CLOSING THE INVENTORY LOOPHOLE: DEVELOPING A NEW STANDARD FOR CIVILIAN INVENTORY SEARCHES FROM THE MILITARY RULES OF EVIDENCE

Sharon Finegan[*]

INTRODUCTION

A fundamental tenet of criminal procedure in the United States is the protection against "unreasonable searches and seizures."[1] One way this right is protected is through the requirement that police searches be supported by a warrant in most circumstances.[2] This principle is limited only by narrow, specific exceptions that the courts have carved out.[3] One such exception is commonly referred to as the "inventory exception," which allows police to search a person arrested or a vehicle impounded at the time of the seizure in order to document items the police will take into their possession.[4]

---

[*] Associate Professor of Law, South Texas College of Law. I am grateful to Geoffrey Corn for his guidance and advice. Many thanks to Adam Gershowitz and Jason Dahlem for their helpful suggestions.

[1] U.S. CONST. amend. IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" *Id.* The Fourth Amendment also limits police searches by requiring that all searches conducted pursuant to a warrant be supported by "probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.*

[2] Johnson v. United States, 333 U.S. 10, 14-15 (1948); United States v. Jones, 187 F.3d 210, 219 (1st Cir. 1999) ("The Supreme Court has recognized a 'general rule that warrantless searches are presumptively unreasonable[.]'" (quoting Horton v. California, 496 U.S. 128, 133 (1990))); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 203-04 (1993).

[3] Katz v. United States, 389 U.S. 347, 357 (1967).

> Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," for the Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . ." "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," and 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. (alterations in original) (citations omitted).

[4] Illinois v. Lafayette, 462 U.S. 640, 643-44 (1983); South Dakota v. Opperman, 428 U.S. 364, 369 (1976). Some courts have asserted that the inventory exception does not fall under the traditional definition of a "search" for constitutional purposes because it is an administrative measure, rather than an investigation based upon some level of suspicion. *Lafayette*, 462 U.S. at 643-44. Indeed, some courts have asserted the inventory exception is not subject to any Fourth Amendment analysis. *See, e.g.*, People v. Sullivan, 272 N.E.2d 464, 469 (N.Y. 1971); People v. Willis, 208 N.W.2d 204, 206 (Mich. Ct. App. 1973).

The intent behind the exception is not to give police the ability to find evidence, but rather to protect the police, the suspect, and the public.[5] Concerns over theft, allegations of theft, and other potential dangers were the impetus for the adoption of the doctrine.[6] Thus, because it is not an investigatory search for evidence of a crime, the police need not have any level of suspicion to invoke the inventory exception.[7] In fact, the reverse is true—police are barred from conducting an inventory search when the basis for the search is a suspicion that they will find evidence of a crime.[8]

Since the Supreme Court's 2009 decision in *Arizona v. Gant*,[9] the inventory exception has taken on increased importance in police investigations.[10] The *Gant* decision restricted officers' ability to search the passenger compartment of a car any time the police arrested the occupants of that car.[11] Despite the significance of this limitation on the state's authority to search a vehicle, police have avoided the constitutional restrictions stemming from the new rule espoused in *Gant* through use of the inventory doctrine.[12] By impounding and conducting an inventory search of a vehicle, officers can accomplish the same search that, prior to *Gant*, would have been legitimized through the "search incident to arrest" exception.[13] Thus, after *Gant*, police are far more likely to arrest an individual in order to impound and inventory his vehicle for the purpose of finding evidence of a crime. This expansion of the use of the inventory exception directly undermines the rationale behind the doctrine—to allow police to conduct a suspicionless, administrative search for the purpose of safeguarding items taken into custody.[14]

---

5 *Opperman*, 428 U.S. at 377-78 (Powell, J., concurring).

6 *Id.* at 368-69 (majority opinion).

7 *Id.* at 383 (Powell, J., concurring).

8 *Katz*, 398 U.S. at 356-57; *see also Opperman*, 428 U.S. at 383 (Powell, J., concurring).

9 556 U.S. 332 (2009).

10 Christopher D. Totten, Arizona v. Gant *and its Aftermath: A Doctrinal "Correction" Without the Anticipated Privacy "Gains"*, 46 CRIM. L. BULL. 1293, 1301 (2010). By limiting the circumstances under which police may search a vehicle under the "search incident to arrest" exception to the warrant requirement, the *Gant* decision has led to police using impoundment and inventory searches far more frequently. *Id.*

11 *Gant*, 556 U.S. at 343-44.

12 Totten, *supra* note 10, at 1301; *see also supra* note 10 and accompanying text.

13 Totten, *supra* note 10, at 1301-02; *see, e.g.*, United States v. Stotler, 591 F.3d 935, 940 (7th Cir. 2010).

14 South Dakota v. Opperman, 428 U.S. 364, 368-69 (1976). Even more troubling than the use of the inventory doctrine to skirt constitutional limitations, courts have found that officers need not have actually seized and searched the car pursuant to the inventory exception for the doctrine to apply. Totten, *supra* note 10, at 1301. Using the inevitable discovery exception in conjunction with the inventory doctrine, courts have found that when the driver of a vehicle is arrested and his vehicle searched, evidence seized during that search is admissible because it would have been legally discovered if the police had conducted an inventory search. *Id.*

Despite the increased use of the inventory doctrine, the ability of police to conduct these suspicionless searches has given rise to many constitutionally problematic policies and court decisions over the years.[15] Courts have struggled with how to limit the discretion that officers have in conducting searches that require no suspicion whatsoever.[16] Yet, despite decades of struggling with the inventory exception, courts still have not identified satisfactory rules that ensure the exception is being used by police officers for its intended purpose, and not as a pretext to find evidence of a crime.

This Article argues that another legal system has rules in place that effectively address the problem posed by the inventory loophole—rules which could easily be adopted in our civilian system of justice. The U.S. military has long dealt with the use of an administrative search exception that is applied in the context of court martial proceedings in much the same way that the inventory exception is used in civilian proceedings.[17] "Inspections" conducted by the government in the military context are not subject to probable cause limitations, as they are not considered a search to investigate evidence of a crime.[18] Therefore, much like in the civilian justice system, the military has carved out an exception to Fourth Amendment re-

---

> [C]ourt decisions have circumvented the *Gant* rule by combining the vehicle inventory exception with the inevitable discovery exception to the exclusionary rule. For example, certain courts are finding evidence admissible in spite of the fact that the former vehicle occupant who has been placed under arrest by police could not access the vehicle at the time of the search, because this evidence would have "inevitably" been found in a subsequent police inventory search under the inventory exception.

Id.

15 State v. Perry, 324 S.E.2d 354, 357 & n.5 (W.Va. 1984).

16 *Id.*

17 The U.S. Court of Military Appeals, now known as the Court of Appeals for the Armed Forces, "dealt on many occasions with various types of military inspections. Indeed, [it has] long acknowledged that the inspection has traditionally been a 'tool' for a commander to use in insuring 'the overall fitness of [his] unit to perform its military mission.'" United States v. Middleton, 10 M.J. 123, 127 (C.M.A. 1981) (second alteration in original) (quoting United States v. Wenzel, 7 M.J. 95, 97 (C.M.A. 1979) (Fletcher, C.J., concurring)). The *Middleton* court went on to note that inspections are a regular part of military life:

> In considering what expectations of privacy a service member may reasonably entertain concerning military inspections, we must recognize that such inspections are time-honored and go back to the earliest days of the organized militia. They have been experienced by generations of Americans serving in the armed forces. Thus, the image is familiar of a soldier standing rigidly at attention at the foot of his bunk while his commander sternly inspects him, his uniform, his locker, and all his personal and professional belongings.

Id.

18 United States v. Gardner, 41 M.J. 189, 191 (C.M.A. 1994) ("The litmus test is whether the examination is made primarily for administrative purposes or instead for obtaining incriminating evidence. The former is admissible under the rule, while the latter is not.").

quirements when a search is not conducted for prosecutorial purposes.[19] However, the military's procedures more effectively ensure that the prosecuting party is not using this exception inappropriately.[20] Those same procedures would work well in the civilian criminal justice system and would provide efficient ways to prevent pretextual inventory searches by police.

Part I of this Article explores the history of the inventory exception, as well as its purposes and place in the criminal justice system. Part II explains the problems the inventory exception has created within the civilian criminal justice system and how the courts have inadequately attempted to deal with those problems. Part III of this Article then looks to the use of the inspection rule in the military system of justice and the way in which the U.S. military has addressed similar problems that the inspection exception has created in the context of courts-martial proceedings. Finally, Part IV of this Article argues that the procedures used in the military context would be well-suited for civilian criminal proceedings and should be adopted by legislatures to address concerns regarding pretextual use of the inventory exception.

I. HISTORY OF THE INVENTORY EXCEPTION

The Fourth Amendment of the U.S. Constitution protects against unreasonable searches and seizures and, under most circumstances, requires the state to obtain a warrant supported by probable cause before conducting a search.[21] Various exceptions and predicates to this requirement have been carved out by the courts, ensuring effective police investigation without heavily infringing on the privacy rights of individuals.[22] Thus, under some unique circumstances or in unique places, police are afforded the ability to

---

19 MIL. R. EVID. 313(b).

20 *Id.*

21 U.S. CONST. amend. IV. The Fourth Amendment has consistently been described as having two main clauses: the first requiring that searches be reasonable and the second requiring the use of warrants based upon probable cause. Robert S. Logan, *The Reverse Equal Protection Analysis: A New Methodology for "Special Needs" Cases*, 68 GEO. WASH. L. REV. 447, 449 (2000) (discussing relevant scholarship on this issue). The interrelationship between these clauses has been the subject of much scholarly discussion. *Id.* Some have argued that the warrant requirement necessarily modifies the reasonableness clause, thereby making warrantless searches presumptively unreasonable absent narrowly defined circumstances. *Id.* Others have argued that the clauses are independent of one another. *Id.* The prevailing view of the twentieth century has adopted the former analysis, holding that searches without warrants are presumptively unreasonable. *Id.*

22 Brooks Holland, *The Road 'Round* Edmond*: Steering Through Primary Purposes and Crime Control Agendas*, 111 PENN. ST. L. REV. 293, 294, 345-46 (2006). Of course, the applicability of the Fourth Amendment depends upon a determination that a search has occurred. Thomas K. Clancy, *What Is a "Search" Within the Meaning of the Fourth Amendment?*, 70 ALB. L. REV. 1, 1 (2006). In order to satisfy this predicate, there must be an actual expectation of privacy on the part of the individual searched and the police must have engaged in an activity that intrudes upon that privacy. *See id.* at 2.

conduct a search without first obtaining a warrant.[23] To understand the nature of these exceptions to the warrant requirement, it must first be noted that search warrants are typically required to find evidence in police investigations seeking evidence of wrongdoing.[24] Consequently, some police action that is not investigatory in nature need not comply with the warrant requirement.[25] This category of non-investigatory action involves functions of law enforcement that serve to protect rather than investigate a crime.[26] Thus, courts have carved out narrow exceptions to the Fourth Amendment when the police act to protect themselves, the public, or a suspect.[27]

In order to fulfill the wide range of functions expected of police departments, police officers are authorized to engage in activities outside of the constraints of criminal investigations. These activities often fall under the label of "community caretaker."[28] In order to perform this community caretaking role, courts have granted officers the power to protect and serve the public.[29] Pursuant to this power, police are permitted to stop, seize, and search under certain non-investigatory circumstances that would, in the context of a criminal investigation, violate the Constitution.[30] The community caretaking exception permits police to invoke these powers in order to carry out their non-investigatory functions.[31] Thus, the emergency aid doctrine, public servant doctrine, and inventory doctrine have all been upheld

---

23 *See* City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).

