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# The Permissible Scope of Texas Automobile Inventory Searches in the Aftermath of Colorado v. Bertine: A Talisman is Created

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# THE PERMISSIBLE SCOPE OF TEXAS AUTOMOBILE INVENTORY SEARCHES IN THE AFTERMATH OF COLORADO V. BERTINE: A TALISMAN IS CREATED

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## I. INTRODUCTION

The fourth amendment to the United States Constitution guarantees freedom from unreasonable searches and seizures.[1] The war-

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1. *See* U.S. CONST. amend. IV. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants

rant requirement and the probable cause requirement advance this constitutionally implied privacy right.[2] But with respect to automobile searches, strict adherence to these safeguards has been eschewed in favor of more flexible, and arguably less protective, versions of reasonableness.[3]

One such version, the "automobile exception" to the warrant requirement, was recognized by the Supreme Court in *Carroll v. United States*.[4] The automobile exception does not, however, dispense with the requirement of probable cause.[5] Rather, it recognizes the inherent exigency of vehicle mobility and, more importantly,

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> 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.

*Id.*; *see also* TEX. CONST. art. I, § 9. Article 1, section 9 maintains:

> The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

*Id.*; *see also* Duncan v. State, 680 S.W.2d 555, 558 (Tex. App.—Tyler 1984, no pet.) (article 1, section 9 of Texas constitution treated as coextensive with fourth amendment to U.S. Constitution).

2. *See* Camara v. Municipal Court, 387 U.S. 523, 528-29, 87 S. Ct. 1727, 1730-31, 18 L. Ed. 2d 930, 935 (1967) (governing principle of fourth amendment interpretation is that unless authorized by valid search warrant, search of private property absent proper consent is "unreasonable"). In *Camara*, the Court also noted that the fourth amendment's function, as is recognized in "countless decisions," is to secure a person's privacy against arbitrary governmental searches. *See id.* at 528, 87 S. Ct. at 1730, 18 L. Ed. 2d at 935; *see also* Union Pac. Ry. v. Botsford, 141 U.S. 250, 251, 11 S. Ct. 1000, 1001, 35 L. Ed. 734, 737 (1891) ("No right is held more sacred, or is more carefully guarded, by common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.").

3. *See* Cady v. Dombrowski, 413 U.S. 433, 440, 93 S. Ct. 2523, 2527, 37 L. Ed. 2d 706, 714 (1973) (branch of law dealing with automobile searches is "something less than a seamless web"); *see also* Chambers v. Maroney, 399 U.S. 42, 48, 90 S. Ct. 1975, 1979, 26 L. Ed. 2d 419, 426 (1970) (regarding justification for warrantless search, Court has consistently drawn distinction between home or office and automobile for fourth amendment purposes); Moylan, *The Inventory Search of an Automobile: A Willing Suspension of Disbelief*, 5 U. BALT. L. REV. 203, 203 (1976) ("yawning credibility gap" resulting from inventory searches has significantly affected fourth amendment litigation); Comment, *Warrantless Searches and Seizures of Automobiles and the Supreme Court from* Carroll *to* Cardwell: *Inconsistently Through the Seamless Web*, 53 N.C.L. REV. 722, 722 (1975) (public's decreased privacy expectation in automobiles led to Supreme Court's inconsistent treatment of warrantless automobile searches and seizures).

4. 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925).

5. *See id.* at 149, 45 S. Ct. at 283-84, 69 L. Ed. at 549 (warrantless search of automobile valid under fourth amendment if done pursuant to officer's belief that probable cause exists to search).

the diminished expectation of privacy in a vehicle's contents as justification for proceeding without a warrant.[6]

Fifty years after *Carroll*, in *South Dakota v. Opperman*,[7] the Court approved an automobile inventory search conducted pursuant to standard police procedures as an administrative search alternative requiring neither probable cause nor a warrant.[8] The reasoning in *Opperman* was first adopted by the Texas Court of Criminal Appeals in *Robertson v. State*.[9] In 1981, in *Gill v. State*,[10] the Texas court addressed the permissible scope of inventory searches, holding that the police may not search the locked trunk of an automobile while conducting an inventory search.[11]

Despite the simplicity of the *Gill* rule,[12] the court of criminal appeals, in the recent decisions of *Kelley v. State*,[13] *Stephen v.*

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6. *See id.* at 153, 45 S. Ct. at 285, 69 L. Ed. at 551 (warrant requirement dispensed with in light of automobile's inherent mobility, which creates valid exigent circumstance to search).

7. 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976).

8. *See id.* at 372, 96 S. Ct. at 3098-99, 49 L. Ed. 2d at 1007 (inventory searches conducted in accordance with standard police procedures are reasonable searches under fourth amendment guidelines).

9. 541 S.W.2d 608, 610-11 (Tex. Crim. App. 1976), *cert. denied*, 429 U.S. 1109 (1977). The majority went on to conclude that, since the search of the defendant's car was conducted by the Houston police acting as caretakers and pursuant to standard police procedure, the search was not unreasonable under the fourth amendment. *See id.* at 611. *Robertson* has been criticized as unnecessarily broadening the power of the police to search an automobile absent any constitutional justifications. *See* Mills, *Criminal Law and Procedure*, 32 Sw. L.J. 461, 471 (1978) (*Robertson* authorized "thorough automobile search" under guise of inventory procedure after defendant's car had been taken into police custody); Perini, *Criminal Law and Procedure*, 31 Sw. L.J. 393, 410 (1977) (*Robertson*'s reliance on *Opperman* appears to be erroneous since *Robertson* did not even consider inventory as search for fourth amendment purposes).

10. 625 S.W.2d 307 (Tex. Crim. App. 1980) (on motion for rehearing). The court of criminal appeals purported to overturn the rule of *Gill v. State* in its opinion in *Osban v. State*, No. 368-83 (Tex. Crim. App. Sept. 17, 1986) (not yet reported). This decision is especially puzzling since the "rule" overturned had nothing to do with the prior holding in *Gill* relating to the permissible scope of vehicle inventory. Instead, the court focused on the holding in *Gill* on original submission that probable cause to believe one part of a vehicle contains contraband does not provide probable cause for searching other parts of the vehicle. *See* Osban v. State, No. 368-83 (Tex. Crim. App. Sept. 17, 1986). The court in *Osban* rejected any reading of its language in *Gill* suggesting that probable cause for search of the passenger compartment could never extend to the vehicle's trunk. *See id.* The *Gill* opinion on motion for rehearing relating to the scope of an inventory was not discussed in *Osban* and is treated in this article as not having been affected by the *Osban* decision.

11. *See Gill*, 625 S.W.2d at 319 (warrantless search of automobile trunk per se illegal absent showing of probable cause and exigent circumstances).

12. *See id.* at 320 ("Under both of our constitutions, the forced entry into the locked trunk of the automobile constituted an unlawful intrusion.").

13. 677 S.W.2d 34 (Tex. Crim. App. 1984).

*State*,[14] and *Guillett v. State*,[15] condoned police intrusion into both locked trunks and a locked glove compartment pursuant to a vehicle inventory.[16] While none of these 1984 cases expressly overruled *Gill*, taken as a whole they significantly expand the scope of inventory permitted by a fair reading of *Gill*. It is this expansion, and its relation to the doctrinal bases for inventory search, that will be explored in this article.[17]

## II. Inventory Searches and the Fourth Amendment—From Opperman to Bertine

Almost all police departments in the United States have adopted a set of procedures authorizing a thorough inventory search of every car impounded by their officers,[18] and these searches are conducted without a warrant or probable cause.[19] As might be expected,

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14. 677 S.W.2d 42 (Tex. Crim. App. 1984).

15. 677 S.W.2d 46 (Tex. Crim. App. 1984).

16. *See Kelley*, 677 S.W.2d at 37 (police inventory search of locked car trunk was proper procedure); *Stephen*, 677 S.W.2d at 44 (police properly conducted inventory of car's trunk); *Guillett*, 677 S.W.2d at 49 (search of locked glove compartment was lawful inventory search).

17. The propriety of a vehicle's initial impoundment is an important factor in determining the overall legality of an inventory. *See* Reamey, *Reevaluating the Vehicle Inventory*, 19 Crim. L. Bull. 325, 326 (1983) (even though impoundment of vehicle is important part of police function, validity of any inventory search depends on legality of car's initial impoundment). The Reamey article discusses situations in which cars are automatically impounded and calls for a fresh analysis of alternatives to vehicle impoundment. *See id.* at 326-33.

18. *See Texas Developments, Following Standard Police Procedures Requiring the Inventorying of Impounded Vehicle is Not Unreasonable Conduct Under the Fourth Amendment*, 5 Am. J. Crim. L. 256, 256 (1977) [hereinafter *Texas Developments*] (in recent years, police departments have developed widespread practice of requiring that contents of impounded vehicles be inventoried); Reamey, *supra* note 17, at 325 (inventory searches become "automatic and accepted method by which untold thousands of vehicles are thoroughly searched annually"); Comment, *The Inventory Search of an Impounded Vehicle*, 48 Chi. Kent L. Rev. 48, 48 (1971) (nearly all police departments have specific procedures for their officers to search impounded vehicles as part of impounding process); Case Comment, *Police Inventories of the Contents of Vehicles and the Exclusionary Rule*, 29 Wash. & Lee L. Rev. 197, 197 (1972) ("common practice" for police to inventory personal property contained in vehicles lawfully in police custody). During inventory searches, items discovered in the car are removed and listed. *See* Note, *Warrantless Searches and Seizures of Automobiles*, 87 Harv. L. Rev. 835, 848 (1974) (during inventory search, car's contents are thoroughly catalogued and any criminal evidence discovered is seized without warrant).

