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NOTES

THE FINAL WORD ON INVENTORY SEARCHES?—*SOUTH DAKOTA V. OPPERMAN*

The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears.¹

In recent years a perplexing problem has arisen concerning police inventory searches² of impounded automobiles. The authority for the police to impound motor vehicles is established clearly by statute in most states.³ Once a vehicle lawfully is impounded, the question is whether a search by the police without a warrant and without probable cause is "reasonable" under the Fourth Amendment.⁴ The United States Supreme Court in *South Dakota v. Opperman*⁵ recently gave

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

2. See Moylan, *The Inventory Search of an Automobile: A Willing Suspension of Disbelief*, 5 U. BALT. L. REV. 203 (1976). See also Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835, 848 (1974).

3. See, e.g., ILL. REV. STAT. ch. 95 1/2, §4-203 (1975):

Removal of motor vehicles or other vehicles—Towing or hauling away:

(a) When a vehicle is abandoned, or left unattended, on a toll highway, interstate highway, or expressway for 2 hours or more, its removal by a towing service may be authorized by a law enforcement agency having jurisdiction.

(b) When a vehicle is abandoned on a highway in an urban district 10 hours or more, its removal by a towing service may be authorized by a law enforcement agency having jurisdiction.

(c) When a vehicle is abandoned or left unattended on a highway other than a toll highway, interstate highway, or expressway, outside of an urban district for 24 hours or more, its removal by a towing service may be authorized by a law enforcement agency having jurisdiction.

(d) When an abandoned, unattended, wrecked, burned or partially dismantled vehicle is creating a traffic hazard because of its position in relation to the highway or its physical appearance is causing the impeding of traffic, its immediate removal from the highway or private property adjacent to the highway by a towing service may be authorized by a law enforcement agency having jurisdiction.

See, e.g., CAL. VEH. CODE, §22651 (West 1971).

4. The Fourth Amendment to the U.S. Constitution provides that

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

U.S. CONST. amend. IV.

5. 428 U.S. 364 (1976).

judicial approval to such inventory searches, thus opening the door to further deterioration of the Fourth Amendment rights of motorists.

In *Opperman*, the defendant's automobile was parked in a metered stall in the Vermillion, South Dakota business district in violation of a local ordinance.⁶ After the issuance of two parking tickets, the automobile was towed to the city impoundment lot. At the time, the car doors were locked and the windows were rolled up. After opening the locked car door, the police proceeded to conduct a standard inventory search of the vehicle, which resulted in the discovery of a small quantity of marijuana in the closed glove compartment. Opperman subsequently was arrested and convicted for possession of marijuana. On appeal, the South Dakota Supreme Court reversed the conviction, holding that the evidence was obtained in violation of the Fourth Amendment.⁷ The United States Supreme Court ultimately concluded, however, that the inventory search was "reasonable" under the Fourth Amendment.⁸ The Court held that when the police have lawfully impounded an automobile, they may search it without a search warrant and without probable cause if they are following standard police procedures. This Note will analyze the rationale for the Court's decision and will discuss alternative solutions to the practical problem presented in *Opperman*.

DETERMINING APPLICABLE STANDARDS

The first issue that must be confronted when attempting to determine the legality of the inventory search is whether it is indeed a "search" for Fourth Amendment purposes.⁹ Although the Supreme Court consis-

6. Opperman's vehicle was parked in violation of a Vermillion, S.D. ordinance which prohibits parking in the downtown area between the hours of 2:00 and 6:00 A.M. After the issuance of the two tickets, a police officer called for a tow truck. Prior to this time, however, the officer made no attempt to identify or contact the car owner, despite the fact that there were current South Dakota license plates on the vehicle. 428 U.S. at 389 n.7, 395.

7. *State v. Opperman*, ___ S.D. ___, 228 N.W.2d 152 (1975). The court concluded that for an inventory search to be "reasonable" it must be strictly limited to the discovery of items within the officer's plain view. The court, in reaching this decision, relied on the test of "reasonableness" set out in *United States v. Lawson*, 487 F.2d 468 (8th Cir. 1973). The court in *Lawson* stated, "[t]here must be a minimal interference with the individual's protected rights." *Id.* at 475.

