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BARK WITH NO BITE: HOW THE INEVITABLE DISCOVERY RULE IS UNDERMINING THE SUPREME COURT'S DECISION IN *ARIZONA V. GANT*

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In 2009, the Supreme Court issued its decision in Arizona v. Gant, *in which it significantly limited the search incident to arrest exception in the automobile search context. Despite what many experts predicted,* Gant *did not open the floodgates of evidence suppression. This is because the* Gant *holding is substantially undermined by the inevitable discovery rule, under which otherwise illegally-seized evidence is deemed admissible under certain circumstances. This article discusses why the Court's decision in* Gant *lacks real-world, practical effect, and how the Court can close the loophole in its* Gant *holding.*

I. INTRODUCTION

The late scholar Karl Llewellyn wrote that "the rule follows where its reason leads; where the reason stops, there stops the rule."[1] Apart from the poetic and literary value of this quotation, Professor Llewellyn's point is quite simple and abundantly relevant in all areas of the law: when a rule is created for certain reasons, and those reasons cease to exist, the rule should no longer be applied. Courts have utilized Professor Llewellyn's axiom in various areas of the law, refusing to apply rules to situations in which the reasons justifying the rules are no longer present.[2]

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[1] K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 189 (Oceana Publications, Inc. 1981) (1930) (emphasis omitted).

[2] *See, e.g.*, Aetna Life & Cas. Co. v. Barthelemy, 33 F.3d 189, 193 (3d Cir. 1994) (applying Llewellyn's principle in insurance context); Anderson v. United Tel. Co. of Kan., 933 F.2d 1500, 1504 (10th Cir. 1991) (applying principle in context of motion for directed verdict); G. & T. Terminal Packaging Co. v. Consol. Rail Corp., 830 F.2d 1230, 1238 (3d Cir. 1987) (Aldisert, J., dissenting) (applying principle in context of federal preemption).

However, in at least one area of Fourth Amendment jurisprudence—the search incident to arrest exception to the warrant requirement—the Supreme Court of the United States has refused to apply Llewellyn's principle. In *Chimel v. California*,[3] the Supreme Court discussed the twin rationales for the search incident to arrest exception—the need to disarm the arrestee and to discover and preserve evidence.[4] Despite these stated rationales, for years the Court expanded the search incident to arrest doctrine well beyond that which was necessary to accomplish its dual purposes. Nowhere was this more apparent than in the automobile context: once an occupant or a recent occupant of a vehicle was placed under arrest, the police were permitted to conduct a full search of the vehicle's passenger compartment as well any containers therein, including consoles, glove compartments, luggage, and bags.[5] Further, the police did not lose this authority when the arrestee was handcuffed in the back of a patrol car at the time of the search and, therefore, could not possibly grab a weapon or hide evidence.[6] As Justice O'Connor wrote in a concurring opinion, "court decisions seem[ed] . . . to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel v. California*."[7]

In 2009, when the search incident to arrest exception seemed to have no limits in the automobile context, the Supreme Court issued its decision in *Arizona v. Gant*.[8] In *Gant*, the Court seemed to reverse its previous course by severely limiting an officer's authority to search a vehicle when the arrestee is detained and therefore cannot access weapons or evidence.[9] The Court in *Gant* held that the twin rationales articulated in *Chimel* allow vehicle searches "incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search,"[10] or "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'"[11] *Gant* was immediately hailed by legal commentators and law enforcement experts alike as a landmark case in Fourth Amendment jurisprudence. The Court's decision in *Gant* both provided hope to many,

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[3] 395 U.S. 752 (1969).

[4] *Id.* at 763–64.

[5] New York v. Belton, 453 U.S. 454, 460–61 (1981).

[6] *See infra* Part II.B.3.

[7] Thornton v. United States, 541 U.S. 615, 624 (2004) (O'Connor, J., concurring).

[8] 129 S. Ct. 1710 (2009).

[9] *Id.* at 1719.

