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Illinois v. Lafayette: Has the Fourth Amendment Vanished in the Face of Administrative Expediency?

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Illinois v. Lafayette: Has the Fourth Amendment Vanished in the Face of Administrative Expediency?

INTRODUCTION

A fundamental purpose of the fourth amendment is to safeguard the individual from unreasonable governmental invasions of legitimate privacy expectations. Consequently, the general rule is that warrantless searches are unreasonable per se. One of the “few and carefully drawn exceptions” to the general rule has been the inventory search. This exception to the warrant requirement was established in the landmark case of South Dakota v. Opperman. Opperman, however, left open the important question whether it is “reasonable” to open a closed container during the course of an inventory search. This question was answered affirmatively by the Supreme Court in Illinois v. Lafayette. Unfortunately, in deciding this issue, the Court has raised a more critical question: Will all government intrusions made under the aegis of standard inventory procedures automatically outweigh an individual’s expectation of privacy?

This Note will examine the Court’s decision in Illinois v. Lafayette to determine whether the Court has expanded the scope of its holding in South Dakota v. Opperman to a degree not contemplated by the Opperman majority. First, a brief discussion of the

1. U.S. CONST. amend. IV. The full text of the Fourth Amendment reads as follows:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
4. An inventory search is a noninvestigatory search for the purpose of protecting the individual's possessions while he is in jail. See infra notes 64-67 and accompanying text. For an in depth discussion of inventory searches, see generally Comment, The Inventory Search of An Offender Arrested for a Minor Traffic Violation: Its Scope and Constitutional Requirements, 53 B.U.L. REV. 858 (1973) [hereinafter cited as Comment, The Inventory Search]; Stroud, The Inventory Search and the Fourth Amendment, 4 Ind. L.F. 471 (1971).
7. Id.

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Opperman decision will provide a background on the establishment of the inventory search exception. This will be followed by a review of a number of federal court decisions made prior to Lafayette. Then the precedents relied upon by the Court in Lafayette will be discussed to determine whether their factual dissimilarities make questionable the underpinnings of the Court's decision. Additionally, there will be a review of some state court decisions which are in conflict with the holding in Lafayette. Finally, this Note will conclude with some suggested alternatives to the inventory procedures sanctioned by the Lafayette Court.

I. BACKGROUND

A. The Inventory Search Exception to the Warrant Requirement

The landmark case of South Dakota v. Opperman9 established the inventory search exception to the warrant requirement.10 In Opperman, the defendant's car had been impounded for multiple parking violations. Following standard procedures, the police inventoried the contents of the car, including the contents of the unlocked glove compartment. The Supreme Court upheld the search.11 The Opperman Court prefaced its discussion by noting the "traditional... distinctions between automobiles and homes or offices in relation to the fourth amendment."12 The Court then stated three distinct objectives underlying the inventory procedure: first, the protection of the owner's property while it remains in police custody; second, the protection of the police against claims or disputes over lost or stolen property; and third, the protection of police from potential danger.13 While the Opperman Court upheld the inventory search of the glove compartment as reasonable, it did not authorize the inspection of any closed container which might be found in the car during the course of a search.14

9. Id.
11. Id. The Court concluded: that in following standard police procedures, prevailing throughout the country and approved by the overwhelming majority of courts, the conduct of the police was not "unreasonable" under the Fourth Amendment.
12. Opperman, 428 U.S. 364, at 367-68. The Opperman court noted: "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects...." Id. at 368. The Court pointed out that automobiles, unlike homes, are subjected to pervasive, continuing governmental regulation and control and the public nature of the automobile as reasons for this diminished expectation of privacy. Id. at 368. In a footnote, Justice Powell pointed out that the "difference turns primarily on the mobility of the automobile and the impracticability of obtaining a warrant in many circumstances. 428 U.S. 364, 382 n.9 (1976) (citations omitted).
14. Id. at 380 n.7.

Mr. Justice Powell observes... that the police would not be justified in sift-
A bare majority found this caretaking measure to be constitutionally reasonable. However, Justice Powell who provided the fifth and deciding vote, noted in his concurring opinion that the Opperman rule “provided no general license for the police to examine all the contents of such automobiles.”

In a dissenting opinion joined by Justices Brennan and Stewart, Justice Marshall found that the majority failed to reconcile “the owner’s constitutionally protected privacy interest against governmental interests furthered by securing the car and its contents.” Notwithstanding the dissenters’ dissatisfaction with the balancing of the interests, there were numerous factual exigencies which allowed the majority to justify the inventory of the contents of the automobile.

B. Federal Court Decisions Prior to Lafayette

Because the decision in South Dakota v. Opperman did not clearly define the limits of an inventory search, a number of federal courts of appeal relied on the holdings in United States v. Chadwick and Arkansas v. Sanders to determine the permissible scope of such searches.

