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NOTES

The Automobile Inventory Search Exception: The Supreme Court Disregards Fourth Amendment Rights in *Colorado v. Bertine*—The States Must Protect the Motorist

The United States Supreme Court recognizes an automobile inventory search exception to fourth amendment protections which allows a search to itemize property taken from a vehicle without a warrant or probable cause. In *Colorado v. Bertine*[1] the Supreme Court held that an automobile inventory search conducted in good faith, in accordance with standardized police procedure requiring police to itemize the contents of a closed container, was reasonable. The Supreme Court in *Bertine* based the reasonableness of the inventory search on standardized police procedure instead of applying the traditional balancing test which weighs compelling governmental interests against an individual's expectation of privacy.

Bertine fails to recognize a motorist's expectation of privacy and does not adequately protect against unreasonable searches and seizures. The fourth amendment protections in *Bertine* represent a minimum level of protection. The federal supremacy clause requires states to respect the fourth amendment's requirements.[2] Our federalist structure of government, however, permits state legislatures and courts to provide additional protection to individuals.

Part I of this note discusses the automobile inventory search exception and the Supreme Court's holding in *Bertine*. Part II analyzes the reasoning in *Bertine* and presents the traditional balancing test. Part III sets forth methods of state constitutional analysis to determine the appropriate level of individual protection, concluding that states should provide greater protection to individuals in automobile inventory searches.

I. The Automobile Inventory Search Exception to the Fourth Amendment

A. *The Treatment of Automobiles*

The drafters of the Bill of Rights sought to protect individual rights from government action through the fourth amendment.[3] The fourth amendment provides that "[t]he right of 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 . . . ."[4]

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1 107 S. Ct. 738 (1987).
2 U.S. CONST. art. VI.
3 *See generally* Dumbauld, *State Precedents for the Bill of Rights*, 7 J. PUB. L. 323, 323-44 (1985).
4 U.S. CONST. amend. IV.

The fourth amendment is directed at "houses" and "effects." Initially the Court had to determine whether an automobile was a "house" or an "effect." Automobiles have a very unique character; a person may carry one or leave it in public or private places. The Supreme Court decided to treat automobiles as "effects." The expectation of privacy in an automobile arises from an individual's right, while the expectation of privacy in a house is associated with a property right.[5]

The Supreme Court has determined that the fourth amendment protects automobiles from unreasonable searches and seizures.[6] Reasonableness has traditionally been defined by the warrant clause.[7] The Supreme Court has recognized a few well defined exceptions to the warrant requirement to justify automobile searches.[8] Several exceptions are based on the mobility and public nature of an automobile and allow a warrantless automobile search if probable cause exists and the exigencies of the situation prevent the police from obtaining a warrant.[9]

The Supreme Court has recognized other exceptions based on police custody, including the inventory search exception.[10] The custodial search exceptions are founded on the continuing and pervasive government regulation of automobiles.[11] Unlike the automobile exceptions which are investigatory in nature and require probable cause, custodial searches are administrative in nature.[12] Custodial searches do not re-

5 Cady v. Dombrowski, 413 U.S. 433, 439 (1973). *See* South Dakota v. Opperman, 428 U.S. 364, 367 (1976). *See generally* Coolidge v. New Hampshire, 403 U.S. 443, 512-13 (1971) (Harlan, J., dissenting); Chambers v. Maroney, 399 U.S. 42, 49 (1970).

6 Cooper v. California, 386 U.S. 58 (1967); Preston v. United States, 376 U.S. 364 (1964); Carroll v. United States, 267 U.S. 132 (1925).

7 Katz v. United States, 389 U.S. 347 (1967). The basic fourth amendment rule is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions." *Id.* at 357.

8 *Id.*; *Coolidge*, 403 U.S. at 455.

9 The leading warrant exceptions involving automobile searches are:

(1) Plain view search. *See, e.g.*, *Coolidge*, 403 U.S. at 466 (an officer must have a legitimate reason for being present and inadvertently discover evidence that is immediately apparent).

(2) Search incident to an arrest. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969) (search is limited to area where the arrestee might obtain a weapon or evidence); New York v. Belton, 453 U.S. 454 (1981) (search extended to jacket on back seat); United States v. Robinson, 414 U.S. 218, 235 (1973) (search extended to the arrestee's person); Gustafson v. Florida, 414 U.S. 260 (1973) (same).

(3) Automobile exception. *See, e.g.*, United States v. Ross, 456 U.S. 798 (1982) (vehicle search based on probable cause may extend to every part of the vehicle and its contents).

10 Custodial searches include:

(1) Automobile inventory search. *See, e.g.*, Colorado v. Bertine, 107 S. Ct. 738 (1987); South Dakota v. Opperman, 428 U.S. 364 (1976).

(2) Preincarceration inventory search. *See, e.g.*, Illinois v. Lafayette, 462 U.S. 640 (1983). *See infra* notes 24-28 and accompanying text.

(3) Brief detentions of automobiles. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 540 (1976) (reasonableness of checkpoint stops turn on factors such as the checkpoint's location and method of operation). The legality of a checkpoint search is limited by the scope of the search and "[a]ny further detention . . . must be based on consent or probable cause." United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975). *See* United States v. Oritz, 422 U.S. 891 (1975). *But see* Delaware v. Prouse, 440 U.S. 648 (1979) (the border search exception does not extend to random stops).

11 *Opperman*, 428 U.S. at 367-76.