[10] *Id.*

[11] *Id.*

including civil libertarians and defense lawyers, and frightened many others, including law enforcement interest groups and prosecutors.[12]

However, despite what many experts predicted, *Gant* has not opened the floodgates of evidence suppression. This is because *Gant* has primarily been undermined by another exception to the warrant requirement that allows otherwise illegally obtained evidence to be admitted if the government can prove by a preponderance of the evidence that the items seized inevitably would have been discovered during a subsequent and lawful inventory search of the vehicle.[13] It appears that the Court's landmark decision in *Gant* has had little practical effect on the availability or exclusion of evidence.

In this Article, I will discuss the search incident to arrest exception to the warrant requirement from the origins of the doctrine to the Court's most recent decisions. Part II of the Article discusses the history of the search incident to arrest exception, both in general and within the automobile context. Part III discusses the Court's recent decision in *Gant*. Part IV explains why the practical effects of *Gant* are not as significant as some may have hoped them to be and suggests several ways in which the Court could close the loophole in its holding in *Gant*.

II. BACKGROUND

A. HISTORY OF THE SEARCH INCIDENT TO ARREST EXCEPTION

In 1914, the Supreme Court mentioned, in dicta, what would subsequently become one of the most widely utilized, and perhaps widely abused, exceptions to the Fourth Amendment's warrant requirement: the search incident to a lawful arrest exception.[14] In *Weeks v. United States*,[15] a case known for its establishment of the exclusionary rule, the Court stated:

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[12] *See, e.g.*, Ken Wallentine, *PoliceOne Analysis:* Arizona v. Gant, POLICEONE.COM (Apr. 22, 2009), http://www.policeone.com/legal/articles/1813475-PoliceOne-Analysis-Arizona-v- Gant/ (discussing concerns over the *Gant* decision). In a *New York Times* article written the same day *Gant* was decided, William J. Johnson, the executive director of the National Association of Police Organizations, had this to say about the Court's decision: "It's just terrible . . . . It's certainly going to result in less drug and weapons cases being made." Adam Liptak, *Supreme Court Cuts Back Officers' Searches of Vehicles*, N.Y. TIMES, Apr. 21, 2009, at A12.

[13] *See infra* note 220.

[14] For a further discussion of the potential for abuse of the search incident to arrest exception, see Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 396 (2001); Michael Schoen, Garcia v. State*: A Recent Texas Court of Criminal Appeals Decision Resolves the Texas Pretext Debate in Favor of an Objective Approach*, 45 BAYLOR L. REV. 781, 784 (1993).

> What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidence of crime. This right has been uniformly maintained in many cases.[16]

Although the search incident to arrest exception to the warrant requirement was not directly at issue in *Weeks*, the Supreme Court nonetheless offered its express support for that common law doctrine.[17] However, because the doctrine was not at issue in that case, the *Weeks* Court failed to discuss its contours. For instance, the Court did not discuss whether the search incident to arrest doctrine allowed officers to search the place where an arrest occurs.[18] Instead, the language of *Weeks* only approved of the practice of searching the person of an arrestee in order to discover and seize fruits or evidence of crime.[19]

The Court elaborated on the search incident to arrest doctrine eleven years after *Weeks*, in *Carroll v. United States*.[20] The defendants in *Caroll* were convicted of transporting intoxicating liquors in an automobile.[21] They argued that the trial court erred when it admitted two of the bottles that were found in their vehicle during a search subsequent to their arrest.[22] According to the defendants, that search and seizure violated the Fourth Amendment and, therefore, the court should have excluded the evidence.[23] In upholding the convictions, the Court cited its earlier decision in *Weeks* and, in fact, elaborated on that previous dicta, holding that "[w]hen a man is legally arrested for an offense, whatever is found upon his person *or in his control* which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution."[24] However, as the Supreme Court subsequently stated, the Court's assertion

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[15] 232 U.S. 383 (1914).

[16] *Id.* at 392.

