 65 and accompanying text. This requirement is to ensure that the inventory is not a pretext for an investigatory search because the police officer has little discretion when the inventory is conducted pursuant to standard procedures. See *Opperman*, 428 U.S. at 383 (Powell, J., concurring).

61. *Bertine*, 107 S. Ct. at 742. Although the Court did not expressly state what the individual's fourth amendment right entails, the Court implied that the fourth amendment affords protection only from "unreasonable" searches and seizures and not from intrusive searches. *Id.* at 743. The Court seemed to indicate that a search is not unreasonable because it is intrusive; rather, the Court appeared to indicate that a search is unreasonable in the inventory search context if not conducted pursuant to legitimate care-taking functions. *Id.*

police, the search was reasonable.<sup>62</sup>

The majority rejected arguments that *Bertine* could be distinguished from *Lafayette* because, in *Bertine*, there was no danger that the arrestee could introduce contraband or weapons into the jail facility. The Court stated that the station house setting was not crucial to the *Lafayette* holding because other governmental interests justified the search.<sup>63</sup> Additionally, the Court concluded that the *Lafayette* decision did not mandate a less intrusive means approach. Thus, it was irrelevant that the police could have allowed Bertine to make other arrangements for the care of his van.<sup>64</sup> Finally, the Court held that a police officer may use a certain amount of discretion so long as it is pursuant to "standard criteria" and not "something other than suspicion of evidence of criminal activity."<sup>65</sup>

### C. The Dissent

Justice Marshall's dissent criticized the Court's application of *Opperman* and *Lafayette*. The dissent noted that the majority opinion allowed the police officer to exercise discretion in determining whether to impound.<sup>66</sup> According to the dissent, this was contrary to the requirement in *Opperman* and *Lafayette* that the police follow standardized procedures.<sup>67</sup> Justice Marshall also noted that Justice Powell's concurrence in *Opperman* stressed that the police should not have any significant discretion concerning the subject or scope of the search.<sup>68</sup>

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62. *Id.* at 742.

63. *Id.* The other interests were the protection of property and the protection of the police against false claims. *Id.*

64. *Id.* The Court quoted *Lafayette*: "[t]he real question is not what 'could have been achieved,' but whether the Fourth Amendment *requires* such steps . . . . The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternate 'less intrusive' means." *Id.* at 742 (quoting *Illinois v. Lafayette*, 462 U.S. at 647) (emphasis in original). Compare this statement with Justice Burger's view in *Opperman*, indicating that alternate arrangements should be made when possible. See *supra* note 33 and accompanying text.

65. *Id.* at 743.

66. *Id.* at 744-46. Justice Marshall noted that at trial the officer who conducted the inventory stated that it was "his own individual discretionary decision" to search the vehicle instead of parking and locking it. *Id.* at 745. Under department procedures, the police officer could have either allowed a third person to take custody of the vehicle, or allowed the driver to park the vehicle if neither the vehicle nor its contents were evidence of a crime, or impound the vehicle. *Id.*

67. *Id.* at 744.

68. *Id.* See *supra* note 34. The concurrence in *Bertine* also indicated that the officer conducting the inventory should not have discretion. According to the *Bertine* concurrence, the inventory search could be conducted only pursuant to standard police proce-

The dissent balanced the individual's expectation of privacy against the governmental interests.<sup>69</sup> Justice Marshall concluded that the interest in protecting police against claims is weak because, even if the police conduct an inventory, a defendant may assert that the officer purposely omitted an item.<sup>70</sup> Regarding the interest in protecting the police from danger, the dissent concluded that the potential danger from an impounded vehicle was so small that it failed to justify an intrusion.<sup>71</sup> The only remaining interest, the protection of the owner's property, also failed to justify an inventory.<sup>72</sup> According to the dissent, the state easily could have protected the arrestee's property by allowing the arrestee to make alternate arrangements.<sup>73</sup> Moreover, the state's interests were weaker than in *Opperman*, and the search into the closed container was more intrusive than a search of an automobile.<sup>74</sup>

Finally, the dissent focused on the applicability of the *Lafayette*

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dures and could not be for investigatory purposes. The concurrence would allow inventories of closed containers found in a vehicle only if all impounded vehicles were similarly inventoried. *Id.* at 744. The result of the concurrence's approach would be to eliminate police discretion regarding the scope of the inventory but still allow police discretion in determining whether to impound.