In Chadwick, federal agents in Boston acting on a tip, arrested the respondents who were suspected of drug trafficking. A double-

Id. at 388 n.6 (Marshall, J., dissenting).
15. Id. at 380 (Powell, J., concurring).
16. Id. at 384 (Marshall, J., dissenting). Justice Marshall criticized the three objectives of the search enumerated by the majority as being insufficient, either individually or collectively. He found two of the three objectives to be irrelevant to the facts of the case, observing that the record of the case indicated that the police were "gratuitous depositors" and were explicitly absolved from any obligation to inventory objects other than those in plain view and to simply lock the car. He found unpersuasive the safety argument for inventorying the car, since the "undifferentiated possibility of harm" was not a sufficient basis for its inventory. Id. at 389-91. Justice Powell observed that the efficacy of inventory searches as a means of discouraging false claims was not clear since a claim could still be made that an item was intentionally omitted from the police records. Id. at 378-79 (Powell, J., concurring).
17. In Opperman the automobile had been legally impounded, the impound lot was not secure, the visible valuables on the dashboard of the automobile prompted the inventory for safekeeping rather than investigatory purposes, and the owner was not available to make other arrangements. See generally Opperman, 428 U.S. 364. Of note is that the Court in Illinois v. Lafayette referred to the car in Opperman as "an abandoned automobile" although it appears that the car was impounded on the same day that it had been cited for the parking violation. Illinois v. Lafayette, 103 S. Ct. 2605, 2610. This may be indicative of the Lafayette Court’s need to justify its expansion of Opperman, since abandonment would connote a voluntary relinquishment of both the property and any expectation of privacy in the contents of the car.

locked footlocker had been placed in the trunk of a car, but before the trunk was closed or the engine started the respondents were arrested. The footlocker was seized and taken to the federal building where it remained under the exclusive control of the agents. More than an hour after the agents had taken control of the trunk, it was searched without a warrant or the consent of the respondent. The Court found that a person has a reasonable expectation of privacy in personal luggage and refused to accept the government's argument that the search was "incident to arrest" or justified by any other exigency. 21

Similarly, in Arkansas v. Sanders, 22 police acting on a tip, removed the respondent's suitcase from the trunk of a taxi and opened it without a warrant or consent. 23 The warrantless search was held to be violative of the fourth amendment. 24 In a concurring opinion, Chief Justice Burger stated: "The essence of our holding in Chadwick is that there is a legitimate expectation of privacy in the contents of a trunk or suitcase accompanying or being carried by a person; that expectation of privacy is not diminished simply because the owner's arrest occurs in a public place." 25 The expectation of privacy established by these two cases was balanced against the government interest furthered by the intrusion of the particular search involved by a number of federal courts of appeal.

In one such case, United States v. Schleis, 26 the police had forced open the defendant's briefcase at the police station. "The briefcase

21. Chadwick, 433 U.S. 1, 13-15. The Chadwick Court also stated in footnote: Unlike the searches of the person, United States v. Robinson, . . . United States v. Edwards, . . . searches of the possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest. Respondents' privacy interest in the contents of the footlocker was not eliminated simply because they were under arrest. Id. at 16 n.10 (citations omitted). It appears that this language does not apply to the facts of Illinois v. Lafayette although it is hard to see why an arrestee at a police station should have less of an expectation of privacy in his personal effects. The only explanation is that the fourth amendment does not apply when an administrative search of a noninvestigatory nature is involved.

22. Sanders, 442 U.S. at 755. In Sanders, police acting on a tip, observed the respondent arrive at an airport and retrieve a suitcase, suspected of containing drugs. The respondent's companion placed the unlocked suitcase in the trunk of a taxi and they departed. The police followed briefly, and then stopped the taxi. They asked the taxi driver to open the trunk and then, without asking the respondent or his companion for permission, opened the unlocked suitcase. Pointing to the similarity of the facts to those in Chadwick, the Court held: "[t]hat the warrant requirement of the fourth amendment applies to personal luggage taken from an automobile to the same degree it applies to luggage in other locations." Id. at 766. The question arises: Why doesn't the warrant requirement apply to luggage or personal effects in the possession of an arrestee?

24. Id. at 766.
25. Id. at 767 (Burger, C.J., concurring).
was locked by a combination lock. No warrant was sought or obtained authorizing the search of the briefcase, nor was Schleis's permission asked. An evidence locker was available at the station house but was not used for the briefcase.\(^{27}\) Relying on *Chadwick*, the court refused to "extend" the *Opperman* rationale beyond the scope intended by the Court decision.\(^ {28}\) The Eighth Circuit went on to state: "Moreover, the valid governmental interest served by an inventory search could have been satisfied here by inventorizing the locked briefcase as a unit."\(^ {29}\) The court apparently reasoned that this would protect the individual's expectation of privacy while simultaneously effectuating the legitimate governmental interest involved.