12 *Id.* at 370 n.5. The inventory search is the antithesis of a search under the automobile exception, a search incident to an arrest, or a search of items in plain view; the inventory search is a mere

quire probable cause; thus, the warrant requirement is inapplicable, and the reasonableness of the search is based on other criteria.[13]

The Supreme Court has traditionally applied a balancing test to determine the reasonableness of searches conducted under the automobile exceptions. The test requires a compelling governmental interest and weighs it against individual privacy interests.[14] The Supreme Court recognizes several governmental interests for automobile searches: preserve evidence, protect the police and the public from potential danger,[15] and protect the owner's property and the police against claims of stolen property.[16]

B. *Early Supreme Court Decisions*

The Supreme Court applied the balancing test to determine the reasonableness of an automobile inventory search in *South Dakota v. Opperman*.[17] The Court found that the government's interest in allowing police to conduct the inventory search was to protect the owner's property from theft[18] and the police from claims of stolen property.[19]

In *Opperman*, the Court found that the police department's interest in securing an automobile's contents outweighed the defendant's diminished expectation of privacy. The officer observed valuables inside the vehicle in plain view[20] and conducted an inventory pursuant to standardized police department procedures. The Court noted that once the officer was lawfully inside the vehicle,[21] it was not unreasonable to open the unlocked glove compartment in an effort to secure the vehicle.[22] The Court emphasized that the defendant was not available to make alternative arrangements to secure his belongings in the vehicle.[23]

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listing of personal property, while other automobile searches are deliberate searches for evidence. Moylan, *The Inventory Search of an Automobile: A Willing Suspension of Disbelief*, 5 U. BALT. L. REV. 203, 207 (1976).

13 *Bertine*, 107 S. Ct. at 741. *See Opperman*, 428 U.S. at 370 n.5.

14 *Opperman*, 428 U.S. at 370-73.

15 Cady v. Dombrowski, 413 U.S. 433 (1973). In *Cady*, the defendant had an accident while driving intoxicated. He was arrested and hospitalized. *Id.* at 436. Subsequently, police had the defendant's vehicle, a rented Ford, towed to a garage where an officer searched the vehicle. Although the defendant was a Chicago police officer, he did not possess a service revolver at the time of the arrest. The police sought to secure the revolver pursuant to standard procedure. *Id.* at 443. While conducting the search for the revolver, the officer discovered several blood stained items in the trunk. *Id.* at 437.

The Supreme Court found the search reasonable. The Court stated that the police exercised custody over the vehicle and directed the search at retrieving a service revolver to protect the public from danger. *Id.* at 447. The Court noted that "the fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable." *Id.*

16 *Opperman*, 428 U.S. at 368. *See* Cooper v. California, 386 U.S. 58, 61-62 (1967).

17 428 U.S. at 370-73. In *Opperman*, the police impounded defendant's vehicle for parking violations. The officer inventoried the contents of the vehicle, including items of personal property in plain view, and discovered marijuana in the unlocked glove compartment. *Id.*

18 *Id.* at 369.

19 *Id.*

20 *Id.* at 366.

21 *Id.* at 375.

22 *Id.* at 376 n.10.

23 *Id.*

Opperman extended the scope of warrantless vehicle inventory searches to unlocked glove compartments, but it did not consider whether the inventory search could extend to closed containers. In *Illinois v. Lafayette*,[24] the Supreme Court applied the balancing test to determine the reasonableness of a warrantless search of a closed container in a preincarceration inventory search.[25] The Court in *Lafayette* stated that the primary government interests which compel a standardized inventory procedure at the station house are to deter false claims, inhibit theft, and prevent injuries within the jail.[26] The Court stated that it is immaterial whether the police anticipate any potential danger.[27] The Court declined to consider the availability of less intrusive means to protect the property.[28]

Lafayette gives police broad authority to conduct a preincarceration inventory search by allowing the search to extend to closed containers in the arrestee's possession. The Court did not state whether the scope of an automobile inventory search is as broad as a preincarceration inventory search.

C. *The Supreme Court's Decision in* Colorado v. Bertine

In *Bertine*,[29] a Boulder, Colorado police officer stopped defendant Steven Lee Bertine for exceeding the speed limit and failing to signal. After a sobriety test, the officer arrested the defendant for driving while intoxicated.[30] A second officer arrived to impound defendant's vehicle and proceeded first to compile an inventory of the vehicle's contents in accordance with department procedure.[31] The officer discovered a closed backpack behind the front seat, opened its main compartment and found a zippered nylon bag. He unzipped the bag and removed three closed metal canisters. The officer discovered cocaine, methaqualone tablets, cocaine paraphernalia and seven hundred dollars in the canisters. He also found two hundred and ten dollars in an envelope within a zippered pouch. Following the inventory search, the officer had the van towed to an impoundment lot.[32]

The defendant filed a motion to suppress the items obtained during the inventory search. The lower court held that the search did not violate the fourth amendment of the United States Constitution, but did vio-

24 462 U.S. 640, 645-46 (1983).

25 A preincarceration inventory search is a search at the police station to inventory the arrestee's personal property. *See supra* note 10. In *Lafayette*, the defendant was arrested for disturbing the peace. *Id.* at 641. At the station, officers searched the defendant's shoulder bag and found amphetamine pills. *Id.* at 642. The lower courts suppressed the evidence, but the Supreme Court held the search valid. *Id.* at 642-43.

26 *Id.* at 645-46. The governmental interests at stake in *Lafayette* were similar to those traditionally recognized in the search incident to an arrest exception. *See supra* note 9. The Court reasoned that when "an arrestee is taken to a police station, that is no more than a continuation of the custody inherent in the arrest status." *Id.* at 645.

27 *Id.* at 648.

28 *Id.* at 647.

29 107 S. Ct. 738 (1987).

30 *Id.* at 739.

31 *Id.* at 740. *See infra* note 69.

32 107 S. Ct. at 740.

late the Colorado Constitution.[33] The Colorado Supreme Court affirmed on the ground that the search violated the federal fourth amendment.[34]

The United States Supreme Court on certiorari reversed. The Court held that the fourth amendment does not prohibit the admission of evidence found in closed containers discovered during an automobile inventory search.[35] The Court found *Opperman* and *Lafayette* controlling where searches are based on custodial functions.[36] The Court distinguished custodial searches from searches of closed containers located within automobiles. The automobile search exceptions do not justify a warrantless search of a closed container when conducted solely for the purpose of investigating criminal conduct.[37] The Court emphasized that the policies behind the warrant requirement and concept of probable cause are not implicated in an automobile inventory search.[38]