19. *See* Reamey, *supra* note 17, at 325 (inventory searches require neither probable cause nor reasonable suspicion to believe that car contains evidence of crime). The police

inventory searches quite frequently lead to the discovery of incriminating evidence which is later used in the prosecution of the car's owner.[20] The search for, and use of, criminal evidence without employing traditional constitutional safeguards has naturally resulted in attacks on the underpinnings of this procedure.[21]

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are also quick to justify this lack of probable cause or absence of a search warrant by arguing that the nature of the inventory search is innocuous. *See* Note, *supra* note 18, at 849 (in inventory search, police support their intrusion by benign purpose, unlike investigative search to uncover criminal evidence); Comment, *supra* note 3, at 754 (purpose of inventory search is purportedly not to look for incriminating evidence but to inventory vehicle's contents). Indeed, an inventory search may allow the police a wider latitude in the scope of their search. *See* United States v. Lawson, 487 F.2d 468, 472 (8th Cir. 1973) (police are in better position when no reason to search because of permitted exploratory inventory search); Mozzetti v. Superior Court, 4 Cal. 3d 699, 712, 484 P.2d 84, 92, 94 Cal. Rptr. 412, 420 (1971) ("The inventory, by its nature, involves a random search of the articles left in an automobile taken into custody; the police are looking for nothing in particular and everything in general."). Numerous other exceptions to the fourth amendment warrant requirement exist. *See* Michigan v. Tyler, 436 U.S. 499, 509, 98 S. Ct. 1942, 1949-50, 56 L. Ed. 2d 486, 498 (1978) (urgent need to preserve life or avoid injury); Schnekloth v. Bustamonte, 412 U.S. 218, 248, 93 S. Ct. 2041, 2058-59, 36 L. Ed. 2d 854, 875 (1973) (owner consents); Coolidge v. New Hampshire, 403 U.S. 443, 465-66, 91 S. Ct. 2022, 2037-38, 29 L. Ed. 2d 564, 582-83 (1971) (evidence in plain view); Chimel v. California, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 2039-40, 23 L. Ed. 2d 685, 693-94 (1969) (area within defendant's control and defendant may reach weapons or destructible evidence); Terry v. Ohio, 392 U.S. 1, 24-25, 88 S. Ct. 1868, 1881-82, 20 L. Ed. 2d 889, 907-08 (1968) (limited search of person, based on reasonable suspicion, to detect weapons); Warden v. Hayden, 387 U.S. 294, 298-99, 87 S. Ct. 1642, 1645-46, 18 L. Ed. 2d 782, 787 (1967) (when police pursuing felon).

20. *See, e.g.*, Williams v. United States, 412 F.2d 729, 730 (5th Cir. 1969); *see also* Note, *Automobile Inventory Search Exception to the Fourth Amendment Expanded by* State v. Williams, 13 N.M.L. REV. 689, 694 (1983) (police frequently find incriminating evidence as result of inventory searches and use it against defendant at trial on original offense or at trial resulting from prosecution due to incriminating evidence). Quite often, this incriminating evidence is obtained by an inventory search of a locked automobile trunk. *See* United States v. Lawson, 487 F.2d 468, 469 (8th Cir. 1973); Duncan v. State, 680 S.W.2d 555, 556-57 (Tex. App.—Tyler 1984, no pet.); Williams v. State, 644 S.W.2d 751, 752 (Tex. App.—Beaumont 1982, no pet.).

21. *See* Mozzetti v. Superior Court, 4 Cal. 3d 699, 705-06, 484 P.2d 84, 88, 94 Cal. Rptr. 412, 416 (routine inventory procedure is undeniably a substantial invasion into car owner's privacy rights). "Regardless of the professed benevolent purposes and euphemistic explication, an inventory search involves a thorough exploration by the police into the private property of an individual." *Id.* at 706, 484 P.2d at 88, 94 Cal. Rptr. at 416. A pervasive concern has been that the inventory search will be used to justify an intrusion which would otherwise be prohibited due to the inability to obtain a warrant for the search. *See* Reamey, *supra* note 17, at 334; *see also* Comment, *supra* note 19, at 724-25 (warrantless inventory searches raise important fourth amendment issues); Comment, *supra* note 18, at 48 (evidence which would not be admissible, even in situations where obtained during search pursuant to search warrant, is now admissible when gained by arguably exploratory search). Any review of the legality of inventory searches must start with an analysis of the different

The real genesis of the vehicle inventory on a national scale occurred in 1976 when the Supreme Court, in *South Dakota v. Opperman*, first specifically recognized the constitutionality of inventory as a feature of the police caretaking function.[22] Opperman's car had been towed and impounded for multiple parking violations,[23] a frequent cause for impoundment.[24] An inventory search of the car's contents, including the contents of the unlocked glove compartment, was prompted by police observing personal effects in plain view in the car's interior.[25] Justice Burger, writing the plurality opinion, concluded that the inventory, conducted in accordance with standard police procedures, was reasonable under the fourth amendment as a response to three distinct governmental interests: (1) protection of the car owner's property while in police custody; (2) protection of the police from claims concerning lost or stolen property; and (3) protection of the police from potential danger.[26]

It is important to recognize, as Justice Powell did in his concurring opinion, that inventory searches do indeed intrude into an area in which a person has a reasonable expectation of privacy.[27]

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interests implicated. *See* Note, *supra* note 20, at 689 (determining constitutionality of inventory searches requires examination of alleged administrative justifications for intrusion and balancing of intrusion against individual's right to privacy). The validity and constitutionality of the police practice of conducting inventory searches of impounded vehicles has become an "increasingly complex and recurring issue." *See id.* Over time, courts have grappled with the task of classifying these procedures for fourth amendment purposes. *Compare* Kaufman v. United States, 453 F.2d 798, 801-02 (8th Cir. 1971) (recovery of gun from car's back seat not result of search in legal sense) *and* Fagundes v. United States, 340 F.2d 673, 676 (1st Cir. 1965) (intrusion of car not search in legal sense) *with* People v. Sullivan, 29 N.Y.2d 69, 77, 272 N.E.2d 464, 469, 323 N.Y.S.2d 945, 952 (1971) (inventory search reasonable under fourth amendment) *and* Gagnon v. State, 212 So. 2d 337, 338-39 (Fla. Dist. Ct. App. 1968) (police discovery of credit cards result of reasonable search). Inventories differ from searches in that inventories allegedly safeguard property while searches seek incriminating evidence; inventories are presumably a more limited intrusion. *See Texas Developments*, *supra* note 18, at 261.

22. South Dakota v. Opperman, 428 U.S. 364, 365, 96 S. Ct. 3092, 3095, 49 L. Ed. 2d 1000, 1003 (1976).

23. *Id.* at 365-66, 96 S. Ct. at 3095, 49 L. Ed. 2d at 1003-04.

24. *See id.* at 368, 96 S. Ct. at 3097, 49 L. Ed. 2d at 1005 (police frequently remove and impound cars that violate parking ordinances).

25. *Id.* at 366, 96 S. Ct. at 3095, 49 L. Ed. 2d at 1003.

26. *See id.* at 369, 96 S. Ct. at 3097, 49 L. Ed. 2d at 1005. The Court also noted that it was "beyond challenge" that the police have the authority to impound vehicles if they disrupt the flow of traffic or threaten public safety. *See id.*

27. *See id.* at 377 n.1, 96 S. Ct. at 3101 n.1, 49 L. Ed. 2d at 1010 n.1 (Powell, J., concurring) ("Routine inventories of automobiles intrude upon an area in which the private

This privacy interest, diminished as it is by the nature of the vehicle, may be outweighed by the governmental interests advanced to justify the inventory procedure.[28] But the privacy interest is certainly not less significant per se; the government bears the burden of establishing in each case that its interests are greater.[29]

Balancing interests is, by definition, the very sort of ad hoc analysis of competing interests reflected in *Opperman*. Even assuming that the identified governmental interests remain static, the dynamics embodied in reasonable expectation of privacy will necessitate an independent analysis of the weight to be accorded privacy rights in each instance.

Until the United States Supreme Court decided *Colorado v. Bertine*[30] in January of 1987, there was no reason to believe that this balancing of privacy rights against governmental needs could not or should not be undertaken by those administering the caretaking function. But in *Bertine*, the Court abandoned field determinations of privacy expectations by police officers in favor of a "bright-line" rule that inventory of the contents of closed containers—even of luggage—within a vehicle's passenger compartment satisfies the reasonableness requirement of the fourth amendment.[31]

*Bertine* did not, however, altogether dispense with balancing to determine whether a particular search procedure is reasonable. To

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citizen has a 'reasonable expectation of privacy.' "). While the Supreme Court has rejected the argument that police officers must determine and weigh the owner's reasonable expectation of privacy prior to conducting an inventory of containers found within an automobile's interior, it has not, at least not yet, held that balancing privacy rights to assess the reasonableness of an inventory is no longer required of a reviewing court. *See* Colorado v. Bertine, ____U.S. ____, ____, 107 S. Ct. 738, 742-43, 93 L. Ed. 2d 739, 747-48 (1987).

28. *See Opperman*, 428 U.S. at 377-78, 96 S. Ct. at 3101, 49 L. Ed. 2d at 1010 (Powell, J., concurring) (whether fourth amendment allows routine inventory searches is determined by balancing of interests).