24 *See* U.S. CONST. amend. IV; *Edmond*, 531 U.S. at 38, 41; Katz v. United States, 389 U.S. 347, 356-57 (1967).

25 *See Edmond*, 531 U.S. at 37.

26 Kyle Graham, *Facilitating Crimes: An Inquiry into the Selective Invocation of Offenses Within the Continuum of Criminal Procedures*, 15 LEWIS & CLARK L. REV. 665, 684 n.86 (2011).

> [J]udicial elaboration of the community caretaking exception to the warrant requirement has established the lawfulness of detentions made for purposes other than criminal investigation. Under this exception to the warrant requirement, officers may initiate a detention when they possess, "specific . . . articulable facts to suspect that a citizen is in need of help or is in peril."

Id. (quoting State v. Marx, 215 P.3d 601, 605 (Kan. 2009)); *see also Edmond*, 531 U.S. at 43-44.

27 *See* Edwin J. Butterfoss, *A Suspicionless Search and Seizure Quagmire: The Supreme Court Revives the Pretext Doctrine and Creates Another Fine Fourth Amendment Mess*, 40 CREIGHTON L. REV. 419, 420 (2007) ("Since opening the door in *Camara*, the Court has upheld suspicionless searches in numerous contexts, creating several categories of constitutionally permissible suspicionless searches." (citing Camara v. Mun. Court, 387 U.S. 523, 537 (1967))); *see also* South Dakota v. Opperman, 428 U.S. 364, 369 (1976); Mary Elisabeth Naumann, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 AM. J. CRIM. L. 325, 330 (1999).

28 Naumann, *supra* note 27, at 330.

29 *Id.* at 330-31, 335, 338.

30 *See id.* at 330.

31 *Id.* The reasoning that forms the basis of these exceptions is that these activities are not conducted to find evidence of criminal wrongdoing but rather to protect and serve the public. *Id.* at 330-31, 335, 338.

as constitutional exceptions to constraints placed on police by the Fourth Amendment.[32]

The Supreme Court has consistently declared that these suspicionless searches must be limited in nature and closely adhere to the purpose behind the search.[33] Yet, in the past two decades, the Court has permitted the expanded application of these suspicionless searches.[34] This expansion has led to the increased prosecutorial use of evidence collected under the guise of police acting in a community caretaking capacity.[35]

The inventory exception is partly responsible for the growing legitimacy of suspicionless searches. This "exception" is grounded in the idea that when police arrest a person or impound her vehicle, officers should be permitted to determine and document what items are being seized and taken into custody.[36] This doctrine serves several protective functions. First, it protects the suspect from police malfeasance and the loss or theft of any items that may be taken into custody.[37] Second, the inventory exception protects the police from false claims of theft and from the possible seizure of dangerous items.[38] Third, the doctrine protects the police and the general public from any dangerous items that might unwittingly be among those

---

32 *Id.* at 330.

33 Butterfoss, *supra* note 27, at 419 ("Time and again the Court has declared as a basic tenet of Fourth Amendment jurisprudence that 'a search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.'" (quoting City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000))).

34 *See id.* at 420 (discussing recent Supreme Court decisions and stating that "the notion that only a single 'category' of permissible suspicionless searches and seizures exists and that the category is 'closely guarded' is a fantasy").

35 Since its initial approval of suspicionless searches, the Court has used different tests to weigh the importance of police purpose in conducting a search. Initially finding police purpose unimportant in assessing the constitutionality of a search, the Court has since shifted to a test that examines what an officer's primary purpose was in conducting the search. *Id.* at 421-22. The expanded use of suspicionless searches has not been without criticism, and the Court itself has developed different, and at times inconsistent, tests to determine the legitimacy of such searches. *Id.* at 433. It is interesting to note that the inventory doctrine has had its own distinct path in the realm of suspicionless search jurisprudence. *Id.* at 439-40. In other areas of suspicionless searches, such as traffic stops and checkpoints, the Court initially found police purpose to be unimportant. *Id.* at 434. Over time, that position has changed and now the Court seems to have adopted a "primary purpose" test, where the search is unconstitutional if the officer's primary purpose in conducting it was to find evidence of criminal wrongdoing. *Id.* at 421-22. Unlike in these other areas, however, in applying the inventory doctrine the Court has consistently used language focusing on the purpose of the police officer conducting the search, explicitly prohibiting the use of pretextual searches. *Id.* at 440. As will be discussed in the following Part, the Court's method of determining whether an inventory search is pretextual has been ineffective.

36 United States v. Lumpkin, 159 F.3d 983, 987 (6th Cir. 1998).

37 South Dakota v. Opperman, 428 U.S. 364, 369 (1976).

38 *Id.*

confiscated by officers.[39] Therefore, the police are permitted to examine the contents of items seized in the process of arrest or impoundment, not for the purposes of criminal investigation, but for purely protective reasons.[40] Indeed, some courts have held that the inventory "exception" is not really an exception to the warrant requirement at all because it is an administrative step and not a "search" for Fourth Amendment purposes.[41]

The practice of police officers inventorying items seized in an arrest has deep historical roots.[42] However, it was not until 1967 that the Supreme Court first explicitly endorsed the use of the inventory rule.[43] In the late 1960s and through the following decade, the Supreme Court began addressing the inventory rule as police departments more frequently used the exception to legitimize the seizure of evidence.[44] The initial cases in which the Court examined the rule presented unique facts that allowed for the use of the exception in limited circumstances.[45] These cases addressed police use of the inventory exception in circumstances when vehicles were in police custody for a significant length of time or were not impounded or where there was information that a vehicle contained items dangerous to the public.[46]

Finally, in 1976, the Court examined the rationale behind the inventory exception and upheld its application in the regular course of police ac-

---

39 *Id; see also* United States v. Mays, 982 F.2d 319, 321 (8th Cir. 1993) ("[O]ne of the reasons for an inventory search is to protect the public and the police from potential danger. In the interest of public safety, police must often play a caretaking role." (citations omitted)).

40 *See* Florida v. Wells, 495 U.S. 1, 4 (1990).

41 Illinois v. Lafayette, 462 U.S. 640, 643-44 (1983).

42 *See generally id.* at 643-47 (describing different cases discussing inventory searches incident to arrests).

43 Cooper v. California, 386. U.S. 58, 61-62 (1967).

44 *See* Butterfoss, *supra* note 27, at 439-42; *infra* notes 45-55 and accompanying text.

45 *See* Cady v. Dombrowski, 413 U.S. 433, 442-43 (1973); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 221 (1968); *Cooper*, 386 U.S. at 59.

46 *Cady*, 413 U.S. at 436; *Dyke*, 391 U.S. at 221; *Cooper*, 386 U.S. at 61-62. In the 1967 case of *Cooper v. California*, the Supreme Court held as valid the inventory search of a vehicle that was in police custody for a significant period of time. 386 U.S. at 61. The Court reasoned that the police, having seized the car, were in possession of it for four months before forfeiture proceedings. *Id*. Under such circumstances, it was reasonable for the police to inventory the car after seizure. *Id.* at 62. The following year, in *Dyke v. Taylor Implement Manufacturing Co.*, the Court dealt with a situation where the police arrested the owner of a car for reckless driving, but did not impound the car. 391 U.S. at 220-21. The Court noted that, without impoundment, the inventory rule did not apply and the police needed some other basis for a warrantless search of the vehicle. *Id.* at 221-22. Finally, in 1973, the Court again addressed the inventory rule in the case of *Cady v. Dombrowski*. 413 U.S. at 436. In *Cady*, the Court examined the use of the inventory rule in circumstances where the police had reason to believe the vehicle might contain items dangerous to the public at large. *Id.* The case involved a vehicle that was disabled following an accident. *Id.* The police learned that owner of the vehicle was a law enforcement officer, and consequently the police searched the vehicle for the owner's firearm, citing concerns over public safety. *Id.* The Court upheld the inventory, noting that the "general public . . . might be endangered if an intruder removed a revolver from the trunk of the vehicle." *Id.* at 447.

tivity.[47] The plurality opinion in *South Dakota v. Opperman*[48] upheld the principle that "inventories pursuant to standard police procedures are reasonable."[49] In so deciding, the Court affirmed lower court precedent that had, for years, permitted police inventories of impounded vehicles and not just in the unique circumstances previously examined by the Court.[50] The plurality relied upon the commonly asserted rationale for the rule, noting that the inventory exception was important not only to protect the suspect whose property was seized but also to protect the police from dangerous items contained in the seized vehicle and false allegations of theft.[51] The Court heavily emphasized the unique nature of the inventory search as an administrative procedure.[52] In his concurrence, Justice Lewis Powell further emphasized the need for such searches to be conducted pursuant to a standardized policy rather than at the discretion of individual officers.[53] Indeed, Justice Powell reasoned that, because of the rigid constraints imposed upon the exception, inventory searches do not invoke the search and seizure protections of the Fourth Amendment as they do not present "special facts for a neutral magistrate to evaluate."[54] In later decisions, the Court described the "so-called inventory search" as "an incidental administrative step," not subject to the Fourth Amendment warrant requirement.[55]

In the years since the Court first addressed the inventory exception, it has recognized the difficulties associated with a suspicionless search and concerns that such searches could be abused by police officers in pursuit of evidence.[56] Recognizing that officer discretion in conducting a suspicionless search could lead to abuse, the Court responded by focusing on the requirement that police departments must have standardized policies in place that govern the use and execution of inventory searches.[57] Under the Court's rationale, if a police department policy limits the discretion of individual officers to determine how and when to conduct inventory searches, then searches conducted pursuant to those policies are less likely to be pretextual

---

47 South Dakota v. Opperman, 428 U.S. 364, 372 (1976).

48 428 U.S. 364 (1976).

49 *Id*. at 372.

50 *Id.* at 369-71.

51 *Id.*

52 *Id.* at 383 (Powell, J., concurring).

53 *Id.*

54 *Opperman*, 428 U.S. at 383 (Powell, J., concurring).

