# COMMENTS

## After Thirty Years, Is it Time to Change the Vehicle Inventory Search Doctrine?

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### I. INTRODUCTION

It was a cold winter night.[1] Bobby Smoltz was returning after a long day of skiing. He was tired and had hurt his leg on the slopes. He had also drunk beer and smoked several joints while skiing. As Smoltz was on his way home, something about the way he was driving caught the eye of Officer Bret Maddux. Maddux pulled his squad car behind Smoltz's 1985 Toyota 4-Runner and followed him for several miles. Eventually, Smoltz's truck crossed over the centerline while turning a corner. At that point, Maddux initiated a traffic stop because he suspected that Smoltz was driving under the influence of intoxicants.[2]

As Maddux approached the truck, he smelled an overwhelming odor of marijuana emanating from the driver's window. Upon looking in,

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1. The facts of this story are based on a recent police report (on file with author). At the request of the parties involved with the incident, all identifying names and references in the report have been redacted and kept confidential. In other words, as the old television show *Dragnet* used to say, "The names have been changed to protect the innocent." (Please also note that this is not meant to imply the guilt or innocence of any party.)

2. In a motion to suppress, defense counsel claimed that Officer Maddux had prior information obtained from an undercover officer that Smoltz was a drug dealer and was carrying large amounts of narcotics (on file with author). This fact is disputed and the actual police report contains no mention of an undercover officer.

Maddux believed that Smoltz was stoned. He asked Smoltz for his driver's license, and after observing Smoltz fumble around, Maddux asked Smoltz to get out of his car for some standard field sobriety tests. Subsequently, Maddux turned on his patrol car's video camera. The video of the stop showed that Smoltz performed comparatively well on the standard field sobriety tests, although he frequently complained about his hurt leg. Still, something did not feel right to Maddux and he decided to probe further. Maddux asked Smoltz if he had consumed any alcohol or taken any other drugs earlier that day. Smoltz admitted that he had drunk some beer and had smoked some marijuana with his friends while he was up on the mountain. Based on this admission and Maddux's training and experience, Maddux placed Smoltz under arrest for driving under the influence of intoxicants. This is where the story really becomes interesting.

After Smoltz was cuffed and placed in the back of the patrol car, Maddux asked for permission to search the vehicle. Smoltz, perhaps realizing the consequences of his earlier admissions, smartly declined. When Maddux asked, "Why not?," Smoltz responded, "Because I do not want you to!"

Nonetheless, Maddux pressed on. He said, "I still have to perform an inventory search of the vehicle. Is there anything I am going to find during that inventory search that you want to tell me about?" Smoltz capitulated: "Well, I do have about four or five ounces of pot in my duffel bag."[3]

Sure enough, when Maddux performed his "inventory search" of the truck, he found eight Ziploc bags containing one-half pound of marijuana each.[4] He also found $667.00 in cash. The truck was towed, and Maddux took Smoltz to jail on charges of possession of a controlled substance with intent to distribute, manufacturing a controlled substance, and driving under the influence of a controlled substance.

Inventory searches are warrantless searches that are not investigatory in scope and are not intended to be searches for evidence.[5] Thus, this

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3. At this point, Officer Maddux most likely had probable cause to search the car, thanks to Smoltz's statements. *See, e.g.*, Brinegar v. United States, 338 U.S. 160 (1949).

4. It is theoretically possible that Officer Maddux may have been able to search the car as a search incident to arrest. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969); *see also* New York v. Belton, 453 U.S. 454 (1981). This article will ignore that possibility and focus mainly on the inventory search or threat of an inventory search, as some officers and police departments now avoid searches of automobiles incident to arrest in favor of inventories. Additionally, in his police report Officer Maddux referred to his search as an inventory search, although, as this Comment will demonstrate, it clearly did not meet the requirements for an inventory search. Even so, Officer Maddux probably performed a legal search here and was justified in doing so. *See supra* note 3.

5. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364, 366–71 (1976).

story raises an interesting problem: whether Officer Maddux abused the inventory search procedure by going beyond the scope permitted by law.

Inventory searches usually occur whenever a car is impounded.[6] Generally, when performing an inventory search, police are looking to find either valuables or dangerous items before the vehicle is towed.[7] The purpose of an inventory search is to protect the vehicle owner's property while it is in police custody and control, protect the police from dishonest claims of theft, and protect officers and the community from potentially dangerous situations.[8] These three reasons make inventory searches a useful procedure that the police should continue to use.[9]

However, just as inventory searches are useful, helpful procedures, the inventory search doctrine itself is immersed in problems.[10] Some of these problems stem from the fact that the public has little or no knowledge of the procedure or its intended use.[11] This is easily demonstrated by Smoltz, who initially refused a general evidentiary search and then made incriminating statements because he did not understand the limitations on the inventory search or what it entailed. If the public is generally ignorant regarding inventory searches, it is also possible that there is a lack of knowledge about the procedure among police, lawyers, and even

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6. *See, e.g.*, SEATTLE POLICE DEP'T, SEATTLE POLICE DEPARTMENT POLICES AND PROCEDURES: AUDIT, ACCREDITATION AND POLICY SECTION § 2.089, at VI (2006) [hereinafter SEATTLE POLICE DEPARTMENT], *available at* http://www.cityofseattle.net/police/Publications/SPD%20Manualv1_1.pdf (mandating an inventory search in non-investigatory situations); DOUGLAS COUNTY [OREGON] SHERIFF'S OFFICE, CRIMINAL DIVISION PROCEDURES § 415 (2001) [hereinafter DOUGLAS COUNTY SHERIFF'S OFFICE] (requiring an inventory search whenever a vehicle is towed). While it is possible to perform an inventory search of a person, as in the case of a jail-booking, see Illinois v. Lafayette, 462 U.S. 640 (1983), this Comment will focus on vehicle inventory searches. Some of the cases discussed in this Comment will involve personal inventory searches, however, as many of the issues are the same.

7. *See, e.g.*, *Opperman*, 428 U.S. at 366–71.

8. *Id.* at 369.

9. One court praised and described the procedure as follows: "We note that there was no intent to discover evidence of a crime. Rather this was responsible, indeed laudable, police conduct to protect the property of the owner of a lawfully impounded car. If valuable property had been left on the seat and floor of the car, plainly visible to anyone peering through the window, the danger of theft would have been substantial. Not surprisingly, it appears that [inventory searches] are standard procedures. They certainly should be." United States v. Mitchell, 458 F.2d 960, 961 (9th Cir. 1972).

10. *See e.g.*, *infra* Parts III, V.

11. As one commentator notes:

> Accumulating empirical evidence suggests that public knowledge of the law is embarrassingly low . . . . One can speculate that people learn the criminal law, or what they think is the criminal law, not from the criminal code, but from friends and family, personal experience, and traditional sources of public information such as schools, newspapers, news magazines, and television.

Paul H. Robinson, *Are Criminal Codes Irrelevant?*, 68 S. CAL. L. REV. 159, 163–64 (1994) (citations omitted). "Public knowledge of criminal law is low. What people do learn they learn from sources other than the code and commonly is wrong." *Id.* at 199.

judges.[12] This Comment will demonstrate that even for those who understand inventory searches, the rules are hopelessly inconsistent and difficult to apply in practice.[13] Such ambiguity leads to an even greater problem: police have the ability to use the procedure to manipulate suspects. Consequently, inventory searches run the risk of not serving their benevolent policy concerns, but instead acting as a "safety net" in cases where an evidentiary search is impossible.[14]

Thus, to ensure that inventory searches continue to serve their useful, intended purpose, courts should abandon their reliance on "reasonable police procedure," and instead adopt clear, bright line rules that define a broad scope for inventory searches, yet require police to obtain consent and to honor a refusal of an inventory search. Part II of this Comment will describe the inventory search as it has developed in the Supreme Court's jurisprudence in order to provide background and understanding of the procedure as it stands today. Part III will address the difficulties in applying the Supreme Court's approach by comparing the differences in police department policies. Part IV will then closely examine Washington's somewhat laudable approach to inventory searches, the limits the state has placed on the scope of inventory searches, and the steps the state has taken to impose a consent requirement. Last, Part V will suggest much needed reforms for Washington and the rest of the nation to ensure that the rights of individuals are protected while inventory searches continue to serve their purpose.

## II. THE SUPREME COURT'S DEVELOPMENT OF THE INVENTORY SEARCH DOCTRINE

The inventory search doctrine that has been followed or adapted by many states[15] was developed by the Supreme Court in four major cases.[16] This Part will begin with a general discussion of standard inventory

12. *See, e.g., infra* Part IV.A, which briefly discusses how in *State v. Houser*, 95 Wash. 2d. 143, 622 P.2d 1218 (1980), the Washington Supreme Court misstated the inventory rule as it had been developed by the U.S. Supreme Court.

13. *See infra* Part III.

14. While preparing this Comment, a government attorney, who has asked to remain anonymous, expressed concern to the author that more and more police are threatening suspects with an eventual inventory search in order to obtain consent for evidentiary searches, "which," he went on to say sarcastically, "I find cute." *See also* Alexander E. Eismann, Note, *Addressing the Pretext Problem: The Role of Subjective Police Motivation in Establishing Fourth Amendment Violations*, 63 B.U. L. REV. 223 (1983) (describing ways in which police use various procedures in order to perform evidentiary searches that would otherwise be improper).

15. *See, e.g.*, People v. Benites, 11 Cal. Rptr. 2d 512 (Cal. Ct. App. 1992); State v. Stalder, 438 N.W.2d 498 (Neb. 1989); State v. Hathman, 604 N.E.2d 743 (Ohio 1992); *Houser*, 95 Wash. 2d 143, 622 P.2d 1218.