[17] *See* Michael Goodin, Arizona v. Gant: *The Supreme Court Gets It Right (Almost)*, 87 U. DET. MERCY L. REV. 115, 119–20 (2010) (discussing history of search incident to arrest exception, including *Weeks*).

[18] Chimel v. California, 395 U.S. 752, 755 (1969).

[19] *Id.*; *Weeks*, 232 U.S. at 392.

[20] 267 U.S. 132 (1924).

[21] *Id.* at 134.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 158 (emphasis added).

in *Carroll* "was far from a claim that the 'place' where one is arrested may be searched so long as the arrest is valid."[25]

However, in the same year that *Carroll* was decided, the Supreme Court issued its decision in *Agnello v. United States*.[26] In *Agnello*, the Court once again expanded the scope of the common law search incident to arrest exception to the warrant requirement, making it applicable not only to a search of the arrestee's person, but also to a search of the place where the arrest is made.[27] Citing both *Weeks* and *Carroll*, the *Agnello* Court held:

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing a 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.[28]

This rule from *Agnello* was solidified two years later in *Marron v. United States*.[29] In *Marron*, federal prohibition agents obtained a warrant to search a particular location being leased by the defendant.[30] The search warrant authorized the agents to seize any intoxicating liquors and articles for their manufacture.[31] When agents arrived at the location to execute the search warrant, the defendant was not there, but they found evidence that the property was being used for the sale and consumption of intoxicating liquors.[32] After placing one individual under arrest, the agents searched for and found large quantities of liquor, some of which was in a closet.[33] While searching that closet, they noticed a ledger showing inventories of liquors, receipts, and expenses.[34] They also found a number of bills in the defendant's name for gas, electric, water, and telephone service.[35] They seized both the ledger and the bills.[36]

Prior to trial, the defendant moved to suppress the ledger and bills, arguing that these items were seized in violation of the Fourth

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[25] Chimel v. California, 395 U.S. 752, 756 (1969).

[26] 269 U.S. 20 (1925).

[27] *See* Goodin, *supra* note 17, at 120.

[28] *Agnello*, 269 U.S. at 30 (citing *Carroll*, 267 U.S. at 158; Weeks v. United States, 232 U.S. 383, 392 (1914)).

[29] 275 U.S. 192 (1927).

[30] *Id.* at 193.

[31] *Id.*

[32] *Id.* at 193–94.

[33] *Id.* at 194.

[34] *Id.*

[35] *Id.*

[36] *Id.*

Amendment.[37] Specifically, the defendant argued that because the ledger and bills were not described in the warrant and because he was not arrested with them on his person, their seizure was illegal.[38] The Government responded that the seizure was justified as either incident to the execution of the search warrant or as incident to the arrest made while executing the warrant.[39] In affirming the defendant's conviction, the Court held that because the agents made a lawful arrest, "[t]hey had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise."[40] After *Agnello* and *Marron*, police could utilize the search incident to arrest exception to justify a warrantless search of both the arrestee's person and the place where the arrest was made.

However, it did not take long for the Supreme Court to limit its holding in *Marron*. In *Go-Bart Importing Co. v. United States*,[41] after federal agents placed several individuals under arrest for dealing in intoxicating liquors, the agents conducted a search of the offenders' offices.[42] During this search, through the threat of force, the agents gained access to a locked desk and safe, from which they took certain papers.[43] The agents also searched other parts of the office and seized more papers.[44] The defendants in *Go-Bart* moved to exclude the papers that were seized during the search.[45] The Court in *Go-Bart* assumed, without deciding, that the arrests made in that case were lawful, despite being made without a warrant.[46] The Court then discussed whether the search and seizure were justified in light of the lawful arrests. In describing the incident, the Court noted that the officers did not observe any crime and that although the officer in charge "had an abundance of information and time to swear out a valid warrant, he failed to do so."[47] The Court went on to distinguish the case before it from *Marron*, noting that the officers in *Marron* were executing a valid search warrant, the arrestee was actively engaged in

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[37] *Id.*

[38] *Id.*

[39] *Id.* at 194–95.