Additionally, in *United States v. Bloomfield*,\(^ {30}\) the Eighth Circuit found that the governmental interest in opening an item which can easily be inventoried as a unit, is "slight" in comparison with the individual's right of privacy.\(^ {31}\) In *Bloomfield*, the defendant's knapsack was taken from his car during the course of an inventory search. Though confining its holding to the facts, and even though the inventory of the car was valid, the court stated that the knapsack should have been inventoried as a unit rather than opened and itemized.\(^ {32}\)

The Court of Appeals for the District of Columbia refused to uphold the search of a defendant's belongings in *United States v. Lyons*.\(^ {33}\) When the defendant was arrested in his hotel room, the police impounded his belongings, including a coat hanging in the closet. Refusing to sustain the search of the defendant's coat as either incident to arrest or as an inventory search, the court said of the "inventory search":

Though the Supreme Court has not specifically so held, it seems indisputable that such a serious invasion of a citizen's expectation of privacy must be governed by the strictures of the fourth amendment; the fact that the intrusion was not motivated by a desire to unearth evidence of criminality does not render the

\(^{27}\) *Id.* at 1169.

\(^{28}\) *Id.* at 1173.

\(^{29}\) *Id.*

\(^{30}\) United States v. Bloomfield, 594 F.2d 1200 (8th Cir. 1979).

\(^{31}\) *Id.* at 1203.

\(^{32}\) *Id.* The *Bloomfield* court found that the first two commonly avowed purposes of an inventory search "protection of the owner's property while it remains in police custody . . . [and] the protection of the police against claims or disputes over lost or stolen property" were better served if the knapsack was inventoried as a unit. It also found that any threat of danger could be easily detected by the use of a device such as dogs trained to locate explosives. *Id.* at 1202-03.

Constitution inapplicable.34

A similar concern with the individual’s expectation of privacy was addressed by the Ninth Circuit. In United States v. Monclavo-Cruz,35 the defendant’s purse was searched at the police station an hour after her arrest. Relying on Chadwick to clarify the reach of the Opperman exception, the court stated: “The search of Monclavo-Cruz’s purse at the station house an hour after her arrest does not qualify as an inventory search. We have already held that Monclavo-Cruz’s expectation of privacy in her purse is one that society recognizes as reasonable.”36 The court held “that the community caretaking functions of the police are usually well served by simply inventorying personal baggage as a unit without searching it.”37

The Sixth Circuit Court of Appeals also looked to the Chadwick Rule and balanced the individual’s right to privacy against the government’s need to intrude. In United States v. Calandrella38 the defendant’s briefcase was taken from him during his arrest. Though refusing to apply Chadwick retroactively, the court stated: “Chadwick established a limit on the validity of warrantless searches of property of an arrested person.”39 Even when dealing with property seized incident to an arrest, the legitimate expectations of an individual need not be sacrificed to further government interests. As pointed out by the court: “[t]he interests sought to be protected by permitting warrantless searches incident to arrest were fully vindicated by the seizure of the briefcase at the time of the arrest.40

These courts attempted to balance the competing interests involved in each case. The Court in Illinois v. Lafayette41 acknowledged that in order to determine the reasonableness of a search, the promotion of legitimate governmental interests must be balanced against the intrusion upon the individual’s fourth amendment rights.42 Whether the Lafayette Court did so is questionable.

II. ILLINOIS V. LAFAYETTE

A. The Facts

Following an argument with a movie theater manager, the defendant was arrested for disturbing the peace and taken to the po-

34. Id. at 331 (footnote omitted) (quoting South Dakota v. Opperman, 428 U.S. 364 (1976)).
35. 662 F.2d 1285, 1289 (1981).
36. Id. at 1289 (citations omitted).
37. Id.
39. Id. at 248.
40. Id. at 249.
41. 103 S. Ct. 2605 (1983).
42. Id. at 2608.
lice station. An inventory search was conducted at the police station, during the post-arrest booking procedure. The defendant's shoulder bag was opened by an officer and the contents were removed. Among the contents of his shoulder bag, was a cigarette package which contained amphetamines. Consequently, the defendant was charged with violating the Illinois Controlled Substance Act.

Upon motion, the trial court suppressed the evidence obtained during the warrantless search of the defendant's bag. An unanimous appellate court affirmed the granting of the motion to suppress, holding that the inventory of the defendant's belongings violated the fourth amendment. When the Illinois Supreme Court denied discretionary review the United States Supreme Court granted certiorari. Relying primarily on South Dakota v. Opperman and Cady v. Dumbrowski, the Court held "[t]hat it is not unreasonable for police, as part of a routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures." It is the reliance upon these precedents which makes the rationale of the Court in Lafayette questionable.

B. Analysis of the Holding

The Court relied on South Dakota v. Opperman and Cady v. Dumbrowski. In Cady, the search involved was not an inventory search pursuant to standard procedures. Rather, it was a warrantless "caretaking search" for the purpose of locating a revolver, believed by police to be in the trunk of a car, which had not been
lawfully impounded. In *Cady*, which was also a five to four decision, the Court concluded that the protection of the public outweighed the intrusion upon the defendant’s privacy resulting from the warrantless search of his automobile.\(^{57}\)

In both *Cady*, where the defendant was in a coma\(^ {58}\) at the time of the search, and *Opperman*, where the defendant was also unavailable,\(^ {59}\) the Court evaluated the reasonableness of the searches upon the facts and circumstances of the individual cases.\(^ {60}\) However, unlike the facts in *Lafayette*, both of these cases involved the search of automobiles, and automobiles have traditionally been exempted from the warrant requirement.\(^ {61}\) The *Lafayette* Court’s expansion of *Opperman* to a post-arrest search of a person’s effects, has reduced the expectation of privacy in those personal effects, to the lesser level of privacy that is afforded an automobile which has been lawfully impounded.