16. Florida v. Wells, 495 U.S. 1 (1990); Colorado v. Bertine, 479 U.S. 367 (1987); Illinois v. Lafayette, 462 U.S. 640 (1983); South Dakota v. Opperman, 428 U.S. 364 (1976).

search rules. Then, in order to provide a greater understanding of inventory search procedure, how the doctrine developed, and its policy implications, this Part will discuss the four major cases: *South Dakota v. Opperman*,[17] *Illinois v. Lafayette*,[18] *Colorado v. Bertine*,[19] and *Florida v. Wells*.[20] While examining those cases, this Part will also analyze their implications, strengths, and shortcomings.

Any discussion of search and seizure procedure begins with the Fourth Amendment to the U.S. Constitution. It provides as follows: "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 . . . ."[21] This Amendment *requires* that a warrant be issued before a search takes place, and consequently, warrantless searches are *per se* unreasonable and unconstitutional.[22] The point of the warrant requirement is that the decision to search should be made "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."[23]

Although warrantless searches are considered *per se* unreasonable, where there is a danger to law enforcement officers or when evidence could be lost or destroyed, the Court has allowed for "a few 'jealously and carefully drawn' exceptions" to the warrant requirement.[24] Other exceptions to the warrant requirement include cases where police are not searching for evidence, but are merely performing a "community caretaking function."[25] It follows that the inventory search doctrine is an exception because police are not searching for evidence but are performing this "community caretaking function" and protecting themselves from dishonest claims of theft.[26] If police do find contraband during the course of a lawfully performed and seemingly benevolent inventory search, then that evidence will be admissible at trial.[27] Additionally, although inventory searches take place without a warrant, they are in fact "searches"

17. *Opperman*, 428 U.S. 364.

18. 462 U.S. 640.

19. 479 U.S. 367.

20. 495 U.S. 1.

21. U.S. CONST. amend. IV.

22. *See* Katz v. United States, 389 U.S. 347, 357 (1967); Johnson v. United States, 333 U.S. 10, 13–14 (1948).

23. *Johnson*, 333 U.S. at 14.

24. Arkansas v. Sanders, 442 U.S. 753, 759 (1979) (quoting Jones v. United States, 357 U.S. 493, 499 (1958)).

25. *See Opperman*, 428 U.S. at 368–69, Cady v. Dombrowski, 413 U.S. 433, 441 (1973).

26. *Opperman*, 428 U.S. at 368–69.

27. *See, e.g.*, *id.* at 369–71 (where evidence obtained from an inventory search was admissible against the defendant).

within the meaning of the Fourth Amendment and are considered reasonable.[28]

Vehicle inventory searches can occur in a variety of situations and they almost always occur after a vehicle is impounded by the police.[29] For example, an inventory search usually happens when a vehicle is impounded where the driver is arrested for driving while intoxicated or driving with a suspended license.[30] In cases where a traffic stop is involved, for the inventory search to be valid, the stop itself must be valid.[31] Many times, inventory searches also occur when there is no stop, no suspect is present, and police are merely impounding an illegally parked or abandoned vehicle.[32] Here again, in order for the search to be valid, the impound of the car must also be valid.[33] Thus, to understand how these rules developed and their current problems, it is helpful to examine the cases that have created them.

### *A.* South Dakota v. Opperman[34] *Describes the Modern Inventory Search Standard and Creates Modern Problems*

The Supreme Court firmly established the inventory search exception to the warrant requirement in *South Dakota v. Opperman*,[35] which held that inventory searches are valid so long as they are performed according to reasonable police procedure.[36] In *Opperman*, a car was illegally parked in a downtown area and received two parking citations.[37] The car was eventually towed to the city impound lot where an officer noticed a wristwatch as well as some other personal items through the

28. For a more detailed discussion of whether inventory searches are really "searches," see 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.4 (4th ed. 2004).

29. *See* sources cited *supra* note 6. The only time when a vehicle inventory search would *not* occur following an impound would be when the police were trying to secure the vehicle before leaving it in a remote area. *See, e.g.*, State v. Stalder, 438 N.W.2d 498 (Neb. 1989).

30. *See, e.g.*, Colorado v. Bertine, 479 U.S. 367 (1987) (defendant was arrested for driving under the influence of alcohol); United States v. Hartje, 251 F.3d 771 (8th Cir. 2001) (defendant was stopped for speeding and later arrested on drug charges); People v. Benites, 11 Cal. Rptr. 2d 512 (Cal. Ct. App. 1992) (defendant's car was towed because he was driving with a suspended license); State v. Hathman, 604 N.E.2d 743 (Ohio 1992) (defendant arrested on suspicion of stealing the car he was driving); State v. White, 135 Wash. 2d 761, 958 P.2d 982 (1998) (defendant was stopped for running a traffic sign; his car was impounded and inventoried because he was driving without a license).

31. State v. Houser, 95 Wash. 2d 143, 147–48, 622 P.2d 1218, 1222 (1980).

32. *See* South Dakota v. Opperman, 428 U.S. 364, 365–67 (1976).

33. *Id.* at 373.

34. *Id.* at 364.

35. *Id.* at 372.

36. *Id.*

37. *Id.* at 365–66.

car's window.[38] Concerned about the safety of the valuables inside the car, the officer entered and searched the vehicle. Pursuant to his department's procedures,[39] he performed the search while noting the items he found on a standard inventory form.[40] Upon opening the car's glove box, the officer found marijuana.[41] When the car's owner eventually appeared to claim his property, he was arrested and charged with unlawful possession of a controlled substance.[42]

While the *Opperman* Court created a rule permitting inventory searches, this rule had many problems.[43] According to the Court, warrantless vehicle inventory searches are valid when they follow reasonable "standard police procedures."[44] However, the Court failed to describe just what those "standard police procedures" were.[45] Instead, it simply claimed that there were procedures "prevailing throughout the country and approved by the overwhelming majority of courts."[46] Unfortunately, in making this statement the Court failed to cite a single court that also approved of a clear, uniform "standard procedure" used throughout the country.[47] Additionally, the Court failed to define the proper scope of an inventory search or address whether or not consent was required to perform the search.[48] As a consequence, "standard police procedures," as defined by individual law enforcement agencies across the country, solely define the limits of an inventory search because the Court did not establish a clear rule.[49]

By contrast, the policy reasons behind allowing inventory searches under the *Opperman* rule were clear.[50] The purpose of allowing the exception was threefold: (1) protecting private property while it remained in police custody; (2) protecting the police against claims or disputes over lost or stolen property; and (3) protecting the police and public from

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38. *Id* at 366.

39. *Id.* at 366.

40. An inventory form is used to record the various items found during an inventory search. *See, e.g., id.* at 380 n.6.

41. *Id.* at 366.

42. *Id.*

43. *See id.* at 385–96 (Marshall, J., dissenting).

44. *Id.* at 372 (majority opinion).

45. Although, a description of the procedures that the Vermillion, South Dakota Police Department used was given. *See id.* at 380 n.6 (Powell, J., concurring).

46. *Id.* at 376. As this Comment will demonstrate, the procedures are anything but uniform and lead to some fantastically inconsistent results.

47. In the court's defense, it did cite to state courts that approved of inventory searches generally. *See id.* at 371 (majority opinion).

48. *Id.* at 385–86 (Marshall, J., dissenting).

49. *Id.* at 372 (majority opinion).

50. *Id.* at 369.

potential danger.[51] Of these three reasons, the third has been most subject to criticism.[52] One noted commentator on Fourth Amendment jurisprudence said that the protection from danger rationale "borders on the ridiculous."[53] Even so, while the danger to the police and public seems minimal, there still exists the possibilities of bombs or booby-traps that could be hidden in a vehicle that is about to be impounded.[54] With today's increased fears of terrorism and suicide bombers, the third rationale may have some credibility left; however, if police have probable cause to believe a car is a serious danger, then performing a regular evidentiary search would not run afoul of the Fourth Amendment.[55] Furthermore, even when the police believe a person, place, or vehicle is potentially dangerous, nothing prevents them from searching in violation of the Fourth Amendment—the exclusionary rule would simply prevent any evidence discovered from being introduced at trial.[56]

*Opperman* was a plurality decision, and the dissenters criticized the Court's policy justifications of protection of property, protection from dishonest claims, and protection of public safety.[57] However, the dissenting justices also had the foresight to point out things that would become issues in later cases, namely the issues of consent and containers.[58] In *Opperman*, the officer looked in a glove compartment during the inventory search.[59] In his dissent, Justice Marshall questioned whether the officer should have been allowed to continue had the glove box been locked.[60] Additionally, he questioned whether or not the police should have been required to obtain the defendant's consent before performing the search.[61] The issue of consent has yet to be definitively resolved, especially in Washington, and it poses a special problem in cases like *Opperman*, where the vehicle owner is not present at the time that the car

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51. *Id.* (citations omitted).

52. *See* State v. White, 135 Wash. 2d 761, 770 n.9, 958 P.2d 982, 986 (1998); 3 LAFAVE, *supra* note 28, at § 7.4(a); Steven M. Christenson, Comment, *Colorado v. Bertine Opens the Inventory Search to Containers*, 73 IOWA L. REV. 771 (1988).

53. *See* 3 LAFAVE, *supra* note 28, at § 7.4(a).

54. *See* Christenson, *supra* note 52, at 786 n.140. However, as the court in *United States v. Cooper* said, "No sane individual inspects for booby-traps by opening a container." 428 F. Supp. 652, 654–55 (S.D. Ohio 1977).

55. *See* 3 LAFAVE, *supra* note 28, at § 7.4(a).