8. 428 U.S. 364 (1976). On remand to the South Dakota Supreme Court, however, that court chose to interpret the South Dakota Constitution as requiring greater protection from unreasonable searches and seizures than the Federal Constitution. Article VI, section 11 of the South Dakota Constitution was held to prohibit routine inventory searches that extend beyond plain view items. *State v. Opperman*, ___ S.D. ___, 247 N.W.2d 673 (1976).

9. For purposes of this appeal, the Attorney General of South Dakota conceded that an inventory is a "search." 428 U.S. at 370 n.6.

tently has evaded this issue,¹⁰ other courts have reached conflicting opinions.¹¹ The New York Court of Appeals in a recent case adopted a restrictive definition of search,¹² limiting it to intrusions that are made "for the purpose of seizing things."¹³ That court distinguished inventory procedures from criminal searches, which are investigative in nature and undertaken with a view towards possible prosecution. Under this view, police inventories could be conducted without limit since the Fourth Amendment standard of "reasonableness" only applies to "searches."¹⁴

The alternative view is to define "search" to include any unwarranted intrusion by the police upon a constitutionally protected area. The Eighth Circuit Court of Appeals has adopted this broad interpretation,¹⁵ reasoning that "[t]o consider an inventory procedure not to be a 'search' does violence to the concept of the Fourth Amendment as a protection of the privacy of the citizenry against unwarranted invasion by government officials."¹⁶ That court chose to disregard the intent of the police in determining whether a particular intrusion was a "search." Rather, it focused on the individual's reasonable expectations of privacy. The basis for this view is the Supreme Court's rejection in an earlier case of "an overly technical definition of 'search.'"¹⁷ Also, as the

10. In *Cady v. Dombrowski*, 413 U.S. 433 (1973), a footnote to the majority opinion noted the question, but stated that it need not decide the issue since the petitioner had conceded that the intrusion constituted a search. *Id.* at 442.

Most recently, in *United States v. Ortiz*, 422 U.S. 891 (1975), the Court stated that "not every aspect of a routine automobile 'inspection' . . . necessarily constitutes a 'search' for purposes of the Fourth Amendment. There is no occasion in this case to define the exact parameters of an automobile search." *Id.* at 897 n.3.

11. The majority of courts recognize that a Fourth Amendment search occurs whenever the police intrude upon a constitutionally protected area, despite the lack of an investigative motive on the part of the police. *See, e.g.*, *United States v. Lawson*, 487 F.2d 468 (8th Cir. 1973); *Mozzetti v. Superior Court*, 4 Cal.3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971); *Gagnon v. State*, 212 So.2d 337 (Fla. App. 1968). Other courts, however, have interpreted the Fourth Amendment to prohibit only those intrusions that are made with the intent of seizing evidence. *See, e.g.*, *St. Clair v. State*, 1 Md. App. 605, 232 A.2d 565 (1967); *People v. Willis*, 46 Mich. App. 436, 208 N.W.2d 204 (1973); *State v. Wallen*, 185 Neb. 44, 173 N.W.2d 372, *cert. denied*, 399 U.S. 912 (1970); *People v. Sullivan*, 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S.2d 945 (1971).

12. *People v. Sullivan*, 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S.2d 945 (1971).

13. *See* ALI, A Model Code of Pre-Arrest Procedure §1.01(1) (Tent. Draft No. 3, 1970).

14. U.S. CONST. amend. IV.

15. *See United States v. Lawson*, 487 F.2d 468 (8th Cir. 1973).

16. *Id.* at 472.

17. *See Terry v. Ohio*, 392 U.S. 1, 19 (1968). In *Terry*, the Court authorized the practice of police "stop and frisk" searches. Thus, in certain limited circumstances a police officer may stop a person and subject him to a limited search for weapons, even though the officer

Court stated in *Camara v. Municipal Court*,¹⁸ a case involving the Fourth Amendment requirements of a search made to enforce a municipal housing code, “[i]t 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.”¹⁹

Once it is determined that an inventory is a search, the procedures used by the police must comply with Fourth Amendment standards. Generally, this means that searches must be conducted pursuant to a search warrant,²⁰ since unauthorized searches are “per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”²¹ While a considerable number of exceptions²² have developed, it is clear that none is directly applicable to the inventory search situation.²³

does not have probable cause for an arrest. The Court, in its decision, reasoned that it is better “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 light of all the exigencies of the case, a central element in the analysis of reasonableness.” *Id.* The rationale of *Terry* applies to all types of searches, including inventory searches.