The *Lafayette* Court also discussed *United States v. Robinson*\(^ {62}\) and *United States v. Edwards*,\(^ {63}\) although neither of these cases involved inventory searches. An inventory search of an arrestee’s belongings prior to his incarceration is generally referred to as a booking search.\(^ {64}\) The searches in *Robinson* and *Edwards* were

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56. In *Cady*, the respondent was involved in a one car collision and arrested for drunken driving. At the direction of the police his car was towed from the scene of the accident. The police did not have actual custody of the car. The respondent, an off-duty policeman was believed to have been carrying a revolver. It was not found on his person or uncovered during the initial search of his car at the scene of the accident. In a five to four decision, the Court upheld the action of the police in returning to the car at the private garage and searching it without a warrant. The Court reasoned that the protection of the public from the possibility that the suspected gun would fall into the hands of vandals, made the search reasonable within the meaning of the fourth amendment. *Id.* at 444-48. The dissent discussed all of the exceptions to the warrant requirement and found no valid exception existed to justify the search of the car an hour after it was taken to the private garage. *Id.* at 450-54. The application of *Cady* by the *Lafayette* court seems misplaced, since the imminent danger of a suspected revolver is far from comparable to the search of a bag not believed to contain anything dangerous.

57. *Cady*, 413 U.S. at 448.
58. *Id.* at 436.
60. In *Cooper v. California*, 386 U.S. 58 (1967), the Court stated: “we made it clear in *Preston* that whether a search and seizure is unreasonable within the meaning of the fourth amendment depends upon the facts and circumstances of each case.” *Id.* at 59.
61. *See supra* note 12 and accompanying text.
64. 2 W. LAFAVE, SEARCH & SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 5.3, at 306 (1978) [hereinafter cited as LAFAVE]. Professor LaFave suggests that the “Robinson-Edwards Rule” would allow a court to justify a preincarceration inventory search upon the additional ground that it is a search incident to arrest. *Id.* at 309. LaFave’s contention is unlikely in the instant case because the search incident to arrest is not a benign, noninvestigatory search but a search for weapons or evidence of a crime. The Illinois Appellate Court, in *People v. Lafayette*, ruled that the search would
searches incident to arrest. The Lafayette Court acknowledged that the factors justifying a search incident to arrest are different from those justifying a search at the police station prior to the incarceration of an arrestee.\textsuperscript{65} While a search incident to an arrest is primarily for the safety of the arresting officer, as well as to prevent the destruction of evidence,\textsuperscript{66} the objectives of an inventory search prior to incarceration are: first, to protect the arrestee's property while he is in jail; second, to protect the police from false claims; and third, to prevent the introduction of contraband and weapons into the jail facility.\textsuperscript{67} The facts of both precedents are inapposite to the facts of Lafayette.

In \textit{United States v. Robinson},\textsuperscript{68} the defendant was validly arrested for driving while his license was revoked. A search incident to the arrest revealed a crumpled cigarette package in the pocket of the defendant's coat which contained drugs. The Court held that the warrantless search incident to arrest was reasonable, and thus required no additional justification under the fourth amendment.\textsuperscript{69} 

not have been valid incident to arrest, despite the state's failure to preserve that argument for appeal. The court stated: "Accordingly, because the shoulder bag was in the officer's exclusive possession and because no exigent circumstances existed, . . . the search was not incident to the defendant's arrest." \textit{Lafayette}, 99 Ill. App. 3d 830, 834, 425 N.E.2d 1383, 1386 (Ct. App. 1981). In his concurrence in \textit{Illinois v. Lafayette}, Justice Marshall, indicated that the search would not have been valid under the "incident to arrest" exception to the warrant requirement: "A very different case would be presented if the State had relied solely on the fact of arrest to justify the search of respondent's shoulder bag. A warrantless search incident to arrest must be justified by a need to remove weapons or prevent the destruction of evidence." \textit{Lafayette}, 103 S. Ct. 2605, 2611 (1983) (Marshall, J., concurring). 

\textsuperscript{65} \textit{Lafayette}, 103 S. Ct. at 2609.


The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. \textit{Id.} at 225 (quoting Agnello v. United States, 269 U.S. 20 (1925)).