29. *Cf. id.* at 379-80, 96 S. Ct. at 3102, 49 L. Ed. 2d at 1011 (Powell, J., concurring) (despite reduced expectation of privacy in automobile, to allow police to conduct unrestrained search of automobile would result in serious intrusion upon car owner's privacy). Justice Powell also noted that when the police removed the items in plain view, rolled up the windows, and locked the car doors, they had satisfied any duty of protection they owed the car owner. *Id.* at 378 n.3, 96 S. Ct. at 3102 n.3, 49 L. Ed. 2d at 1011 n.3 (Powell, J., concurring). The justice concluded by emphasizing that one of the main reasons supporting the validity of inventories is that the police have "no significant discretion" concerning the permissible scope of their search. *Id.* at 384, 96 S. Ct. at 3104-05, 49 L. Ed. 2d at 1014 (Powell, J., concurring).

30. ____ U.S. ____, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987).

31. *See id.* at ____, 107 S. Ct. at 743, 93 L. Ed. 2d at 748.

the contrary, the Court relied heavily upon its decision in *Illinois v. Lafayette*,[32] noting that the balancing done in that case justified the inventory of personal effects of an arrestee being jailed.[33] Apparently, the Court has preserved balancing of interests generally, and determining reasonable expectation of privacy specifically, as the exclusive domain of courts reviewing inventory searches.[34] In this case, the privacy interest of Steven Bertine in the contents of containers within his backpack was found insufficient to outweigh the needs of the government; therefore, the search was reasonable.[35]

The Supreme Court's "bright-line" approach to balancing has seemingly settled, for the time being, the question of whether unlocked containers within the passenger compartment of an impounded vehicle fall within the permissible scope of an automobile inventory search. They do.[36] It remains to be seen whether the

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32. 462 U.S. 640, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983).

33. *See Bertine*, ___ U.S. at ___, 107 S. Ct. at 742, 93 L. Ed. 2d at 746. Describing the decision in *Lafayette*, Chief Justice Rehnquist noted, "In deciding whether this search was reasonable, we recognized that the search served legitimate governmental interests similar to those identified in *Opperman*. We determined that those interests *outweighed* the individual's Fourth Amendment interests and upheld the search." *Id.* (emphasis added).

34. The only obvious alternative to this reading of the *Bertine* opinion is that, at least in vehicle inventory cases, invasion of containers within the passenger compartment, and perhaps the entire vehicle, is per se reasonable, the balancing having been done once and for all and the Court having decided that an expectation of privacy could, as a matter of law, never outweigh the governmental interests served by inventory. To accept this interpretation of the Court's decision would require simultaneously dispensing with considerable precedent recognizing the varying levels of privacy expectation in containers of differing types and elevating the governmental interests recognized in *Opperman* to a new and illogical importance.

35. *See Bertine*, ___ U.S. at ___, 107 S. Ct. at 742, 93 L. Ed. 2d at 746-47. The Colorado Supreme Court, relying on Arkansas v. Sanders, 442 U.S. 753, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979) and United States v. Chadwick, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977), had interpreted fourth amendment privacy interests to be greater in personal luggage than in an automobile. People v. Bertine, 706 P.2d 411, 414-15 (Colo. 1985), *rev'd*, Colorado v. Bertine, ___ U.S. ___, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987). Balancing this heightened expectation of privacy in the contents of the backpack against the governmental interests recognized in *Opperman*, the Colorado court concluded that "the defendant's privacy interests in the cans outweighed the government's need to inventory their contents." *See id.* at 418.

36. If *Opperman* is read as holding that inventory may properly extend to unlocked glove compartments, *Bertine* would seem only a slight expansion in permitting the search of an unlocked container found within the passenger compartment. This interpretation, however, overlooks the significance of the backpack as a repository for personal effects, a characteristic of great significance to the Colorado Supreme Court and the dissenting justices in *Bertine*. *See* People v. Bertine, 706 P.2d at 414-15, 418; Colorado v. Bertine, ___ U.S.

fourth amendment's reasonableness requirement will be satisfied as easily when the inventory extends to locked containers within the passenger compartment or to a locked trunk compartment.[37]

## III. The Scope of Vehicle Inventory Searches in Texas

### A. Gill v. State

The permissible scope of inventory searches in Texas was first meaningfully addressed by the court of criminal appeals in *Gill v. State*, nearly six years before the Supreme Court's decision in *Bertine*.[38] In *Gill*, a Houston police officer pulled up next to the

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at ____, 107 S. Ct. at 749, 93 L. Ed. 2d at 755 (Marshall, J., dissenting). The Colorado Supreme Court noted in its opinion: "Most significantly, the search here involved an intrusion into a container intended as a repository of personal effects. Unlike the unlocked glove compartment in *Opperman*, containers such as backpacks do not carry a diminished expectation of privacy." 706 P.2d at 418. Similarly, Justice Marshall, dissenting from the decision in *Bertine*, pointed out that "the Court completely ignores respondent's expectation of privacy in his backpack. Whatever his expectation of privacy in his automobile generally, our prior decisions clearly establish that he retained a reasonable expectation of privacy in the backpack and its contents." ____ U.S. at ____, 107 S. Ct. at 749, 93 L. Ed. 2d at 755 (Marshall, J., dissenting).

37. There is reason to believe the *Bertine* opinion has laid the groundwork for this extension. In absolving the police of any responsibility for initially balancing competing interests, the Court quoted with approval its opinion in *United States v. Ross*:

> When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of [a] vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.

*Bertine*, ____ U.S. at ____, 107 S. Ct. at 743, 93 L. Ed. 2d at 747-48 (quoting United States v. Ross, 456 U.S. 798, 821-22, 102 S. Ct. 2157, 2171, 72 L. Ed. 2d 572, 591 (1982)). If the Court intends that "nice distinctions" will not apply to the scope of inventory searches in the future, it effectively will be permitting a search of the same scope as that allowed when probable cause exists. This prospect is placed in better perspective by recognizing that the "automobile exception" search described in *Ross* is for the purpose of finding criminal evidence or contraband, not for the relatively insignificant governmental purposes nominally advanced by inventory. Indeed, without the "nice distinctions," the scope of inventory searches would not be coextensive with that of searches conducted pursuant to probable cause; they would exceed probable cause searches in scope because they would not be limited to places in which the evidence or contraband could be found. Rather, the scope would be the equivalent of that permitted by a general warrant.

38. *See* Gill v. State, 625 S.W.2d 307, 309 (Tex. Crim. App. 1980) (on motion for rehearing) (appeal concerned propriety of intrusion by police into locked trunk subsequent to discovering contraband in car's interior), *overruled on other grounds by* Osban v. State, No. 368-83 (Tex. Crim. App. Sept. 17, 1986) (not yet reported).

defendant's car in a parking lot outside of a convenience store.[39] After briefly conversing with the defendant,[40] the officer asked him to produce identification.[41] When the defendant presented an altered driver's license,[42] the police officer arrested him.[43] After thoroughly searching the interior of the defendant's car,[44] the police officer asked for, and was denied, the key to the car's trunk.[45] Later, with the aid of a wrecker driver, the officer removed the back seat of the car and discovered hydromorphone tablets in the trunk.[46]

Justice Teague, in an opinion denouncing the police search of the trunk,[47] began by emphasizing that a proper inventory consists of simply listing the items of personal property found in plain view within the automobile.[48] Because the intrusion is limited in this way,[49] inventories, unlike other "pure" searches under the fourth amendment, are not predicated upon either probable cause or the existence of a warrant.[50] However, where the scope of the search

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39. Id. at 312 (Clinton, J., concurring).

40. *Id.* at 313 (Clinton, J., concurring). Officer Lawrence admitted he was stalling for time when he talked to defendant about directions to the Astrodome. *Id.*

41. *Id.* at 313 (Clinton, J., concurring). Justice Clinton also gives a detailed analysis of Brown v. Texas, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979), and concludes that, under *Brown*, the defendant had not been seized for fourth amendment purposes when the officer asked for identification and the defendant complied. *See id.* at 313 n.3 (Clinton, J., concurring).

42. 625 S.W.2d at 314-15 (Clinton, J., concurring).

43. *See id.* at 315 (Clinton, J., concurring) (display of altered license and driving without valid license were offenses under TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (Vernon 1977).

44. *See id.* (Clinton, J., concurring) (a search pursuant to Chimel v. California, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 2040, 23 L. Ed. 2d 685, 694 (1969), which authorized officer to conduct search, or protective sweep, in areas of defendant's immediate control, yielded no contraband other than single marijuana cigarette).

45. *Id.* at 316 (Douglas, J., dissenting).

46. *Id.* (Douglas, J., dissenting). The defendant was given a five year prison sentence and five thousand dollar fine for possession of hydromorphone. *See id.* at 309.

47. *Id.* at 317.

48. *See id.* at 319 (by using standard inventory form, police officer "lawfully inventories the contents of a lawfully impounded motor vehicle"). Justice Teague was quick to note the unique nature of the automobile inventory search. *See id.* (true automobile inventory search does not take place within confines of probable cause and search incident to lawful arrest).