55 Illinois v. Lafayette, 462 U.S. 640, 644 (1983).

56 Whren v. United States, 517 U.S. 806, 811 (1996).

57 Naumann, *supra* note 27, at 351 (noting that "[t]he effectiveness of the procedures in ensuring that the officer does not use the doctrine as a pretext . . . is doubtful. Standard procedures do not prevent the officer from conducting a search if he has a pretext for the intrusion; he is simply required to conduct that search in a specified manner.").

or to abuse the reasoning behind the inventory rule.[58] Thus, the *Opperman* reasoning shifted the focus from the legitimacy of the inventory rule itself to whether police departments had standard policies in place to administer the technique.[59] This rationale set the stage for further adoption of the inventory exception by lower courts, and those lower courts similarly focused their examination on the existence of standardized police department policies and whether inventory searches were routine and conducted pursuant to those policies.[60]

Following these decisions legitimizing the use of the inventory exception, police departments began to more frequently claim that evidence was seized pursuant to the exception and thus admissible in criminal proceedings.[61] And with the Supreme Court's stamp of approval, lower courts continued to uphold the validity of evidence seized during routine police inventory searches of impounded vehicles.[62] Yet the courts' validation of inventory searches did not stem the tide of questions raised about their scope and the circumstances under which they could be used. In fact, in the decades following *Opperman*, courts were routinely confronted by problems created by these suspicionless searches.[63] These problems reflect the significant constitutional challenges of the inventory exception and the need to create laws that adequately protect individual rights when police are authorized to conduct such searches.

---

58 *See* Florida v. Wells, 495 U.S. 1, 4 (1990). In determining when the police are permitted to conduct an inventory search, the Court has focused on the appropriate circumstances for seizure. For vehicle searches, this focus relates to when a vehicle may be permissibly impounded. *Id.* at 3-5. Just as the Court has focused on standardized policies when determining the constitutionality of methods used in conducting an inventory search, so too has the Court focused on whether standard procedures are in place governing the impoundment of a vehicle as a predicate for the inventory. *See* Chad Carr, *To Impound or Not to Impound: Why Courts Need to Define Legitimate Impoundment Purposes to Restore Fourth Amendment Privacy Rights to Motorists*, 33 HAMLINE L. REV. 95, 111-12 (2010).

59 *See Opperman*, 428 U.S. at 374-75.

60 Carr, *supra* note 58, at 111. The dissenters in *Opperman* argued that, in order for an inventory search to be valid, police officers should obtain the owner's consent. *Opperman*, 428 U.S. at 385 (Marshall, J., dissenting). Reasoning that if an inventory is, in large part, to protect the belongings of the person whose vehicle is seized, the dissenters asserted that it should be up to the individual to determine whether he permits the inventory to take place. *Id.* at 392-94. Indeed, the plurality did not address this issue, and so the *Opperman* holding did not determine whether the police were permitted to conduct an inventory any time a car was able to be impounded, or whether the officers needed to permit other methods for the owner to safeguard the contents of the car. *Id.* at 392-93.

61 *See generally* Charles E. Moylan, Jr., *The Inventory Search of an Automobile: A Willing Suspension of Disbelief*, 5 U. BALT. L. REV. 203, 220 (1976) (arguing that officers' use of the inventory doctrine was "creating a credibility gap of mammoth proportions").

62 *Wells*, 495 U.S. at 8 (Brennan, J., concurring).

63 *See, e.g.*, United States v. Lopez, 547 F.3d 364, 369-71 (2d Cir. 2008); United States v. Kennedy, 427 F.3d 1136, 1143-44 (8th Cir. 2005); United States v. Hope, 102 F.3d 114, 116 (5th Cir. 1996).

II. CONSTITUTIONAL PROBLEMS CREATED BY THE INVENTORY EXCEPTION

Despite its growing use by police departments as an argument for the admissibility of evidence found pursuant to a seizure, the inventory exception poses severe constitutional problems. These problems are most clearly exposed in cases analyzing the legitimacy of the seizure and the scope of the search under the inventory doctrine.[64] In these two areas, courts have struggled to arrive at a consistent rule that would ensure that Fourth Amendment rights are protected while permitting police to engage in legitimate community caretaking activities. An additional problem has been exposed by the attempted solution courts have created to address concerns regarding the suspicionless search. The courts' focus on departmental policies governing the circumstances under which an inventory search can be conducted exposes the difficulty in using procedural limitations on officer discretion as the sole method of addressing pretextual searches. As evidenced by the inconsistent development of the law regarding the circumstances under which a vehicle can be impounded and the proper scope of an inventory search, better rules must be adopted to avoid further erosion of constitutional protections against unreasonable and arbitrary searches.

A. *Legitimacy of Seizure*

A significant question arose in the wake of Supreme Court cases validating inventory searches as to the circumstances under which seizures were permitted.[65] In *Opperman*, the Supreme Court focused on the lack of officer discretion in conducting inventory searches.[66] However, the *Opperman* Court did not explore whether police policies governing the impoundment and subsequent inventory of vehicles should be limited to permit seizure only under narrowly defined circumstances.[67] Thus, to ensure the rationale behind the inventory exception was satisfied, lower courts questioned whether the police were permitted to conduct inventory searches even when less intrusive means were available.[68]

While the *Opperman* decision clarified much about the validity of inventory searches generally, the decision failed to address whether police

---

64 *See infra* Parts II.A-B.

65 Jason S. Marks, *Taking Stock of the Inventory Search: Has the Exception Swallowed the Rule?*, CRIM. JUST., Spring 1995, at 11, 13.

66 South Dakota v. Opperman, 428 U.S. 364, 383 (1976) (Powell, J., concurring).

67 *See generally id.* at 364-96.

68 *See, e.g.*, United States v. Edwards, 577 F.2d 883, 891-95 (5th Cir. 1978); People v. Clark, 357 N.E.2d 798, 799-801 (Ill. 1976); State v. Mangold, 414 A.2d 1312, 1313 (N.J. 1980); Gords v. State, 824 S.W.2d 785, 786-88 (Tex. App. 1992).

needed to obtain the consent of the arrestee to inventory his car.[69] This issue takes on particular significance when options other than inventory exist to ensure the safeguarding of seized items.[70] The lack of guidance from the Court became a source of conflict among lower court decisions dealing with inventory searches.[71]

A common example of the problem confronting courts in the wake of *Opperman* involved the arrest of the driver of a vehicle.[72] Prior to *Opperman*, when such an arrest led to the car being left in an unsafe or illegal location, courts found that the police could constitutionally impound that vehicle as part of their community caretaking function.[73] In contrast, following *Opperman*, courts were faced with determining whether police were permitted to impound a vehicle even if there were reasonable alternatives to impoundment and the owner refused to consent to the seizure.[74] Courts disagreed about whether officers must choose the least invasive means of ensuring the goals of the inventory rule were met or whether they could exercise discretion in deciding to impound and inventory the vehicle.[75] On the one hand, courts have reasoned that it was not always practicable to expect the police to choose a less invasive method of safeguarding the items in the vehicle.[76] On the other hand, courts noted that allowing officers the choice between impoundment and some less invasive procedure vested in officers the very discretion that the Supreme Court had attempted to limit.[77]

---

69 *Opperman*, 428 U.S. at 392 n.12 (Marshall, J., dissenting). As Justice Thurgood Marshall explained,

> it does not hold that the police may proceed with [an inventory] search in the face of the owner's denial of permission. . . . [I]f the owner of the vehicle is in police custody or otherwise in communication with the police, his consent to the inventory is prerequisite to an inventory search.

Id.

70 *See, e.g.*, Illinois v. Lafayette, 462 U.S. 640, 647-48 (1983).

71 *See, e.g.*, *Edwards*, 577 F.2d at 891-95; *Clark*, 357 N.E.2d at 799-801; *Mangold*, 414 A.2d at 1312-18; *Gords*, 824 S.W.2d at 786-88.

72 State v. White, 387 A.2d 230, 232-33 (Me. 1978).

73 State v. Singleton, 511 P.2d 1396, 1399-400 (Wash. Ct. App. 1973).

74 *White*, 387 A.2d at 232-33. A typical example of these circumstances involves another licensed driver in the car whom the police do not arrest. The question confronted by courts involves whether the police are required to allow the arrestee to hand over possession to this passenger for safekeeping. Similarly, if the police arrested a vehicle owner in her car, but at the time of the arrest, the car was parked legally, the question became whether the police could still impound the vehicle even though it was not impeding traffic or in violation of any traffic laws.

75 *See, e.g.*, *Edwards*, 577 F.2d at 891-95; *Clark*, 357 N.E.2d at 799-801; *Mangold*, 414 A.2d at 1312-18; *Gords*, 824 S.W.2d at 786-88.

76 *See, e.g.*, Illinois v. Lafayette, 462 U.S. 640, 648 (1983) ("Even if less intrusive means existed of protecting some particular types of property, it 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 and which must be sealed as a unit.").

77 Florida v. Wells, 495 U.S. 1, 11 (1989) (Blackmun, J., concurring).

In the *Illinois v. Lafayette*[78] decision, the Supreme Court addressed some of the confusion among the lower courts on this issue.[79] The *Lafayette* Court rejected the idea that the constitutionality of the inventory rule depended on the police engaging in the least intrusive means of furthering the interests of the rule.[80] The majority reasoned that "[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means."[81] In so holding, the Court noted that it was "hardly in a position to second-guess police departments as to what practical administrative method will best deter theft by and false claims against its employees and preserve the security of the stationhouse."[82]

Thus, as with prior precedent, the Court focused on the need for standardized police procedures to control discretion in the initiation and execution of the inventory.[83] The Court did not focus on providing substantive constraints on the application of the rule to address problems associated with the inventory doctrine. Rather, the Court seemed to indicate that a standardized police policy restraining an individual officer's judgment in conducting an inventory search was sufficient to address the concerns regarding abuse of discretion and pretextual seizures that led to inventory searches.[84]

The *Lafayette* decision did not resolve the conflicting opinions among lower courts regarding whether least restrictive measures were required in conducting inventory searches. Indeed, lower courts continued to grapple with the decision, so the Court once again examined its position in *Colorado v. Bertine*.[85] In *Bertine*, the Court held that "reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure."[86]

Despite clear Supreme Court precedent holding that police are not bound to choose the least intrusive method of safeguarding the property of

---

78 462 U.S. 640 (1983).

79 *See generally id.*

80 *Id.* at 647.

81 *Id.* The *Lafayette* case involved the inventory search of an individual following arrest and before incarceration, however, the Court did not distinguish between inventory searches of an individual and inventory searches of a vehicle after impoundment. *Id.* at 645-47.

82 *Id.* at 648. The Court further explained its rationale noting that "it is not [the Court's] function to write a manual on administering routine, neutral procedures of the stationhouse. [The Court's] role is to assure against violations of the Constitution." *Id.* at 647.

83 *Lafayette*, 462 U.S. at 646.

84 *Id.* at 648.

85 479 U.S. 367 (1987). Unlike *Lafayette*, the *Bertine* case involved the inventory of a vehicle and specifically addressed whether police were prohibited from impounding and inventorying a car when there were less intrusive options available to them. *Id.* at 372.