The Court stated that the governmental interests in *Bertine* were nearly the same as those justifying the inventory searches in *Opperman* and *Lafayette*.[39] By securing the property, the police protected it from unauthorized interference, helped guard against claims of theft, vandalism or negligence, and averted any danger to police or others. The Court stated that the reasonableness of an inventory search does not depend on the security of the impoundment lot or the availability of less intrusive means to secure the vehicle.[40] While setting forth governmental interests, the Supreme Court did not weigh them against the defendant's privacy interests. The Court determined that once an inventory search has commenced, police do not have sufficient time to consider an individual's privacy interest.[41]

The Court emphasized that the police conducted the inventory search in good faith and in accordance with department procedure re-

33 *Id.*

34 People v. Bertine, 706 P.2d 411 (Colo. 1985), *rev'd sub. nom.* Colorado v. Bertine, 107 S. Ct. 738 (1987). The Colorado Supreme Court recognized that inventory searches constituted an exception to the warrant requirement of the fourth amendment under *Opperman*. *Id.* at 414. The court, however, distinguished *Opperman* from the facts in *Bertine* because the property was within sealed containers and not in plain view. *Id.* The court declined to apply the preincarceration inventory search exception in *Lafayette* to automobile inventory searches, stating that the same compelling governmental interests that justify broad searches in the jailhouse setting do not necessarily extend to inventory searches of impounded vehicles. *Id.* at 416-19. The court further declined to apply Colorado cases supporting preincarceration searches. Avalos v. People, 179 Colo. 88, 498 P.2d 1141 (1972); People v. Glaubman, 175 Colo. 41, 485 P.2d 711 (1971). *See infra* note 89 and accompanying text & text accompanying note 98.

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

36 *Id.* at 742. *See Lafayette*, 462 U.S. at 643; *Opperman*, 428 U.S. at 370.

37 107 S. Ct. at 741. *See* United States v. Chadwick, 433 U.S. 1 (1977). In *Chadwick*, following the defendant's arrest, federal agents seized a footlocker in the open trunk of a parked vehicle. The agents transported the footlocker to the federal building where it remained in their exclusive control. With probable cause to believe the footlocker contained contraband, the agents conducted a search without a warrant or the defendant's consent. The Supreme Court affirmed a motion to supress evidence obtained from the footlocker. *Id.* at 16. *See also* Arkansas v. Sanders, 442 U.S. 753 (1979) (police removal of a suitcase from a taxicab trunk and warrantless search of it violated the fourth amendment). *See infra* notes 58-63 and accompanying text.

38 *See supra* notes 10-13 and accompanying text.

39 107 S. Ct. at 742.

40 *Id.*

41 *Id.* at 743.

quiring officers to open closed containers and list the contents.[42] The Court held that an automobile inventory search conducted in accordance with police procedure is reasonable.[43]

The dissent in *Bertine* argued that the search was not conducted according to standardized procedures[44] and that the police were given unfettered discretion to conduct the search.[45] The dissent also argued that based on the facts, a greater expectation of privacy existed in *Bertine* than was present in *Opperman* and *Lafayette*.[46]

II. The Federal Minimum Fails to Protect the Motorist

Judicial approval of inventory searches in *Opperman* opened the door to deterioration of a motorist's fourth amendment rights.[47] *Bertine*'s extension of that search to closed containers has slammed the door on a motorist's fourth amendment rights. The supremacy clause requires that states respect the minimum level of protection the fourth amendment gives individuals as defined by the Supreme Court.[48] *Bertine* represents the minimum level of constitutional protection a state must afford an individual in an automobile inventory search. This minimum fails to adequately protect a motorist. *Bertine* adopts an inflexible rule that gives police unlimited power to search vehicles that come within their custody, regardless of the nature of the custody. Consequently, inventory

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42 *Id.* at 742.

43 *Id.* The concurring opinion of Justice Blackmun, joined by Justices Powell and O'Connor, emphasized that the underlying rationale for the inventory exception to the warrant requirement is that police should not have discretion to determine the scope of the inventory search. Rather, standard department procedures ensure that police do not use inventory searches as a general means of discovering evidence. *Id.* at 744.

44 *Id.* (Marshall, J., and Brennan, J., dissenting).

45 "Standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Id.* (citing Delaware v. Prouse, 440 U.S. 648, 661 (1979)).

46 *Id.* at 749.

47 Note, *The Final Word on Inventory Searches?*, South Dakota v. Opperman, 26 DE PAUL L. REV. 834, 837-38 (1977).

48 State constitutions and courts were the principle guardians of a citizen's fundamental rights to be free of government interference until the first quarter of the twentieth century. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1144-45 (1985); Note, *Unenumerated Rights Clauses In State Constitutions*, 63 TEX. L. REV. 1321, 1322-23 (1985). *See* People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975). State bills of rights were added to state constitutions before the federal constitution was drafted. Pound, *The Development ofConstitutional Guarantees of Liberty*, 20 NOTRE DAME LAW. 347, 371-79 (1945). In fact, the Bill of Rights, as proposed by Madison, was based on the provisions of a 1789 state bill of rights. *Project Report: Toward an Activist Role for State Bill of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 275-76 (1973).

Courts gradually imposed federal constitutional restrictions on the states through "selective incorporation." Wolf v. Colorado, 338 U.S. 25 (1949); Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship between State and Federal Courts*, 63 TEX. L. REV. 977, 979 (1985). *See also* Abrahamson, *supra*, at 1145-47; Note, *supra*, at 1323.

From the 1950s through the early 1970s, state courts focused almost exclusively on federal constitutional decisions to decide state criminal cases. Abrahamson, *supra*, at 1147. *See* Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of* Michigan v. Long, 59 NOTRE DAME L. REV. 1118, 1142-43 (1984). *See also* Wilkes, *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223, 228 (1984) (approach referred to as "doctrine of state construction").

searches conducted pursuant to standardized police procedure are reasonable per se.

The Supreme Court in *Bertine* failed to apply the traditional balancing test of weighing compelling governmental interests against individual privacy interests. The Court did not articulate governmental interests that were compelling and ignored individual privacy interests.