\textsuperscript{67} \textit{LaFAVE}, supra note 64; Comment, \textit{The Inventory Search}, supra note 4. While this is a primary concern underlying a preincarceration search, it can be accomplished less intrusively. In \textit{Commonwealth v. Wilson}, 389 Mass. 115, 448 N.E.2d 1130 (1983), the Supreme Judicial Court of Massachusetts upheld the search of an arrestee's wallet prior to his incarceration. This was because a statute required that a record of all money or other property found in the possession of prisoners be kept. 448 N.E. 2d at 1132. But the court noted "another justification for preincarceration searches is to keep weapons and contraband from the prison population. This objective, however, does not justify the inspection of contents of a wallet if the custodian is going to retain it." This reasoning occurred to the Illinois Appellate Court in \textit{People v. Lafayette}. In its opinion, it pointed out that the officer "admitted the defendant's shoulder bag was small enough to be placed and sealed in a larger bag or box for protective purposes." \textit{Lafayette}, 99 Ill. App. 3d at 835, 425 N.E.2d at 1384.

\textsuperscript{68} 414 U.S. 218 (1973).

\textsuperscript{69} The \textit{Robinson} Court stated:

It is the fact of the lawful arrest which established the authority to search, and
In United States v. Edwards, the defendant was arrested at eleven o'clock in the evening for an attempted break in. He was subsequently incarcerated overnight. Paint chips discovered near a window which had been pried open prompted police to examine the defendant's clothes for similar paint chips. The following morning his clothes were taken from him in order to be examined. The clothing contained paint chips which were used to incriminate him. In a five to four decision the Court upheld the warrantless seizure of the respondent's clothes even though a substantial period of time had elapsed since the defendant's arrest and the completion of the administrative booking procedures. It seems interesting that in Robinson, Justice Marshall's dissenting opinion, which was joined by Justices Douglas and Brennan, rejected the alternative theory of sustaining the search of the cigarette package taken from the defendant's shirt as a booking search. In a footnote Justice Marshall stated:

\[\text{[t]}\text{he justification for stationhouse searches is not the booking process itself, but rather the fact that the suspect will be placed in jail...[E]ven had it become necessary to place respondent in confinement, it is still doubtful whether one could justify opening up the cigarette package and examining its contents.}\]

Justice Marshall resolved any doubt as to the justification of opening a container prior to placing an arrestee in jail in Illinois v. Lafayette. The reason why Justices Marshall and Brennan have appeared to change their position, might be discovered in their concurring opinion in which they indicate that the search of Lafayette's shoulder bag would not have been sustainable as incident to his arrest.

The Court's discussion of the Robinson-Edwards line of cases, which has eviscerated the privacy expectation of one's person due to his arrest status, indicates the Lafayette Court's intention to, in a similar fashion, eliminate any expectation of privacy in an arrestee's possessions if he is to be incarcerated. Further indication of this intent is illustrated by the Court's rejection of the relevancy of United States v. Chadwick and Arkansas v. Sanders, which were

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we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but it is also a "reasonable" search under the Amendment.

Id. at 235.

71. Id. at 808.
72. Robinson, 414 U.S. at 258 n.7 (Marshall, J., dissenting) (quoting United States v. Mills, 472 F.2d 1231 (1972)).
74. Id. at 2611 (Marshall, J., concurring).
75. See supra note 69 and accompanying text.
relied upon by the Illinois Appellate Court in reaching its decision.\(^7\)

The Court's dictum that the warrant requirement should not apply in an inventory search context\(^7\) should not be the basis for condoning a search which is overly intrusive. As indicated by the court in \textit{United States v. Calandrella}, interests sought to be protected in a pre-incarceration situation can similarly be vindicated as soon as the arrestee relinquishes his property to the police at the station house. Once the property is in custody, the primary concern of preventing the introduction of weapons and contraband into jail facility is effectuated. It is anomalous to require a warrant to search a personal effect believed to contain contraband, but not require a warrant to search a personal effect when there is not belief that it contains contraband.

This contradiction is apparent when considering the absence of exigencies surrounding the administrative search of an arrestee's personal effects at a police station. The \textit{Lafayette} Court's observation that "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"\(^8\), is more applicable to an arrest situation where an officer must make ad hoc judgments than it is to an administrative search which is usually conducted according to set procedures.

The effect of the decision in \textit{Illinois v. Lafayette}\(^8\) upon those Federal Courts of Appeal which have previously attempted to balance the competing interests involved in an inventory search, will be to eliminate their discretion to protect the individual's privacy from over-intrusive invasions. Just as the \textit{Robinson-Edwards}\(^8\) line of cases has eliminated an arrestee's expectation of privacy in his person, the decision in \textit{Lafayette} eliminates an arrestee's expectation of

\textbf{Notes:}


\(^8\) Lafayette, 103 S. Ct. at 2608.

\(^9\) This particular language in \textit{Lafayette} was taken from \textit{New York v. Belton}, 453 U.S. 454 (1981). \textit{Belton} involved the stop of an automobile by a New York State Trooper. The trooper, by himself, arrested the four occupants of a car for possession of a controlled substance. After searching them and positioning them in four separate areas outside of the car so they were not in reach of each other, he searched the contents of the car. The trooper, unzipped the pocket of a jacket found in the car and discovered cocaine inside. \textit{Id.} at 455-56. The factual situation of \textit{Belton} would not allow a single arresting officer to "balance the social and individual interests involved in the specific circumstance" confronting him. \textit{Id.} (quoting \textit{Dunaway v. New York}, 442 U.S. 200, 213-14 (1979)). The police station, after an arrestee has been placed in custody and transported, had no factual exigencies comparable to those in \textit{Belton} which would require such a "bright-line" standard, i.e., allowing any container to be opened.