Responding to the dissent's argument that the procedures allowed police officers too much discretion to the officers, Chief Justice Rehnquist stated that the dissent only "selectively" quoted from the police directive. Chief Justice Rehnquist noted that discretion was limited because the police could "not park and lock the vehicle where there [was a] reasonable risk of damage or vandalism to the vehicle or where the approval of the arrestee [could not] be obtained." *Id.* at 743 n.7.

69. *Id.* at 746. The governmental interests are the three "needs" articulated in *Opperman*. See *supra* note 25 and accompanying text.

70. *Id.* at 747. In reaching this conclusion, Justice Marshall referred to the *Opperman* concurrence, in which Justice Powell stated that "inventories are [not] a completely effective means of discouraging false claims, since there remains the possibility of accompanying such claims with an assertion that an item was stolen prior to the inventory or was intentionally omitted from the police records." *Id.* (quoting *Opperman*, 428 U.S. 378-79 (Powell, J., concurring)).

71. *Id.* Justice Marshall noted that this interest failed to receive the support of a majority of the Court in *Opperman* as Justice Powell, who cast the deciding vote in *Opperman*, stated: "there is little danger associated with impounding unsearched vehicles. . . ." *Id.* (quoting *Opperman*, 428 U.S. at 378 (Powell, J., concurring)).

72. *Id.* at 748.

73. *Id.* Justice Marshall noted that the *Opperman* plurality considered whether the owner was available to make other arrangements. The *Bertine* majority rejected this factor. *Id.* There was evidence in the record indicating that the defendant in *Bertine* would have been willing to park the vehicle on a nearby street and leave it unattended for a short time. *Id.* The *Bertine* Court stated that "while giving Bertine an opportunity to make alternate arrangements would undoubtedly have been possible," *Lafayette* does not require less intrusive means. *Id.* See *supra* note 64.

74. *Id.* Justice Marshall stated that *Opperman* did not involve a search of closed containers or other items that "touch upon intimate areas of an individual's personal affairs." *Id.* (Powell, J., concurring) (quoting *Opperman*, 428 U.S. at 380 n.7).

decision to *Bertine*. Because *Lafayette* dealt with the possibility of a defendant's bringing contraband or weapons into the station, there was a "powerful interest" in conducting an inventory search.<sup>75</sup> Accordingly, when the station house concerns are absent, the search is inappropriate.

#### IV. ANALYSIS

##### A. *An Expansion of Opperman by the Rejection of Expectation of Privacy*

*Opperman* contains language limiting both the timing and physical scope of an inventory search.<sup>76</sup> In addition, the *Opperman* concurrence contained restrictive language indicating that closed containers in impounded vehicles are protected from inventory searches.<sup>77</sup>

In *Bertine*, the Supreme Court, by not recognizing a higher expectation of privacy in closed containers, extensively expanded the scope of vehicle inventory searches beyond that which was intended in *Opperman*. Although the *Opperman* plurality rejected a probable cause approach when examining the reasonableness of an inventory search,<sup>78</sup> it looked to the diminished expectation of privacy as a justification for inventories of impounded automobiles.<sup>79</sup> In *Bertine*, Chief Justice Rehnquist recognized the need to consider expectation of privacy when he stated: "In light of those strong governmental interests and the diminished expectation of privacy in an automobile, we upheld the search [in *Opperman*]."<sup>80</sup>

In *Bertine*, the expectation of privacy was much greater than the governmental interests.<sup>81</sup> If the Court had followed *Opperman*, it would have accorded more protection to closed containers because

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75. *Id.*

76. See *supra* notes 31-33. But see *Bertine*, 107 S. Ct. at 741 n.4 ("Opperman did not address the question whether the scope of an inventory search may extend to closed containers located in the interior of an impounded vehicle."). See LAFAYETTE, *supra* note 1, at 102 ("Although a superficial reading of the plurality opinion in *Opperman* might prompt the conclusion that the Court has given the green light to all police vehicle inventory procedures, this is not the case.").

77. See *supra* note 34 and accompanying text.

78. See *supra* note 15 and accompanying text.

79. See *supra* note 13. The *Bertine* Court also rejected a probable cause approach but went further by stating that expectation of privacy is part of a probable cause analysis and is, therefore, irrelevant in determining the reasonableness of an inventory search. *Bertine*, 107 S. Ct. at 741.