18. 387 U.S. 523 (1967).

19. *Id.* at 530.

20. *Almeida-Sanchez v. United States*, 413 U.S. 266, 269 (1973); *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967). *Contra*, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (Black, J., concurring and dissenting), in which Justice Black states that the test under the Fourth Amendment should not be “the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances.” Justice Black’s view is that the Fourth Amendment really prohibits “unreasonable searches” and not warrantless searches. *Id.* at 509. This view has not, however, been fully accepted by the majority of the Court.

21. *Katz v. United States*, 389 U.S. 347, 357 (1967). *See also* *United States v. Watson*, 423 U.S. 411, 427 (1976); *United States v. Chadwick*, 532 F.2d 773, 778 (1st Cir. 1976).

22. *See, e.g.*, *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (where an individual consents to a search, the police may proceed without a warrant, provided the consent was voluntarily given); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (permitting an officer to make a warrantless search if he has a prior justification for an intrusion in the course of which he inadvertently comes across a piece of evidence in “plain view” incriminating the accused); *Chimel v. California*, 395 U.S. 752 (1969) (allowing a warrantless search within an arrested person’s “immediate control” to insure the officer’s safety and to prevent the concealment or destruction of evidence); *Terry v. Ohio*, 392 U.S. 1 (1968) (permitting a warrantless search of the outer clothing of a person suspected by the police of being involved in criminal activity, in order to discover weapons which might be used to assault the officer); *Warden v. Hayden*, 387 U.S. 294 (1967) (where the police are in “hot pursuit” of a suspected criminal, they may conduct a warrantless search of the premises into which he flees); *Carroll v. United States*, 267 U.S. 132 (1925) (where there is probable cause to stop a car moving on the highway, the police may search it without a warrant).

23. None of the exceptions apply in the inventory search because there is no probable cause or suspicion involved and the owner has not given consent. *But see* *Moylan, supra*

Therefore, theoretically at least, the Court should require a search warrant based on probable cause before the police are allowed to search an individual's automobile. However, as Justice Powell's concurring opinion in *Opperman* recognized,²⁴ the typical inventory search is conducted routinely, pursuant to standard police regulations. "There are thus no special facts for a neutral magistrate to evaluate."²⁵ Consequently, probable cause, as an element of Fourth Amendment analysis, is inappropriate in analyzing the inventory search involved here. Rather, the Court must proceed under the theory that a search may be valid under the Fourth Amendment, even though there is no search warrant and no probable cause, so long as the search is "reasonable."²⁶

Thus, it is necessary to determine "reasonableness" by "balancing the need to search against the invasion which the search entails."²⁷ As one court expressed it, for the police intrusion to be found reasonable under the circumstances of this case, there must have been "a minimal interference with the individual's protected rights."²⁸

note 2, in which the author argues that inventory searches must be analyzed under the "plain view" exception to the search warrant requirement. See also text accompanying notes 79-80 *infra*.

24. 428 U.S. at 376 (Powell, J., concurring).

25. *Id.* at 383.

26. *South Dakota v. Opperman*, 96 S.Ct. 3092, 3097 n.5 (1976). The Court made a distinction between "routine administrative caretaking functions" and criminal investigations:

We have frequently observed that the warrant requirement assures that legal inferences and conclusions as to probable cause will be drawn by a neutral magistrate unrelated to the criminal investigative-enforcement process. With respect to noninvestigative police inventories of automobiles lawfully within governmental custody, however, the policies underlying the warrant requirement . . . are inapplicable.

Id. See also *United States v. Lawson*, 487 F.2d 468 (8th Cir. 1973). That court stated that [w]hen determining the legality of an automobile search, a court must determine its reasonableness under all the circumstances presented; a search which is determined to be reasonable will not be held invalid for the failure to obtain a warrant, even if it would have been practical to do so.