\(^8\) 103 S. Ct. at 2605.

\(^9\) See supra notes 62-71 and accompanying text.
privacy in his possessions by virtue of his impending incarceration. After Lafayette, the only requirement will be that an inventory search is in accordance with established inventory procedures,\(^8\) regardless of what local agency or individual officer has instituted them.\(^4\) Already, the Court of Appeals for the Eleventh Circuit has interpreted Lafayette to stand for the proposition that "the existence of less restrictive alternatives to a search are not to be considered in calculating whether a search which falls into an exception to the warrant requirement is reasonable.\(^5\) This effectively eliminates any fourth amendment protection from over-intrusive administrative searches in a pre-incarceration situation.

Of interest will be the effect of the holding on established inventory procedures which currently do not allow for the opening of sealed containers, but which require that they be inventoried as a unit.\(^6\) It is reasonable to expect that these procedures will be "re-standardized" to allow the opening of any sealed container to more accurately itemize the contents, and better protect the interests involved. The Lafayette Court's blanket authorization of any standard inventory procedure has opened the door for investigatory searches, which formerly could not be made without judicial approval, to be made under the guise of administrative procedure. While the effect of the decision on federal courts is apparent, the effect on future state court decisions is not as certain.

III. STATE COURT DECISIONS

A number of state courts have chosen to give greater protection under their own state constitutions than that afforded by the Federal Constitution.\(^7\) In People v. Bayles,\(^8\) a case relied upon by the

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83. Lafayette, 103 S. Ct. at 2611.
84. The Court has not addressed the question of who should be responsible for instituting standard procedures. Apparently the Court is not concerned with the possibility that the procedures may be instituted by a local sheriff. This was the concern of the Illinois Supreme Court in People v. Bayles, 82 Ill. 2d 128, 411 N.E.2d 1346 (1980), which was relied on by the Illinois Appellate Court in People v. Lafayette. See infra notes 88-94 and accompanying text.
85. United States v. Par, 716 F.2d 796, 816 n.21 (8th Cir. 1983). "The Supreme Court has held that the existence of less restrictive alternatives to a search are not to be considered in calculating whether a search which falls into an exception to the warrant requirement is reasonable." Id. (citing Illinois v. Lafayette, 103 S. Ct. at 2610).
86. Currently the Drug Enforcement Agency requires that an arrestee's possessions be inventoried, but locked or sealed containers be inventoried as units rather than being opened. Brief for United States Government As Amicus Curiae Supporting Reversal, at 22 n.9, Illinois v. Lafayette, 103 S. Ct. 2605 (1983) [copy on file in the offices of California Western Law Review].
87. In State v. Caraher, 293 Or. 741, 653 P.2d 942, 947 (1982), a search of a woman's purse at the time of her arrest was upheld. The court noted that a state is "free as a matter of its own law to impose greater restrictions on police activity than those that the United States Supreme Court holds to be necessary upon federal constitutional stan-
Illinois appellate court in deciding *People v. Lafayette*, the Supreme Court of Illinois refused to uphold the opening of a suitcase during the inventory search of a car. Although it was opened pursuant to the standard procedures of the local sheriff, the court held that the search was violative of the fourth amendment. Balancing the "Opperman objectives" of protecting the defendant's property and the police from false claims or possible danger, against the defendant's right of privacy, the court found that there was no concern with safety and that the first two objectives could have been achieved in a less intrusive manner. The *Bayles* court did not hold that all warrantless openings of closed containers during the course of an inventory search are invalid, indicating that the competing interests should be balanced in each case.

The Supreme Court of Hawaii found that a "rule of reason" required that governmental intrusions into personal privacy could not be greater than absolutely necessary. In *State v. Kaluna* the court...
held that an inventory search did not justify the examination of the contents of a packet taken from the person of an arrestee prior to her incarceration. The court chose to give greater protection under Hawaii's Constitution than that afforded by the Federal Constitution and held the search “unreasonable.”

Similarly in *Reeves v. State*, the Supreme Court of Alaska held that the objectives of a pre-incarceration inventory search could be satisfied without the opening of a sealed container found on the person of an arrestee. In *Reeves*, the defendant was arrested for driving while intoxicated. During the booking process a pat-down of his jacket indicated a small object in one of the pockets. The officer removed the object, which was a tightly wrapped balloon. A search of the balloon revealed that it contained a narcotic. Noting that the state Constitution gave broader protection against unreasonable searches and seizures than the Federal Constitution, the court held that a pre-incarceration inventory search could not include the search of items taken from an arrestee's possession, unless a warrant or other recognized exception to the warrant requirement applied.