56. *See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914). The exclusionary rule announced in *Weeks* was applied to the states by operation of the Fourteenth Amendment in Mapp v. Ohio, 367 U.S. 643 (1961).

57. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364, 389–92 (1976) (Marshall, J., dissenting).

58. *Id.* at 385.

59. *Id.* at 366 (majority opinion).

60. *Id.* at 385 n.1 (Marshall, J., dissenting).

61. *Id* at 385.

is impounded.[62] Despite this controversy, *Opperman* has become the established rule regarding inventory searches and has been followed by many states.[63]

### *B. The Doctrine is Refined in* Illinois v. Lafayette,[64] *and the Need for Uniform Standards of Police Procedure is Established*

Seven years after *Opperman*, the Supreme Court expanded the scope of inventory searches to include containers, such as luggage and briefcases, and affirmed the need for a clear, uniform standard.[65] In *Illinois v. Lafayette*, the Court applied the *Opperman* rationale to inventory searches of the person.[66] There, the defendant was arrested for disturbing the peace and was taken to jail.[67] During the booking process, he was ordered to empty his pockets and his bag was searched.[68] The search yielded amphetamine pills hidden inside a cigarette case package.[69] The *Lafayette* Court acknowledged that the police have a right to make a full and complete search of a person following a lawful custodial arrest.[70] However, the Court distinguished routine administrative inventory searches from investigatory searches based on probable cause because of the need to protect safety and the inmate's property.[71] Once again, the Court relied on the *Opperman* policy justifications in order to support the use of inventory searches in this context.[72]

*Lafayette* is important for two reasons. First, it was here that the Court began to expand the scope of inventory searches to containers.[73] Second, the Court applied an oft-quoted phrase to inventory search doctrine: "[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."[74] Many commentators have agreed that a "single familiar standard" is needed for inventory searches and police procedure in

62. *See* discussion *infra* Parts IV, V.B.

63. *See, e.g.*, People v. Benites, 11 Cal. Rptr. 2d 512 (Cal. Ct. App. 1992); State v. Hathman, 604 N.E.2d 743 (Ohio 1992); State v. Atkinson, 688 P.2d 832 (Or. 1984).

64. 462 U.S. 640 (1983).

65. *Id.* at 642, 647–48.

66. *Id.* Again, while this Comment focuses on vehicle inventory searches, some of the jurisprudence relating to personal inventory searches is relevant.

67. *Id.* at 641.

68. *Id.* at 641–42.

69. *Id.* at 642.

70. *Id.* at 644–45 (quoting United States v. Robinson, 414 U.S. 218, 235 (1973)).

71. *Id.* at 646.

72. *Id.* at 643, 647.

73. *Id.* at 642, 647–48 (although the search occurred in the context of a jail-booking and the items were on the defendant's person, containers were still involved).

74. *Id.* at 648 (quoting New York v. Belton, 453 U.S. 454, 458 (1981)).

general; yet, few, if any, have suggested what it should be or how to achieve it.[75] Quizzically, the Court contradicted itself in making this statement.[76] Immediately prior to affirming the need for a single standard, the Court said that it was not in a place to second-guess police departments in the policies they set and that departments should be entitled to set policies based on their administrative needs.[77] While the Court attempted to create a singular, national rule to define the scope of inventory searches, it actually created a fragmented and inconsistent rule by continuing to rely on the policies of individual agencies.

### *C.* Colorado v. Bertine[78] *Opens the Door to Container Searches and Allows for Greater Inconsistencies Among Different Search Policies*

After *Lafayette* allowed for container searches when performing an inventory of a person prior to booking, *Colorado v. Bertine* extended the rule to allow for container searches when performing an inventory of a vehicle.[79] In *Bertine*, the defendant was arrested for driving under the influence of alcohol.[80] The arresting officer called to have the defendant's van towed and impounded.[81] While waiting for the tow truck to arrive, two officers performed an inventory search of the van, in which they discovered a backpack.[82] Upon opening the backpack, they found drugs, cocaine paraphernalia, and lots of cash.[83] After the Colorado Supreme Court struck down the search as violating the Fourth Amendment, the Supreme Court of the United States granted certiorari; the issue on appeal was whether entering the backpack was beyond the scope of an inventory search.[84]

Relying on *Lafayette*, the *Bertine* Court held that the police legally searched the defendant's backpack.[85] Here again, the rule from

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75. *See* James W. Hilliard, *A "Single Familiar Standard": Warrantless Vehicle Inventory Searches*, 82 ILL. B.J. 370 (1994) (demonstrating the difficulty in applying different police procedures and arguing for a uniform one); Christenson, *supra* note 52 (arguing for a different bright line rule for containers than the one established by the Supreme Court). *See generally* Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith'*, 43 U. PITT. L. REV. 307 (1982) (reaffirming Professor LaFave's support of clear bright line rules and repudiating the way that the Supreme Court has quoted him and applied its own form of bright line rules).

76. *Lafayette*, 462 U.S. at 648.

77. *Id.*

78. 479 U.S. 367 (1987).

79. *Id.* at 374–75.

80. *Id.* at 368.

81. *Id.*

82. *Id.* at 368–69.

83. *Id.* at 369.

84. *Id.* at 370–71.

85. *Id.* at 372–76.

*Opperman* was applied: so long as police follow "reasonable regulations," an inventory search will be upheld as valid "even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure."[86] However, as in *Lafayette*, the *Bertine* Court reaffirmed the need for "a single familiar standard," but did not define that standard.[87] Apparently, the Court reasoned that the single familiar standard was satisfied so long as the police were following their own established guidelines.[88] In *Bertine*, the police department's policy mandated the officers to open every container they found during an inventory search.[89] Because the officers were following that policy, the inventory search was valid.[90] Also, having dispensed with the idea in *Opperman*, the *Bertine* Court completely failed to address the issue of consent.[91]

The *Bertine* rule has been criticized for giving officers broad scope and discretion. As he did in *Opperman* and *Lafayette*, Justice Marshall dissented.[92] Among his more stinging points, Justice Marshall argued that the purpose of relying on police procedure was to limit officer discretion, and the procedure in *Bertine* allowed officers the choice of whether or not to impound a vehicle and inventory it.[93] Additionally, Marshall pointed out factual difficulties in the case where the officers were not actually performing an inventory search but were instead searching for evidence.[94] For instance, the officer in charge of the search easily found the drug contraband and noted it on the inventory form, but he failed to note the defendant's wallet or rent money.[95]

Scholarly criticism of *Bertine* has seriously questioned whether searches of containers serve the purposes of the inventory search.[96] Some scholars argue that this case established a "bright line" rule allowing container searches.[97] However, this case actually gave police the option to establish "reasonable" policies allowing container searches, which leads to strange and inconsistent results.[98] Nonetheless, some claim that

86. *Id.* at 374.
87. *Id.* at 375.
88. *See id.* at 372–76.
89. *Id.* at 374 n.6.
90. *Id.*
91. *Id.* at 368–76 (nowhere does the majority mention consent).
92. *Id.* at 377–87.
93. *Id.* at 379–81 (Marshall, J., dissenting).
94. *See id.* at 383.
95. *Id.*
96. *See*, Christenson, *supra* note 52.
97. *Id.* at 783.
98. *See* discussion *infra* Part III.

*Bertine* should be overturned in order to better protect people's privacy.[99] The opinion is unclear as to whether container searches actually further the policies underlying the inventory search doctrine and whether consent should play a role in the ability to refuse such a container search. Unfortunately, the inconsistencies that arise by allowing police agencies to set their own policies regarding container searches have not been corrected.

### *D.* Florida v. Wells[100] *Ensures that Inconsistent Search Policies With Regard to Scope and Consent Will Continue*

The confusing rule announced in *Bertine*[101] reappeared in *Florida v. Wells*,[102] which reaffirmed that opening containers would be valid if a police department policy authorized it.[103] In *Wells*, the defendant was pulled over for speeding and was arrested for driving under the influence of alcohol.[104] He was informed by the arresting officer that his car would be towed and inventoried.[105] The defendant then consented to a search of the car's trunk.[106] Police completed a full inventory search at the police impound facility, and found the butts of two joints in the ashtray.[107] The defendant's suitcase, which was found in the trunk, was opened to reveal a garbage bag filled with marijuana.[108] The defendant was charged with unlawful possession of a controlled substance.[109] The Florida Supreme Court suppressed the evidence as fruits of an illegal search because, relying on *Bertine*, the police had no "policy specifically requiring the opening of closed containers found during a legitimate inventory search."[110]

The U.S. Supreme Court affirmed the Florida court, but on slightly different grounds.[111] While the Florida court suppressed the evidence because the police did not have a clear policy *requiring* the opening of containers, the Supreme Court said that police policy need only authorize officers to open containers *at their own discretion* for container searches to be valid.[112] Thus, since the police in this case had a policy that did not

99. *See* Christenson, *supra* note 52.
100. 495 U.S. 1 (1990).
101. 479 U.S. at 374.
102. 495 U.S. 1.
103. *Id.* at 4.
104. *Id.* at 2.
105. *Id.*
106. *Id.*
107. *Id.*
108. 490 U.S. 1 (1990).
109. *Id.*
110. *Id.* at 3 (quoting State v. Wells, 539 So.2d 464, 469 (Fla. 1989)).
111. *Id.* at 4.
112. *Id.*

even mention containers, the search of the suitcase was found invalid.[113] Of course, like *Bertine*, this rule encourages some strange results: if police have an "open-the-container" policy, then container inventory searches are valid; if not, then they are invalid.[114]

Justices Brennan, Marshall, Blackmun, and Stevens concurred in the judgment only, and Justice Brennan wrote an opinion criticizing the Court on the same issues that were present in *Opperman*, *Lafayette*, and *Bertine*.[115] The majority completely abandoned the idea that standardized police procedures should be used to *limit* police discretion, not *expand* it.[116] Additionally, the Court once again ignored its own call for a "single familiar standard."[117]

Seventeen years after the decision in *Wells*, the Court has yet to reexamine its position on inventory searches. The doctrine has developed to a point where it is unclear whether the Court has established a bright line rule or something else entirely. While the Court may claim that it has established a clear, bright line rule,[118] bright line application has been abandoned for a case-by-case approach. As one circuit court stated, "The central inquiry in determining whether such an inventory search is reasonable is a consideration of the totality of the circumstances."[119] Certainly, a totality of the circumstances approach to searches is fundamentally opposed to the concept of bright line rules.[120] Although courts have been analyzing inventory search policies under a totality of the circumstances approach,[121] there have been repeated calls for a single, uniform standard with a bright line rule that is easy for police to apply in the field.[122] If lower courts are applying a totality of the circumstances approach in evaluating police actions under inventory search jurisprudence,[123] then the Supreme Court has failed in its attempt to create a

113. *Id.* at 4–5.