[40] *Id.* at 199 (citing Agnello v. United States, 269 U.S. 20, 30 (1925); Carroll v. United States, 267 U.S. 132, 158 (1924); Weeks v. United States, 232 U.S. 383, 392 (1914)).

[41] 282 U.S. 344 (1931).

[42] *Id.* at 349.

[43] *Id*. at 349–50.

[44] *Id.* at 350.

[45] *Id.*

[46] *Id.* at 356.

[47] *Id.* at 358.

illegal activity, and "[t]here was no threat of force or general search or rummaging" because the items seized "were visible and accessible."[48] Based on the facts of the case before it, the Court in *Go-Bart* held that the search conducted was unreasonable and, therefore, that the evidence should be suppressed.[49]

Just one year after *Go-Bart* was decided, the Court decided another case in which it limited the applicability of its holding in *Marron*. In *United States v. Lefkowitz*, federal prohibition agents applied for and received a warrant to arrest the defendant.[50] After entering the location listed in the warrant—a room that was approximately ten feet wide by twenty feet long—the agents placed the defendant under arrest and began searching the room and seizing various papers.[51] The agents opened all the drawers of the two desks in the room, examined their contents, and seized books, papers, and other items.[52] The agents also searched a towel cabinet located in the room and seized papers from it as well.[53] However, unlike in *Go-Bart*, the desks and the cabinet were not locked when the agents opened them.[54]

The defendant in *Lefkowitz* moved to suppress the evidence seized during the search.[55] The defendant's motion to suppress was denied by the district court, but the Second Circuit reversed, citing the Supreme Court's decision in *Go-Bart*.[56] In deciding whether the search was lawful under the Fourth Amendment, the Court in *Lefkowitz* first noted that the defendant in that case was lawfully arrested pursuant to an arrest warrant.[57] The Court also noted that, as in *Go-Bart*, the officers did not observe a crime being committed.[58] The Court held that the agents "assumed the right contemporaneously with the arrest to search out and scrutinize everything in the room in order to ascertain whether the books, papers or other things contained or constituted evidence of . . . [a] crime . . . . Their conduct was unrestrained."[59] The Court further held that a law enforcement agent's

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[48] *Id.* at 358.
[49] *Id.*
[50] 285 U.S. 452, 458 (1932).
[51] *Id.*
[52] *Id.* at 458–59.
[53] *Id.* at 459–60.
[54] *Id.* at 460.
[55] *Id.* at 460–61.
[56] *Id.* at 461.
[57] *Id.* at 462.
[58] *Id.* at 462–63.
[59] *Id.* at 463–64.

authority to conduct a search incident to arrest "is not greater than that conferred by a search warrant."[60] The Court reasoned that the use of search warrants was more likely to protect against unlawful searches "than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."[61]

The Court then went on to distinguish the facts of the case before it from the facts present in *Marron*. The Court noted that, in *Marron*, the officers observed a crime being committed in their presence, that the arrestee was maintaining a nuisance in violation of federal law, that the offense involved the element of continuity (consumption and sale of alcohol), that the ledger and bills were in plain view when seized, and that the ledger and bills were closely related to the offense being investigated.[62] The Court held that "[t]he facts disclosed in the [*Marron*] opinion were held to justify the inference that when the arrest was made the ledger and bills were in use to carry on the criminal enterprise."[63]

The Court in *Lefkowitz* held that, unlike the situation in *Marron*, the facts of the case before it did not justify the search and seizure.[64] In particular, the Court noted that "the searches were exploratory and general and made solely to find evidence of respondents' guilt of the alleged conspiracy or some other crime,"[65] and that, "[t]hough intended to be used to solicit orders for liquor in violation of the Act, the papers and other articles found and taken were in themselves unoffending."[66] The Court noted that, in previous decisions, it had created a distinction between searches to find evidence to convict an individual of a crime and searches to find stolen goods or seize forfeited property, as well as searches conducted "in order to prevent the commission of [a] crime."[67] The *Lefkowitz* Court concluded that the case before it did "not differ materially from the *Go-Bart* case and is ruled by it. An arrest may not be used as a pretext to search for evidence. The searches and seizures here challenged must be held violative of respondents' rights under the Fourth and Fifth Amendments."[68]

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[60] *Id.* at 464.