The Supreme Court of Wisconsin refused to uphold the search of a purse in *State v. Prober*. When a purse taken from a car during the course of an inventory search was opened, the court found that

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The packet contained barbiturates. The defendant was subsequently charged with unlawful possession of drugs. *Id.* at 362-63, 520 P.2d at 54.

96. “We have not hesitated in the past to extend the protections of the Hawaii Bill of Rights beyond those of textually parallel provisions in the Federal Bill of Rights when logic and sound regard for the purposes of those protections have so warranted.” *Id.* at 369, 520 P.2d at 58.

97. *Id.* at 375, 520 P.2d at 61.


99. *Id.* at 736-37. The *Reeves* court found that two valid justifications for a pre-incarceration search: (1) the preventing of weapons and contraband from entering into a jail, and (2) the protection of the arrestee's property and the related interest of the government in protecting itself from false claims, could be protected by placing the arrestee's property into a property bag and securing it. *Id.* at 735.

100. *Id.* at 730.

101. The *Reeves* court stated:

Finally, the inventory conducted shall consist of a cataloging of the arrestee's property thus seized and may not, without specific request from the arrestee, extend to a search and inventory of the contents of any object, closed or sealed container, luggage, briefcase, or package. We believe that a pre-incarceration search thus limited both adequately protects the reasonable interests of the state and appropriately respects an arrestee's reasonable expectation of privacy.

*Id.* at 737-38. A few weeks after the decision in *Reeves*, the Supreme Court of Alaska also refused to sustain the search of a container, taken from the pocket of an arrestee during a booking search; holding it beyond the permissible scope of an inventory search. See, *State v. Lyle*, 600 P.2d 1357 (Alaska 1980).

102. 98 Wis. 2d 345, 297 N.W.2d 1 (1980).
the individual’s right to privacy outweighed the government’s need to intrude:

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 related to inventory searches—against the right of the people to be free of warrantless intrusions into their personal effects.103

In People v. Counterman,104 the Supreme Court of Colorado refused to uphold the search of the defendant’s sealed knapsack, taken from his car during an inventory of its contents. Stating that “[t]he owner clearly had an expectation of privacy with regard to his sealed knapsack which was sufficient to invoke constitutional protection against unreasonable police intrusion,”105 the court held the search violative of the fourth amendment and the corresponding section of the Colorado Constitution.106 Additionally, the court remarked that “[t]he legitimate purposes of the inventory search could have been fully accomplished by merely noting the item as a sealed knapsack.”107

In People v. Laiwa,108 the California Supreme Court refused to sustain the search of the defendant’s tote bag after he was arrested as an accelerated booking search.109 In rejecting the justification that a booking search conducted in the field is no more intrusive than one conducted at the police station,110 the court held that such searches were impermissible under the warrant requirement of the California Constitution.111 The court pointed out the dangers of an accelerated booking search by contrasting it with permissible intrusions such as a search incident to arrest, and a pat-down in the event of transportation of the arrestee, which are restricted in their scope. The court stated:

[a]n accelerated booking search would have no such restrictions.
If such an exception were recognized, police officers would have

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103. Id. at 356, 297 N.W.2d at 7.
104. 190 Colo. 152, 556 P.2d 481 (1976).
105. Id. at 154, 556 P.2d at 483.
106. Id. at 158, 556 P.2d at 485.
107. Id.
109. Id. at 724, 669 P.2d at 1286, 195 Cal. Rptr. at 513.
110. The Laiwa Court expressly overruled People v. Bullwinkle, 105 Cal. App. 3d 87, 164 Cal. Rptr. 163 (1980). In Bullwinkle, the defendant was arrested in her home. At the time of her arrest, the police took her purse and transported it to the police station, where it was searched without a warrant. In explaining the theory of a booking search, the court in Bullwinkle states: “The theory is that the privacy of the prisoner and her effects would have been invaded anyway, and that therefore no greater intrusion on that privacy occurs when the search is conducted other than during the booking process.” Id. at 90, 164 Cal. Rptr. at 168.
111. Laiwa, 34 Cal. 3d at 728, 669 P.2d at 1288, 195 Cal. Rptr. at 513.
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The potential for abuse that would be facilitated by an accelerated booking search is not substantially greater than that which may occur as a result of allowing the opening of sealed containers in a pre-incarceration booking search. Many minor offenses can support an incarceration at the option of the officer—such as driving without a license. In the event that the person cannot make bail, or is merely placed in a holding cell until bail is made, his personal effects could be searched. This danger was noted by the Hawaiian Supreme Court in State v. Kaluna. That court pointed out that confidential papers of a lawyer arrested for a traffic offense might be scrutinized by an officer.

This danger for abusing an actual booking search is not unrealistic. In State v. Garcia the defendant was arrested for criminal trespass. “Although it was not decided whether Garcia would be held in jail, he was put through the standard booking process . . . .” When the defendant’s wallet was searched a small quantity of cocaine was found. Although the police eventually decided to release Garcia, he was placed in a cell for a short time after the search. His conviction for possession of cocaine was affirmed by the Oregon Supreme Court.