114. *See, e.g.*, Colorado v. Bertine, 479 U.S. 367, 374; *Wells*, 495 U.S. at 4–5.

115. *See Wells*, 495 U.S. at 5–10, (Brennan, J., concurring).

116. *Id.* at 7–8.

117. *Id.* at 9.

118. *See* discussion *supra* Parts II.C, II.D.

119. United States v. Hartje, 251 F.3d 771, 775 (8th Cir. 2001) (citing United States v. Marshall, 986 F.2d 1171, 1174 (8th Cir. 1993)).

120. For instance, Black's Law Dictionary defines a bright line rule as "[a] legal rule of decision that tends to resolve issues, esp. ambiguities, simply and straightforwardly, sometimes sacrificing equity for certainty." BLACK'S LAW DICTIONARY (8th ed. 2004). By contrast, the totality of the circumstances approach examines the entire situation, and the court makes a "common sense judgment." *Id.*

121. *See Hartje*, 251 F.3d at 774; *Marshall*, 986 F.2d 1171. *See also Wells*, 495 U.S. 1; Colorado v. Bertine, 479 U.S. 367 (1987); South Dakota v. Opperman, 428 U.S. 364 (1976).

122. *See Wells*, 495 U.S. 1; *Bertine* 479 U.S. 367; Illinois v. Lafayette, 462 U.S. 640 (1983). *See also* Hilliard, *supra* note 75.

123. As in *Hartje*, 251 F.3d at 771.

clear, bright line rule. This failure has led to difficulties in applying the rule and inconsistent policies nationwide.

## III. DIFFICULTIES IN APPLYING THE CURRENT INVENTORY SEARCH DOCTRINE AND THE RESULTING INCONSISTENT POLICIES

The inventory search standard developed by the Supreme Court is difficult to apply because it requires a two-step analysis, relying in part on police policies that can vary from place to place.[124] A simple, clear, truly bright line standard should be adopted that will allow police to apply the rule in pressure situations, allow the bench and bar to easily analyze inventory searches in litigation, and allow the public an easier understanding of its rights. This Part will discuss the difficulties of applying the current standard, will compare two policies from different law enforcement agencies in different states, and will end with a discussion of the importance of a uniform standard of procedure for inventory searches.

As described in Part II, an inventory search will be upheld if police were following an established standard policy or procedure that is reasonable.[125] The difficulty with this rule is knowing *what* exactly the police procedure *is* and knowing what is considered "reasonable." Another difficulty is the lack of public knowledge surrounding the inventory search procedure, because few people know what policies the police actually follow.[126]

Public knowledge of police policy and procedure is lacking, in part, because law enforcement agencies do not like to release policies and procedures to the general public.[127] However, a contributing factor to the lack of public knowledge may be a lack of public interest in learning the policies. Certainly, no one[128] wants to spend their Saturday reading a

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124. *See* discussion *infra* Part III.B.

125. *See* discussion *supra* Part II.

126. *See, e.g.*, Robinson, *supra* note 11 ("public knowledge of the law is embarrassingly low"). To test this idea, one must ask oneself if he or she knew of this procedure and the policies surrounding it prior to reading this Comment. If so, do one's non-lawyer and non-police friends know what inventory searches are and that they routinely take place without a warrant? *See also* Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of* Chimel *and* Belton, 2002 WIS. L. REV. 657, 663 (discussing the difficulties of obtaining police policies and procedures, partly because police procedures are exempted under FOIA).

127. The policies are not always readily available. *See* Moskovitz, *supra* note 126. However, in the author's experience, some departments were willing to give a copy of the policies to anyone who called. This is the case with the Washington State Patrol, who posts many of their forms and publications online and also provides contact information for those seeking to obtain other polices which are not posted. WASHINGTON STATE PATROL, RECORDS AND REPORTS, http://www.wa.gov/wsp/reports/reports.htm (last visited Nov. 19, 2005). The Seattle Police Department is bucking the trend by posting its entire police procedure manual online in PDF format, *supra* note 6.

128. Except, perhaps, a few professors, students, and law review members.

somewhat dry police policy manual. However, when one's car is about to be towed by the police and there are personal, private items in it, inventory search policies immediately become more important. Even some prosecutors, defense attorneys, and perhaps judges have probably never looked up a police search policy until they faced the threat of an impending hearing. Thus, it seems prudent to describe some of the police search policies that presently exist.

### *A. A Comparison of Two Different Inventory Search Policies*

The current inventory search doctrine, as developed through *Opperman*, *Lafayette*, *Bertine*, and *Wells*, encourages different and inconsistent policies to flourish among different jurisdictions. As a result, there is no uniform procedure prevailing throughout the nation.[129] It is entirely possible that there could be two different, valid policies which vary drastically in scope, such as one where opening containers is approved and another where opening containers is not approved.[130] Likewise, there could be two different, valid policies where one allows for significant officer discretion and the other significantly curtails it.[131] Given a possible lack of public knowledge about the law[132] and these possible differences, a comparison between two policies is necessary.

#### 1. Douglas County, Oregon

A good example of the typical inventory search policy under the Supreme Court's standard comes from Douglas County, Oregon. The Douglas County Sheriff's Office has an inventory policy that specifically relies on the *Opperman* policy justifications.[133] It states:

> The procedure is intended to:
> 1. Insure the protection of the owner's property.
> 2. Reduce the assertion of false claims against officers or other persons for lost, stolen or damaged property.
> 3. Reduce the danger to the deputies and the public that may arise from the towing and storage of un-inventoried property, i.e., hazardous chemicals, explosives, and firearms, etc.[134]

The policy goes on to require that deputies inventory the entire vehicle before it is towed, "including the glove compartment, spaces under

129. *See* discussion *supra* Part II.
130. *See, e.g.*, Florida v. Wells, 495 U.S. 1, 3–5 (1990).
131. *Id.*
132. *See, e.g.*, Robinson, *supra* note 11.
133. DOUGLAS COUNTY SHERIFF'S OFFICE, *supra* note 6.
134. *Id.*

the seats and trunk of the vehicle."[135] Deputies are directed to list all of the vehicle's contents on a tow slip, noting any locked compartments, and they are prohibited from opening closed containers until the case has been reviewed by the District Attorney.[136] This is a model policy under the *Opperman* standard.[137] It clearly lays out the deputy's responsibilities and the scope of the search, it mentions closed containers and limits deputy discretion in opening them, and it makes clear to the deputy that the purpose of the search is not to find evidence. Still, it should be noted that this policy does little to protect whatever privacy concerns or consent issues that may be present in an inventory search: once a subject's car is impounded, most of what is there is fair game for the search.[138]

### 2. City of Seattle, Washington

By contrast, the Seattle Police Department's policy is a little less clear, but it provides greater privacy protections to the vehicle owner.[139] In Seattle, police are empowered with discretion in deciding whether to impound a vehicle.[140] This type of discretion was a problem at issue in the dissent of *Bertine*[141] and concurrence of *Wells*.[142] When making the determination of whether or not to do an inventory search, however, Seattle police are specifically told *not* to inventory the car if there is reason to believe that the vehicle contains evidence of a crime.[143] This is a good way of safeguarding potential evidence from the reaches of the exclusionary rule[144] because it completely divorces inventory searches from evidentiary searches. However, even if a vehicle is placed on an "investigatory hold" by a Seattle police officer, an inventory search may still be

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135. *Id.*

136. *Id.*

137. *Compare* South Dakota v. Opperman, 428 U.S. 364 (1976).

138. *See* DOUGLAS COUNTY SHERIFF'S OFFICE, *supra* note 6.

139. SEATTLE POLICE DEPARTMENT, *supra* note 6, at §§ 2.065, 2.089. The greater privacy protections are probably due, in part, to the Washington courts' approach to inventory searches, discussed *infra* Part IV.

140. SEATTLE POLICE DEPARTMENT, *supra* note 6, at § 2.089.

141. Colorado v. Bertine, 479 U.S. 367, 377–87 (1987) (Marshall, J., dissenting).

142. Florida v. Wells, 495 U.S. 1, 5–10 (1990) (Brennan, J., concurring).

143. According to the Seattle police,

> Officers shall make a routine inspection of an impounded vehicle for items of value, unless the vehicle is impounded on an investigatory hold. Absent exigent circumstances, consent, or some other legal authority, nothing in this section shall be construed to authorize a search or seizure of a vehicle without a warrant where a warrant would otherwise be required.

SEATTLE POLICE DEPARTMENT, *supra* note 6, at § 2.089(VI)(A).