49. *See id.* at 316 ("A true inventory search of an automobile . . . is just that and *nothing more*") (emphasis added). Justice Teague also made a point that the police may not search the locked trunk of an impounded automobile. *See id.* He expressly avoided the issue of the "fine legal distinctions" between searching opened or unopened containers discovered within an automobile. *Id.*

50. *Id.*

exceeds these limits, it is necessarily cloaked with fourth amendment safeguards. In *Gill*, the court concluded that absent a showing of probable cause and exigent circumstances, the warrantless search of a locked trunk is "per se illegal," apparently because conducting an inventory of the trunk was considered per se excessive.[51]

In reaching this conclusion, Justice Teague also noted that the State, in attempting to justify its actions as an inventory, overlooked two important facts bearing on the expectation of privacy in, and the security of, personal items placed in a locked car trunk.[52] First, items placed in a trunk are not in the plain view of passersby or would-be thieves, as are items in a car's interior.[53] Second, the security afforded by a locked trunk makes it much less likely that it will be forcibly entered.[54] Because of that greater security, the court observed, the possibility of subsequent claims against the police for lost or stolen property is greatly reduced,[55] as is the possibility of theft or vandalism of the trunk's contents.[56]

This heightened expectation of privacy in the contents of a car trunk is not, therefore, overcome by the purportedly benevolent purposes of an inventory search,[57] and would, in fact, be outweighed only when the police could demonstrate probable cause justifying a search of the trunk.[58] To hold otherwise, Justice Teague concluded, would do nothing less than condone the full search of an automobile every time the owner was lawfully arrested.[59]

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51. *Id.*

52. *See id.*

53. *See id.* ("opaque nature" of trunk completely hides items within trunk from external view).

54. *See id.* (automobile trunk requires breaking or removing of lock to gain entry into trunk's interior, while merely breaking window affords easy access to personal items in car's interior). Justice Teague pointed out that the need to remove a car's back seat, as in the instant case, also demonstrated the increased security within a locked car trunk. *Id.*

55. *See id.* (if locked trunk can be entered only by excessive force, unlikely that subsequent claims concerning lost or stolen property will arise).

56. *Id.*

57. *See id.*

58. *See id.* (expectation of privacy in locked trunk could be outweighed where police have "*reasonable expectation to believe*," or "*probable cause*" to demonstrate, that car's trunk contains dangerous instrumentality). Justice Teague emphasized that the force required to enter the trunk showed that the purported justifications of the inventory search were not substantial enough to overcome the owner's heightened expectation of privacy in the contents of the locked trunk. *Id.* at 319-20. Probable cause may be developed from the contents of the passenger compartment. *See* Osban v. State, No. 368-83 (Tex. Crim. App. Sept. 17, 1986) (not yet reported).

59. *See* 625 S.W.2d at 320 (State advocates that lawful, routine arrest of suspect in

### *B.* Kelley v. State, Stephen v. State, Guillett v. State

On September 19, 1984, the Texas Court of Criminal Appeals issued opinions in the cases of *Kelley v. State*,[60] *Stephen v. State*,[61] and *Guillett v. State*,[62] which substantially expanded the scope of vehicle inventory. In *Kelley* and *Stephen*, the defendants were initially stopped by the police for erratic driving.[63] After each defendant was arrested, his car was subjected to a thorough inventory.[64] In each case, the police obtained the keys to the trunk of the car without the owner's consent, opened and searched the trunk, and found incriminating evidence.[65]

In distinguishing these two cases from *Gill*, Justice McCormick emphasized the fact that in *Kelley* and *Stephen* there was no forced entry into the trunk.[66] He reasoned that since the police in *Gill* could not open the trunk, they were effectively free from any subsequent claims for lost or stolen property.[67] Since, however, the police in *Kelley* and *Stephen* had keys to the car's trunk, they were exposed to potential liability from claims of loss or theft, a concern evidently sufficient to justify inventory of the secured trunk.[68]

The dissenting opinions in both *Kelley* and *Stephen* asserted that *Gill* had been effectively overruled by the court's holdings.[69] Justice Miller, in his dissenting opinion to *Kelley*, noted that the

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automobile authorizes search of "virtually every nook and cranny of that autombile"). Justice Teague summarily dispensed with this argument by noting that it had no legal basis in either the Texas or United States constitution or in any court of criminal appeals' interpretation of these documents. *Id.*

60. 677 S.W.2d 34 (Tex. Crim. App. 1984).

61. 677 S.W.2d 42 (Tex. Crim. App. 1984).

62. 677 S.W.2d 46 (Tex. Crim. App. 1984).

63. *See Kelley*, 677 S.W.2d at 37 (defendant's car seen weaving across center line of roadway); *Stephen*, 677 S.W.2d at 43 (defendant's car observed making abrupt left turn without signaling).

64. *Kelley*, 677 S.W.2d at 37; *Stephen*, 677 S.W.2d at 43.

65. *See Kelley*, 677 S.W.2d at 37 (appellant gave officer keys to the trunk); *Stephen*, 677 S.W.2d at 43 (arresting officer took the keys from the ignition to open the trunk).

66. *Kelley*, 677 S.W.2d at 37; *Stephen*, 677 S.W.2d at 44.

67. *See Kelley*, 677 S.W.2d at 37 (police in *Gill* "would have been free from any claims of tampering" with defendant's property); *Stephen*, 677 S.W.2d at 44.

68. *See Kelley*, 677 S.W.2d at 37; *Stephen*, 677 S.W.2d at 44 (in both cases, inventory search of locked trunk was means of protecting police from subsequent claims for theft).

69. *Kelley*, 677 S.W.2d at 39 (Miller, J., dissenting) ("For my part, I cannot condone the majority's holdng and certainly cannot reconcile it with *Gill*"); *Stephen*, 677 S.W.2d at 46 (Teague, J., dissenting) ("majority opinion implicitly overrules" *Gill*'s principles of law).

majority's opinion was not supported by *Opperman*,[70] and that it effectively authorized an unlimited search of every car once the owner was arrested, the same concern previously used to support the holding in *Gill*.[71] Justice Teague, dissenting to *Stephen*, concluded that the majority had effectively condoned a search of a constitutionally-protected area without either probable cause or a search warrant.[72]

In *Guillett v. State*, the defendant was arrested for public intoxication.[73] After the police placed the defendant in the patrol car, they conducted an inventory of his car.[74] One of the officers obtained the defendant's keys and unlocked the glove compartment where he discovered methaqualone.[75] The defendant was subsequently prosecuted for possession of a controlled substance.[76]

Justice Campbell, in an opinion upholding the police inventory search of the locked glove compartment,[77] noted the "paramount" fact that in this case the police had the defendant's keys, whereas in *Gill*, the defendant declined to give his keys to the police.[78] The facts in *Guillett* were found indistinguishable from the facts in *Opperman*, a similarity used to justify the conclusion that the inventory was reasonable.[79] Justice Campbell saw no difference in the fact that in *Opperman* the car was locked and the glove compartment was unlocked, while in *Guillett*, the car was unlocked and the glove compartment was locked.[80]

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70. *Kelley*, 677 S.W.2d at 40 (Miller, J., dissenting).

71. *Id.* at 41 (Miller, J., dissenting) (majority embraces the court's view of the State's argument in *Gill*, authorizing search of "every nook and cranny" of car once driver arrested, and "cloaks it in the imprimatur of law"). Justice Miller wondered if the majority was not actually helping the police fight crime "regardless of the concepts of individual liberty involved." *Id.*; *see* Gill v. State, 625 S.W.2d 307, 320 (Tex. Crim. App. 1981) (on motion for rehearing), *overruled on other grounds by* Osban v. State, No. 368-83 (Tex. Crim. App. Sept. 17, 1986) (not yet reported).

72. *Stephen*, 677 S.W.2d at 46 (Teague, J., dissenting).

73. *Guillett*, 677 S.W.2d at 48.

74. *Id.*

75. *Id.* The opinion does not state how or from where police obtained keys.

76. *Id.* at 47.

77. *Id.* at 49.

78. *Id.* at 48.

79. *Id.* at 49. The *Opperman* facts are set out but not actually compared to those in *Guillett*. *See id.* For a discussion of *Opperman*, see *supra* notes 22-29 and accompanying text.

80. *See* 677 S.W.2d at 49 ("We do not find this difference to be of any great

## IV. The Relation of Governmental Interests and Scope Analysis

The holdings in *Gill* and the three more recent cases were based, at least in part, on the Supreme Court's decision in *Opperman*,[81] an interpretation of fourth amendment limits that has subsequently been reaffirmed by *Colorado v. Bertine*.[82] Before *Bertine*, commentators and courts discussed, often critically, the soundness of *Opperman* and its progeny.[83] Some critics pointed to the Court's general deference to "standard police procedure" as a validation of inventory searches.[84] Other critics voiced concern that the police,

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significance.").

Justice Teague again expressed frustration with the majority's new rule that once the police have probable cause to arrest the car's driver, they are justified in conducting a thorough warrantless search of the entire car, including the locked glove compartment. *Id.* at 49-50 (Teague, J., dissenting). He concluded that the majority had completely failed to understand *Gill*'s reasoning and holding. *Id.* at 50. As a result of this misinterpretation, Justice Teague cautioned, the right of Texas citizens to be free from unreasonable searches and seizures had been dealt a crippling blow. *Id.* at 50-51.

81. *See Guillett*, 677 S.W.2d at 49 (facts of instant case held similar to facts of *Opperman*; holding in *Opperman* applicable to instant case); *Stephen*, 677 S.W.2d at 44 (court cites *Gill* to justify inventory search in instant case and court in *Gill* refers extensively to *Opperman* in reaching its decision); *Kelley*, 677 S.W.2d at 37 (majority cites *Opperman* for principle that inventory searches conducted pursuant to standard police procedures are constitutional); *Gill*, 625 S.W.2d at 317-18 (majority refers to *Opperman* at length in discussion of validity of inventory search of locked trunk).