86 *Id.* at 374.

an arrestee, lower courts have continued to struggle with this issue and have come to conflicting determinations.[87] Looking to protections afforded by state constitutions, some lower courts have determined that police must defer to the decision of an arrestee regarding impoundment if other, less intrusive methods are available to safeguard the vehicle.[88] Other courts have spelled out more clearly the circumstances under which police are permitted to impound and inventory a vehicle, further limiting officer discretion in inventory cases.[89] Still, other courts have closely followed Supreme Court precedent and determined that police may choose the circumstances under which they impound and inventory a vehicle, provided that such circumstances are prescribed in advance by police policy and the inventory is conducted in good faith.[90] Thus, while the Supreme Court has addressed this issue repeatedly, there is no consensus among state courts on the application of the inventory rule when other means are available to accomplish the goals of the exception.[91] With so much conflicting precedent on point, a rule

---

87 *See, e.g.*, United States v. Vite-Espinoza, 342 F.3d 462, 470 (6th Cir. 2003) (finding Tennessee law may require that the police use reasonable alternatives available to them when impounding a car); Robinson v. State, 537 So. 2d 95, 96 (Fla. 1989) (holding that "[o]fficers no longer are required to provide an alternative to impoundment, if they act in good faith"); Gords v. State, 824 S.W.2d 785, 787-88 (Tex. App. 1992) (finding that under Texas law, officers are required to allow the defendant to choose to give possession of the car to a licensed passenger rather than impounding it).

88 *Gords*, 824 S.W.2d at 787-88. In Texas, for example, officers must permit a licensed passenger to take possession of the vehicle if the driver does not want the vehicle impounded. *Id.* Indeed, the Texas Court of Criminal Appeals has noted that:

> State courts have the opportunity to experiment with constitutional rights and lay potential guidelines for future constitutional decisions of not only state courts but the Supreme Court as well. The United States Supreme Court has in fact looked to state constitutional jurisprudence and experience in determining to apply the federal Bill of Rights to the states.

Heitman v. State, 815 S.W.2d 681, 686 (Tex. Crim. App. 1991).

89 State v. Jewell, 338 So. 2d 633, 640 (La. 1976) (noting that a police regulation and conformity with the requirements of such regulation cannot make lawful what would otherwise be an unconstitutional search).

90 *See, e.g.*, Sellman v. State, 828 A.2d 803, 815 (Md. Ct. Spec. App. 2003). As the Court of Special Appeals of Maryland reasoned in emphasizing the importance of policies limiting officer discretion:

> The value in standardized inventory search policies and the reason their existence is critical to the inventory search exception is that external, objective, and routine controls remove the individual police officer's discretion over whether to conduct a search and limit his discretion over how to conduct the search, thereby minimizing the risk that inventory searches will be used as after-the-fact justifications for unsupported investigatory searches. A police officer's individual practice for conducting searches is internal, subjective, and routine only to him and not to others. The interests to be advanced by regulating police officer inventory searches are not advanced by leaving each police officer free to adopt his own inventory search practice.

Id. at 815-16.

91 *Vite-Espinoza*, 342 F.3d at 470; *Robinson*, 537 So. 2d at 96; *Gords*, 824 S.W.2d at 787-88.

that more clearly establishes the constitutional rights of individual defendants would better preserve due process protections. As discussed below, other problems associated with the inventory doctrine have also resulted in widely divergent rules being applied in lower courts.

B. *Scope of the Search*

Another area in which the inventory doctrine has caused confusion and conflicting opinions in the lower courts involves the scope of such searches. Specifically, courts have addressed the constitutionality of searching containers that are found during an inventory search of a person or vehicle.[92] The difficulty in determining the scope of an inventory search mirrors that of determining whether the police are required to employ the least invasive measure. In examining this issue, courts have once again focused on the discretion of officers to determine the proper scope of the search and have come to different conclusions regarding the ability to open containers when conducting an inventory.[93]

When the Supreme Court first addressed the proper scope of a subsequent search of a seized vehicle or person, it focused on the heightened expectation of privacy in closed containers.[94] Early cases did not specify the inventory exception as the basis for police searches of containers seized in the course of an arrest or impoundment.[95] In these cases, the government focused its argument on other exceptions to the warrant requirement, such as the automobile exception or search incident to arrest exception.[96] Today, however, the circumstances under which the containers were opened and searched in these cases would fall within the reach of the inventory doctrine. In these early cases, the Court held that, under most circumstances, police may not search a closed container, even when that container is located in a place where police may otherwise legitimately search.[97] Reasoning

---

92 *See, e.g.*, State v. Snow, 268 P.3d 802, 806-07 (Or. Ct. App. 2011) (noting that an element of the inventory doctrine involves the scope of the search itself).

93 *See, e.g.*, United States v. Bloomfield, 594 F.2d 1200, 1203 (8th Cir. 1979); Snell v. State, 721 S.W.2d 628, 632-33 (Ark. 1986); State v. Bonin, 591 A.2d 38, 39-40 (R.I. 1991) (per curiam).

94 Arkansas v. Sanders, 442 U.S. 753, 763-64 (1979), *abrogated by* California v. Acevedo, 500 U.S. 565 (1991); United States v. Chadwick, 433 U.S. 1, 12-13 (1977), *abrogated by* California v. Acevedo, 500 U.S. 565 (1991).

95 *Sanders*, 442 U.S. at 763-64; *Chadwick*, 433 U.S. at 14-15.

96 *Sanders*, 442 U.S. at 762; *Chadwick*, 433 U.S. at 14.

97 *Sanders*, 442 U.S. at 763; *Chadwick*, 433 U.S. at 13. An exception to this pattern is the *Lafayette* case, where the Court held that police may search the bag of a person arrested after they arrive at the stationhouse. Illinois v. Lafayette, 462 U.S. 640, 648 (1983). The Court reasoned that officer and prisoner safety required that all items held by the prospective inmate be the valid subject of a search. *Id.* at 646-47. The Court focused on the unique nature of the prison environment in determining the constitutionality of the search of a handbag after the suspect had been arrested and brought to the police station. *Id.* at 646. The Court also noted that while there were other, less intrusive means of safeguarding

that a person manifests a greater expectation of privacy in items placed in a closed container than in a car, the Court repeatedly found that items contained in closed containers inside of a vehicle were not the valid subject of a warrantless search.[98]

The question of whether police were constitutionally permitted to open closed containers located within a vehicle that was otherwise the subject of a lawful inventory search was addressed in two distinct ways by the lower courts.[99] One line of reasoning found that the police could never constitutionally open a closed container in the process of an inventory search.[100] Explaining that a person manifests a greater expectation of privacy when she places items in a closed container, these courts found that police should be required to get a warrant prior to opening any such container.[101] Further, these decisions examined the policy behind the inventory rule and noted that other methods were available to police that would allow for the safeguarding of items contained in a closed container.[102]

Contrasted with this line of authority, other courts focused on the procedures in place at the time of the inventory.[103] As exemplified in *Colorado v. Bertine*, this approach emphasizes the need for standardized police policies governing inventory searches in order to limit officer discretion.[104] The rationale in these decisions underscores the need for strict rules to prevent officers from exercising discretion in opening containers during a search.[105] Courts focus on the fact that a policy mandating the opening of all containers during a search or forbidding such action altogether would properly limit officer discretion in conducting the search and make it less likely that an officer would open a container with the objective of finding evidence, rather than safeguarding the items contained within.[106] Thus, these courts leave it to police departments to determine whether officers could legally open containers found during an inventory search.[107]

---

items contained in the bag, the police were not required to use the least intrusive means in conducting an inventory search. *Id.* at 648.

98 *See, e.g.*, State v. Prober, 297 N.W.2d 1, 7 (Wis. 1980).

99 *See, e.g.*, Hicks v. State, 398 So. 2d 1008 (Fla. Dist. Ct. App. 1981); State v. Bramlett, 609 P.2d 345, 349 (N.M. Ct. App. 1980); *Prober*, 297 N.W.2d at 7.

100 *Prober*, 297 N.W.2d at 7.

101 *See, e.g.*, *Prober*, 297 N.W.2d at 7 ("In recognizing that there is a greater expectation of privacy in closed or sealed containers found inside a vehicle than there is in a vehicle itself, we are balancing the need of the government (here, those relating to inventory searches) against the right of people to be free of warrantless intrusions into their personal effects.").

102 *See, e.g.*, People v. Counterman, 556 P.2d 481, 485 (Colo. 1976).

103 *See, e.g.*, United States v. Young, 825 F.2d 60, 61 (5th Cir. 1987); Harmon v. State, 748 P.2d 992, 994 (Okla. Crim. App. 1988).

104 Colorado v. Bertine, 479 U.S. 367, 375-76 (1987).

105 *See id.* at 376-77 (Blackmun, J., concurring).

106 *See id.*

107 *See id.*

Nearly a decade after the *Lafayette* decision, the Supreme Court addressed the conflicting authority among lower courts regarding the permissible scope of inventory searches.[108] In *Bertine*, the Court held that police were allowed to open closed containers in the course of a valid inventory search, provided that the opening of the container was permitted and governed by police policies in place at the time of the search.[109] The Court emphasized the fact that such searches needed to be sufficiently regulated in order to limit officer discretion and prevent investigatory searches conducted under the guise of inventory searches.[110]

Expanding upon this holding several years later, the Court held in *Florida v. Wells*[111] that the contents of a locked suitcase located within a car were not the subject of a valid inventory search without a policy in place that governed such a search.[112] The Court noted that the foundation for its decision was to ensure the goals of the inventory exception were met and that such a "search must not be a ruse for general rummaging in order to discover incriminating evidence."[113] Yet the Court also noted that its holding permitted for a certain amount of officer discretion in conducting the search, noting that "[a] police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself."[114] While this discussion is mere dicta in the case, it indicates a significant shift from previous decisions mandating policies that limited the exercise of discretion by individual officers toward a more flexible approach that acknowledges and allows for such discretion.[115]

Much like the confusion and disagreement among lower courts that followed high court decisions addressing whether least intrusive means were required in safeguarding seized items, courts have been at odds since the *Bertine* decision on the permissible scope of an inventory search. Once again, some courts have found that state constitutions provide greater protections to criminal suspects than the U.S. Constitution.[116] In *Autran v.*

---

108 *Id.* at 373-74 (majority opinion).

109 *Id.*

110 *See Bertine*, 479 U.S. at 373-74.

111 495 U.S. 1 (1990).

112 *Id.* at 4.

113 *Id.*

114 *Id.* In his concurrence, Justice William Brennan agreed with the conclusion that police departments may not grant individual officers total discretion to determine the scope of inventory searches, but disagreed with the majority's stance that "a State may adopt an inventory policy that vests individual police officers with *some* discretion to decide whether to open such containers." *Id.* at 7-8 (Brennan, J., concurring).

115 *Id.*

116 *See, e.g.*, Michael E. Keasler, *The Texas Experience: A Case for the Lockstep Approach*, 77 MISS. L.J. 345, 359 (2007).