[61] *Id.*

[62] *Id.* at 465.

[63] *Id.*

[64] *Id.* at 467.

[65] *Id.* at 465.

[66] *Id.*

[67] *Id.* at 465–66 (citing Boyd v. United States, 116 U.S. 616 (1886); Weeks v. United States, 232 U.S. 383, 395 (1914)).

[68] *Id.* at 467.

Go-Bart and *Lefkowitz* illustrate that, in the early 1930s, the Supreme Court attempted to limit the scope of permissible police actions during a search incident to a lawful arrest.[69] However, this limiting trend would not continue indefinitely. For example, in *Harris v. United States*,[70] the Court seemed to expand the authority given to police under the search incident to arrest exception.[71] In *Harris*, federal agents obtained two warrants for the defendant's arrest, one for mail fraud and the other for sending a forged check through interstate commerce.[72] FBI agents went to the defendant's apartment, placed him under arrest, put him in handcuffs, and then began to search the entire apartment, which consisted of four rooms: a living room, a bedroom, a bathroom, and a kitchen.[73] The stated reasons for the search were to find two canceled checks that were "thought to have been used in effecting the forgery" and to find "any means that might have been used to commit" the crimes.[74] Over the defendant's objections, the agents conducted a thorough search of the entire apartment that lasted for approximately five hours.[75] During the search, one of the agents discovered in a bedroom bureau drawer a sealed envelope marked "George Harris, personal papers."[76] The agent tore open the envelope and found the defendant's altered Selective Service documents.[77] After the district court denied the defendant's motion to suppress this evidence,[78] the seized documents were used to convict the defendant of violating the Selective Service Act.[79] The Tenth Circuit affirmed the defendant's conviction, finding that "the search was carried on in good faith by the federal agents for the purposes expressed, that it was not a general exploratory search for

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[69] *See* Kenneth M. Murchison, *Prohibition and the Fourth Amendment: A New Look at Some Old Cases*, 73 J. CRIM. L. & CRIMINOLOGY 471, 501–02 (1982) (discussing how *Go-Bart* and *Lefkowitz* represented a break from Court's Prohibition Era search incident to arrest decisions).

[70] 331 U.S. 145 (1947).

[71] *See* James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417, 1424 (2007) (discussing history of search incident to arrest exception and noting that *Harris* was an abrupt break from Court's previous decisions).

[72] *Harris*, 331 U.S. at 148.

[73] *Id.* at 148.

[74] *Id.* at 148–49.

[75] *Id.* at 149.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.* at 146.

merely evidentiary materials, and that the search and seizure were a reasonable incident to petitioner's arrest."[80]

The Court in *Harris* affirmed the defendant's conviction, finding that the search at issue was lawful as a search incident to arrest.[81] In support of its conclusion, the Court appeared to expand the search incident to arrest doctrine by leaps and bounds, holding that, not only were the police permitted to search the room in which the defendant was arrested, but could search his entire four-room apartment because, in the words of the Court, "[h]is control extended quite as much to the bedroom in which the draft cards were found as to the living room in which he was arrested."[82] Because the evidence at issue could "easily have been concealed in any of the four rooms of the apartment," the police were permitted to conduct a broad search.[83] Although the Court recognized that other cases might call for more limited searches, it held that "the area which reasonably may be subjected to search is not to be determined by the fortuitous circumstance that the arrest took place in the living room as contrasted to some other room of the apartment."[84]