Since the primary justification of a pre-incarceration search is to prevent weapons or contraband from entering a jail facility, even the search of a closed container prior to a temporary incarceration would be permissible under Lafayette. Consequently, any person

112. Id. at 727, 669 P.2d at 1288, 195 Cal. Rptr. at 513. The court also noted: “Because this case does not involve a true booking search, we have no occasion to determine the ultimate limits of such a search.” Laiwa, 34 Cal. 3d at 727 n.9, 669 P.2d at 1288 n.9, 195 Cal. Rptr. at 513 n.9. The court cited Reeves v. State, 599 P.2d 727 (Alaska 1979) and State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974), as states which had determined the limits of a booking search. This might indicate the attitude of the California Supreme Court, however, when the issue is squarely presented, the California Supreme Court may find itself prevented from giving that same protection, by Proposition 8, which allows California courts to give only that protection afforded by the federal Constitution.

113. In Lafayette, the defendant was arrested for disturbing the peace. In United States v. Robinson, the defendant was arrested for driving while his license was expired.


115. Id. at 368 n.5, 520 P.2d at 58 n.5 (1974).


117. Id. at 175, 665 P.2d at 1382.

118. Id. at 177, 665 P.2d at 1383.
arrested and taken to a police station may be subject to a search of his personal effects, no matter how brief his incarceration may be.

A number of state courts have relied on their own constitutions to give greater protection than that afforded by the fourth amendment. However, even those courts will need to protect their decisions from review by the Supreme Court should they wish to continue to give increased protection. As noted by the Supreme Court in Michigan v. Long, "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent state grounds, this Court will not undertake to review the decision." Whether those states which have afforded greater protection to an individual’s right of privacy in an inventory search context will continue to do so in light of Illinois v. Lafayette is questionable.

IV. ALTERNATIVES

One alternative to allowing individual police agencies to establish their own standard inventory procedures would be for the legislature to prescribe guidelines for inventory searches. This would allow for a balancing of the competing interests by an elected body that is not responsible for the investigation of criminal acts, and would be more inclined to be objective.

Another alternative would be to allow an arrestee to place his belongings in a locker, which has already been suggested by a federal district court. An arrestee’s possessions could be screened for explosives by dogs or airport-type x-ray machines, and subse-

119. See supra notes 87-118 and accompanying text.
120. 103 S. Ct. 3469 (1983).
121. Id. at 3476.
122. In United States v. Mills, 472 F.2d 1231 (D.C. Cir. 1972), the defendant was arrested for a petty offense. The arresting officer did not advise him of the opportunity to post $50 bond and leave the precinct, rather than be incarcerated. The defendant was told to empty his pockets and drugs were found among the contents. The court held that the search was unreasonable, as it violated the guarantees of the fourth amendment. The defendant’s conviction was reversed. Id. at 1233, 1241. The court did not “grapple with the difficult questions of permissible occasion and extent of inventory searches,” but noted:

When a petty offense is of a collateral nature, a question arises whether an offender without means (a) can be detained on account of such violation—or whether such detention enforces a discrimination on the basis of wealth; and (b) assuming he can be detained, whether a person arrested for such a petty offense can be subject to a thorough search, or whether a less extreme intrusion on privacy does not mark the limits of reasonableness, as by giving him an opportunity, like that accorded someone given a bathhouse locker for temporary use, to “check” his belongings in a sealed envelope, perhaps upon executing a waiver releasing the officer of any responsibility.

Id. at 1239 n.11.
quently placed in a steel locker and locked by the arrestee himself who would retain the key.

A final alternative would be to exclude the use of any evidence of a crime found in the belongings of an arrestee as the result of an inventory search which was conducted for the noninvestigatory purpose of safeguarding his property. This is extremely unlikely, however, in light of the Court's discontent with the Exclusionary Rule.

CONCLUSION

The decision in *Illinois v. Lafayette*\(^{123}\) is unusual because it is an unanimous decision in an area of the law which has been permeated by numerous close decisions; the majority of which have been decided by a margin of five to four. Ironically, in *South Dakota v. Opperman*,\(^{124}\) a five to four decision primarily relied upon by the *Lafayette* Court, Justice Powell stated: “The absence of a warrant will not impair the effectiveness of a post-search review of the reasonableness of a particular inventory search.”\(^{125}\) Yet the decision in *Illinois v. Lafayette* has effectively removed from review, any inventory search which purports to conform with existing standard procedures. Consequently, law enforcement agencies which institute procedures will effectively decide what is constitutionally reasonable, thus eliminating an important fourth amendment protection.

While future decisions in the federal courts will be bound, state court decisions which seek to give greater protection under their own constitutions must be insulated from review by the Supreme Court.\(^{126}\) The amount of protection afforded an arrestee may turn on whether he is arrested by state or federal officers or even which state he is arrested in. The *Lafayette* decision has further eroded the already-waning individual's right to privacy in his personal effects.

*Philip Popper*

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125. *Id.* at 383 (Powell, J., concurring).
126. *See supra* notes 120-21 and accompanying text.