The government's interest in protecting a motorist's property is not compelling enough to require an extensive inventory search. An inventory search is not even justified where the owner is present and able to dispose of items. In *Opperman* the owner of the impounded vehicle was not available.[49] In *Bertine* the motorist was present and would not have been detained very long considering the nature of the custody. Defendant might have been willing to leave the vehicle where it was for such a short period of time.[50] An owner can adequately protect his property by rolling up the windows and locking the doors. The Court should not assume that the motorist would want police to do more.[51] Police may also confiscate items before placing them on an inventory list.[52]

The government's interest in protecting police against claims is an attenuated justification for automobile inventory searches. The police are sufficiently protected by the law of bailments. The police, as custodians of the impounded vehicle, are either an involuntary bailee or a "gratuitous depository." As such, the police owe a duty of "slight care" for the preservation of the property, and are only liable for losses occasioned by "gross negligence."[53] This provides adequate protection against false claims.

Additionally, the government's interest in protecting police from claims is not compelling where the property is returned to the vehicle.[54] In this situation the inventory does not provide more security to the vehicle and the police liability remains the same. Regardless of the procedure adopted by police, the motorist may allege that an item was intentionally omitted from the inventory list.[55]

The government's interest in protecting police from potential danger is not compelling in automobile inventory searches. *Opperman* recognized that "there does not appear to be any effective way of identifying in advance those circumstances or classes of automobile impoundments

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49 *Opperman*, 428 U.S. at 370-73.

50 *Bertine*, 107 S. Ct. at 748 (Marshall, J., and Brennan, J., dissenting) (the lone governmental interest to protect the owner's property is outweighed by the owner's presence and ability to make other arrangements). *See Opperman*, 428 U.S. at 392 n.12 (Marshall, J., dissenting) (consent is a prerequisite to an inventory search where the owner of the vehicle is in police custody or otherwise in communication with police).

51 *See* Note, *supra* note 47, at 840-41 (citing Mozzetti v. Superior Court, 4 Cal. 3d 699, 708-10, 484 P.2d 84, 89-91, 94 Cal. Rptr. 412, 417-19 (1971)).

52 *Id.* at 840. *See also* Moylan, *supra* note 12, at 208.

53 Note, *supra* note 47, at 841. *See* Mozzetti v. Superior Court, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971). *See generally* S. WILLISTON, THE LAW OF CONTRACTS, §§ 1038, 1038A, at 900-07 (3d ed. 1967 & Supp.).

54 Moylan, *supra* note 12, at 209.

55 *Bertine*, 107 S. Ct. at 747.

which represent a greater risk."[56] No facts in *Bertine* or *Opperman* suggested the likelihood of dangerous items.[57]

The majority in *Bertine* also failed to consider the defendant's privacy interest in the backpack under the balancing test. In *United States v. Chadwick*[58] and *Arkansas v. Sanders*,[59] the Supreme Court considered the fourth amendment protections of containers independent from the automobile search exceptions.[60] The Court found that an individual's expectation of privacy in luggage is substantially greater than in an automobile.[61] The Court determined that an individual's privacy interest in closed containers exceeds the government's interest in conducting the search.[62] The factors which diminish the privacy aspects of an automobile do not apply to luggage because luggage is intended as a repository of personal effects.[63]

The Supreme Court in *Bertine* did not recognize an expectation of privacy in the defendant's backpack. The Court distinguished *Chadwick* and *Sanders* from *Bertine* on the grounds that they involved searches conducted solely for the purpose of investigating criminal conduct and were subject to the warrant requirement.[64] The Court explained that no warrant requirement exists for an automobile inventory search and thus *Chadwick* and *Sanders* do not control.[65]

The Court effectively limited the protection both *Chadwick* and *Sanders* gave to an individual's privacy interest in closed containers to searches protected by the warrant requirement. For example, if a motorist is arrested for traffic violations, he has no expectation of privacy and all containers in the vehicle are subject to an inventory search. However, a motorist suspected of transporting contraband has an expectation of privacy in all closed containers in a vehicle and is protected by the warrant and probable cause requirements. The underlying contradiction is that an inventory search for the owners "protection" may be used, unequivocally, to his detriment in criminal proceedings.[66] *Bertine* expands police power to conduct warrantless searches. Clearly, the search in *Bertine* was more intrusive than *Opperman* because it extended to containers in which the owner had a reasonable expectation of privacy, regardless of his expectation of privacy in his vehicle.[67]

The majority in *Bertine* asserted that standardized inventory procedures will ensure reasonableness. This argument fails to justify an extensive inventory search. The underlying assumption is that standardized

56 *Opperman*, 428 U.S. at 378.

57 *Bertine*, 107 S. Ct. at 742 n.5. *See also id.* at 747 (Marshall, J., and Brennan, J., dissenting).

58 433 U.S. 1 (1977). *See supra* note 37.

59 442 U.S. 753 (1979). *See supra* note 37.

60 *Id.* at 763 n.11.

61 442 U.S. at 764-66; 433 U.S. at 12-15.

62 *Id.*

63 433 U.S. at 13.

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

65 *Id.*

66 *See* Moylan, *supra* note 12, at 219 ("It would be a small comfort to go to the penitentiary, reassured that you are there only because the police were adamant in protecting you from petty theft regardless of whether you wished such protection.").

67 *Bertine*, 107 S. Ct. at 749 (Marshall, J., dissenting).

procedures will eliminate unfettered police discretion, thus preventing general exploratory searches for evidence of a crime.[68] This assumption is false. Under the police department regulations in *Bertine*, if the driver is taken into custody or the vehicle obstructs traffic, the police retain discretion to park and lock a vehicle or impound it.[69] Another regulation provides that the police must impound and inventory a vehicle used in the commission of a crime or which is the fruit of a crime.[70] Thus, despite department regulations, the police in *Bertine* retained unbridled discretion to inventory a vehicle's contents, including closed containers.

Bertine establishes a minimum level of protection against unreasonable searches and seizures. The motorist, however, has no expectation of privacy in repositories of personal effects and an inventory search is per se reasonable if conducted pursuant to standardized inventory procedure. The existence of a standardized department procedure does not provide adequate protection to the motorist against unbridled discretionary searches.[71]

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68 *See generally* Baker & Khourie, *Improbable Cause—The Poisonous Fruits of a Search After Arrest for a Traffic Violation*, 25 OKLA. L. REV. 54, 63 (1972) (the justification for an inventory is based on the assumption that law enforcement officials have a greater regard for protecting a motorist's property than for discovering evidence to convict him).