State,[117] for example, the Texas Court of Criminal Appeals focused on the principle that the scope of an inventory must be limited and officer discretion restrained.[118] Thus, the court reasoned that officers may not open containers in the course of an inventory search and instead asserted that officers must safeguard the containers in some other fashion or obtain a warrant to open them.[119]

Other courts have held that as long as police department policies provide clear guidelines permitting officers to open containers during an inventory search, the search of the closed container is constitutionally valid.[120] These courts once again focus on the limited discretion afforded officers under such policies, finding that the expanded scope of an inventory search does not unconstitutionally infringe a person's reasonable expectation of privacy because individual officers are not making investigatory decisions; rather, they are engaging in an administrative activity to safeguard the suspect's valuables.[121]

As evidenced by the conflicting decisions in these cases, the problems confronted by courts in determining the constitutional validity of a seizure or the proper scope of a search under the inventory doctrine persist despite the numerous decisions that have attempted to rectify those issues. At the heart of these cases is the difficulty in ensuring that an inventory search is not conducted for the purpose of discovering evidence. In attempting to ensure that the police are not engaging in pretextual searches, courts have focused their analysis on limiting officer discretion—a focus that presents its own problems.

C. *Limiting Officer Discretion*

The underlying rationale for the inventory exception—to safeguard items seized—must be protected in order to provide a legitimate basis for continued use of the doctrine. However, courts have found it difficult to determine an officer's purpose for impoundment of a vehicle or the subsequent search of that vehicle.[122] Any examination of intent is fraught with

---

117 887 S.W.2d 31 (Tex. Crim. App. 1994) (en banc).

118 *Id.* at 34.

119 *Id.* at 41-42.

120 *See, e.g.*, Thompson v. State, 966 S.W.2d 901, 905 (Ark. 1998); State v. Hathman, 604 N.E.2d 743, 746 (Ohio 1992).

121 *See Hathman*, 604 N.E.2d at 745.

122 *See* Ed Aro, Note, *The Pretext Problem Revisited: A Doctrinal Exploration of Bad Faith in Search and Seizure Cases*, 70 B.U. L. REV. 111, 111-12 (1990).

> Pretextual police conduct has a long history as a vexing and persistent fourth amendment problem. The Supreme Court's inconsistent and sometimes opaque treatment of the pretext problem, combined with the fourth amendment's general doctrinal complexity and the uncertain role of subjective intent in search and seizure cases, makes the resolution of pretext claims a troubling and frustrating task.

difficulty, particularly when attempting to determine a police officer's intent when conducting a search.[123] Officers are well aware of the basis for exceptions to the warrant requirement and know the purpose required for a search to fall under those exceptions.[124] Further, as with any police intrusion, an officer may have more than one reason for determining that a search and seizure is necessary.[125] Thus, courts have struggled to determine an officer's purpose when he chooses to impound and inventory a vehicle.

Rather than requiring proof of the intent behind the seizure and search, courts focus their analysis on policies in place that limit officer discretion to conduct these searches.[126] Yet this focus fails to adequately address the possibility of pretextual searches.[127] As evidenced by the conflicting authority among lower courts and the different standards applied under the federal and state constitutions, the inventory exception presents significant constitutional dilemmas.[128] The very different rulings by lower courts exemplify a real concern with the inventory doctrine: limiting police discretion. Indeed, the very reason inventory searches are constitutionally permissible, according to the Supreme Court, is that they do not allow police to exercise judgment on whether to conduct such a search.[129] The constitutional validity of the inventory doctrine rests on the fact that it is not an investigatory search

---

Id. at 111.

123 *See, e.g.*, United States v. Beal, 430 F.3d 950, 954 (8th Cir. 2005); United States v. Marshall, 986 F.2d 1171, 1175 (8th Cir. 1993) ("[T]he police may not raise the inventory-search banner in an after-the-fact attempt to justify what was, as in the present case, in fact purely and simply a search for incriminating evidence.").

124 *See, e.g.*, *Marshall*, 986 F.2d at 1175 ("Officer Dwyer later repeated that the search was directed toward finding evidentiary items to be used in a criminal proceeding. Officer Dueker, called as a rebuttal witness, echoed his partner's statements that the purpose of searching the mini-van was to find evidence of criminal activity.").

125 United States v. Judge, 864 F.2d 1144, 1147 n.5 (5th Cir. 1989) (noting that "there are undoubtedly mixed motives in the vast majority of inventory searches, [but that] the constitution does not require and our human limitations do not allow us to peer into a police officer's 'heart of hearts.'").

126 South Dakota v. Opperman, 428 U.S. 364, 375-76 (1976).

127 This is not to say that limiting officer discretion fails to serve any useful purpose. Indeed, restricting officer discretion through department-wide policies can reduce arbitrary and discriminatory searches thereby helping to protect constitutional rights. "[A]n overly broad, unstructured and unchecked discretionary power to search and seize can and too often will be used to discriminate against people in ways that offend important values, some of them constitutionally based, of our society." William J. Mertens, *The Fourth Amendment and the Control of Police Discretion*, 17 J.L. REFORM 551, 564 (1984). However, exclusive focus on limiting discretion through police policies fails to take into account the ease of compliance even when the police officer's purpose is investigatory in nature.

128 Gerald S. Reamey et al., *The Permissible Scope of Texas Automobile Inventory Searches in the Aftermath of* Colorado v. Bertine*: A Talisman Is Created*, 18 TEX. TECH. L. REV. 1165, 1178 n.84 (1987) (citing Backer v. State, 656 S.W.2d 463, 467 (Tex. Crim. App. 1983) (en banc) (Clinton, J., dissenting)).

129 Justice Lewis Powell stated in *Opperman* that the inventory doctrine requires that "no significant discretion is placed in the hands of the individual officer: he usually has no choice as to the subject of the search or its scope." *Opperman*, 428 U.S. at 384 (Powell, J., concurring).

(i.e., hunting for evidence in a criminal case), but rather an administrative procedure conducted to further specific policies designed to protect the suspect, officers, and the public alike.[130] Yet the practicalities of police activity necessitate the exercise of judgment in many circumstances.[131] Eliminating discretion altogether is impractical; however, courts are rightly concerned with the problem of pretextual searches being conducted under the guise of a valid inventory search.[132] As the Supreme Court has repeatedly emphasized, the fundamental purpose in limiting officer discretion in executing an inventory search is to eliminate the likelihood that the search is "a ruse for a general rummaging" to find evidence of a crime.[133]

Based upon this reasoning, the courts until now have seemed to focus almost entirely on police department policies in place at the time of the inventory search to address concerns about pretextual searches.[134] Reasoning that a policy in place mandating the seizure and inventory of specific items under specific circumstances limits officer discretion to engage in investigatory searches, courts have placed significant weight on these guidelines as solutions to the constitutional problems presented by suspicionless searches.[135] Nevertheless, as evidenced by contradictory case law and differences between jurisdictions, not all courts find the existence of police inventory procedures sufficient to prevent the constitutional problems associated with them.[136]

---

130 "The underlying rationale for allowing an inventory exception to the Fourth Amendment warrant rule is that police officers are not vested with discretion to determine the scope of the inventory search. This absence of discretion ensures that inventory searches will not be used as a purposeful and general means of discovering evidence of crime." Colorado v. Bertine, 479 U.S. 367, 376 (1987) (Blackmun, J., concurring).

131 Delaware v. Prouse, 440 U.S. 648, 661 (1979).

132 *Compare id.* ("[S]tandardless 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."), *with* Mertens, *supra* note 127, at 566 ("[I]t must also be recognized that police discretion is, within limits, not only unavoidable but also desirable.").

133 City of Indianapolis v. Edmond, 531 U.S. 32, 45 (2000) (quoting Florida v. Wells, 495 U.S. 1, 4 (1990)).

134 Jennifer A. Russell, United States v. Castro*: The Fifth Circuit Authorizes Administrative Impoundments Regardless of an Officer's Motives as Long as the Impoundment Is Based on Standard Police Procedures*, 33 CREIGHTON L. REV. 843, 880 (2000) ("[T]he Supreme Court and Fifth Circuit have recognized the right to impound vehicles when police officers act in accordance with standard police procedures . . . . The police may impound any vehicle as long as the discretion to impound is exercised according to standardized police procedures.").

135 United States v. Matthews, 591 F.3d 230, 238 (4th Cir. 2009); United States v. Hall, 497 F.3d 846, 852 (8th Cir. 2007); United States v. Tackett, 486 F.3d 230, 232 (6th Cir. 2007).

136 *See* Marks, *supra* note 65, at 13 ("After *Wells*, lower courts and local police departments have been left without adequate guidance to determine what constitutes 'standardized criteria' that sufficiently limit individual police officers' discretion in conducting inventory searches to protect an arrestee's personal effects.").

With as much conflicting precedent on point as this issue has created, it is clear the courts have not yet found a satisfactory solution to the constitutional problems that inventory searches present. While the focus on whether police procedures were in place prior to the inventory search and followed in conducting the search can limit officer discretion to some extent, the exercise of such discretion can never be eliminated from routine police procedure. Further, the focus on standardized procedures is based on the idea that such procedures can be used as a basis for determining whether the inventory was mere pretext for finding evidence of a crime. But as conflicting court decisions indicate, this focus is misplaced.[137] Officer discretion and pretextual searches still exist and courts continue to be vexed by the use of the inventory doctrine.[138] As the Supreme Court has stated when discussing Fourth Amendment exceptions: "[I]t may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."[139]

The focus of the courts should be on determining whether the search itself is investigatory and hence whether the inventory is merely used as a pretext to obtain evidence. By weighing procedure over purpose, the courts fail to address the significant constitutional problems presented by pretextual searches. This failure eats away at the guarantees of the Fourth Amendment and can lead to police abuses that the Framers specifically sought to prevent. Thus, rules are needed that actually give meaning to the intent behind the Fourth Amendment guarantees, rather than focusing on whether procedural requirements are satisfied.[140]

Rather than develop an entirely new rule to apply to inventory situations, courts could look to another system of justice that has developed clear rules to address administrative searches that are improperly conducted for investigatory searches. Under the Manual for Courts-Martial ("MCM"), the U.S. military justice system has created clear rules to limit the discretion

---

137 "Because the Supreme Court failed to rule whether standardized criteria for conducting an inventory search must be memorialized in written policy guidelines, the lower federal courts have produced divergent opinions." *Id.* at 14.

138 Various scholars have attempted to address the problem of pretextual searches in different ways. Indeed, one scholar has argued that all evidence seized in a search conducted for non-investigatory purposes should be inadmissible at trial as part of a "use exclusion" approach. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 436-39 (1974). Other scholars attempted to resolve the problem by arguing that police should be limited in their ability to arrest for minor offenses, thereby reducing the likelihood of pretextual searches. *See* Edwin J. Butterfoss, *Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications in the Supreme Court's Fourth Amendment Pretext Doctrine*, 79 KY. L.J. 1, 51-52 (1990).

139 Boyd v. United States, 116 U.S. 616, 635 (1886) (concerning the search incident to arrest exception to the warrant requirement).

140 Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 692 (2011).

of officers conducting routine inspections.[141] These guidelines set forth rules that could be easily adopted in the civilian justice context for inventory searches and offer a more effective means of limiting individual officer discretion and preventing pretextual searches.