82. ___ U.S. ___, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987).

83. *See* Mozzetti v. Superior Court, 4 Cal. 3d 699, 712, 484 P.2d 84, 92, 94 Cal. Rptr. 412, 420 (1971) (Burke, J., concurring) (protection of owner's property and protection of police from fraudulent claims do not justify police rummaging through closed containers and sealed packages); *see also* Reamey, *supra* note 17, at 325 (one must wonder why thorough rethinking of rationale for inventory searches has not occurred). The Reamey article also notes that those decisions which have implicitly limited *Opperman* have done so by focusing on the propriety of the car's impoundment and the permissible scope of the inventory search itself. *Id.* at 326; *see also* Comment, *supra* note 18, at 48 (even though courts justify inventory searches as routine police procedure, the constitution does not allow otherwise unreasonable search to become reasonable based on frequency of intrusion); Note, *supra* note 18, at 853 (requirement that warrantless searches be justified only by special circumstances would align procedure of inventory searches "with the general corpus of fourth amendment law").

84. *See* Backer v. State, 656 S.W.2d 463, 467 (Tex. Crim. App. 1983) (Clinton, J., dissenting) (standard police procedure justification has led to "a hodgepodge of local idiosyncrasy"); *see also Texas Developments*, *supra* note 18, at 260 (court has created duty on other police departments to begin inventory searches but reasoning is circular: court creates duty to inventory and then holds that because duty exists, resulting inventory is not unreasonable); Note, *supra* note 18, at 852 (any inquiry into intent of police officer regarding true purpose behind inventory search is clouded if police have standard procedure of

in securing the car owner's property, rarely consult the car's owner for alternatives to the impoundment and inventory procedure.[85] The main criticism of *Opperman*, however, has been directed at the soundness of relying upon the three governmental interests articulated by the Court in assessing whether an inventory is reasonable at its inception.[86] Much of this criticism applies with equal force to the *Bertine* decision.

### *A. Protection of the Car Owner's Property*

If the police are seriously concerned about protecting a car owner's property, their goal would be better achieved by at least consulting with the car's owner before inventorying the vehicle's contents.[87] Often, an owner would prefer to assume the risk of theft

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inventorying all vehicles coming into police custody); Note, *supra* note 20, at 702 (validity of inventory search is determined by its reasonableness in light of fourth amendment principles, not by what police determine to be reasonable procedures).

85. *See* Jones v. State, 345 So. 2d 809, 810 (Fla. Dist. Ct. App. 1977) (since car owner's friends were available to remove car, police had no need to conduct inventory search); Comment, *supra* note 3, at 762 (inventories should be allowed without warrant only if police have some reason to believe that securable property is located in car and car's owner cannot be found, or is so incapacitated, that he is unable to secure safety and privacy of his car and its contents). Even if the car does contain property, most of the time the police know where to locate the owner, who can usually do whatever he desires to protect his own property. *Id.* at 761. *But see* Wallis v. State, 636 S.W.2d 1, 2 (Tex. App.—Dallas 1982, no pet.) (unreasonable to require police officer to seek alternatives regarding impoundment of defendant's vehicle).

86. South Dakota v. Opperman, 428 U.S. 364, 389, 96 S. Ct. 3092, 3107, 49 L. Ed. 2d 1000, 1017 (1976) (Marshall, J., dissenting) (none of reasons given to permit inventory searches, taken separately or together, can justify automobile inventory procedures); 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.4, at 565 n.16 (1978) (some doubt as to validity of government interest that inventory searches protect police from potential danger since "if the police are endangered by unsearched cars in their possession, then it would seem that the public is endangered by cars parked on the streets"); Reamey, *supra* note 17, at 338 (obvious that protection of property justification is actually secondary concern behind permitting police to conduct searches); Case Comment, *supra* note 18, at 203-04 (if vehicle is stored free of charge, police are gratuitous bailees, and as such, owe duty to car owner not to be grossly negligent). In this case, simply locking the car door would seem to satisfy the police duty of care. *See id.*

87. *See* Colorado v. Bertine, ___ U.S. ___, ___, 107 S. Ct. 738, 748, 93 L. Ed. 2d 739, 754 (1987) (Marshall, J., dissenting); *see also, e.g.*, United States v. Wilson, 636 F.2d 1161, 1165 (8th Cir. 1980) (since owner of car was present during inventory search, police had other ways to protect their interest besides intruding into privacy of locked automobile trunk); Mozzetti v. Superior Court, 4 Cal. 3d 699, 707, 484 P.2d 84, 89, 94 Cal. Rptr. 412, 417 (1971) (if police insist on denying car owner opportunity to personally suggest how he wants his car's contents secured, then it is unreasonable to believe that inventory of items

or loss rather than give up his privacy interest in the vehicle, especially if the vehicle can be secured in some other way.[88] Moreover, because expectation of privacy is a fluid concept, it is constitutionally unrealistic to treat the invasion of every automobile compartment or container in the same fashion. Even assuming a car owner need not be offered alternatives for protection of his belongings left in plain view within the passenger compartment, offering such alternatives might be necessary in light of the vastly different interests involved when items are secured and hidden from view.

Also, since the inventory search is often a significant intrusion upon the owner's reasonable expectation of privacy,[89] the balancing undertaken in *Opperman* dictates that if the search is to be constitutional, its utility must be substantial enough to outweigh any privacy rights that a car owner has in his personal property.[90]

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not within plain view is for owner's benefit); Miller v. State, 403 So. 2d 1307, 1313 (Fla. 1981) (if main justification for inventory search is protection of car and its contents, it follows that if owner is available, he should be consulted concerning impoundment of car); Jones v. State, 345 So. 2d 809, 810 (Fla. Dist. Ct. App. 1977) (after arresting car owner for driver's license violation, police conducted inventory search of entire car, including locked trunk, even though car owner requested that police allow his friends to drive car from scene).

88. In *Bertine*, for example, the defendant's car was stored in a "lighted, private storage lot with a locked 6-foot fence" that was patrolled by police and security guards. Nothing had ever been stolen from there. ___ U.S. at ___ n.6, 107 S. Ct. at 747 n.6, 93 L. Ed. 2d at 752 n.6 (Marshall, J., dissenting); *see also* Reamey, *supra* note 17, at 337 (most car owners would undoubtedly assume "de minimus risk" inherent in leaving articles in unsecured car rather than subject contents of their cars to intrusive search conducted pursuant to standard inventory procedure). Indeed, if a car contains items requiring special care, it is logical to assume the owner would ask the police to retrieve the items and return them to his custody. *Id.* at 335. Moreover, "property loss is an insurable harm, whereas a violation of privacy is not." Note, *supra* note 18, at 853. If, however, a car owner consents to a police search of his car, the question of protecting the car owner's property is irrelevant in determining the validity of the inventory search. *See* United States v. Hall, 565 F.2d 917, 922 (5th Cir. 1978); State v. Slockbower, 79 N.J. 1, ___, 397 A.2d 1050, 1051 (1979) (routine inventory procedures following impoundment are unconstitutional invasions of owner's right of privacy unless owner consents).

89. *See* United States v. Lawson, 487 F.2d 468, 472 (8th Cir. 1973) (police procedure involved, whether termed inventory or search, definitely substantial invasion of car owner's reasonable expectation of privacy).

90. *Cf. Mozzetti*, 4 Cal. 3d at 706-07, 484 P.2d at 88-89, 94 Cal. Rptr. at 416-17 (balancing of governmental interest against onwer's expectation of privacy rebuts justification that police search was conducted to protect owner's property); *cf. also* Reamey, *supra* note 17, at 335 (no governmental interest is actually advanced by the justification of protection of car owner's property); Comment, *supra* note 3, at 761 (even if inventory provides greater

Despite the holdings in *Opperman* and *Bertine*, protection of property is not accomplished by making a list of the car's contents,[91] and security may actually be compromised, as it was in *Gill*, by police entry into protected areas to conduct the inventory.[92]

If the traditional all-inclusive inventory search were discarded as a per se method of safeguarding property, less intrusive alternatives better suited to individual circumstances might be employed. Since a person has a decreased expectation of privacy regarding items left in plain view within the car, it would be reasonable for police to inventory, and perhaps remove them to prevent theft.[93] The intrusion would be minimal and its scope related to the need justifying it. At the same time, the owner's reasonable expectation of privacy in the remainder of the car would be preserved.[94] The

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protection than rolling up windows and locking doors, it means significantly greater intrusion upon person's reasonable expectation of privacy within his automobile).

91. In *Mozzetti*, the court called the justification of protection of the owner's property "superficial and without substantial merit in an area of constitutional protection." 4 Cal. 3d at 707, 484 P.2d at 88, 94 Cal. Rptr. at 416. That police may have custody of a vehicle does not create a new possessory right in the vehicle's contents to justify a search of the vehicle. *See id.* at ____, 484 P.2d at 91, 94 Cal. Rptr. at 419; *see also* State v. Hatfield, 364 So. 2d 578, 581 (La. 1978) (police officer stated that inventory search is "a means of checking the vehicle without a search warrant"). *Contra* State v. Ruffino, 94 N.M. 500, ____, 612 P.2d 1311, 1313 (1980) (inventory searches are valid if they are made to protect owner's property); Duncan v. State, 680 S.W.2d 555, 559 (Tex. App.—Tyler 1984, no pet.) (court rationalized propriety of inventory search by stating that once vandal has broken door lock, there is little hope that he will be deterred from breaking glove compartment lock). It seems that this justification in *Duncan* is supportable only if we consider the police to be equal in status to vandals.