69 *Bertine*, 107 S. Ct. at 745 (Marshall, J., and Brennan, J., dissenting). The dissent asserts that the officer conducting the *Bertine* search exercised discretion not to "park and lock" the vehicle. *Id.* The dissent notes that the police department regulations give officers unbridled discretion to "park and lock" or impound the vehicle. *Id.* at 746. The latter entails a search and inventory of the vehicle's contents, including closed containers.

> Subsections 7-7-2(a)(1) and 7-7-2(a)(4) of the Boulder Revised Code authorize police to impound a vehicle if the driver is taken into custody or if the vehicle obstructs traffic. A departmental directive authorizes inventory searches of impounded vehicles.
>
> . . . .
>
> If the vehicle and its contents are not evidence of a crime and the owner consents, § III of the General Procedure provides, in relevant part:
>
> "A. Upon placing the operator of a motor vehicle in custody, Officers *may* take the following steps in securing the arrestee's vehicle and property . . .:
>
> . . . .
>
> "4. The Officer shall drive the vehicle off the roadway and legally park the vehicle in the nearest *public* parking area. The date, time, and location where the vehicle is parked shall be indicated on the *impound form*.
>
> "5. The Officer shall remove the ignition keys, and lock all doors of the vehicle.
>
> "6. During the booking process, the arrestee shall be given a continuation form for his signature which indicates the location of his vehicle. One copy of the continuation form is to be retained in the case file." App. 93-94 (emphasis added).

107 S. Ct. at 745 nn.1 & 3.

70 Section II(A) of the General Procedure establishes the following impoundment procedures:

> "1. If the vehicle or its contents have been used in the commission of a crime or are themselves the fruit of a crime, the Officer shall conduct a detailed vehicle inspection and inventory and record it upon the VEHICLE IMPOUND FORM.
>
> "2. Personal items of value should be removed from the vehicle and subsequently placed into Property for safekeeping.

107 S. Ct. at 745 n.4. The dissent argues that this discretionary scheme is unreasonable like the random spot checks in Delaware v. Prouse, 440 U.S. 648 (1979).

71 Moylan, *supra* note 12, at 220 ("Police routine cannot be the constitutional touchstone unless we are willing to entrust our liberties to the discretion of the police commissioner.").

III. Additional State Protections for Motorists in Automobile Inventory Searches

A. *State Constitutional Analysis*

While the fourth amendment provides a minimum level of protection, the principles of federalism permit the states to provide additional protections through state constitutions.[72] The state courts may exercise this discretion through state constitutional analysis.

A few state courts apply a "corollary" approach to constitutional analysis.[73] Under the corollary approach the state court applies the United States Supreme Court's interpretation of federal constitutional rights to state constitutional analysis. Some state courts are bound to adopt the federal interpretation by restrictive state constitutional provisions. Since 1970, to curtail criminal procedure rights, some states have adopted amendments to their bills of rights.[74] Both California[75] and Florida[76] have prevented courts from excluding evidence on independent state grounds and all evidence is admissible unless it violates federal standards.

Implicit in the corollary approach is the theory that the United States Constitution adequately guarantees fundamental liberties.[77] Based on federal grounds, these decisions are subject to review by the United States Supreme Court.[78] Those states which adopt the corollary approach of constitutional analysis will necessarily adopt the inadequate federal protections of *Bertine*.[79]

The majority of state courts apply a "supplemental" approach to state constitutional law analysis.[80] Under the supplemental approach, a court first determines whether state action violates federal constitutional rights. If the court determines that the action did not violate federal law,

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72 Our unique system of federalism ensures that "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards. But, of course, a State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." Oregon v. Hass, 420 U.S. 714, 719 (1975) (citations omitted) (emphasis in original). *See also* People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976); People v. Brisendine, 13 Cal. 3d 529, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975); State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974); State v. Ball, 124 N.H. 226, 471 A.2d 347 (1983); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975); Commonwealth v. Campana, 455 Pa. 622, 314 A.2d 854, *cert. denied*, 417 U.S. 969 (1974); State v. Opperman, 274 N.W.2d 673 (S.D. 1976); State v. Taylor, 60 Wis. 2d 506, 210 N.W.2d 873 (1973).

73 *See generally* Wilkes, *supra* note 48, at 251-56.

74 Wilkes, *supra* note 48, at 233 n.44 (list of amendments by state).

75 CAL. CONST. art. I, § 28 (criminal procedure rights restricted through anti-exclusionary rule). *E.g.*, *In Re* Lance W., 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985). *See* Bedsworth, In re Lance W.: *The Ship of State Makes a Course Correction*, 13 W. ST. U.L. REV. 9 (1985) (supporting California constitutional amendment). *But see* Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 982-86 (1985).

76 FLA. CONST. art. 1, § 12 (anti-exclusionary rule). *See generally* Wilkes, *supra* note 48, at 251-56.

77 *Id.* at 228-29.

78 U.S. CONST. art. III, § 2; 28 U.S.C. § 1254 (1982).

79 *See* Gary v. State, 647 S.W.2d 646 (Tex. Crim. App. 1982) (court adopted federal doctrine of South Dakota v. Opperman, 428 U.S. 364 (1976)). *See also* State v. Fortune, 236 Kan. 248, 689 P.2d 1196 (1984) (scope of Kansas bill of rights usually considered identical to federal fourth amendment).