Id. at 473.

27. *Camara v. Municipal Court*, 387 U.S. 523, 536 (1967). In reaching this view on "reasonableness," the Court recognized that the basic purpose of the Fourth Amendment is "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Id.* at 528.

28. *United States v. Lawson*, 487 F.2d 468, 475 (8th Cir. 1973). *Lawson* involved a conviction for illegal transport of a firearm, which was based on evidence obtained as a result of an automobile inventory search. The court held that the evidence was illegally seized, since the only justification for the search was "bare police custody" of the automobile. *Id.*

ANALYSIS OF THE COURT'S OPINION

The Court in *Opperman* purported to implement this balancing process. It found three reasons for upholding the inventory search: protection of the owner's property, protection of police from lost property claims, and protection of police from potential danger. These reasons were balanced against the invasion of privacy. However, the Court held that there is a "lesser expectation of privacy" in one's automobile.²⁹ Unlike one's house, the automobile is constantly in public and is subject to regulation. Thus, the Court found that the need to search outweighed the minimal invasion of privacy.

The Court's holding that there is a "lesser expectation of privacy" in one's automobile contradicts an explicit statement in an earlier decision³⁰ that "[a] search, even of an automobile, is a substantial invasion of privacy."³¹ The holding also misapplies the principle laid down in *Katz v. United States*³² that "the Fourth Amendment protects people, not places."³³ Under *Katz*, the scope of Fourth Amendment protection is co-extensive with the individual's reasonable expectations of privacy. It is contended that *Opperman* had a reasonable expectation of privacy in the contents of his automobile. This interest cannot be ignored or lightly considered in analyzing the reasonableness of the search involved. The Court should have followed its earlier decisions and recognized a right to privacy in one's automobile. It then should have balanced the more than minimal invasion of privacy against the need to search.

An analysis of the purported rationale for inventory searches is essential in order to determine the "reasonableness" of such searches.³⁴ The Court in *Opperman* set forth the most frequently cited justifications for upholding the validity of inventory searches.³⁵ First, the majority as-

29. 428 U.S. at 368.

30. *United States v. Ortiz*, 422 U.S. 891 (1975). *Ortiz* involved a search of the defendant's automobile by border patrol officers at a traffic checkpoint removed from the border and its functional equivalents. The Court held that in the absence of consent or probable cause, the Fourth Amendment forbids such searches. Even though *Ortiz* did not involve an inventory search, the Court recognized that a person has an expectation of privacy as to his automobile and that automobiles are not subject to unlimited search.

31. *Id.* at 896.

32. 389 U.S. 347 (1967).

33. *Id.* at 351. The Court also stated that what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.*

34. In *Cooper v. California*, 386 U.S. 58 (1967), the Court stated the standard for determining the validity of a search of a motor vehicle to be whether the search was reasonable under all the circumstances. *Id.* at 62. See note 64 and accompanying text *infra* for a discussion of the *Cooper* decision.

35. 428 U.S. at 369-72.

serted that inventorying the contents of impounded automobiles is necessary to protect the owner's property while the vehicle remains in the custody of the police.³⁶ However, when subjected to critical analysis, it is clear that this purported rationale is without basis in fact.³⁷ The owner supposedly is protected because the inventory procedure allows the police to safeguard unprotected valuables and results in a detailed listing of all articles of personal property secured by the police.³⁸ This argument fails in two essential respects, however: (1) there is nothing to prevent the police from simply omitting a particular item of property from the inventory list,³⁹ and (2) there is no reason for the Court to assume that all motorists want their property "protected" in this manner.⁴⁰ As the California Supreme Court in *Mozzetti v. Superior Court*⁴¹ observed,

[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.⁴²

The validity of this criticism is strikingly apparent in *Opperman*, since at the time of the impoundment the car doors were locked and the windows were rolled up.⁴³ In fact, in order for the police to inventory the car for Opperman's "protection," they had to break into it.⁴⁴ Clearly, if

36. *Id.* See also *United States v. Pennington*, 441 F.2d 249 (5th Cir.), cert. denied, 404 U.S. 854 (1971); *People v. Sullivan*, 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S.2d 945 (1971).