III. EVIDENTIARY RULES GOVERNING MILITARY INSPECTIONS

Military rules of criminal procedure and evidence are not governed by the same statutory law that affects civilian proceedings.[142] While the rules employed in the context of courts-martial may mimic those utilized in civilian proceedings, those rules are derived from an entirely different source.[143] The Constitution grants Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces[.]"[144] Historically, Congress has left the development of procedural rules for military criminal proceedings to the judgment of military commanders.[145] And until the middle of the twentieth century, the branches of the military were governed by the Articles of War and the Articles for the Government of the Navy.[146]

After World War II, however, a movement to establish better procedural rules and rights for servicemembers gained momentum.[147] As a result, the Uniform Code of Military Justice ("UCMJ") was created.[148] The UCMJ has gone through many transformations over the last fifty years, and these changes have resulted in a military system of justice that has taken on more characteristics of civilian criminal justice systems in the United States.[149]

---

141 MIL. R. EVID. 313.

142 Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, *in* EVOLVING MILITARY JUSTICE 3, 3 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002).

143 In *Dynes v. Hoover*, the Supreme Court established the legitimacy of a separate system of justice for the military. 61 U.S. 65, 79 (1857).

144 U.S. CONST. art. I, § 8, cls. 12-14; Nunn, *supra* note 142, at 3 ("The constitutional responsibility for establishing regulations for land and naval forces is vested in Congress.").

145 *See* Fredric I. Lederer & Barbara Hundley Zeliff, *Needed: An Independent Military Judiciary. A Proposal to Amend the Uniform Code of Military Justice*, *in* EVOLVING MILITARY JUSTICE, *supra* note 142, at 27, 30 ("In its most fundamental form, military criminal law stems directly from the unfettered right of the military commander to discipline subordinates for violations of the commander's orders, including orders to comply with expected standards of behavior.").

146 *Id.* at 31.

147 *Id.* at 32 ("Popular disenchantment with military justice during World War II resulted in a substantial reform effort.").

148 *Id.*; *see* Nunn, *supra* note 142, at 5 ("[C]ommanders are authorized to use the criminal law, the Uniform Code of Military Justice, to punish those who disobey any such orders.").

149 *See* Lederer & Zeliff, *supra* note 145, at 32. For example, the UCMJ establishes a three-tier court system, overseen by judges, rather than commanders. There has been much scholarly debate about the need for military courts to mirror the civilian justice system. *See id.* at 30.

However, the military system of justice is still fundamentally different from civilian systems.[150]

A. *Balancing Military Fitness with the Protection of Fundamental Rights*

The rules governing military justice reflect the need to maintain an effective military as weighed against protecting fundamental rights of servicemembers.[151] Congress, in managing this balance, created procedural rules in the UCMJ and MCM that are similar to those utilized in civilian criminal procedure.[152] However, in most cases, the rules in the military justice context reflect a more restrictive view of individual rights in order to ensure the proper functioning of the military.[153] Yet Congress also strives to ensure that the constitutional rights of servicemembers are protected.[154] Indeed, in some circumstances, military rules are better able to protect the rights of servicemembers than criminal procedural rules protect the rights of individuals in civilian systems of justice.[155] This phenomenon is evident in the evidentiary rules established for military inspections in the MCM.[156]

---

150 *See id.* at 34 ("Under the Uniform Code and the Rules for Courts-Martial, convening authorities, who are usually senior commanders, have the sole power to create courts martial; decide whether to send a case to trial, and if so to what type of tribunal; appoint the court members (the jurors); and approve the findings (verdict) and sentence.").

151 In analyzing the UCMJ, the D.C. Circuit has stated: "The need for national defense mandates an armed force whose discipline and readiness is not unnecessarily undermined by the often deliberately cumbersome concepts of civilian jurisprudence. Yet, the dictates of individual liberty clearly require some check on military authority in the conduct of courts-martial." Curry v. Sec'y of Army, 595 F.2d 873, 880 (D.C. Cir. 1979). *See also* Lederer & Zeliff, *supra* note 145, at 30 ("Until fairly recently, courts-martial tended to elevate 'crime control' considerations over due process concerns, the intention being to speed up resolution of charges brought against the accused servicemember.").

152 Congress is vested with the authority to determine what due process rights are afforded to members of the military. Weiss v. United States, 510 U.S. 163, 177 (1994). However, in exercising this authority, "[m]embers of Congress are mindful of the Supreme Court's admonition that Congress is not free to disregard the Constitution when dealing with military affairs." Nunn, *supra* note 142, at 10.

153 *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955) (noting that "military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts").

154 "[W]hen the Senate Armed Services Committee considers a military practice or proposal that would deprive military personnel of the rights enjoyed by their civilian counterparts, the committee carefully assesses the military necessity for any difference in treatment and gives careful consideration to a wide range of views." Nunn, *supra* note 142, at 10.

155 DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 1-1, at 3 (4th ed. 1996) (noting that "the military system has been innovative in many areas of criminal law and in many respects provides greater protection for an accused than does the civilian system"). *See generally* David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990s—A Legal System Looking for Respect*, 133 MIL. L. REV. 1 (1991).

156 *See* MIL. R. EVID. 313.

"A fundamental precept of military leadership is that commanding officers are accountable for the training, readiness, and performance of their units."[157] This premise has formed the foundation for the use of military inspections and, over time, the military has formulated rules to help balance the privacy rights of individual soldiers with the policy considerations of running a prepared and effective military.[158]

Rule 313 of the Military Rules of Evidence governs inspections and inventories in the armed forces.[159] As defined by the rule:

> An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure . . . security, military fitness, or good order and discipline . . . .[160]

The rule further emphasizes that inspections are not permitted for the purpose of finding evidence of criminal activity on the part of the servicemember.[161] Rather, the inspection serves an administrative function much like the "community caretaking" purpose of the inventory rule in the civilian context.[162] In addition, like the inventory rule, the inspection rule is vulnerable to the same concerns over pretextual searches.[163]

It should be noted that servicemembers have a reasonable expectation of privacy in their person and belongings.[164] In fact, the U.S. Court of Ap-

---

157 United States v. Jackson, 48 M.J. 292, 293 (C.A.A.F. 1998)

158 The evidentiary rules governing military justice cases are found in the MCM, promulgated by the executive branch. The rules for courts-martial contained within the Manual stem from the executive's delegation of authority to the armed to develop regulations that implement the rules espoused therein. *See* SCHLUETER, *supra* note 155, § 1-1(B), at 7.

159 MIL. R. EVID. 313.

160 MIL. R. EVID. 313(b). The Army Court of Military Review further explained inspections as:

> [A]n examination or review of the person, property, and equipment of a soldier, the barracks in which he lives, the place where he works, and the material for which he is responsible. An inspection may relate to readiness, security, living conditions, personal appearance, or a combination of these and other categories . . . . Among the attributes of an inspection are: that it is regularly performed; often announced in advance; usually conducted during normal duty hours; personnel of the unit are treated evenhandedly; and there is no underlying law enforcement purpose.

United States v. Hay, 3 M.J. 654, 655-56 (A.C.M.R. 1977).

161 "An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule." MIL. R. EVID. 313(b).

162 "The authority to order an inspection under M.R.E. 313 is directly tied to a commander's inherent authority; it is the connection with command authority, and the commander's responsibility to ensure fitness of a unit, that keeps a valid inspection scheme within constitutional parameters." United States v. Miller, 66 M.J. 306, 308 (C.A.A.F. 2008) (citing United States v. Bickel, 30 M.J. 277, 280, 282 (C.M.A. 1990)).

163 *See, e.g.*, United States v. Jackson, 48 M.J. 292, 297-98 (C.A.A.F. 1998) (Gierke, J., dissenting).

164 *See* United States v. Thatcher, 28 M.J. 20, 22 (C.M.A. 1989).

peals for the Armed Forces has stated: "It is time-honored precedent of this Court that a servicemember possesses a Fourth-Amendment right to protection against unreasonable searches and seizures."[165] However, the privacy rights of servicemembers are far more limited than those belonging to other individuals.[166] Thus, "in some instances, an intrusion that might be unreasonable in a civilian context not only is reasonable but is necessary in a military context."[167] In balancing the interests of military personnel against the need to maintain the order and discipline of the armed forces, the Court of Appeals for the Armed Forces has noted: "If the criticism be voiced that, in effect, we have narrowed the rights of military personnel, the reply is that 'the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.'"[168]

Thus, inspections conducted in order to maintain discipline and order are a routine part of a servicemember's life.[169] These inspections conducted for administrative purposes probably intrude upon the privacy rights of individuals far more than searches conducted in the civilian criminal law context. At the same time, recognizing that there is some expectation of privacy on the part of soldiers, the Military Rules of Evidence seek to limit the circumstances under which items obtained from an inspection can be used.[170]

B. *Inspection Searches in the Military Context*

Because servicemembers do have rights under the Fourth Amendment of the U.S. Constitution, a search conducted that intrudes upon their privacy must be reasonable.[171] Thus, much like in the civilian context, a typical

---

165 *Id.* The U.S. Court of Appeals for the Armed Forces, as it is referred to in this Article, operated under a different name prior to 1994: the U.S. Court of Military Appeals.

166 *See* United States v. Middleton, 10 M.J. 123, 126-27 (C.M.A. 1981).

> It has often been said that the Bill of Rights applies with full force to men and women in the military service unless any given protection is, expressly or by necessary implication, inapplicable. . . . [I]t is foreseeable that reasonable expectations of privacy within the military society will differ from those in the civilian society.

Id. (citing United States v. Ezell, 6 M.J. 307 (C.M.A. 1979)).

167 *Thatcher*, 28 M.J. at 22.

168 *Middleton*, 10 M.J. at 128 (quoting Parker v. Levy, 417 U.S. 733, 744 (1974)).

169 "In considering what expectations of privacy a service member may reasonably entertain concerning military inspections, we must recognize that such inspections are time-honored and go back to the earliest days of the organized militia. They have been experienced by generations of Americans serving in the armed forces." *Id.* at 127.

170 MIL. R. EVID. 313(b).

171 *See* United States v. Burney, 66 M.J. 701, 703 (A.F. Ct. Crim. App. 2008) ("This concept of reasonableness has . . . long been directly associated with a service member's expectation of privacy under the Fourth Amendment.").

search in the military context must be supported by probable cause.[172] Yet not all searches are subject to this requirement.[173] Again, just as in the civilian context, the military rules have carved out specific limited exceptions to probable cause requirements.[174] One such exception is the military inspection.[175]

As expressed by case law and the Military Rules of Evidence, the focus of an inspection is to maintain order and discipline in the military.[176] Because inspections are conducted for administrative purposes and not to use in the prosecution of a crime, probable cause supporting the search is not necessary.[177] Therefore, an inspection that is used for the primary purpose of obtaining evidence for use in courts-martial or other disciplinary proceedings is invalid.[178]

Just as in civilian cases, courts of military justice are concerned with pretextual searches.[179] Indeed, perhaps because of the regularity with which inspections are conducted, military courts regularly confront cases involving allegations that an illegal search for incriminating evidence was conducted by the government under the guise of an inspection.[180] When the inspection is a mere ploy to find evidence for use in a disciplinary proceeding, courts will suppress any evidence found during the course of the inspection.[181] As the Court of Appeals for the Armed Forces has held: "[A]ny 'inspection' which is, in reality, a subterfuge for a traditional search for

---

172 Military Rule of Evidence 315 provides that a search may be conducted "by competent military or civilian authority based upon probable cause." *See* United States v. Ayala, 69 M.J. 63, 66 (C.A.A.F. 2010) (Effron, J., dissenting) (discussing MIL. R. EVID. 315).