144. *See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961). *See also supra* note 56.

performed in the absence of a warrant.[145] In such cases, the search is performed by "Criminal Investigations personnel" who are limited from opening the trunk or any locked containers.[146]

### 3. Comparison

While the Seattle Police Department's inventory policy has some innovative, positive features to it, what it lacks is clear direction for the officer, especially with regard to scope.[147] Officers are merely directed to "make a routine inspection" upon impound and are not directed to list the contents of the vehicle as in the Douglas County policy.[148] Additionally, Seattle officers are not told whether they should open containers when performing an inventory on cars that do not have an investigatory hold.[149] This ambiguity and lack of direction will create problems if the policy is ever called into question in a courtroom.

The differences between the Douglas County and the Seattle Police Department inventory policies are quite stark.[150] Although these two policies come from different states, the Supreme Court in *Opperman* assumed that "standard police procedures prevail[ed] throughout the country and [were] approved by the overwhelming majority of courts."[151] As these two policies and the cases[152] above demonstrate, no such uniform standard procedure existed, and different departments have different inventory search rules that may vary drastically in scope.[153]

## *B. The Importance of Having a Uniform Standard*

A uniform standard is needed because the law values consistency and the public should be able to know what to expect. As it stands now, different law enforcement policies will likely produce different results. Inventory policies, and thus what would be found following a lawful impound, change not only from state to state, but from county to county and

145. SEATTLE POLICE DEPARTMENT, *supra* note 6, at § 2.065(II)(F).

146. *Id.*

147. *Id.* at § 2.089(VI).

148. *Id.*

149. *Id.*

150. It is also helpful to compare the policies of other departments. Some of the cases addressing inventory searches have quoted or described police policies. *See, e.g.*, Colorado v. Bertine, 479 U.S. 367, 380 n.4 (1987) (Marshall, J., dissenting); South Dakota v. Opperman, 428 U.S. 364, 380 n.6, n.7 (1976) (Powell, J., concurring).

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

152. *See* discussion *supra* Part II.

153. For a good discussion demonstrating the importance and need of a "single familiar standard," see Hilliard, *supra* note 75.

city to city.[154] A person arrested for drunk driving in one city might also be charged with possession of a controlled substance in that city, where if he was stopped a few miles up the road, an inventory search would yield no evidence of another crime. While laws and policies may change from one jurisdiction to another, a person's privacy expectations possibly do not.

The Supreme Court's purpose in initially relying on police procedures was to limit officer discretion.[155] However, as the dissenters in *Lafayette* and *Bertine* pointed out,[156] the way the rule has developed has actually increased police discretion when performing inventory searches. It is, in fact, police departments themselves who set inventory search policies, which alone gives police the power and discretion in determining the scope and rules of the search.

One example of the inconsistencies in the Supreme Court's standard is in the area of container searches. As noted in Part II, following *Wells*,[157] agencies whose policies allowed container searches would have that evidence admitted at trial, where others that did not allow such searches would have the evidence excluded at trial.[158] As the Douglas County and Seattle Police examples demonstrate, the policies that exist today are actually quite far from the "single familiar standard" desired for in *Lafayette*.[159]

Aside from inconsistencies, the current standard creates another problem—it is difficult for police, lawyers, and judges to apply.[160] The current piecemeal standard requires a step-by-step analysis.[161] First, a court must determine whether or not the officer was following the established policy.[162] Second, it must be determined if that policy is

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154. *See* discussion *supra* Parts II.C, II.D. *See also* discussion *supra* Part III.A. Policies could even be different when stopped at the same place, depending on the law enforcement agency involved. Different agencies, such as city police, county sheriffs, and state patrols often share concurrent jurisdiction over the same area.

155. *See Opperman*, 428 U.S. at 374–75 (when discussing Cady v. Dombrowski, 413 U.S. 433 (1973), "[t]he Court carefully noted that the protective search was carried out in accordance with *standard procedures* in the local police department . . . a factor tending to ensure that the intrusion would be limited in scope").

156. *See* discussion *supra* Parts II.B, II.C.

157. Florida v. Wells, 495 U.S. 1 (1995). *See* discussion *supra* Part II.D.

158. To further complicate things, container searches of the person are always allowed upon jail-booking. So, if a container was not searched in the vehicle inventory, but the suspect brought it to jail with them, it would be searched eventually. *See* Illinois v. Lafayette, 462 U.S. 640 (1983).

159. *See* discussion *supra*, Part III.A.

160. The application requires a complicated, two step analysis. *See* discussion *infra*, Part III.B. *See also Opperman*, 428 U.S. 364.

161. *Opperman*, 428 U.S. 364.

162. *Id.*

"reasonable."[163] While determining whether or not the officer was following policy is a relatively simple analysis, analyzing reasonableness is anything but. In doing so, a court must make a subjective, case-by-case analysis of the policy anytime it is challenged.[164] Thus, a court is not asking whether the officer's actions were reasonable, as it would be under a simple, one-step totality of the circumstances analysis, but it is asking whether the policy the officer followed was reasonable. If the policy is not reasonable, then the way that an entire department has been performing searches could be called into question.[165] Of course, this raises a question: if the Supreme Court was so intent on analyzing reasonableness, why set up a complicated two-step analysis rather than look only at the officer's actions? The answer is that the Court was trying to set up a bright line rule, but failed.[166]

The need for a clear bright line rule has not dissipated. The reasoning behind the "single familiar standard" advocated for in *Lafayette*, *Bertine*, and *Wells* is sound and still present.[167] Bright line rules promote efficiency.[168] More importantly, given that police are required to make decisions under pressure and in potentially dangerous situations, bright line rules help police determine in advance what decisions are legal and what evidence they find will be upheld at trial.[169] Prosecutors must also

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163. *Id.*

164. *See, e.g.*, Florida v. Wells, 495 U.S. 1 (1990); Colorado v. Bertine, 479 U.S. 367 (1987); *Opperman*, 428 U.S. 364. Clear rules are favored over subjective analysis in police procedure cases because, in part, they establish limits that protect rights while also being easy to follow for those not trained in the law. *See* LaFave, *supra* note 75. Professor LaFave also suggests the following:

> Four questions . . . should be put before any supposed 'bright line' rule is adopted by a court: (1) Does it have clear and certain boundaries, so that it in fact makes case-by-case evaluation and adjudication unnecessary? (2) Does it produce results approximating those which would be obtained if accurate case-by-case application of the underlying principle were practicable? (3) Is it responsive to a genuine need to forego case-by-case application of a principle because that approach has proved unworkable? (4) Is it not readily subject to manipulation and abuse?

*Id.* at 325–26.

165. It should be noted that of the myriad of cases the author surveyed, very few courts actually found a police policy to be unreasonable when a policy existed at the time of the search. *See, e.g.*, *Bertine*, 479 U.S. 367; Illinois v. Lafayette, 462 U.S. 640 (1983); *Opperman*, 428 U.S. 364; United States v. Mendez, 315 F.3d 132 (2d Cir. 2002); United States v. Hartje, 251 F.3d 771 (8th Cir. 2001); State v. Smith, 76 Wash. App. 9, 882 P.2d 190 (1994); People v. Benites, 11 Cal. Rptr. 2d 512 (Cal. Ct. App. 1992). *But see* State v. Custer, 868 P.2d 1363 (Or. App. 1994).

166. *See* LaFave, *supra* note 75, for what makes a successful bright line rule.

167. *See* Hilliard, *supra* note 75.

168. *Id. See also* LaFave, *supra* note 75, at 325–26.

169. The *Lafayette* Court noted:

> [I]t would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched . . . "[a] single familiar standard is essential to guide police officers, who have only lim-

believe that their officers are making legal searches and that they will not lose a case based on a technicality.[170] The current inventory search standard, as it has been developed by the Supreme Court, calls that belief into question and thus should be changed.

## IV. WASHINGTON'S APPROACH TO INVENTORY SEARCHES

While a federal standard based on the U.S. Constitution already exists for inventory searches, states are free to impose greater privacy restrictions based on their own laws.[171] Washington has chosen to do this.[172] This Part will discuss and analyze Washington's inventory search rules as they have developed through two cases, *State v. Houser*[173] and *State v. Williams*.[174] It will then critique how the Washington standard has been misapplied by a federal court in *United States v. Wanless*.[175] This Part will conclude by briefly examining how Washington's approach has been refined through several more recent cases.

### *A.* State v. Houser[176] *Adopts the* Opperman *Policy, But Modifies the* Opperman *Rule*

The first Washington case to address inventory searches following the announcement of *Opperman* was *State v. Houser*,[177] which recognized the *Opperman* rule but disposed with the two-step analysis and instead focused entirely on the officer's actions in performing an inventory search.[178] In *Houser*, the defendant was pulled over for making an improper turn.[179] After some investigation it became clear that the

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ited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."

Illinois v. Lafayette, 462 U.S. 640, 648 (1983) (quoting New York v. Belton, 453 U.S. 454, 458 (1981)).

170. *See id.*

171. *See, e.g.*, State v. White, 135 Wash. 2d 761, 768–69, 958 P.2d 982, 986 (1998) (where the Washington Supreme Court imposed a greater standard than the U.S. Constitution required, based on state law claims and describes other instances in which it has done so); Christenson, *supra* note 52, at 793–94 (advocating that states can and should provide greater protections against container searches through their own constitutions).

172. *See, e.g.*, *White*, 135 Wash. 2d at 761, 958 P.2d at 982; State v. Williams, 102 Wash. 2d 733, 689 P.2d 1065 (1984); State v. Houser, 95 Wash. 2d 143, 622 P.2d 1218 (1980); State v. Smith, 76 Wash. App. 9, 882 P.2d 190 (1994); State v. Mireles, 73 Wash. App. 605, 871 P.2d 162 (1994) (all discussed *infra* this Part).