92. *See Gill*, 625 S.W.2d at 319-20.

93. *See, e.g.*, United States v. Lawson, 487 F.2d 468, 474 (8th Cir. 1973) (seizure of evidence in plain view not unreasonable under fourth amendment if police are attempting to secure car itself). Only the "plain view inventory search" satisfies this standard. *See, e.g.*, Lamb v. State, 561 P.2d 123, 124 (Okla. Crim. App. 1977) (inventory search reasonable when evidence seized was in plain view within passenger compartment).

94. *See, e.g.*, Judge v. State, 419 So. 2d 1171, 1172 (Fla. Dist. Ct. App. 1982) (since primary purpose for inventory search is to secure and protect owner's property, any subsequent search must be for "good faith caretaking purpose" and not as guise to conduct general exploratory search for incriminating evidence); *see also Lawson*, 487 F.2d at 471 (no way to equate police conduct of seizing evidence in plain view with that of breaking into locked trunk); State v. Bradshaw, 41 Ohio App. 2d 48, ____, 322 N.E.2d 311, 318 (1974) (police custody of car, combined with police duty to protect owner's property, permits taking reasonable measures to protect car and its contents, but does not permit police to conduct full blown investigatory search). *See generally* Reamey, *supra* note 17, at 343 (inventory search of only items in plain view presents slight intrusion which is logical since owner's reasonable expectation of privacy dominates any governmental interest in preventing loss of property).

Supreme Court has ignored such distinctions, preferring to test inventory searches by a standard of applied reasonableness without regard for whether the procedure employed was more intrusive than other available methods.[95]

### *B. Protection of the Police from Civil Liability*

It is also questionable whether the police must conduct inventory searches in order to protect themselves from subsequent claims concerning lost or stolen property.[96] In inventory situations, police are merely involuntary bailees who owe the car owner only a minimal duty of care to keep the property in their custody safe.[97] As such, the police could satisfy their duty of care, and at the same time limit their future liability for lost or stolen property, merely by rolling up the car windows and locking the doors.[98]

Moreover, inventory no more prevents false claims than it protects property. If the property, vehicle, keys and inventory are in the possession and control of the police, the listing of items is, at best, flimsy evidence that the police acted properly. Actually, an

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95. In *Bertine*, the Supreme Court continued to reject the argument that police should choose the least intrusive procedure when several are available which would serve the government's interests. Instead, the Court only considered whether the method chosen by the police was reasonable. ____ U.S. at ____, 107 S. Ct. at 742-43, 93 L. Ed. 2d at 746-48. This determination is, of course, made retrospectively, with the Court having full knowledge of the contraband or evidence found in the search.

96. *See Opperman*, 428 U.S. at 379, 96 S. Ct. at 3102, 49 L. Ed. 2d at 1011 (Powell, J., concurring) (police inventory searches may not actually be effective means of discouraging false claims since car owner may allege item was stolen before inventory or purposely omitted from inventory record). Justice Marshall agreed with Justice Powell, questioning the effectiveness of inventory searches in reducing police liability. *Id.* at 391, 96 S. Ct. at 3108, 49 L. Ed. 2d at 1018 (Marshall, J., dissenting); *see also* 2 W. LAFAVE, *supra* note 86, § 7.4, at 371-72 (other security measures, less intrusive than an inventory search, will suffice to protect police against fraudulent claims of lost or stolen property, especially when the car owner has definitely prohibited inventory search of his car); Reamey, *supra* note 17, at 338 (increasing security for impounded vehicles would better safeguard items in police actual or constructive custody).

97. *See, e.g.*, *Mozzetti*, 4 Cal. 3d at 709, 484 P.2d at 89-90, 94 Cal. Rptr. at 417-18 (police, as involuntary bailees, only owe car owner slight duty of care). Once this standard of care is satisfied, civil liability is precluded and the justification for this governmental interest is thus eliminated. *See id.*

98. *See* United States v. Lawson, 487 F.2d 468, 477 (8th Cir. 1973) (it is difficult to understand how the property would be better protected by the police breaking into and searching a locked trunk rather than by merely rolling up the windows and locking the doors).

accurate listing by the police would be much more beneficial to claimants who have lost items. It would help establish their claim in cases of theft or neglect. As with the "protection" rationale, this interest is not one which aids the government. Rather, it is likely to provide a benefit, if at all, to the property owner. Benefits are usually waivable by the party enjoying them, which in this case is the owner, not the government.

### *C. Protection of the Police from Danger*

Finally, it has been said that the police must conduct inventory searches in order to protect themselves and others from danger.[99] This justification has been criticized as unrealistic.[100] The safety interest, by itself, has never before been accepted by the Supreme Court to justify any warrantless search under the fourth amendment.[101] Probable cause or reason to believe a detainee is armed and dangerous has always been required.[102] If the police did have probable cause to believe a car contained dangerous materials, the car could be searched without relying upon inventory search procedures and without obtaining a warrant.[103]

More to the point, to permit a search of every vehicle on these grounds is to assume that impounded vehicles are likely to contain dangerous instrumentalities. Allowing the invasion of protected areas on mere possibility is closely akin to the blanket issuance of general warrants. Also, it indulges the most unlikely contingency by accepting that a person would break into a secured vehicle

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99. *Opperman*, 428 U.S. at 369, 96 S. Ct. at 3097, 49 L. Ed. 2d at 1005.

100. *See* Note, *supra* note 18, at 852 (safety justification for inventory search is "at best a make-weight argument" since it is difficult to imagine a situation in which failure to conduct an inventory search would result in physical harm to police).

101. *See Opperman*, 428 U.S. at 390 n.8, 96 S. Ct. at 3107 n.8, 49 L. Ed. 2d at 1017-18 n.8 (Marshall, J., dissenting) (Court has never condoned a search of any home or car merely because the police subjectively reason that a vandal may break in and find dangerous weapons); *accord Texas Developments*, *supra* note 18, at 262 (absent logical argument in support of court's stance, exempting inventories from penumbra of fourth amendment is "questionable at best").

102. *See, e.g.*, Michigan v. Tyler, 436 U.S. 499, 509, 98 S. Ct. 1942, 1949-50, 56 L. Ed. 2d 486, 498 (1978) (warrantless search is justified if conducted in response to urgent need to preserve life or avoid injury).

103. *See* 2 W. LAFAVE, *supra* note 86, § 7.4, at 572 (public protection argument seems ridiculous since if the police actually had probable cause to believe dangerous items were in a car, these items could be seized without any inventory justification).

guarded by employees or agents of the police, find a weapon, and use it to harm someone.[104] It is hardly surprising that this concern has been taken so lightly.

## V. Expectation of Privacy to Determine Scope

The foregoing analyses of the *Opperman* underpinnings do not suggest the abolition of inventory, but do highlight the need to restrict its use to maintain the balance embodied in reasonableness. In permitting the inventory of an unlocked glove compartment, the *Opperman* court did not purport to strike a balance for other compartments in other circumstances. Even the decision in *Bertine* stopped short of holding that scope was without limit once impoundment was proper.[105] In *Gill v. State*, the Texas Court of Criminal Appeals logically applied the learning of *Opperman*. In doing so, it recognized the expectation of privacy as the proper yardstick by which to determine the reasonableness of an inventory's scope.[106]

First, *Gill* recognized that removal and inventory of items in plain view is appropriate in light of the slight expectation of privacy in such objects.[107] Of course, items located in a car's trunk are not within plain view and are less likely to be stolen than property placed in its interior.[108] In fact, police often take property that has

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104. Justice Marshall, dissenting in *Bertine*, observed:

> Not only is protecting the police from dangerous instrumentalities an attenuated justification for most automobile inventory searches, but opening closed containers to inventory the contents can only increase the risk. In the words of the District Court in *United States v. Cooper*, 428 F. Supp. 652, 654-655 (S.D. Ohio 1977): 'The argument that the search was necessary to avoid a possible booby-trap is . . . easily refuted. No sane individual inspects for booby-traps by simply opening the container.'

*Bertine*, ___ U.S. at ___, 107 S. Ct. at 748, 93 L. Ed. 2d at 753 (Marshall, J., dissenting).

105. *See supra* note 29.

106. Gill v. State, 625 S.W.2d at 320 (varying expectations of privacy in different parts of automobile determinative of car owner's right to privacy under fourth amendment).

107. *See id.* at 319.