173 *See generally* MIL. R. EVID. 314 (describing rules for searches not requiring probable cause).

174 *See* United States v. Morris, 28 M.J. 8, 15-17 (C.M.A. 1989) (Cox, J., concurring in part and dissenting in part).

175 *See Ayala*, 69 M.J.at 67.

176 *See, e.g. Burney*, 66 M.J. at 702 (stating that the purpose of inspections is for "security, military fitness, or good order and discipline" (citing MIL. R. EVID. 313(b))).

177 *See supra* note 174 and accompanying text.

178 *Ayala*, 69 M.J. at 64-65.

179 *See* United States v. Middleton, 10 M.J. 123, 130 (C.M.A. 1981).

> Concern has been expressed that the "commander's authority to inspect to carry out his *military* mission inevitably would lead under existing admissibility standards to use of such inspections solely to conduct law enforcement operations or as a ruse for others within the military justice system to avoid the probable cause requirements of the Fourth Amendment."

Id. (quoting United States v. Thomas, 1 M.J. 397, 405 (C.M.A. 1976) (Fletcher, C.J., concurring in the result)).

180 *See, e.g.*, United States v. Thatcher, 28 M.J. 20, 22 (C.M.A. 1989); United States v. Lange, 35 C.M.R. 458, 459-61 (C.M.A. 1965).

181 "Such evidence is admissible when safeguards are present which assure that the 'inspection' was really intended to determine and assure the readiness of the unit inspected, rather than merely to provide a subterfuge for avoiding limitations that apply to search and seizure in a criminal investigation." *Middleton*, 10 M.J. at 131-32.

evidence of crime will be seen for what it is; and, if conducted without probable cause or in an unreasonable manner, will be condemned."[182] But unlike comparable rules in the civilian context, the military rules of evidence carve out specific guidelines for ensuring that the inspection is not merely pretext to conduct an illegal search.[183]

Rather than focusing on whether a standard is in place governing the use of inspections, courts interpreting Rule 313(b) focus on the purpose behind the search by looking at the facts and circumstances leading up to and involving the specific "inspection" in question.[184] The military courts do not focus heavily on officer discretion, acknowledging that eliminating such discretion in the context of a search is impracticable.[185] Rather, the courts examine the search itself to see whether the primary purpose of the commanding officer was to find evidence to use in a disciplinary proceeding.[186]

In order to provide adequate protections to the individual servicemembers and ensure that Fourth Amendment rights are not abridged, the Military Rules of Evidence place the burden on the government to show that the inspection was not mere subterfuge to conduct an illegal search.[187] Going one step further, the government must make this showing using a clear and convincing standard of proof.[188] Thus, if the defense raises the argument that an inspection was pretextual and conducted to discover evidence for use in disciplinary proceedings, the burden shifts to the government to show by clear and convincing evidence that the inspection was not conducted for the primary purpose of obtaining such evidence.[189]

In using this standard, the courts do not expect commanding officers to abandon their discretion in ordering an inspection.[190] Rather, courts consider the exercise of individual judgment along with all the other facts and cir-

---

182 *Thatcher*, 28 M.J. at 22.

183 MIL. R. EVID. 313(b).

184 *See Thatcher*, 28 M.J. at 25 (finding the government failed to meet its burden of clear and convincing evidence that an inspection was a lawful search and not an investigation for evidence of criminal activity).

185 *See* United States v. Patterson, 39 M.J. 678, 682-83 (N.M.C.M.R. 1993) (citing United States v. Flowers, 26 M.J. 463, 465 (C.M.A. 1988)).

186 *See* United States v. Ayala, 69 M.J. 63, 64-65 (C.A.A.F. 2010).

187 MIL. R. EVID. 313(b); *see* United States v. Jackson, 48 M.J. 292, 297 (C.A.A.F. 1998) (Gierke, J., dissenting).

188 *See* United States v. Konieczka, 31 M.J. 289, 293 (C.M.A. 1990). In *Konieczka*, the trial judge found that the conduct of those conducting the inspection "raised questions whether th[e] inspection was a mere subterfuge for a search" and went on to conclude "that the prosecution did not show by clear and convincing evidence that this government action was a valid inspection." *Id.*

189 *See* United States v. Campbell, 41 M.J. 177, 181 (C.M.A. 1994). In *Campbell*, the appellate court found that the prosecution did not present clear and convincing evidence that a urinalysis was a valid inspection. *Id.* at 182. In so finding, the court focused on the fact that the serviceman was targeted for search because of a suspicion that he had engaged in drug activity. *See id.* at 183.

190 *See, e.g.*, *Patterson*, 39 M.J. at 682-83.

cumstances that surround the inspection.[191] In so doing, the courts avoid heavy reliance on whether a specific policy is in place at the time of the inventory and put the government in the position of showing specific facts supporting the basis for the search.[192]

In determining whether the government has satisfied its burden, among other things, courts look to: (1) the officer who commanded the inspection to determine what his primary purpose was in ordering the search;[193] (2) whether the search was an inventory in name only;[194] (3) whether the inspection was conducted at random or targeted individuals;[195] and (4) whether there was a specific policy in place providing for an inspection under the given circumstances.[196] It is important to note that the last criterion is not all determinative, as it is in the civilian context.[197] Having or lacking a policy that governs the timing and procedures of an inspection can help provide clear and convincing evidence that the search was not pretextual; however, this is only one of many factors that courts may examine.[198]

Perhaps one of the most valuable aspects of this burden-shift that occurs in military proceedings is that defense attorneys get an opportunity to challenge the purpose behind the search. Rather than focusing entirely on the existence of a policy and the compliance with that policy, military defense attorneys have the ability to substantively challenge the purpose of the search and force the government to come up with clear and convincing

---

191 *Jackson*, 48 M.J. at 296 ("Whether the Government can meet the clear-and-convincing standard will depend on the facts and circumstances of the case, including the nature of the contraband.").

192 United States v. Shover, 45 M.J. 119, 122 (C.A.A.F. 1996). In *Shover*, the court reviewed whether a urinalysis screening for drugs was a valid inventory search. *Id.* The court held that "[b]ecause the urinalysis 'was directed immediately following a report' that an unknown person had planted marijuana in Maj Adams' briefcase, the burden was on the prosecution to 'prove by clear and convincing evidence' that the urinalysis was an inspection within the meaning of Mil. R. Evid. 313." *Id*. The court eventually found that the search was valid. *Id.*

193 *Id.* ("In deciding whether a urinalysis is a valid inspection or a subterfuge search, the focus is on the commander who ordered the urinalysis.").

194 *Jackson*, 48 M.J. at 298 (Gierke, J., dissenting).

195 *Patterson*, 39 M.J. at 683*; see also Jackson*, 48 M.J. at 294.

196 *Patterson*, 39 M.J. at 682-83.

197 South Dakota v. Opperman, 428 U.S. 364, 383 (1976) (Powell, J., concurring); *see also supra* notes 53, 57-58 and accompanying text.

198 *Jackson*, 48 M.J. at 294 ("Mil. R. Evid. 313(b) makes clear that it is reasonable for an inspection to include 'an examination to locate and confiscate unlawful weapons and other contraband' and permits such an examination, even if it 'was directed immediately following a report of a specific offense in the unit . . . and was not previously scheduled[.]' In order to meet the primary purpose test in such a case, the Government must 'prove by clear and convincing evidence' that the examination met the criteria for an inspection with regard to its military purpose." (alterations in original) (quoting MIL. R. EVID. 313(b))).

reasons demonstrating the search was administrative and not intended to find evidence to use against a specific servicemember.[199]

This is not to say that there are not problems presented by the rules established for military inspections. Courts have disagreed on the types of evidence that will satisfy the clear and convincing standard.[200] Some courts have granted great weight to the testimony of the commanding officer that a search was done for proper inventory purposes.[201] Dissenting opinions in those cases have noted the heavy burden placed on the government by the clear and convincing test and the need to hold the government to that standard.[202] Yet, while there are conflicting opinions regarding the means that will satisfy Rule 313, the emphasis in its application is placed on the purpose behind a search.[203] By focusing on the intent of the officer conducting the search and forcing the government to come up with convincing evidence supporting the validity of the inspection, the military rule seems designed to more adequately protect the rights of individuals than the rules utilized in the civilian context.

IV. USING THE MILITARY INSPECTION RULE IN THE CIVILIAN INVENTORY CONTEXT

As evidenced by the conflicting court precedent in civilian courts, the inventory doctrine presents significant constitutional challenges that are not easily resolved.[204] In existing jurisprudence, courts have attempted to address these issues by focusing on one factor: limiting the discretion of officers conducting inventory searches.[205] By heavily focusing on strict guidelines governing these types of searches, courts attempt to limit the occurrence of pretextual searches, ensuring that officers only conduct searches under circumstances and using methods mandated in advance by police

---

199 *Id.* at 296.

200 *Compare* United States v. Valenzuela, 24 M.J. 934, 935-36 (A.C.M.R. 1987), *with Jackson*, 48 M.J. at 293-95.

201 *See, e.g.*, *Valenzuela*, 24 M.J. at 935-36. Such heavy reliance on the testimony of a military commander in determining the search can undermine the clear and convincing standard and undermine the intent and efficacy of Rule 313(b). *See infra* note 202 and accompanying text.

202 In *Jackson*, the majority held the trial court's determination that a search was an inspection was not clearly erroneous. 48 M.J. at 293. The trial court's determination rested in large part on the testimony of the officer who ordered the inspection. *Id.* at 295. Noting that a commander's testimony that a search was not pretextual should not be dispositive, the dissent argued that courts "must look at the circumstances, not merely the words used by the commander to describe the examination. While the commander's stated intent is an important factor, it is not a talisman at which legal analysis stops." *Id.* at 298 (Gierke, J., dissenting).

203 MIL. R. EVID. 313(b); *Jackson*, 48 M.J. at 293-94.

204 *See supra* Part 0.

205 United States v. Patterson, 39 M.J. 678, 682 (N.M.C.M.R. 1993); *Valenzuela*, 24 M.J. at 937.

departments.[206] Yet this focus is misplaced. The focus on police department policies as a proxy for legal searches ignores the fact that an inventory could follow department policy to the letter, but still be initiated and conducted for the purpose of discovering evidence related to a crime.