80 Pollock, *supra* note 48, at 984. *See* cases cited *supra* note 48; Abrahamson, *supra* note 48, at 1147.

the court then determines whether the state constitution provides greater protection.[81] Traditionally, if the state court relied on the state constitution, the Supreme Court would not review the decision due to the jurisdictional requirements of article III to the United States Constitution.[82] This judicial restraint respects the adequate and independent nature of state constitutional interpretations.[83]

The Supreme Court, however, recently modified the adequate state ground rule in an effort to examine state court judgments recognizing greater fundamental rights.[84] In *Michigan v. Long*,[85] the Supreme Court created a presumption of state court reliance on federal constitutional law.[86] A court may overcome the presumption by including a "plain statement" that the decision is based on independent state grounds.[87]

Under the supplemental approach the state court first considers the constitutionality of state action under federal law. Following *Long*, the Supreme Court will presume that state court decisions adopting the supplemental approach are based solely on federal law even if the decision was ultimately based on the state constitution.[88] The federal presumption has a pervasive effect; it subjects state court decisions to Supreme Court review.

Bertine illustrates this dilemma. In *Bertine*, the trial court found that the inventory search did not violate the defendant's fourth amendment rights, but suppressed the evidence on state constitutional grounds citing state court decisions.[89] The Colorado Supreme Court affirmed.[90] The court, however, based its holding on the United States Constitution.[91] The majority opinion stated that under *Chadwick* and *Sanders* different

81 *See, e.g.*, State v. Williams, 93 N.J. 39, 459 A.2d 641 (1983).

82 "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . ." U.S. CONST. art. III, § 2, cl. 1. *See* Pollock, *supra* note 48, at 980.

83 *See* Reeves v. State, 599 P.2d 727 (Alaska 1979) (independent interpretation of state constitutional provision protecting individuals from unreasonable search and seizures); People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975); State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974); State v. Culotta, 343 So. 2d 977 (La. 1976); State v. Ball, 124 N.H. 226, 471 A.2d 347 (1983); State v. Benoit, 417 A.2d 895 (R.I. 1980); State v. Opperman, 247 N.W.2d 673, 675 (S.D. 1976); State v. Badger, 141 Vt. 430, 450 A.2d 336 (1982). *See also* State v. Kennedy, 295 Or. 260, 666 P.2d 1316 (1983) (independent interpretation of double jeopardy clause).

84 *See, e.g.*, Michigan v. Long, 463 U.S. 1032 (1983). In *Long*, Justice Stevens suggests that the Supreme Court's aggressive review of lower federal and state court decisions enforcing the fourth amendment has led state officers to file petitions for certiorari from state court suppression orders that are explicitly based on independent state grounds. *Id.* at 1068 (Stevens, J., dissenting). *See, e.g.*, Gannaway v. State, 448 So. 2d 413 (Ala. 1984), *cert. denied*, 469 U.S. 1207 (1985); People v. Corr, 682 P.2d 20 (Colo.), *cert. denied*, 469 U.S. 855 (1984); Jamison v. State, 455 So. 2d 1112 (Fla. Dist. Ct. App. 1984), *cert. denied*, 469 U.S. 1127 (1985); State v. Burkholder, 12 Ohio St. 3d 205, 466 N.E.2d 176, *cert. denied*, 469 U.S. 1062 (1984); State v. Von Bulow, 475 A.2d 995 (R.I.), *cert. denied*, 469 U.S. 875 (1984).

85 463 U.S. 1032 (1983).

86 Pollock, *supra* note 48, at 981; Wilkes, *supra* note 48, at 229.

87 463 U.S. at 1042.

88 *See* People v. Bertine, 706 P.2d 411 (Colo. 1985), *rev'd sub. nom.* Colorado v. Bertine, 107 S. Ct. 738 (1987).

89 *Bertine*, 706 P.2d at 414. The trial court relied on People v. Counterman, 192 Colo. 152, 556 P.2d 481 (1976). The facts of *Counterman* are similar to *Bertine*. *See id.* at 482-83. The Colorado Supreme Court in *Counterman* applied the balancing test and held that the defendant's expectation of privacy outweighed the government's interests in the search. *Id.* at 485.

90 *Bertine*, 706 P.2d at 411.

91 *Id.* at 419.

expectations of privacy existed with regard to containers as compared to automobiles.[92] Obviously, the Colorado Supreme Court believed that the fourth amendment afforded greater protections than the United States Supreme Court subsequently found in *Bertine*. The Colorado Supreme Court applied federal law because it had adopted the supplemental approach.

In response to Supreme Court decisions which severely limited fourth amendment rights for criminal suspects, several state courts have recently applied the "primary" approach to constitutional analysis.[93] A court will seek to resolve questions of fundamental liberties under a state constitution before considering federal rights.[94] Under this approach a court will determine if the federal constitution provides protection only in those cases where the state constitution does not. The underlying objective is to avoid Supreme Court review by basing decisions on adequate and independent state grounds.[95] Thus, state courts may accord the individual greater protection against unreasonable inventory searches.

B. *Recommended State Protections*

In states where courts adopt the corollary or supplemental approach to constitutional analysis, standardized police procedure determines the reasonableness and permissible scope of an automobile inventory search. In these states, legislatures should narrow situations where impoundment is lawful[96] and create rigid inventory procedures[97] to afford individuals greater protection against unreasonable searches.

State courts should apply the primary approach and provide greater protection to motorists in automobile inventory searches than the federal minimum. In *Bertine*, the Colorado Supreme Court could have affirmed the level of state protection in automobile inventory searches based on

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92 *Id.* at 415-16.

93 *See, e.g.*, People v. Drisbrow, 16 Cal. 3d 101, 545 P.2d 272, 281, 127 Cal. Rptr. 360 (1976). *See* Pollock, *supra* note 48, at 979. Commentators define the trend by state courts to expand constitutional rights of criminal suspects as the "New Federalism" and the "New States Rights." *See* Wilkes, *supra* note 48, at 225-28. *See generally* Galie, *State Constitutional Guarantees and the Alaska Supreme Court: Criminal Procedure Rights and the New Federalism, 1960-1981*, 18 GONZ. L. REV. 221 (1983); Mosk, *The New States' Rights*, 10 CAL. J. L. ENFORCEMENT 81 (1976).

94 State v. Ball, 124 N.H. 226, 231-34, 471 A.2d 347, 350-51 (1983); State v. Kennedy, 295 Or. 260, 666 P.2d 1316, 1318 (1983). *See* Pollock, *supra* note 48, at 983; Wilkes, *supra* note 48, at 256-57.