108. *Id.*; State v. Houser, 95 Wash. 2d 143, ___, 622 P.2d 1218, 1226 (1980) (property locked in automobile trunk is not in any great danger of being stolen; indeed, many cars are left unattended on city streets and no unreasonable risk is posed to contents within locked trunks); *cf.* Reamey, *supra* note 17, at 345 ("Trunks, like glove compartments, are seemingly quite secure and require no further intrusion to protect the property contained therein as long as the locking device on the trunk is working properly.").

been inventoried and place it in the car's trunk for safekeeping.[109]

More importantly, *Gill* recognized that a person has an increased expectation of privacy regarding those items in a car's locked trunk.[110] Taking this increased expectation of privacy into account, any valid inventory search of a locked car trunk would have to further some substantial governmental interest in order to achieve constitutional reasonableness.[111] In light of the fact that a locked compartment concomitantly expresses both a heightened expectation of privacy and a diminished need for protection by the police, reasonableness would seem to be difficult for the government to demonstrate.[112]

Despite the limitations expressed and implied in *Gill* and dictated by a conscientious balancing of competing interests, the Texas Court of Criminal Appeals has held in *Kelley*,[113] *Stephen*,[114] and *Guillett*[115] that once the police are justified in conducting an inventory search, they may freely explore both a car's locked trunk and

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109. *See Mozzetti*, 4 Cal. 3d at 702, 484 P.2d at 85, 94 Cal. Rptr. at 413 (after vehicle inventoried, contents discovered were placed in trunk and trunk locked). Additionally, an agreement by the State not to introduce into evidence the contents seized from a locked car trunk seems to demonstrate the State's awareness that an inventory search was excessive in scope. *See* Pearson v. State, 649 S.W.2d 786, 790 (Tex. App.—Fort Worth 1983, pet. ref'd).

110. *Gill*, 625 S.W.2d at 319. This increased expectation of privacy was also mentioned by Justice Marshall in *Opperman*. 428 U.S. at 388 n.6, 96 S. Ct. at 3106 n.6, 49 L. Ed. 2d at 1016-17 n.6 (Marshall, J., dissenting) (today, people carry their "most personal and private papers and effects" in their cars).

111. *Opperman*, 428 U.S. at 388, 69 S. Ct. at 3106, 49 L. Ed. 2d at 1016 (Marshall, J., dissenting) (since an automobile search is a substantial invasion of privacy, the importance of the interests used to justify the search of private areas of car should be no less than those interests required to justify a search of similar scope in a home or office); *see also* Reamey, *supra* note 17, at 334 (even if inventory search is undertaken as a caretaking function, it must still advance some legitimate governmental interest). Only when the car owner's reasonable expectation of privacy is exceeded by a substantial governmental interest should a locked trunk or glove compartment be subject to an inventory search. *Opperman*, 428 U.S. at 388, 96 S. Ct. at 3106, 49 L. Ed. 2d at 1016.

112. *See, e.g.*, United States v. Wilson, 636 F.2d 1161, 1163 (8th Cir. 1980) (resulting police search was unreasonable based on owner's greater expectation of privacy in locked trunk of his automobile); Mozzetti v. Superior Court, 4 Cal. 3d 699, 706, 484 P.2d 84, 88, 94 Cal. Rptr. 412, 416 (1971) ("Constitutional rights may not be evaded through the route of finely honed but nonsubstantive distinctions"); State v. Houser, 95 Wash. 2d 143, ____, 622 P.2d 1218, 1226 (1980) (any purported justification of protection of property in locked car trunk is outweighed by car owner's expectation of privacy for property in locked car trunk).

113. Kelley v. State, 677 S.W.2d 34 (Tex. Crim. App. 1984).

114. Stephen v. State, 677 S.W.2d 42 (Tex. Crim. App. 1984).

115. Guillett v. State, 677 S.W.2d 46 (Tex. Crim. App. 1984).

its locked glove compartment,[116] an interpretation that far exceeds even the expansive reading given the fourth amendment by the Supreme Court in *Bertine*. It is evident that the court of criminal appeals has not only departed from its reasoning in *Gill*,[117] but has also divorced itself from established fourth amendment principles in an effort to justify these intrusive and once unjustifiable inventory searches.[118]

This strained reasoning is seen first in *Kelley* and *Stephen*. The court concluded that the police, by possessing the key to the car's trunk, were exposing themselves to potential liability for lost or stolen property and were thus justified in searching the locked trunk of the car.[119] This reasoning ignores Justice Teague's observation in *Gill* that since a car's trunk is more secure than its interior, the possibility of subsequent claims concerning loss or theft of property located within a locked trunk is greatly reduced.[120] Alternatively, the officers could have placed the car keys in the police property room and insulated themselves even further from subsequent claims.[121] And, of course, all of this debate assumes that inventory would either protect the police from claims of loss or deter actual theft.

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116. *Kelley*, 677 S.W.2d at 37; *Stephen*, 677 S.W.2d at 44-45; *Guillett*, 677 S.W.2d at 49. And, of course, Texas is not alone. *See, e.g.*, State v. Ruffino, 94 N.M. 500, ——, 612 P.2d 1311, 1313 (1980) (allowing warrantless inventory of locked trunk).

117. *See Kelley*, 677 S.W.2d at 41 (Miller, J., dissenting) (majority conveniently ignores fact that in *Gill*, main and independent reason for court's decision was that "the inventory search doctrine per se does not encompass a locked trunk"); *Stephen*, 677 S.W.2d at 46 (Teague, J., dissenting) (majority authorizes warrantless search of locked trunk which was specifically held to be "per se illegal" in *Gill*); *Guillett*, 677 S.W.2d at 50 (Teague, J., dissenting) (majority opinion demonstrates "total lack of understanding" of what *Gill* stated and held).

118. *See Kelley*, 677 S.W.2d at 41 (Miller, J., dissenting) (term "inventory search" now works to destroy any reasonable expectation of privacy under Texas Constitution); *Stephen*, 677 S.W.2d at 46 (Teague, J., dissenting) (although police officer conducted warrantless inventory search of locked trunk lacking any probable cause, majority states this type of conduct is no longer unreasonable under fourth amendment); *Guillett*, 677 S.W.2d at 50-51 (Teague, J., dissenting) (search conducted is condemned and proscribed by United States and Texas constitutions).

119. *Kelley*, 677 S.W.2d at 37; *Stephen*, 677 S.W.2d at 44.

120. 625 S.W.2d at 319.

121. *See* Reamey, *supra* note 17, at 346 (any keys possessed by police should be placed in property room, thereby securing locked glove compartment and its contents against intrusion by anyone other than police).

In *Guillett*, the court also distinguished *Gill* because the police had the key to the car's locked glove compartment.[122] These opinions overlooked the fact that no difference exists between the situation in *Gill* in which the car owner refuses to voluntarily relinquish the keys, and the situation in which the police obtain the keys from an uncooperative arrestee by search incident to arrest or by inventory of personal effects. *Kelley*, *Stephen*, and *Guillett* are not consent cases, and the court does not suggest that they are. But in nonconsent cases, the police will invariably gain possession of the keys if an arrest is made and the car is impounded. By focusing on whether the police had the keys, the court has effectively approved the inventory of every compartment that can be opened by those keys in every impoundment following arrest. Since post-arrest impoundment may well be the most common sort, warrantless searches of locked compartments unsupported by any level of suspicion may now become commonplace in Texas.

In *Guillett*, the court secondarily justified the inventory of the locked glove compartment as being supported by *Opperman*.[123] The court ignored the important distinguishing fact that in *Opperman*, the police inventoried only the contents of an unlocked, not locked, glove compartment.[124] In light of this significant difference, the court's reliance on selected portions of *Opperman* to justify inven-

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122. *Guillett*, 677 S.W.2d at 48. Justice Campbell quotes testimony from *Gill* that the police asked the wrecker driver to remove the back seat because "he knew how" to get into the locked trunk. *Id.* at 49. What difference the wrecker driver's knowledge makes in the instant case in unclear. An argument could be made that since the police, like the wrecker driver in *Gill*, "knew how" to get into the locked glove compartment (using keys), the resulting inventory search, as in *Gill*, should have been declared unconstitutional. *Cf. id.* at 48-49 (court places great emphasis on fact that in *Gill* Justice Teague supposedly held inventory search of locked trunk unconstitutional solely on basis that wrecker driver, and not police, "knew how" to enter locked trunk). The *Guillett* court, however, supported this tenuous distinction merely by placing undue emphasis on isolated language from the opinion in *Gill*. *See id.* at 48 (majority quotes from *Gill* opinion wherein Justice Teague stated that "*under the facts presented*," inventory search of locked trunk was unreasonable); *cf.* Reamey, *supra* note 17, at 346 n.100 (speculation whether police could inventory locked trunk if they had key is "unsupported by reason or logic" due to clear language in *Gill* that inventory search of locked trunk is "per se illegal").

123. *See Guillett*, 677 S.W.2d at 49, where the court concluded that "facts in the instant case are much like those" in *Opperman*. The court went on to briefly discuss the facts in *Opperman* and found it immaterial that in the instant case the glove compartment was locked while the glove compartment in *Opperman* was unlocked. *Id.*

124. *Opperman*, 428 U.S. at 380 n.6, 96 S. Ct. at 3102 n.6, 49 L. Ed. 2d at 1011 n.6 (Powell, J., concurring).

tory of a locked glove compartment is at least suspect and almost certainly misplaced.[125]

*Colorado v. Bertine*[126] provides no substantial additional support for the Texas position on inventory. While the *Bertine* decision certainly expanded the permissible scope of passenger compartment inventory searches to include luggage-type containers, it did not address the unique privacy expectation represented by a locked compartment. Protection of the owner's property, the only significant interest advanced by inventory,[127] is satisfied by the lock on the compartment unless the owner requests additional protection.[128]

The most disturbing and important point is that all three of the Texas cases have jettisoned sound constitutional principles in order to support the expansive scope of these inventory searches.[129] It is settled that inventory is an administrative procedure and is not intended to uncover evidence of crime.[130] In *Gill*, the court specifically noted that the police, while conducting an inventory search, do *nothing more* than take stock of those items found in plain view or in unlocked compartments within the car.[131] Moreover, the inventory must be conducted pursuant to a standard policy of the agency impounding the vehicle.[132] As is true of other procedures

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125. *See* Reamey, *supra* note 17, at 346 (why should police possession of keys to locked trunk or glove compartment matter with respect to any *Opperman* justification?); *cf.* 2 W. LAFAVE, *supra* note 86, § 7.4, at 579 (that *Opperman* allowed opening of unlocked glove compartment should not be taken as sign that police may also search locked trunks).