80. *Id.*

81. See *supra* notes 36-43 and accompanying text, discussing the Illinois Supreme Court's approach and recognition of the high privacy interest in closed containers. See also notes 70-72 and accompanying text, discussing the weakness of the state's interest.

of the increased expectation of privacy, just as the *Opperman* Court accorded less protection to automobiles because of the diminished expectation of privacy.<sup>82</sup> Instead, the *Bertine* court distinguished those cases that had afforded protection to closed containers, reasoning that those cases set up a standard for probable cause that was inapplicable to a non-investigatory search.<sup>83</sup> Although those cases involved criminal investigations, the higher expectation of privacy recognized in them should also be recognized to an inventory search.<sup>84</sup> As Chief Justice Rehnquist observed, expectation of privacy was a factor for the *Opperman* Court.<sup>85</sup> The Court, therefore, has used the diminished expectation of privacy to justify an inventory, but has refused to recognize a higher expectation to protect against intrusive inventories.

### B. Impact on Illinois Law

Illinois recognizes a higher expectation of privacy in closed containers found in an impounded vehicle.<sup>86</sup> The Illinois Supreme Court's reasoning in *Bayles* was almost identical to that of the Colorado Supreme Court in *Bertine*, that closed containers found in an impounded vehicle should be accorded more protection. After the United States Supreme Court decision in *Bertine*, rejecting the reasoning in *Bayles*, the higher level of protection previously recognized in Illinois will no longer be available.

Fourth amendment protection also is reduced by the *Bertine* Court's rejection of the less intrusive means approach as a factor in determining the reasonableness of an inventory.<sup>87</sup> This rejection will have a significant impact on Illinois law. Prior to *Bertine*, the failure to use less intrusive means was considered by the Illinois courts as evidence of investigatory motive by the police.<sup>88</sup> With

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82. See *supra* note 13, discussing the *Opperman* Court's analysis of the diminished expectation of privacy in a vehicle. The Colorado Supreme Court interpreted *Opperman* as "establish[ing] the balancing test weighing the legitimate governmental interests advanced by the search against the invasion of privacy which the search entailed." *People v. Bertine*, 706 P.2d at 414.

83. *Bertine*, 107 S. Ct. at 741.

84. In *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Court stated: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Id.* at 530.

85. *Bertine*, 107 S. Ct. at 741.

86. *Bayles*, 82 Ill. 2d at 137-41, 411 N.E.2d at 1351-52.

87. See *supra* note 64 and accompanying text.

88. See *People v. Velleff*, 94 Ill. App. 3d 820, 823-24, 419 N.E.2d 89, 92 (2d Dist. 1981) ("failure to exhaust less-intrusive alternative before conducting an inventory search has been held to indicate an improper investigatory motive resulting in an unreasonable

this limitation gone, the burden may be on the arrestee to show that the inventory was merely a pretext for a criminal investigation.<sup>89</sup> Absent a statement from the officer who conducted the inventory, an arrestee likely will find it impossible to show that his car was impounded and an inventory was conducted as part of a "fishing expedition."<sup>90</sup>

### C. *Standard of Reasonableness in Bertine*

Instead of balancing the arrestee's expectation of privacy against the governmental interests, the balancing test used by *Bertine* weighs the governmental interests against the arrestee's fourth amendment rights.<sup>91</sup> These governmental interests, which were

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search and seizure"); *People v. Valdez*, 81 Ill. App. 3d 25, 28, 400 N.E.2d 1096, 1099 (2d Dist. 1980) (unlawful for police to take custody of lawfully parked car); *People v. Fox*, 62 Ill. App. 3d 854, 857, 379 N.E.2d 917, 918-19 (1978) (inventory search unreasonable under fourth amendment when police officers could have let passenger drive arrestee's vehicle).

89. One of the factors leading the *Bertine* Court to uphold the inventory was an absence of an investigatory motive by the police. *Bertine*, 107 S. Ct. at 743. Presumably, the arrestee must show an investigatory purpose, although the opinion is not clear on this point.