The protections of the Fourth Amendment are fundamental to the proper functioning of our system of justice.[207] The few exceptions carved out to the warrant requirements are limited in nature and applied with caution.[208] Those exceptions should not be given wide berth to overtake the protections of the Amendment itself. Thus, if the basis for the inventory exception is that it is only available as an administrative search and cannot be used as a means to discover evidence of a crime, the current system of adjudging whether the inventory doctrine has been properly invoked is simply inadequate.

It is uncommon for civilian courts to look to the military system of courts-martial for rules protecting constitutional guarantees.[209] Indeed, the foundation for the rules contained in the Military Rules of Evidence is based upon those rules found in the Federal Rules of Evidence.[210] Further, the military system of justice often relies upon civilian case law to analyze the constitutionality of the government's actions.[211] However, in the context of suspicionless inspection searches, the Military Rules of Evidence and precedent have provided a clearer and more effective means of protecting individual privacy rights than civilian courts and legislatures.[212] Thus, by adopting some of the procedures used in Rule 313, civilian courts would ensure a more effective means of embodying the spirit of the inventory rule.

Rule 313 allows for inspections under most circumstances, but it provides additional protections to the individual being searched if there is evidence presented that she was the target of a search or that the search was

---

206 South Dakota v. Opperman, 428 U.S. 364, 383 (1976) (Powell, J., concurring); *supra* notes 57-58.

207 United States v. Williams, 354 F.3d 497, 508-09 (6th Cir. 2003) ("Every citizen has a fundamental right to the protections guaranteed by the Fourth Amendment.").

208 *See supra* note 3.

209 *See generally* Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 5-6 (1985) ("Historically, the relationship between the civilian courts and the military justice system has been marked with mistrust, misunderstanding, and even antipathy.").

210 Elizabeth Cameron Hernandez & Jason M. Ferguson, *The Brady Bunch: An Examination of Disclosure Obligations in the Civilian Federal and Military Justice Systems*, 67 A.F. L. REV. 187, 226 (2011) (noting "that the Military Rules of Evidence originate from and frequently emulate the Federal Rules of Evidence used in the civilian criminal justice system.").

211 When the Supreme Court addresses military cases involving interpretation of constitutional provisions, it emphasizes the distinctions between the sources of civilian and military procedural rights and gives great deference to Congress in determining what regulations are necessary to govern the military. *See* Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981) (noting that the Court grants more deference to congressional decisions regarding military affairs than in almost any other context).

212 *See supra* Part 0.

investigatory in nature.[213] Once a showing has been made that the inspection was targeting a specific individual or seeking items typically sought in a search for evidence to use in a courts-martial or other disciplinary proceeding, the burden of proof regarding the validity of the inspection shifts to the government.[214] At that point, the government has the burden of showing that the inspection was not done as mere subterfuge to conduct an illegal search to find evidence.[215] Further, the government must make this showing by clear and convincing evidence.[216] In the process of demonstrating that the inspection is a legitimate exercise of constitutional authority, the government will put witnesses on the stand to testify about the reasons for the search and the circumstances surrounding the search.[217] It is at this point that the defense may cross examine and call into question the testimony supporting the suspicionless search, giving the defendant a meaningful opportunity to challenge the constitutionality of the search.[218]

A similar procedure should be adopted in the civilian criminal justice context. Once a defendant has introduced some evidence that a search was pretextual in nature, additional protections should be implicated that further protect his constitutional rights. For example, an individual can make an initial showing that would invoke the additional protections of this new rule if he can show that his car was impounded when other cars under similar circumstances are not typically seized, can demonstrate that he was the target of a police investigation for other crimes, or can point to any other facts that would indicate that the search conducted was investigatory and not administrative in nature. At this point, the burden would shift to the state to prove by clear and convincing evidence that the search was not investigatory in nature, but rather was conducted as a pure administrative function to safeguard items contained in the vehicle. In meeting this burden, the state could introduce policies in place governing the execution of inventories, but this evidence would not be the sole focus of the inquiry. Other evidence would include the testimony of officers conducting the inventory, facts and circumstances surrounding the particular inventory, and information regarding the procedures police have used in similar circumstances. Just as in the military context, at this point defense attorneys would have the opportunity to question the state's evidence and cross-examine witnesses, thereby effectively challenging the constitutionality of the search. This method, while more cumbersome than the procedural rules utilized in the civilian system,

---

213 MIL. R. EVID. 313(b).

214 *Id.*; United States v. Jackson, 48 M.J. 292, 297 (C.A.A.F. 1998) (Gierke, J., dissenting).

215 *See Jackson*, 48 M.J. at 296; *see also* United States v. Shover, 45 M.J. 119, 122 (C.A.A.F. 1996).

216 *See Jackson*, 48 M.J. at 296; *see also Shover*, 45 M.J. at 122.

217 *Jackson*, 48 M.J. at 295; *Shover*, 45 M.J. at 122; United States v. Campbell, 41 M.J. 177, 182 (C.M.A. 1994).

218 *E.g.*, United States v. Thatcher, 28 M.J. 20, 25 (C.M.A. 1989).

ensures that courts do not give more weight to the efficiency of criminal prosecution than they do to the fundamental protections of the Fourth Amendment.

The civilian criminal justice system's adoption of the principles underlying this military rule of evidence does not come without some challenges. First, judges will need to be prepared to hold the state to its burden and insist that clear and convincing evidence supports claims of a valid inventory. As seen in the military context, judges can often unintentionally ease the burden on the government by requiring very little testimony to support the assertion that an inventory was not subterfuge.[219] For this rule to work in the civilian system, judges need to ensure that the mere label "inventory" is not enough to prove by clear and convincing evidence that a search is not investigatory in nature. Second, the adoption of this rule will result in further evidentiary hearings in trial courts regarding the validity of inventory searches. For courts that are typically already overwhelmed with cases, additional hearings can further impede the ability to function effectively. Yet constitutional rights cannot be ignored merely because they are cumbersome or difficult to enforce.[220] While this proposal might impede police investigations and create more hurdles for prosecutors attempting to introduce evidence in criminal proceedings, such challenges must be balanced against the need to ensure that an individual's reasonable expectation of privacy is protected.[221]

The constitutional protections of the Fourth Amendment should be zealously guarded by rules of criminal procedure. Where exceptions to the search and seizure requirements of the Amendment exist, they must be limited in nature and applied with great care. Yet in the most extreme case of an inventory, where police are permitted to examine all of a suspect's belongings without the slightest suspicion, the courts have granted great leeway to police departments to allow for such searches.[222] Current practice of focusing on officer discretion in conducting these searches is neither practicable nor effective; thus, we need another means of ensuring that constitutional safeguards are satisfied.

The Military Rules of Evidence provide just such a method. By shifting the burden to the state to prove the legitimacy of a suspicionless search, ensuring that such proof is adequate by requiring a clear and convincing standard of proof, and providing a meaningful opportunity for defendants to

---

219 *See Jackson*, 48 M.J. at 295-96.

220 United States v. McGee, 798 F. Supp. 53, 58 (D. Mass. 1992) ("Conservation of government resources is an important concern but not one that outweighs the constitutional rights of a criminal defendant.").

221 *See* Aro, *supra* note 122, at 123-24 (noting that "[i]nevitably, the [F]ourth [A]mendment sometimes interferes with well-intentioned police efforts").

222 South Dakota v. Opperman, 428 U.S. 364, 383 (1976) (Powell, J., concurring); *supra* notes 57-58.

challenge the legitimacy of the search, this new rule would more effectively safeguard Fourth Amendment protections and ensure that the inventory doctrine is not utilized to conduct illegal searches.

CONCLUSION

The constitutionality of police inventory searches has been consistently challenged in courts.[223] A search that requires no level of suspicion leaves great room for pretextual and illegal searches. Courts have had to weigh the clear need for police to inventory items seized in the course of an arrest against the need to safeguard rights granted by the Fourth Amendment.[224] However, in the four decades since the Supreme Court first addressed the inventory doctrine, courts have still not found an effective way of balancing the needs of police departments with the privacy rights of individuals.[225] Indeed, the Supreme Court itself has altered its course several times in determining what constitutes a legitimate inventory search.[226]

Despite the constitutional challenges the inventory doctrine presents, the use of the exception is expanding rapidly. Since the *Arizona v. Gant* decision, which significantly restricted the ability of police to conduct searches incident to arrest, courts have permitted the state to avoid the constitutional limitations set forth in the decision by invoking the inventory doctrine.[227] This expansion of the use of inventory searches is particularly troubling given the lack of consistency in the precedent controlling the appropriate use and scope of the rule governing such searches.

Currently, a majority of courts focus on the policies adopted by police departments in determining the legality of any given inventory search.[228] Yet this focus does not adequately address the underlying rationale of an inventory search—allowing for administrative searches but prohibiting searches that are conducted for investigatory purposes. By focusing on police department policies as a means of limiting officer discretion, courts have not sufficiently addressed the reasoning behind the inventory rule. In so doing, they have failed to protect the Fourth Amendment rights of criminal suspects.

A far more effective way of safeguarding those constitutional protections exists in the military justice system. Inspections, an administrative search with a policy rationale similar to that of the inventory, are suspicion-

---

223 *See supra* Part I.

224 *See supra* Part II.

225 *See supra* Part II.

226 *See supra* Part I.

227 Arizona v. Gant, 556 U.S. 332, 342-43 (2009); Totten, *supra* note 10, at 1300-01, 1306.

228 *See, e.g.*, *supra* note 58.

less searches used in the military context.[229] Much like inventories, inspections are not conducted to find evidence to prosecute an individual, but for administrative purposes to ensure the fitness, effectiveness, and readiness of the military.[230] Rather than focusing solely on the policies in place authorizing the government to conduct these searches, the Military Rules of Evidence provide specific procedures that ensure the inspections are not used as pretext to conduct an illegal search.[231] By placing the burden on the government to show that an inspection was conducted for legitimate purposes, and holding it to a clear and convincing standard of proof, the military has devised a method of safeguarding Fourth Amendment protections for its servicemembers in courts-martial proceedings. This rule provides opportunities for a far more meaningful challenge to a pretextual search, and gives the defendant the ability to go behind policies in place to examine the motivation behind a search.

Adapting this rule for use in determining the legality of inventory searches in the civilian justice system would ensure that constitutional protections are preserved and that suspicionless administrative searches are not used to circumvent those protections. By examining the purpose behind an inventory search and allowing defendants to meaningfully challenge such searches, this rule would provide a better means of guaranteeing the constitutional rights espoused by the Fourth Amendment.

---

229 United States v. Campbell, 41 M.J. 177, 183 (C.M.A. 1994); United States v. Patterson, 39 M.J. 678, 682 (N.M.C.M.R. 1993); United States v. Thatcher, 28 M.J. 20, 25-26 (C.M.A. 1989).

230 MIL. R. EVID. 313(b); United States v. Jackson, 48 M.J. 292, 293-94 (C.A.A.F. 1998); United States v. Valenzuela, 24 M.J. 934, 937 (A.C.M.R. 1987).

231 MIL. R. EVID. 313.