173. 95 Wash. 2d 143, 622 P.2d 1218 (1980).

174. 102 Wash. 2d 733, 689 P.2d 1065 (1984).

175. 882 F.2d 1459 (9th Cir. 1989).

176. 95 Wash. 2d 143, 622 P.2d 1218.

177. *Id.*

178. *See id.* at 154, 622 P.2d at 1225.

179. *Id.* at 145, 622 P.2d at 1221.

defendant was driving without a valid license.[180] The defendant was arrested, and the officer made a discretionary decision to impound the car, rather than allow one of the defendant's friends to retrieve it.[181] Prior to impound, the officer performed an inventory search of the car which included opening the locked trunk with the car's ignition key.[182] Upon doing so, the officer found some pills in a grocery bag and opened "a closed toiletry bag which also contained drugs."[183] The defendant was charged with and convicted of unlawful possession of a controlled substance.[184]

The Washington Supreme Court held that the evidence should have been suppressed, basing its decision on both the Fourth Amendment to the U.S. Constitution and article I, § 7 of the Washington constitution.[185] In doing so, the court found the search invalid under the *Opperman* standard, although it misstated the *Opperman* rule saying, "The reasonableness of [an inventory] search or seizure must be decided in light of the facts and circumstances of the case."[186] Under its *Opperman* analysis, the *Houser* court believed the officer impounded the car for investigatory purposes, in order to use the inventory search as a ruse to rummage for evidence.[187] However, what is notable about this case is how the court began to tweak the *Opperman* standard as it is applied in Washington. The court abandoned the obnoxious and needlessly complicated two-step approach of determining if police procedure was followed and then determining whether that procedure was reasonable.[188] Instead, the court stated that "a noninvestigatory inventory search . . . is proper when conducted *in good faith*" for the purposes of: (1) protecting the owner's property from theft; and (2) protecting police from dishonest claims of theft.[189] In essence, the court adopted the *Opperman* reasonableness rationale for *police search policies* as the *test for searches* while abandoning the controversial "public danger" rationale.[190]

Overall, this general rule announced in *Houser* is better than the federal rule announced in *Opperman*, because it simplifies the analysis. However, the *Houser* rule is not perfect because it relies on a case-by-

180. *Id.* at 146, 622 P.2d at 1221.

181. *Id.*

182. *Id.* at 147, 622 P.2d at 1221.

183. *Id.*

184. *Id.* at 145, 622 P.2d at 1220.

185. *Id.* at 147–48, 622 P.2d at 1222.

186. *Id.* at 148, 622 P.2d at 1222. In actuality, the *Opperman* rule merely requires that police follow an established procedure that is found to be reasonable. *See* discussion *supra.*

187. *Id.* at 152, 622 P.2d at 1224.

188. *Id.* at 154, 622 P.2d at 1225.

189. *Id.* (emphasis added).

190. *Compare id.*, *with* South Dakota v. Opperman, 428 U.S. 364, 369-74 (1976).

case approach instead of a bright line rule. To that extent, the rule focuses solely on the officer's actions rather than on the policy the officer followed.[191] If the U.S. Supreme Court is truly intent on analyzing inventory searches under a reasonableness or totality of the circumstances method then it should adopt an approach which focuses on the search itself. However, the *Houser* approach is not a bright line, *per se* rule and it does not exemplify a "single familiar standard" that is easy for police, prosecutors, judges, and defense attorneys to apply.[192]

Although the Washington Supreme Court adopted a modified version of the *Opperman* reasonableness test in *Houser*, the court also began to adopt bright line rules relating to scope and consent.[193] Among these was a rule that said searching a *locked* trunk was outside the scope of an inventory search.[194] The court believed that searching a locked trunk would do little to accomplish the dual purposes of protecting the owner's property and protecting the police from claims of theft.[195] That idea is open to criticism because if police have a key to the trunk, it does not protect them from dishonest claims of theft, even if they do not enter the trunk. There is little to stop a defendant from claiming a dishonest cop stole the gold bar he was keeping in his trunk, especially if the police make no search or record of what was actually in that trunk. Additionally, the trunk is not as secure as the *Houser* majority claimed.[196] Although "countless numbers of automobiles with locked trunks are daily left on the city streets of this country . . . ," those same automobiles are often burglarized.[197] The dissent picked up on this issue and criticized the majority for limiting the inventory search from serving its intended purposes.[198]

Additionally, the court adopted a bright line rule that prohibited the police from opening a closed piece of luggage, like the toiletry bag, without the owner's consent.[199] The court held, "[a]bsent exigent circumstances, a legitimate inventory search only calls for noting such an item as a sealed unit."[200] Although this rule is open to similar criticisms as the rule prohibiting entry into a locked trunk, it is important for two reasons. First, it represents a step in the direction of establishing a clear, uniform,

191. *Houser*, 95 Wash. 2d at 158–59, 622 P.2d at 1228.
192. *See* Hilliard, *supra* note 75. *See also* discussion *supra* Parts II.B, II.C, II.D, III.B.
193. *Houser*, 95 Wash. 2d at 154, 622 P.2d at 1225.
194. *Id.* at 155–56, 622 P.2d at 1226–27.
195. *Id.*
196. *Id.*
197. *Id.* at 156, 622 P.2d at 1226.
198. *Id.* at 166, 622 P.2d at 1233 (Doran, J., dissenting).
199. *Id.* at 158–59, 622 P.2d at 1227–28 (majority opinion).
200. *Id.* at 158, 622 P.2d at 1228.

statewide system of bright line rules for police.[201] Second, it indicates that the court viewed consent, at this early date, as an important component of an inventory search, even if only for containers.[202]

### *B.* State v. Williams[203] *Further Defines Washington's Inventory Search Rules and Contemplates Consent*

In *State v. Williams*, the court reaffirmed that inventory searches must follow a valid impound to be lawful, and it further considered consent as a requirement to an inventory search.[204] In *Williams*, the defendant was arrested in connection with a robbery.[205] At the time of his arrest, the defendant had just pulled into his driveway; the police drove by, saw the defendant sitting in his car and ordered him out.[206] Believing the robbery had just been committed and that evidence was close at hand, the arresting officer performed what he termed an inventory search of the defendant's car.[207] The officer found jewelry from the robbery in the car and immediately stopped the inventory search in order to wait for a warrant.[208] After determining that the search was not valid as a *Terry*[209] stop,[210] the court quickly dismissed the inventory search as not being performed pursuant to a lawful impound.[211] Notably, the court in *Williams* did not analyze the inventory search issue in depth because its primary focus was on the *Terry* issue.[212] However, the court stated in dicta that "it is doubtful that the police could have conducted a routine inventory search without asking [the defendant] if he wanted one done."[213] The dissent dismissed this claim as running counter to the goals of the inventory search as described in *Opperman*.[214]

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201. *Compare id.*, *with* State v. Williams, 102 Wash. 2d 733, 689 P.2d 1065 (1984), *and* State v. White, 135 Wash. 2d 761, 958 P.2d 982 (1998).

202. *See* cases cited *supra* note 201.

203. 102 Wash. 2d 733, 689 P.2d 1065.

204. *Id.* at 742–43, 689 P.2d at 1070–71.

205. *Id.* at 734–35, 689 P.2d at 1066–67.

206. *Id.*

207. *Id.* at 735, 689 P.2d at 1067.

208. *Id.*

209. Terry v. Ohio, 392 U.S. 1 (1968) (holding that police are entitled to briefly detain individuals for "investigatory stops" and, if necessitated by "'reasonable suspicion,'" perform a protective frisk of the suspect for weapons). Protective searches under the *Terry* doctrine were extended to passenger compartments of automobiles in Michigan v. Long, 463 U.S. 1032 (1983).

210. *Williams*, 102 Wash. 2d at 736–40, 689 P.2d at 1067–69.

211. *Id.* at 742–43, 689 P.2d at 1070–71.

212. *Id.*

213. *Id.* at 743, 689 P.2d at 1071.

214. *Id.* at 747, 689 P.2d at 1073.

This short statement that appears at the end of *Williams* has had a great effect on the cases[215] that followed and will continue to do so. Although it is dicta,[216] this line indicated the court's interest in requiring consent for inventory searches. The Ninth Circuit Court of Appeals faced this issue when it addressed *Williams* a few years later.[217]

### *C. The Ninth Circuit Misapplies the* Williams *Dicta*

Five years after *Williams* was decided, a federal inventory search case came to the Ninth Circuit Court of Appeals, which imposed consent as a requirement for performing an inventory search in Washington.[218] In *United States v. Wanless*, two vehicles were pulled over by the Washington State Patrol.[219] Since none of the people in the cars had driver's licenses, the investigating troopers called for a tow to have the vehicles impounded.[220] While waiting for the tow truck, the troopers inventoried the vehicle, according to Washington State Patrol policy, and discovered drugs, drug paraphernalia, and a loaded handgun.[221] The Ninth Circuit, for reasons that are not entirely clear, incorrectly stated that the troopers were required to follow Washington law in performing their inventory search as part of "standard procedures."[222] Then, the court *erroneously* claimed that Washington law *required* the troopers to obtain consent before performing any inventory search.[223] In doing so, the court relied *solely* on the dicta contained in *Williams* as "Washington law as set forth by the state's highest court."[224] Prior to *Wanless*, the only mention of requiring consent in Washington for an inventory search, other than when opening containers,[225] was in the *Williams* dicta. The Washington State Patrol manual did not require the troopers to obtain consent,[226] and the troopers were told to go ahead with the search after consulting with a member of the Washington State Bar.[227] The dissent picked up on the

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215. *See, e.g.*, United States v. Wanless, 883 F.2d 1459 (9th Cir. 1989); State v. White, 135 Wash. 2d 761, 958 P.2d 982 (1998).