37. For a critical analysis of the purported rationales for inventory searches, see Comment, *The Aftermath of Cooper v. California: Warrantless Automobile Searches in Illinois*, 1968 U.ILL.L.F. 401, 407-08.

38. Moylan, *supra* note 2, at 207-08.

39. *Id.* at 208.

40. 428 U.S. at 392-93 (Marshall, J., dissenting).

41. 4 Cal.3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971). In *Mozzetti*, the motorist was injured in an automobile collision and was taken to the hospital. Before removing the vehicle to the impoundment lot, the police conducted a routine inventory search of the automobile, during which they seized a quantity of marijuana, found in a closed suitcase on the back seat of the car. The Supreme Court of California reversed the conviction for possession of marijuana, holding that the police violated the Fourth Amendment in seizing an item during the inventory search which was not in plain view.

For a discussion of *Mozzetti*, see Comment, *Police Inventories of the Contents of Vehicles and the Exclusionary Rule*, 29 WASH. & LEE L. REV. 197 (1972); Note, *Police Inventory of Items Beyond Plain View During Search of Automobile Stored After Accident Violative of Fourth Amendment*, 40 FORDHAM L. REV. 679 (1972).

42. 4 Cal.3d at 707, 484 P.2d at 88-89, 94 Cal. Rptr. at 416-17.

43. Brief for Respondent at 2, *South Dakota v. Opperman*, 428 U.S. 364 (1976).

44. *Id.* In a similar case which involved the police breaking into a locked car in order to "inventory" it, the court stated:

the automobile owner saw fit to leave valuable possessions in his unattended vehicle, the police and the courts should respect that motorist's judgment as to the degree of protection required for those items. It may be contended that most motorists would prefer not to suffer such an invasion of privacy⁴⁵ under the pretext of protecting the car owner's property.

The second purported rationale which the Court in *Opperman* set forth to justify the inventory search is that it is necessary to protect the police against lost property claims.⁴⁶ It is difficult, however, to see how the police could possibly be liable in such a situation. The South Dakota Supreme Court's view of state law was that as "gratuitous depositors"⁴⁷ the police would only be obligated to secure those items of property in plain view and to lock the car doors and roll up the windows.⁴⁸ Furthermore, under the law of bailments, an involuntary bailee generally is not liable for items of property which are not clearly visible or of which the bailee has no knowledge.⁴⁹

In *Opperman*, therefore, the police, as gratuitous depositors, might concededly have a duty of "slight care" towards those items of property in plain view. However, it is difficult to conclude that the police would owe any duty of care towards items of property in a closed glove compartment. To justify automobile inventory searches on the basis of avoiding potential police liability is to rely on at best a makeshift argument that is deserving of no judicial support.⁵⁰

[I]t is hard to see, when the car was locked and the windows rolled up at the time it was impounded, how the property is better safeguarded by a breaking into the car and locked trunk to inventory. In many cases, the value of the property 'safeguarded' by these actions would be less than the damage caused to the automobile by these 'protective' measures.

United States v. Lawson, 487 F.2d 468, 477 (8th Cir. 1973).

45. *Katz v. United States*, 389 U.S. 347 (1967), recognized that what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351. Thus, as Justice Powell recognized in his concurring opinion in *Opperman*, "[r]outine inventories of automobiles intrude upon an area in which the private citizen has a 'reasonable expectation of privacy'" 428 U.S. at 377 n.1 (Powell, J., concurring).

46. 96 S.Ct. at 3096.

47. *State v. Opperman*, ____ S.D. ____, 228 N.W.2d 152 (1975). The court stated that "[w]hen in possession of an impounded car the police are acting as gratuitous depositors." *Id.* at 159.

48. *Id.* See also S.D. COMPILED LAWS ANN. §43-39-11 (1967), which states that "[a] gratuitous depository must use at least slight care for the preservation of the thing deposited."