126. ___ U.S. ___, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987).

127. *Id.* at ___, 107 S. Ct. at 748, 93 L. Ed. 2d at 753 (Marshall, J., dissenting) ("only the government's interest in protecting the owner's property actually justifies an inventory search of an impounded vehicle"). Neither *Opperman* nor *Bertine* demonstrated any logically compelling reason to premise inventory on protection from false claims or safety concerns. *Id.*

128. When the vehicle is locked while impounded, "[t]he owner would then enjoy the protection of not only the devices provided by the vehicle manufacturer, but also the security afforded by whatever measures are employed by the storage lot to safeguard vehicles." Reamey, *supra* note 17, at 336. The dissent in *Bertine* argued that the property protection interest could have been satisfied by permitting the owner, who was present on the scene, to make alternative arrangements for the storage of the vehicle and its contents. ___ U.S. at ___, 107 S. Ct. at 748, 93 L. Ed. 2d at 754 (Marshall, J., dissenting).

129. *Kelley*, 677 S.W.2d at 41 (Miller, J., dissenting); *Stephen*, 677 S.W.2d at 46 (Teague, J., dissenting); *Guillett*, 677 S.W.2d at 49-50 (Teague, J., dissenting).

130. *See Opperman*, 428 U.S. at 376, 96 S. Ct. at 3101, 49 L. Ed. 2d at 1009 (search condoned as non-investigatory).

131. 625 S.W.2d at 319.

132. *See Opperman*, 428 U.S. at 376, 96 S. Ct. at 3101, 49 L. Ed. 2d at 1009; *Gill*, 625 S.W.2d at 319.

permitting specific police intrusions for a limited purpose, police are granted very limited discretion in executing the search,[133] and this limitation is an important recognition of the doctrinal proximity of such a search to constitutionally-prohibited activity. Therefore, to maintain the proper constitutional perspective, the scope of an inventory search should coincide with, but never exceed, the degree necessary to take stock of items in plain view or in unlocked compartments within the car.[134] As a corollary, broadening the scope of the inventory search to exceed its limited purposes infringes privacy rights without the accompanying safeguards of probable cause or warrant that are otherwise constitutionally required.[135] Seen in this light, the balancing of privacy against governmental interests is a substitute for the traditional safeguards, and should be undertaken with the care that characterization demands.

## VI. CONCLUSION

In *Gill v. State*,[136] the Texas Court of Criminal Appeals laid a proper foundation for the preservation of a citizen's right to privacy in items of personal property in an automobile subject to impoundment and inventory. In taking seriously its role as an arbiter of reasonableness, the court tacitly, and, at points, expressly, acknowledged that the expectation of privacy is the critical factor to measure

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133. *See Opperman*, 428 U.S. at 379-80, 96 S. Ct. at 3102-03, 49 L. Ed. 2d at 1011-12 (Powell, J., concurring) (unrestrained inventory search would be serious intrusion upon person's privacy).

134. *See, e.g., id.* at 383, 96 S. Ct. at 3104, 49 L. Ed. 2d at 1013 (Powell, J., concurring) (officer may not make discretionary determination to extend search simply because certain conditions are satisfied); United States v. Wilson, 636 F.2d 1161, 1163 (8th Cir. 1980) (legitimate seizure of automobile does not automatically permit police to conduct unlimited search of automobile; inventory search must be reasonable in scope); State v. Houser, 95 Wash. 2d 143, ____, 622 P.2d 1218, 1225 (1980). ("The direction and extent of such searches must be restricted to effectuating the purposes which justify their exceptions to the Fourth Amendment.").

135. *See, e.g.*, United States v. Lawson, 487 F.2d 468, 475 (8th Cir. 1973) (reasonableness of search must be evaluated in light of fourth amendment principles, not in light of what are to be considered reasonable police procedures); Gonzales v. State, 507 P.2d 1277, 1282 (Okla. Crim. App. 1973) (if police inventory search is subterfuge, based on suspicion that the vehicle may contain contraband, any discovery of such contraband is not admissible and "the police inventory void *ab initio*").

136. 625 S.W.2d 307 (Tex. Crim. App. 1981) (on motion for rehearing), *overruled on other grounds by* Osban v. State, No. 368-83 (Tex. Crim. App. Sept. 17, 1986) (not yet reported).

against the government's need to inventory. Recognition of this limiting factor provided a measure of protection against unlimited police scrutiny of a vehicle's contents under the guise of inventory.

But by abandoning this limitation in *Kelley*,[137] *Stephen*,[138] and *Guillett*,[139] the court has skewed the balance. These cases mean much more than the expansion of inventory scope. They mean that *any* expectation of privacy is meaningless in this context. Were that expectation replaced by another suitable safeguard, the result might be less alarming, but, when one measure is removed from the balance without a corresponding adjustment, balancing becomes formalistic; the outcome is predetermined.

Has the court really gone so far? If an expectation of privacy cannot be held in a locked compartment, the court clearly has eviscerated the concept of privacy in the vehicle context. There is reason to believe that any expectation of privacy in a vehicle is now per se unreasonable in Texas. Only where the police do not have and cannot obtain a key to the compartment will their inventory be thwarted. A driver may apparently maintain the security of personal effects carried in a vehicle only by locking them in a compartment for which he carries no key. Surely this diminution of privacy is not warranted by the suspect interests articulated in *Opperman*.[140]

The Supreme Court's decision in *Colorado v. Bertine*[141] will undoubtedly be seen by some as vindication of the court of criminal appeals' view of the fourth amendment. In actuality, Texas has gone much farther than the Supreme Court in sanctioning inventory of locked compartments. While *Bertine* may signal a regrettable diminution of the role that expectation of privacy is to play in fourth amendment assessments of inventory scope, it is premature to interpret the decision as a wholesale abandonment of the concept.

Moreover, Texas law need not and should not uncritically follow the development of fourth amendment jurisprudence.[142] The

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137. Kelley v. State, 677 S.W.2d 34 (Tex. Crim. App. 1984).

138. Stephen v. State, 677 S.W.2d 42 (Tex. Crim. App. 1984).

139. Guillett v. State, 677 S.W.2d 46 (Tex. Crim. App. 1984).

140. South Dakota v. Opperman, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976).

141. ___ U.S. ___, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987).

142. The Colorado Supreme Court, for example, specifically reserved the question of whether the search in *Bertine* violated article II, section 7 of the Colorado Constitution.

court of criminal appeals and the courts of appeals have previously declined to interpret article I, section 9 of the Texas Constitution[143] as coextensive with the federal constitution, reaffirming the continuing vitality of the Texas exclusionary rule and a body of search and seizure law antedating many analogous interpretations of the fourth amendment.[144]

No impediment exists, under either a fourth amendment analysis or an interpretation of the Texas Constitution, to reaffirmation of the balancing undertaken in *Gill*. Noble motivations cannot and should not protect illogic from criticism. Indeed, illogic undermines the persuasiveness of legal precedent while, at the same time, often imperiling fundamental and well-developed safeguards against improper governmental intrusion.[145] If the United States Supreme Court has indulged the government's desire to facilitate the finding of criminal evidence at the expense of personal liberty, the court of criminal appeals need not follow, nor set, the example.

It has been said that the word "automobile" is not a talisman before which the fourth amendment fades away and disappears.[146] This sentiment has been echoed in Texas.[147] It now appears, however, that the word "inventory" has become such a talisman.[148]

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*See* People v. Bertine, 706 P.2d 411, 419 (Colo. 1985), *rev'd*, ____ U.S. ____, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987).

143. TEX. CONST. art. I, § 9.

144. *See, e.g.*, Howard v. State, 617 S.W.2d 191, 193 (Tex. Crim. App. 1979); Hill v. State, 643 S.W.2d 417, 419 (Tex. App.—Houston [14th Dist.]), *aff'd*, 641 S.W.2d 543 (Tex. Crim. App. 1982); Garza v. State, 678 S.W.2d 183, 189-90 (Tex. App.—San Antonio 1984, pet. granted). Writing to urge this very kind of independent analysis, Justice Miller of the court of criminal appeals recently noted that

> we have and we pride ourselves in having our own concepts of what our Constitution means to us. To willingly vest interpretation of any part of our Constitution in a court composed of justices who are neither elected by the people of Texas nor necessarily nominated for office by a president the people of Texas elected, and who certainly are not accountable to the people of Texas, is a genuine travesty of Texas justice.

Osban v. State, No. 368-83, slip op. at 2 (Tex. Crim. App. Sept. 17, 1986) (Miller, J., dissenting).

145. For a development of this theme in a different context, see Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1 (1986).

146. Coolidge v. New Hampshire, 403 U.S. 443, 461-62, 91 S. Ct. 2022, 2035-36, 29 L. Ed. 2d 564, 579-80 (1971).

147. *See Gill*, 625 S.W.2d at 319 (citing *Coolidge*).

148. *Bertine*, ____ U.S. at ____, 107 S. Ct. at 749-50, 93 L. Ed. 2d at 756 (Marshall, J., dissenting).