216. *Williams*, 102 Wash. 2d at 743, 689 P.2d at 1071.

217. *See* discussion *infra* Part IV.C.

218. *Wanless*, 882 F.2d 1459.

219. *Id.* at 1460.

220. *Id.* at 1461.

221. *Id.* at 1461–62.

222. *Id.* at 1463. *See* discussion *supra* Part II.

223. *Wanless*, 882 F.2d at 1463.

224. *Id.* at 1463–64. The court also relied on Robert F. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U. PUGET SOUND (SEATTLE U.) L. REV. 411, 578 (1988); however, that article in turn relied only on the dicta in *Williams* to claim that consent was required.

225. *See* discussion *supra* Part IV.A (of State v. Houser, 95 Wash. 2d 143, 622 P.2d 1218 (1980)).

226. *Wanless*, 882 F.2d at 1468 (Wright, J., dissenting).

227. *Id.* at 1461 (majority opinion).

majority's warped view of Washington law and harshly criticized it for overstepping its bounds.[228] While requiring consent or allowing suspects to refuse searches is a lofty goal and the future of inventory search doctrine,[229] it is *not* the place for a federal appellate court to write Washington law.[230] Furthermore, as is apparent with the misapplication of the *Williams* dicta in *Wanless*, federal appellate judges may not be as well-versed in Washington constitutional law as a Washington Supreme Court Justice.[231]

### *D. Washington Refines Its Approach to Consent and the Scope of Inventory Searches*

A few years after *Wanless*, the Washington Court of Appeals refused to extend a consent requirement to inventory situations where the car's owner was not present or where the searches are performed as part of jail booking.[232] In *State v. Mireles*,[233] the defendant's car was seized in connection with a lien for unpaid child support.[234] Upon a routine administrative inventory search, a worker with the Department of Social and Health Services found a stash of cocaine.[235] The court applied an analysis similar to *Houser*[236] and said that the defendant did not have the ability to refuse the search merely because he was not present for the search.[237] Thus, while not conclusively decided, consent is not a requirement in all situations. Similarly, in *State v. Smith*,[238] the Court of Appeals applied the *Houser* analysis to the personal inventory search of a defendant's purse upon jail booking and did not mention the issue of consent.[239] So, consent is likely not required in booking situations either.

The Washington Supreme Court's most recent case involving inventory searches is *State v. White*, decided in 1998, which reaffirmed the *Houser* limitations on scope, yet refused to clearly adopt a consent requirement.[240] In *White*, the defendant was stopped for running a stop sign; his car was impounded because he was driving with an expired

228. *See id.* at 1467–69 (Wright, J., dissenting).

229. *See* discussion *infra* Part V.

230. *See, e.g.*, Erie. R. Co. v. Tompkins, 304 U.S. 64 (1938).

231. *See, e.g.*, *Wanless*, 882 F.2d at 1467–69.

232. State v. Mireles, 73 Wash. App. 605, 871 P.2d 162 (1994); State v. Smith, 76 Wash. App. 9, 882 P.2d 190 (1994).

233. 73 Wash. App. at 605, 871 P.2d at 162.

234. *Id.* at 608, 871 P.2d at 163.

235. *Id.*

236. *See* discussion *supra* Part IV.A.

237. *Mireles*, 73 Wash. App. at 610–14, 871 P.2d at 164–67.

238. 76 Wash. App. 9, 882 P.2d 190 (1994).

239. *Id.* at 15–16, 882 P.2d at 194–95.

240. 135 Wash. 2d 761, 958 P.2d 982 (1998).

license.[241] Under the police department's inventory search policy, the officer was required to open the trunk if he had a key or if there was a release latch in the passenger compartment.[242] The trunk contained an unlocked tackle box that contained drug paraphernalia, marijuana, cocaine, and money.[243] The *White* court maintained a bright line rule where police could enter an unlocked glove box, but as in *Houser*, entry into a locked trunk regardless of accessibility through a latch, was *verboten*.[244] Additionally, the court reaffirmed that police actions in Washington generally will be judged by the totality of the circumstances, without regard to standardized procedure.[245] Lastly, the issue of consent made another appearance, once again in dicta.[246] In a footnote, the majority said that vehicle owners should be asked whether they consent to the inventory search and be given the opportunity to reject it.[247] In making this claim, the court relied on both *Williams* and *Wanless*.[248]

After *White*, Washingtonians are left with a two big questions. First, although the issue has usually been relegated to discussion in dicta and not conclusively decided, it seems that drivers have the ability to refuse an inventory search in Washington.[249] In fact, all U.S. citizens may have this right.[250] Unfortunately, neither a Washington court nor the U.S. Supreme Court has ever addressed this issue directly and definitively.[251] Furthermore, it is unclear whether police must ask for consent and under what circumstances, although the Washington Supreme Court suggests that police must ask for consent in some situations.[252] Second, it remains to be seen whether the policy behind the inventory search is being served by Washington's limited scope for inventory searches. As the dissenters in *White* pointed out, there are some situations where a would-be thief could get into a "locked" trunk or could access closed containers.[253]

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241. *Id.* at 764, 958 P.2d at 983.

242. *Id.* at 765, 958 P.2d at 984.

243. *Id.*

244. *Id.* at 766–68, 958 P.2d at 984–85.

245. "Further, compliance with established police procedures does not constitutionalize an illegal search and will not enable police to search a locked trunk without a warrant." *Id.* at 771, 958 P.2d at 987.

246. *Id.*

247. *Id.* at 771 n.11, 958 P.2d at 987.

248. *Id.*

249. *See* discussion of *Williams* and *White*, *supra* Parts IV.B, IV.D.

250. *See* 3 LAFAVE, *supra* note 28, at § 7.4(a) (arguing that police must honor a driver's refusal of an inventory search).

251. *See* discussion of *Williams* and *White supra* Parts IV.B, IV.D.

252. *See* discussion *supra* Part IV.

253. State v. White, 135 Wash. 2d 761, 775–76, 958 P.2d 982, 989–90 (1998).

## V. PROPOSALS FOR CHANGING INVENTORY SEARCHES IN WASHINGTON AND ACROSS THE NATION

Courts should establish a clear, simple standard that is easy to apply. Bright line rules that are easy to follow in the field should prevail over a "reasonableness" analysis. This Part will discuss a two part proposal to improve the inventory search doctrine. First, in order for inventory searches to serve their intended purpose, the scope of the searches should be broad, allowing police to search anywhere a potential thief could go. Second, a consent requirement should be incorporated into the procedure so civil liberties are adequately protected from such a broad search. Given the complicated nature of the inventory search as it has developed both nationally and in Washington over the last thirty years, these improvements can make the doctrine serve its original goals.

The term "reasonableness" pervades judicial opinions on the Fourth Amendment, perhaps because the word is raised by the Amendment itself.[254] Abandoning the reasonableness, or case-by-case, approach would mean abandoning the rule the Washington Supreme Court announced in *Houser*[255] and that the U.S. Supreme Court adopted in *Opperman*.[256] While this rule has been around for almost three decades, it is difficult to apply[257] and is subject to abuse.[258] However, police need to be able to have a "single familiar standard" with which to guide their actions in an often hectic environment.[259] What follows is a two part proposal for just such a standard.

### *A. Clearly Define the Proper Scope of an Inventory Search*

The scope of the inventory search should allow police to search trunks, glove compartments, and closed containers. Inventory searches should not be extremely limited in scope because that would defeat the purpose of the doctrine. Trunks, glove compartments, or closed containers should be fair game during an inventory search because a thief could easily access those places. Officers should be limited, as the Douglas County Sheriff's Office policy states, from damaging the vehicle by ripping open the seats, door panels, and the like,[260] but police should not be prevented from searching any place a would-be thief could access. Certainly, this rule allows for wide latitude in officer discretion in deciding

254. U.S. CONST. amend. IV.
255. 95 Wash. 2d 143, 622 P.2d 1218 (1980).
256. 428 U.S. 364 (1976).
257. *See* discussion *supra* Part III.
258. *See, e.g.*, Eismann, *supra* note 14.
259. Illinois v. Lafayette, 462 U.S. 640, 648 (1983).
260. *See* DOUGLAS COUNTY SHERIFF'S OFFICE, *supra* note 6.

where valuables are and what a thief might be able to get, and that was a chief complaint of those who concurred in *Bertine*[261] and *Wells*.[262] Unfortunately, police discretion with regard to scope can be hard to regulate, and a toothless attempt at curtailing discretion in this instance would not further the policy goals underlying the inventory search.

The purpose of the inventory search is to protect property from theft and to protect police from claims of theft.[263] This policy can hardly be accomplished if law enforcement officials cannot search everywhere a thief can. The biggest example of this comes from *White*,[264] where the Washington Supreme Court held that an officer cannot search a trunk, even if it can be accessed through a release latch located inside the passenger compartment.[265] As the dissenters pointed out, if a thief can easily reach a trunk in this manner, but the police cannot, then the inventory search doctrine is pointless.[266] Additionally, a *per se* rule prohibiting trunk searches creates a grey area with regard to hatchbacks, station wagons, SUVs, and cars with fold-down rear seats. Is a trunk in such a car ever considered locked? If it is, police are unable to search that area under the current Washington rules,[267] although a thief can get to that area.