90. *State v. Opperman*, 89 S.D. at 31, 228 N.W.2d at 152. The South Dakota Supreme Court was afraid that by not providing full fourth amendment protection inventory searches would become "fishing expeditions" that would "whitt[le] away Fourth Amendment protection." *Id.* After the United States Supreme Court overturned its holding in *State v. Opperman*, 89 S.D. 26, 228 N.W.2d 152 (1975), the South Dakota Supreme Court subsequently invalidated the search on a matter of state constitutional grounds. *State v. Opperman*, 247 N.W.2d 673, 675 (1976). Although the language of the South Dakota Constitution was almost identical to the federal constitution, the South Dakota Supreme Court stated "that logic and a sound regard for the purposes of protection afforded by the [South Dakota Constitution] warrant a higher standard of protection than the United States Supreme Court found necessary under the Fourth Amendment." *Id.* at 674-75.

The Illinois Constitution states:

The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches and seizures, invasions of privacy or interception of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

ILL. CONST. ART. I, § 6. The Illinois Constitution appears to provide more protection against intrusive searches by government than is provided for in the federal constitution. The Illinois Constitution specifically articulates a right to be free from unreasonable invasions of privacy. Despite this apparently more protective language, the Illinois Supreme Court has declined to interpret the Illinois Constitution differently than the Supreme Court's interpretation of the federal constitution. See *People v. Clark*, 65 Ill. 2d 169, 357 N.E.2d 798 (1976) (stating that although the state constitution contains a reference to "invasion of privacy," it will be construed consistent with the federal constitution).

91. For a more detailed review of the *Bertine* test, see *supra* note 60 and accompanying text.

identified in *Opperman*, are weak in cases similar to *Bertine* and *Bayles*. The interest in protecting against "dangerous instrumentalities" is weaker in a vehicle inventory because the concern of having a defendant bring dangerous instrumentalities into the station house are gone.<sup>92</sup> The interest in protecting the police against false claims is weak in almost all situations because state law can limit liability. Further, false claims may still be brought regardless of how extensive an inventory may be.<sup>93</sup> Finally, the interest in protecting the arrestee's property could be accomplished easily by allowing the arrestee to make alternate arrangements whenever possible. If the arrestee is allowed to make such arrangements, he protects his own property and the police are not burdened with that responsibility. Furthermore, it relieves the police from liability and ensures that dangerous instrumentalities are not brought into the station.

In *Bertine*, although governmental interests were weak, the arrestee's fourth amendment interest failed to outweigh the governmental interests outlined in *Opperman*.<sup>94</sup> The Court focused on whether the *Opperman* objectives were pursued by the police through "standard procedures" and without an investigatory motive. The fault with this formulation is that it allows significant intrusions into expectations of privacy in order to meet minimal governmental interests.

#### D. The Ramifications of Bertine

The Court seems to have concluded that all inventory searches are reasonable if the *Opperman* objectives are met and if the inventories are pursuant to "standard criteria." Although the Court stated that the inventory could not be conducted for investigatory purposes, the nebulous requirement of "standard criteria"<sup>95</sup> allows the police officer to exercise significant discretion. Consequently, inventories may be conducted as a pretext for criminal investigations.<sup>96</sup> Furthermore, by testing reasonableness on such a deferen-

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92. *Bertine*, 107 S. Ct. at 749 (Marshall, J., dissenting). Although this interest was not "critical" to the *Lafayette* holding, the fact that it is weak should weigh in favor of the arrestee. The Court summarily dismissed this argument.

93. See *supra* note 70 and accompanying text.

94. *Bertine*, 107 S. Ct. at 742.

95. *Opperman* required "standard procedures" that were more precise than in *Bertine*. Also, *Opperman* allowed no discretion to the officer making the inventory of an impounded vehicle. *Opperman*, 428 U.S. at 375. See *supra* note 34 and accompanying text (discussing Justice Powell's restriction on the police officer's discretion).

96. See *supra* notes 86-90 and accompanying text.



tial standard,<sup>97</sup> the Court essentially is allowing police departments to determine the scope of fourth amendment protection.

#### V. CONCLUSION

In *Bertine*, the Supreme Court took a substantial step in diminishing fourth amendment protection by expanding the inventory search doctrine to closed containers in an impounded vehicle. Consequently, the greater protection that the Illinois Supreme Court recognized will no longer be available. Unless *Bertine* is read very narrowly by the courts there will be a tremendous potential for abuse.

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97. The Court noted the cases relied on in *Opperman* (*Cooper, Harris, and Cady*) "accorded deference to police caretaking procedures designed to secure and protect vehicles and their contents within police custody." *Bertine*, 107 U.S. at 741.