49. See WILLISTON, CONTRACTS, §§1038, 1038A, at 900-07 (3d ed. 1967).

50. 428 U.S. at 391 (Marshall, J., dissenting). See also *Dodge v. Turner*, 274 F. Supp. 285 (Utah 1967), in which the court stated: "The claim that the officer had to search the

Finally, relying on *Cooper v. California*,⁵¹ the Court in *Opperman* contended that inventory searches of lawfully impounded automobiles are justified as a "protection of the police from potential danger."⁵² Under this approach, however, it would be possible to justify any search merely by stating that the police officer involved had reason to fear for his personal safety. For example, in a recent Delaware case⁵³ involving an automobile inventory search, the police attempted to justify a search of a closed satchel in an impounded automobile on the grounds that it may have contained explosives or other dangerous substances.⁵⁴ The court in that case wisely decided that such an argument was "too conjectural to fulfill the Fourth Amendment requirement of reasonableness of a search without a warrant."⁵⁵ However, after the Court's decision in *Opperman*, it is more likely that such far-fetched arguments will be sustained by the courts in order to justify inventory searches under the pretext of "protection of the police from potential danger."⁵⁶

Thus, it is apparent that there is little support in fact for the Court's view that inventory searches are necessary to protect either the car owner's property or the police. However, the Court in its decision also relied on the automobile exception established in *Carroll v. United States*.⁵⁷ The *Carroll* decision is inapposite because it involved a probable cause search of a car stopped on the highway, where it would have been impractical to require the police to obtain a search warrant.⁵⁸ In

car before impounding it because if he had not he could be held civilly liable for conversion of articles which might be claimed to have been in the car and later not found, is specious." *Id.* at 291.

51. 386 U.S. 58 (1967).

52. 428 U.S. at 369.

53. *State v. Gwinn*, 301 A.2d 291 (Del. 1973).

54. *Id.* at 295.

55. *Id.*

56. 428 U.S. at 369.

57. 267 U.S. 132 (1925). In *Carroll*, the issue was the admissibility of certain contraband liquor seized during a warrantless search of a car stopped on the highway. The Supreme Court held that when there is probable cause to believe that a car stopped on the highway contains evidence of crime, that vehicle may be searched without a warrant. The Court recognized

a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Id. at 153.

58. *Id.* See also *Chambers v. Maroney*, 399 U.S. 42, 51 (1970), in which the Court extended the *Carroll* rationale by holding that when the police have probable cause to stop and search a car stopped on the highway, they may bring the car to the police station and

the typical inventory search situation, however, there is neither probable cause nor the exigency of a fleeting vehicle. The mere fact that inventory searches involve automobiles is not sufficient to invoke the automobile exception to the warrant requirement of the Fourth Amendment.⁵⁹

The Court also is inaccurate in drawing an analogy between the inventory search involved in *Opperman* and the searches in *Cooper v. California*,⁶⁰ *Harris v. United States*,⁶¹ and *Cady v. Dombrowski*.⁶² These cases are distinguishable from *Opperman*, and do not, as the Court asserts, "point the way to the correct resolution of this case."⁶³

Cooper involved the search of an automobile pursuant to a California statute which authorized the police to impound any vehicle involved in narcotics transportation, pending forfeiture proceedings.⁶⁴ The Court upheld the search, stating that "[i]t would be unreasonable to hold that the police, having to retain the car . . . had no right, even for their own protection, to search it."⁶⁵ *Cooper* thus is distinguishable in that there was a close relationship between the reason the vehicle was taken into custody, the reason for the arrest, and the reason for the search.⁶⁶ Such a relationship is lacking in the typical inventory search situation. In *Opperman*, for example, there was no relationship between the reason for the impoundment, a parking violation, and the subsequent arrest for possession of marijuana. Nor was the vehicle impounded pursuant to forfeiture proceedings. Finally, the Court in *Cooper* recognized that "lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it. . . ."⁶⁷ However, the *Opperman* Court did not acknowledge this conclusion of its prior decision.

conduct a warrantless search of it.

59. *United States v. Young*, 489 F.2d 914, 916 (6th Cir. 1974). See also *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), in which the Court commented that although the *Carroll* decision created an exception to the search warrant requirement, "[it did] not declare a field day for the police in searching automobiles." *Id.* at 269.