The same policy goals of protection from theft and claims of theft that exist with respect to trunks and glove compartments also apply to containers because many valuables stored in containers are small in size and easily accessible to thieves. If police are prohibited from searching containers, then it would be easy for a person to claim that her diamond engagement ring or Rolex watch was stolen, as these are small items that could be hidden in just about any container. While some commentators believe that containers should be off limits during an inventory search,[268] container searches may well be necessary, especially if the container will be left in the car while it is impounded. Of course, broad searches and those that allow for officer discretion are troubling to those concerned

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261. Colorado v. Bertine, 479 U.S. 367, 376 (1987) (Blackmun, J., concurring) ("[A]bsence of discretion ensures that inventory searches will not be used as a purposeful and general means of discovering evidence of crime.").

262. Florida v. Wells, 495 U.S. 1, 7–8 (1990) (Brennan, J., concurring) ("I cannot join the majority opinion because it goes on to suggest that a State may adopt an inventory policy that vests individual police officers with *some* discretion . . . .").

263. Omitted is the third rationale, protecting the public from danger, as it has been significantly discounted over time. *See* discussion *supra* Part III.A.

264. State v. White, 135 Wash. 2d 761, 958 P.2d 982 (1998).

265. *Id.* at 771, 958 P.2d at 987.

266. *Id.* at 775, 958 P.2d at 989 (Durham, C.J., dissenting).

267. *Id.* at 771, 958 P.2d at 987.

268. *See* Christenson, *supra* note 52.

about civil liberties.[269] However, these broad inventory searches are intended to protect property interests and are not designed to discover evidence. In part, due to the diminished privacy interest citizens have in their automobiles and, in part, due to the legitimacy of the policy interests underlying the doctrine, courts have determined that the safeguards of a warrant are not required for an inventory search.[270]

### *B. Imposing a Consent Requirement as a Safeguard for a Broad Inventory Search Power*

If such a broad inventory search power is to exist, a consent requirement should and must be clearly incorporated into the inventory search doctrine in order to protect people's privacy. Clear statewide or nationwide safeguards should be adopted that, if violated, would result in an inventory search being found *per se* unreasonable. In addition to consent, some simple changes should be adopted, such as requiring police to complete an inventory form every time they do an inventory search. These reforms, taken as a whole, would protect privacy rights and allow citizens, not police, to determine the limits of the search.[271]

Consent is easy to incorporate in those situations where the vehicle owner or a driver is present.[272] An officer performing a search should be required to inform the occupants that she will be searching the car for inventory purposes only and that the occupants have a right to refuse the search. Warnings that inform people of their rights are not unheard of in situations where there is no other way to adequately protect those rights.[273] While some might be concerned that warnings would result in fewer prosecutions, the purpose of the inventory search is *not* to produce

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269. *See, e.g.*, LaFave, *supra* note 75 (arguing, in part, that bright line rules should only be used when they can effectively protect people's privacy); Florida v. Wells, 495 U.S. 1, 7–8 (1990) (Brennan, J., concurring) ("I cannot join the majority opinion because it goes on to suggest that a State may adopt an inventory policy that vests individual police officers with *some* discretion . . . ."); New York v. Belton, 453 U.S. 454, 463–72 (1981) (Brennan, J., dissenting) (arguing warrantless searches should be limited in scope to the needs of the rationale that supports them and that bright line rules are never justified on the basis of law enforcement efficiency).

270. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364, 367–73 (1976) (noting the diminished privacy interests in automobiles due to government regulation and frequent inspection and also disfavoring the use of warrants due to the automobiles inherent mobility).

271. Despite that inventory search rules and policies should not limit the scope of inventory searches so that the doctrine serves its intended policy goals, as discussed *supra* Part V.A, the scope of a search *should* be able to be limited by consent, or lack of consent, in order to protect a person's privacy. For instance, if a driver feels an inventory search is getting too intrusive, she should be able to stop the search at any time.

272. *See, e.g.*, State v. White, 135 Wash. 2d 761, 958 P.2d 982 (1998); State v. Williams, 102 Wash. 2d 733, 689 P.2d 1065 (1984); State v. Mireles, 63 Wash. App. 605, 871 P.2d 162 (1994).

273. Such as in the case of a custodial interrogation. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

evidence of a crime.[274] If the doctrine is invoked for that purpose, the search is invalid.[275]

Unfortunately, verbal warnings about consent and refusal do not work in situations where the vehicle's owner or driver is not present.[276] Washington courts have already recognized this problem and have decided not to impose a consent requirement in these situations.[277] When a driver is not present, some other scheme should be established to alert vehicle owners of the possibility of an inventory search. Possible solutions could include prophylactic warnings in the driver's training manual or signs near parking areas. Another approach would be an implied consent rule for those who abandon vehicles in situations where they are subject to impound. Implied consent rules already exist under drunken driving statutes, where it is implied that those driving cars consent to a blood, breath, or urine test and, if a person refuses, he is subject to a penalty.[278] While such a law should not apply to people who are present when an inventory search is about to take place, passing a statute and making it part of driver's education would put people on notice that abandoning a car would subject it to an inventory search. None of these solutions is perfect, but something is required to make the unidentifiable driver aware of what is at stake.

Once a person has been notified of their ability to refuse an inventory search, or even if they have not been, police should always honor a person's refusal, absent exigent circumstances. However, following a refusal, something must be done to satisfy the policy reasons behind the inventory search. In other words, there must be a secondary procedure to protect the police from dishonest claims of theft and to protect the vehicle owner's property. By far, the simplest and most effective way to do this is to require the subject to sign a release form. Under such a release, the person would give up their right to bring claims against the government for theft and they would assume the risk of any losses that might occur as a result of the impound. Police already carry plenty of forms for such things as issuing reports, traffic citations, and taking statements, and citizens are frequently asked to sign police forms for incidents in which they are involved.[279] The introduction of a release agreement would not

274. *See, e.g.*, *Opperman*, 428 U.S. at 364.

275. *Id.*

276. Such as in *Opperman*, *id.*, where the defendant's car was impounded for a parking violation.

277. *See Mireles*, 73 Wash. App. at 605, 871 P.2d at 162.

278. For a good example of an implied consent law, *see* WASH. REV. CODE. § 46.20.308 (2005).

279. *See, e.g.*, SEATTLE POLICE DEPARTMENT, *supra* note 6, at § 2.081 (describing the various forms that are used by Seattle Police in traffic enforcement and when and how they are used).

be overly burdensome as police are already required to carry and use multiple forms for various traffic incidents.[280]

Obviously, these proposed changes cannot happen overnight. Ideally, legislatures should make these changes to the inventory doctrine in the form of statutes. Doing so would put people on notice that the policies and procedures established would be effective statewide instead of changing from city to city or county to county. However, over the past thirty years, legislatures as a whole have failed to address inventory searches.[281] Due to this lack of legislative action, courts have been forced to impose their own rules, although some have been loathe to do so.[282] If courts continue to set inventory search policy, they should implement the above reforms, especially those with regard to consent.

## VI. CONCLUSION

After thirty years, little has changed in inventory search doctrine.[283] Generally, inventory searches are upheld as valid if they are performed according to a reasonable police procedure that protects the owner's property from theft, protects the police from dishonest claims of theft, and protects the public from harm.[284] This rule is confusing, complicated, and difficult to apply. Due to the demand for clarity, state courts have started responding with their own rules.[285] Washington has responded by abandoning the focus on police department policy and by imposing some bright line rules.[286] Washington has even begun to incorporate consent as

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280. *See id.*

281. Some legislatures have addressed search and seizure procedures generally. *See, e.g.*, COLO. REV. STAT. §§ 16-3-101 to 16-3-405 (West 2007); FLA. STAT. ANN. §§ 933.01 to 933.40 (West 2006); GA. CODE ANN. §§ 17-5-1 to 17-5-56 (West 2006); ILL. COMP. STAT. ANN. 725 §§ 5/108-1 to 5/108-14 (West 2006); IOWA CODE §§ 808.1 to 808.14 (West 2007); KAN. STAT. ANN. §§ 22-2501 to 22-2530 (2006); MINN. STAT. §§ 626.04 to 626.22 (West 2007); MO. ANN. STAT. §§ 542.266 to 542.301 (West 2006); N.C. GEN. STAT. ANN. §§ 15A-241 to 15A-259 (West 2001); VA. CODE. ANN. §§ 19.2-52 to 19.2-60 (West 2006).

282. One court noted the following:

> Like the Supreme Court of the United States, we are a judicial, not a legislative body. It is not our function to decide as a matter of policy how, and for what purpose, automobiles or other private property that come into official custody should be examined. That is a matter for politically accountable officials to decide by laws, ordinances, or delegations of rulemaking authority.

State v. Atkinson, 688 P.2d 832, 835 (Or. 1984). In reality, courts do decide law as a matter of policy, especially in inventory search cases.

283. *Compare* South Dakota v. Opperman, 428 U.S. 364 (1976), *with* State v. White, 135 Wash. 2d 761, 958 P.2d 982 (1998).

284. *See, e.g.*, Florida v. Wells, 495 U.S. 1 (1990); Colorado v. Bertine, 479 U.S. 367 (1987); Illinois v. Lafayette, 462 U.S. 640 (1983); *Opperman*, 428 U.S. at 364.

285. *See, e.g.*, discussion *supra* Part IV.

286. *See, e.g.*, *White*, 135 Wash. 2d 761, 958 P.2d 982.

a necessary component of inventory searches.[287] Bright line rules requiring consent and defining the scope of the search are the future of this doctrine. To ensure that inventory searches continue to serve their useful, intended purpose for the next thirty years, courts should broaden the scope of inventory searches to allow police to search wherever a thief could and require police to obtain consent for inventory searches where the driver is present.

287. *See, e.g.*, *id* at 771 n.11, 958 P.2d at 987.