95 *Long*, 463 U.S. 1032; *Ball*, 124 N.H. 226, 471 A.2d 347.

96 *See infra* notes 102-07 and accompanying text. Even those states which have restrictive state constitutional provisions may provide greater protection to the individual. *See supra* notes 74-76 and accompanying text (discussion of California and Florida provisions). Anti-exclusionary rules relate to the remedy available to the accused, rather than substantive rights. Wasserman, *Angeles and Tierce: Independent State Grounds for Due Process Threatened*, 13 W. ST. U.L. REV. 61, 70 (1985). State courts may determine the scope of the automobile inventory search and the accused's remedies for illegal searches, other than exclusion of evidence. People v. Carter, 163 Cal. App. 3d 1183, 210 Cal. Rptr. 103 (1985) (California case law limits the scope of an inventory search); Miller v. State, 403 So. 2d 1307 (Fla. 1981) (Florida case law requires police to give a motorist an opportunity to make alternative arrangements). Other remedies available include civil suits, legislative sanctions, and administrative proceedings. *See* Bedsworth, *supra* note 75, at 17. These remedies, however, are ineffective to prevent state immunity. *See generally* Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269. Additionally, it is difficult to calculate appropriate damages.

97 *See infra* notes 102-07 and accompanying text.

the Colorado Constitution as interpreted by state court decisions.[98] In the future, if the Colorado Supreme Court decides to provide greater protections to citizens, it must do so on independent state grounds to overcome the presumption that the decision is based on federal law.

State courts must first examine the state's constitutional language. The court may recognize greater individual rights under unenumerated rights clauses or broad state constitutional provisions.[99] Even where the state's constitutional language is similar to that of the United States Constitution, a state court should independently determine the plain meaning under principles of federalism.[100] To avoid the presumption of federal law basis in *Michigan v. Long*,[101] the state court must make a clear statement that their determination of constitutional rights is based on state law.

Both the state legislatures and courts should facilitate a standard of reasonableness in automobile inventory searches considering the legitimate governmental interests and individual privacy expectations. Only where the governmental interests outweigh the individual's privacy interest should an automobile inventory search be reasonable.

Protecting the owner's vehicle is a compelling governmental interest only where the vehicle is abandoned, presents a hazard to traffic, or is evidence of a crime.[102] Statute or police procedure should require the arresting officer to advise the owner of the impounded vehicle and allow the motorist/owner to make alternative arrangements where possible.[103]

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98 *See supra* note 89 and accompanying text.

99 For a description of unenumerated rights clauses, see Note, *supra* note 48, at 1323-31. *See, e.g.*, State v. Daniel, 589 P.2d 408 (Alaska 1979); ALASKA CONST. art. I, § 14 (warrant requirement protects "other property"); MONT. CONST. art. II, §§ 10-11 (guaranteed right of privacy).

100 *See, e.g.*, State v. Luna, 93 N.M. 773, 606 P.2d 183 (1980) (police need probable cause or exigent circumstances to justify an automobile inventory search); State v. Opperman, 247 N.W.2d 673 (S.D. 1976) (on remand, the South Dakota Supreme Court declined to apply the federal interpretation of reasonableness in South Dakota v. Opperman, 428 U.S. 364 (1976), and held the inventory search unreasonable under the South Dakota Constitution).

101 463 U.S. 1032 (1983). *See supra* notes 85-87 and accompanying text.

102 *See* Miller v. State, 403 So. 2d 1307 (Fla. 1981). *See also* Wagner v. Commonwealth, 581 S.W.2d 352 (Ky. 1979) (warrant or consent required for valid inventory search), *rev'd in part* 663 S.W.2d 213 (1983) (protection not a valid interest where probable cause present); State v. Gaut, 357 So. 2d 513 (La. 1978) (state must show both the need to impound and the need to search); People v. Class, 67 N.Y.2d 431, 494 N.E.2d 444 (1986) (inventory search held invalid where stop based solely on traffic infraction).

103 *E.g.*, State v. Daniel, 589 P.2d 408 (Alaska 1979) (construing ALASKA ADMIN. CODE tit. 13, § 02.350); State v. Murphy, 6 Conn. App. 394, 505 A.2d 1251 (1986) (police department policy did not require impoundment where the defendant was available to make alternate arrangements); State v. Slockbower, 79 N.J. 1, 397 A.2d 1050 (1979) (construing N.J. STAT. ANN. § 39:4-136 (West 1973) to hold that impoundment is only authorized where the motorist is unable to move vehicle or it is abandoned). *See* Ross v. State, 428 So. 2d 781 (Fla. Dist. Ct. App. 1983) (police are required to give the motorist the opportunity to make alternative arrangements); Miller v. State, 403 So. 2d 1307 (Fla. 1981) (same); Session v. State, 353 So. 2d 854 (Fla. Dist. Ct. App. 1977) (same); Stobhert v. State, 165 Ga. App. 515, 301 S.E.2d 681 (1983) (impoundment was unnecessary following the defendant's arrest where the vehicle was legally parked and the passenger was available to drive); State v. Darabaris, 159 Ga. App. 121, 282 S.E.2d 744 (1981) (same); State v. Ludvicek, 147 Ga. App. 784, 250 S.E.2d 503 (1978) (same); State v. Fortune, 236 Kan. 248, 689 P.2d 1196 (1984) (officers should only impound the vehicle where it is illegally parked and unattended or where the motorist is unable or unwilling to make alternate arrangements); State v. Mangold, 82 N.J. 575, 414 A.2d 1312 (1980) (following a lawful impoundment of a vehicle blocking the road, the officer should afford the motorist an opportunity to remove personal property).

The motorist should also be given an option to park and lock the vehicle where possible.[104] This procedure ensures that the vehicle receives at least the degree of protection that the motorist could provide. Only in those situations where the owner consents, or the owner cannot be located, or the vehicle is evidence of a crime, will the need to protect the vehicle's contents justify a search.