60. 386 U.S. 58 (1967).

61. 390 U.S. 234 (1968).

62. 413 U.S. 433 (1973).

63. 428 U.S. at 375.

64. At the time of *Cooper's* arrest, section 11611 of the California Health and Safety Code provided that any officer making an arrest for a narcotics violation could seize and hold as evidence, a vehicle used to store, conceal, transport or sell narcotics, pending completion of forfeiture proceedings. 386 U.S. 58, 60. The statute was repealed June 7, 1967.

65. *Id.* at 61-62.

66. *Id.* at 61.

67. *Id.*

Harris involved an inventory search of an impounded automobile after the defendant's arrest for robbery. After conducting a thorough inventory search, and while in the process of rolling up the windows and locking the doors, the officer saw an automobile registration card in the name of the robbery victim lying face up on the metal stripping over which the door closed. In a per curiam opinion, the Court held that the registration card was not seized in violation of the Fourth Amendment since it was in "plain view."⁶⁸ *Harris* is clearly inapplicable to the inventory search involved here though, since it involved the seizure of evidence in "plain view," which concededly, is not the case in *Opperman*.⁶⁹

Finally, in *Cady v. Dombrowski*⁷⁰ the Supreme Court upheld a warrantless search of an automobile that was impounded following a collision. The search was conducted solely because the local police had a reasonable belief that the automobile contained a gun.⁷¹ Therefore, *Cady* is of questionable authority in attempting to validate the routine inventory search in *Opperman*, since the particular factual situation involved in *Cady* was clearly the basis for the Court's decision. That case is distinguishable on two grounds.⁷² First, in *Cady*, the owner of the vehicle was incapacitated as a result of a collision and, therefore, was unable to make his own arrangements for the storage and safekeeping of his vehicle and its contents. In *Opperman*, however, there is no indication that the vehicle owner could not have made his own arrangements for the safekeeping of his automobile. As Justice Marshall pointed out in his dissent,⁷³ the police should have attempted to contact him. Second, in *Cady*, the police had reasonable grounds to believe that the impounded vehicle contained a revolver that ultimately might be used to threaten the public safety. In *Opperman*, however, there was no

68. 390 U.S. at 236. The "plain view" doctrine was set out by the Court in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The "plain view" doctrine permits a warrantless search when the police officer has a prior justification for an intrusion in the course of which he inadvertently comes across a piece of evidence in plain view that incriminates the accused. *Id.* at 466.

69. The state of South Dakota, in its brief, conceded that the intrusion had exceeded the area of "plain view." See Brief for Petitioner at 7-8, *South Dakota v. Opperman*, 428 U.S. 364 (1976). See also 428 U.S. at 386-87.

70. 413 U.S. 433 (1973).

71. In *Cady*, the driver of the automobile was a Chicago police officer who was incapacitated as a result of a collision. The local police were under the impression that he was required to carry his service revolver at all times. Thus, when they did not find the gun on his person, they searched the automobile in order to protect the public from potential harm. *Id.* at 437.

72. See Brief for Respondent at 12-13, *South Dakota v. Opperman*, 428 U.S. 364 (1976).

73. 428 U.S. at 394 (Marshall, J., dissenting).

reason for the police to believe that the car contained anything dangerous.

Thus, it must be concluded that none of the three asserted justifications for the inventory search, nor the related decisions in *Cooper*, *Harris*, and *Cady*, support the Court's holding in *Opperman*. However, even if it is assumed that the police have a valid interest in inventorying the contents of impounded automobiles, there are more reasonable methods of reconciling those interests with the Fourth Amendment rights of motorists.