Protecting police against claims is a compelling government interest only when the vehicle is already in lawful custody and the police are subject to potential liability. State legislatures may protect police against liability by statute.[105] When the motorist chooses to park and lock the vehicle, the police should require that the motorist sign a request form and waiver of claims against the police. State legislatures should require that the standard inventory form specify what property is in the vehicle and compel police to place valuable items in a safe place.[106] The legislature should review police department policy to ensure that police do not have unbridled discretion to conduct inventory searches and ensure that searches are narrow in scope. Police procedures should require police to itemize as one unit all containers discovered during the course of an automobile inventory.[107] This adequately protects a motorist's property and gives maximum protection to police against false claims.

State courts should ensure that police liability is limited under the law of bailments to losses occasioned by gross negligence.[108] Restricting an inventory search to items in plain view provides adequate protection to the police against claims of lost or stolen property.[109] The state court should scrutinize the circumstances of the inventory search to determine if it was reasonable in scope. If valuable items are listed on an inventory form and then left in the vehicle, no additional protection exists for the

104 *See, e.g.*, *supra* note 69 and accompanying text.

105 *See, e.g.*, S.D. CODIFIED LAWS ANN. § 43-39-11 (1983) (gratuitous depository must use at least slight care to preserve the property deposited).

106 *See, e.g.*, *supra* note 54 and accompanying text. *See also* State v. Atkinson, 64 Or. App. 517, 669 P.2d 343 (1983) (the inventory provides no additional protection where the police leave valuables in the vehicle).

107 *E.g.*, State v. Daniel, 589 P.2d 408 (Alaska 1979); People v. Counterman, 192 Colo. 152, 556 P.2d 481 (1976); People v. Dennison, 61 Ill. App. 3d 473, 378 N.E.2d 220 (1978) (inventory search may not extend to a toolbox); State v. Jewell, 338 So. 2d 633 (La. 1976) (inspecting contents of an aspirin bottle held inconsistent with automobile inventory search); State v. Pace, 171 N.J. Super. 240, 408 A.2d 808 (1979) (police cannot open attache case in course of search for the owner's identification); State v. Dowens, 285 Or. 369, 591 P.2d 1352 (1979) (exigent circumstances must exist to justify a search of closed containers during an inventory search); State v. Keller, 265 Or. 622, 510 P.2d 568 (1973) (same); State v. Prober, 98 Wis. 2d 345, 297 N.W.2d 1 (1980) (search of defendant's purse exceeded the scope of an automobile inventory search). *But see* State v. Roth, 305 N.W.2d 501 (Iowa 1981) (automobile inventory search may extend to contents of a closed container, including a paper bag, but not a purse, suitcase, or briefcase which police could alternatively remove from the vehicle and inventory as a unit).

108 *See supra* note 53 and accompanying text.

109 *Opperman*, 247 N.W.2d 673, 675 (noninvestigative police inventory searches of automobiles without a warrant restricted to safeguarding articles in the plain view of the officer's vision). *See, e.g.*, State v. Daniel, 589 P.2d 408, 414 (Alaska 1979); State v. Gwinn, 301 A.2d 291 (Del. 1972) (inventory search limited to items in plain view and search of a satchel was unreasonable); Nealy v. State, 400 So. 2d 95, 97 n.7 (Fla. Dist. Ct. App. 1981) (inventory search of automobile after defendant's arrest for traffic violations held unreasonable); State v. Bradshaw, 41 Ohio. App. 2d 48, 322 N.E.2d 311 (1974) (same); State v. Goff, 272 S.E.2d 457 (W. Va. 1980) (where an automobile is lawfully impounded, no basis exists for an inventory search unless the property is in plain view).

owner's possessions and the police would have the same degree of liability as if no search had been conducted.

State courts, when weighing the governmental interests against an individual's privacy interests, should consider the privacy aspects of closed containers separately from a vehicle.[110] The privacy interests in closed containers recognized in *Chadwick* and *Sanders*[111] clearly outweigh the governmental interests present in automobile inventory searches. An individual does not relinquish constitutional protections with respect to personal effects by placing them within a vehicle.[112]

IV. Conclusion

Unlike other automobile search exceptions, the automobile inventory search is a mere listing of personal property and not investigatory. The fourth amendment's requirement of reasonableness applied to automobile inventory searches is based on standard policy procedures and may extend to closed containers if the procedures permit. Presently, states that apply the corollary or supplemental approach to constitutional analysis of individual rights are obligated to accept the federal minimum in *Bertine*.

The *Bertine* majority justifies the inventory search as protecting the police against false claims and protecting the motorist's personal property. The theory that police are protected against false claims disregards the self-serving nature of the inventory list and common law and statutory limitations on liability. Additionally, the theory that motorist's property is protected by an inventory does not account for policeman theft, the motorist's preference to make alternative arrangements, and police failure to remove valuables from the vehicle. Notably those arguments are undermined by the appearance that police avoid safeguarding alternatives in an effort to "inadvertently" discover evidence of a crime.

States should decline to allow police broad, discretionary authority in automobile inventory searches. State legislatures should narrow situations where impoundment is lawful and develop rigid inventory procedures. State courts should afford greater protection to individuals against unreasonable governmental intrusion by basing decisions on adequate and independent state constitutional grounds. An automobile inventory search should not justify the search of sealed containers, in the

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110 *Pace*, 171 N.J. Super. 240, 408 A.2d 808. In *Bertine*, 107 S. Ct. 738 (1987), the Supreme Court declined to consider the privacy aspects of the closed container separately from the vehicle search. The result is that container searches conducted where probable cause exists but no warrant was issued are illegal under *Chadwick* and *Chambers*, while the same search is now legal if the vehicle is towed to a police impoundment lot under *Opperman* and *Bertine*. Police officers may leave all items in the car until an inventory search is conducted. A vivid example of this paradox is Reese v. Commonwealth, 220 Va. 1035, 265 S.E.2d 746 (1980) where the court held that a search in the morning was illegal because the officers had an intent to investigate, while a search of the same vehicle later that day was a lawful inventory search. *See generally* Grano, *Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, and the Warrant Requirement*, 69 J. CRIM. L. & CRIMINOLOGY 425 (1978).

111 *See supra* notes 58-67 and accompanying text.

112 *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979).

absence of exigent circumstances or another exception to the warrant requirement.

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