ALTERNATIVES

Justice Marshall, in his dissenting opinion in *Opperman*,⁷⁴ set forth a two step analysis⁷⁵ which seems to provide a suitable solution to the inventory search problem. First, when it is feasible for the police to ascertain ownership of the vehicle and to contact the owner, as in *Opperman*, Marshall found no practical reason for allowing the police to search a motorist's car without that person's consent. Clearly, if the car is registered in the state, the police should, at a minimum, be required to make an effort to contact the owner. In many cases, the owner could then decide for himself whether to consent to the inventory search or to make his own arrangements for safeguarding the contents of the automobile.⁷⁶

In those cases when it is impossible to determine who owns a particular vehicle, or when the owner is ascertainable but cannot be contacted, the police should be allowed to search a vehicle only when they have "specific cause to believe that a search of the scope to be undertaken is necessary in order to preserve the integrity of particular valuable property threatened by the impoundment."⁷⁷

Finally, the Court could have adopted the position of the California Supreme Court,⁷⁸ which recognizes the validity of inventory searches, but limits their permissible scope to items in plain view. This would preclude searches of such areas as the trunk and glove compartment.

74. 428 U.S. at 382.

75. *Id.* at 392-94.

76. It is difficult to imagine how a court could justify an inventory search when the owner is contacted and indicates that he would prefer to make his own arrangements for protecting the vehicle's contents, yet such a decision was upheld in two recent cases. See *St. Clair v. State*, 1 Md. App. 605, 232 A.2d 565 (1967); *Cabbler v. Commonwealth*, 212 Va. 520, 184 S.E.2d 781 (1971), *cert. denied*, 405 U.S. 1073 (1972).

77. 428 U.S. at 393 (Marshall, J., dissenting).

78. 4 Cal.3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971). This is also the view that the South Dakota Supreme Court, on remand, ultimately accepted on the basis of their state constitution. See *State v. Opperman*, ___ S.D. ___, 247 N.W.2d 673 (1976).

This is inconsistent with the rationale for inventory searches since, if a motorist keeps valuables in his automobile, they would most likely be found in an enclosed area such as a glove compartment.⁷⁹ However, this approach does show greater respect for the automobile owner's privacy and, as the majority admitted, there is some degree of privacy in automobiles which deserves judicial protection.

CONCLUSION

Despite reasonable alternatives, the Court in *Opperman* seems to have adopted an inflexible rule which gives the police almost unlimited power to search vehicles that happen to come into their possession. So long as the police can argue that the search was merely an "inventory" conducted pursuant to standard police procedure, the courts will find the search reasonable. Despite Justice Powell's statement, in his concurring opinion,⁸⁰ that "the unrestrained search of an automobile and its contents would constitute a serious intrusion upon the privacy of the individual . . .,"⁸¹ it is unclear what type of police conduct would be held to constitute an "unrestrained search" of an automobile. The logical conclusion from *Opperman* is that the police may search a lawfully impounded automobile with any degree of intensity they choose, short of totally dismantling the vehicle. Despite possible investigatory police motives in inventorying an automobile, the courts will feel constrained to uphold the searches as "reasonable" if the police, acting pursuant to standard police procedures, assert that they are merely protecting the owner's property or protecting themselves from false property claims.⁸²

Ultimately, if the Court's rationale is accepted, *Opperman* can be viewed as the triumph of property rights over Fourth Amendment privacy rights.⁸³ In the future, motorists can rest assured that, in the event

79. See Comment, *supra* note 37, at 407.

80. 428 U.S. at 376 (Powell, J., concurring).

81. *Id.* at 379-80.

82. *But see* Altman v. State, 335 So.2d 626 (Fla. App. 1976), decided after the Supreme Court decision in *Opperman*. That court reversed the defendant's conviction for possession of marijuana, ruling that it was unreasonable for the police to conduct an inventory search of defendant's automobile when a friend was willing and able to take care of the vehicle.

When the driver of a motor vehicle is arrested and a reliable friend is present, authorized and capable to remove an owner's vehicle which is capable of being safely removed; or when the arrestee expresses a preference as to towing service and designates an appropriate carrier and destination for the vehicle, it is unnecessary for the police to impound it. In either of these instances the rationale for an inventory search does not exist.

Id. at 629.

83. 428 U.S. at 395-96 (Marshall, J., dissenting).

their automobile is impounded by the police for any reason, their personal property will be "protected" by means of an inventory search conducted without a warrant and without probable cause. Such motorists should be forewarned, however, that any incriminating evidence that is found during such a "protective search" may form the basis for a criminal prosecution.

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