The Court in *Harris* distinguished the facts of the case before it from the facts present in *Go-Bart*, holding that *Go-Bart* involved a situation where officers "entered premises ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search for merely evidentiary materials tending to connect the accused with some crime."[85] By contrast, the Court noted that, in *Harris*, "the agents were in possession of facts indicating petitioner's probable guilt of the crimes for which the warrants of arrest were issued. The search was not a general exploration but was specifically directed to the means and instrumentalities by which the crimes charged had been committed . . . ."[86] The Court concluded that "[t]he search which followed the arrest was appropriate for the discovery of such objects. Nothing in the agents' conduct was inconsistent with their declared purpose."[87]

Although the Supreme Court appeared ready and willing to significantly expand the search incident to arrest exception in *Harris*, just

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[80] *Id.* at 150.
[81] *Id.* at 155.
[82] *Id.* at 152.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 153.
[86] *Id.*
[87] *Id.*

one year later the pendulum swung once again, this time toward limiting the exception.[88] Whereas the legality of the search in *Harris* was upheld by a five to four vote, the search at issue in *Trupiano v. United States*[89] was declared unconstitutional by the same margin.[90] The petitioners in *Trupiano* built and operated an illegal distillery.[91] Unbeknownst to the petitioners, federal agents were informed of their operation and one of the agents went undercover as a farm hand, assisting the petitioners in building the distillery.[92] Based on information provided by the undercover agent, other federal agents traveled to the distillery one evening.[93] As they drove onto the premises, the agents could smell fermenting mash and could hear the distillery equipment.[94] As they approached the distillery, one of the agents looked through an open door and could see the equipment.[95] The agents then entered the building, placed the petitioners under arrest, and "seized the illicit distillery."[96] After the arrest, the agents conducted a further search and found a large number of cans containing alcohol as well as several vats containing fermenting mash.[97] The petitioners moved to suppress the evidence seized by the agents, arguing that it was obtained in violation of the Fourth Amendment.[98] The district court denied the motion to suppress and the Third Circuit affirmed.[99]

In reversing the Third Circuit and holding that the search was unlawful, the Court in *Trupiano* first noted that the agents engaged in the raid "without securing a search warrant or warrants of arrest,"[100] despite the fact that "they had more than adequate opportunity to obtain such warrants before the raid occurred . . . ."[101] The Court described the case as one "where contraband property was seized by federal agents without a search

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[88] *See* Tomkovicz, *supra* note 71, at 1424 (discussing inconsistencies amongst search incident to arrest decisions during this time period).

[89] 334 U.S. 699 (1948).

[90] *Id.* at 709–10. Justice Douglas, who joined the majority in *Harris*, provided the fifth (swing) vote in *Trupiano*. *See* J. Woodford Howard Jr., *On the Fluidity of Judicial Choice*, 62 AM. POL. SCI. REV. 43, 53 (1968).

[91] *Trupiano*, 334 U.S. at 701.

[92] *Id.*

[93] *Id.* at 702.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.* at 699.

[99] *Id.* at 703.

[100] *Id.*

[101] *Id.*

warrant under circumstances where such a warrant could easily have been obtained."[102] The Court held that, although the warrantless arrests were valid because the arresting agents observed a felony being committed in their presence,[103] the search was not lawful as an incident to those arrests.[104] The Court held that "[i]t is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable."[105] The Court noted that, in the case before it, the agents knew "every detail of the construction and operation of the illegal distillery long before the raid was made," and that the undercover agent "was in a position to supply information which could easily have formed the basis for a detailed and effective search warrant."[106] Further, the Court held that "there was an abundance of time during which such a warrant could have been secured, even on the night of the raid after the odor and noise of the distillery confirmed their expectations."[107] The Court also noted that "the property was not of a type that could have been dismantled and removed before the agents had time to secure a warrant."[108]

Discussing its search incident to arrest jurisprudence, the Court in *Trupiano* held that the right to conduct a search incident to arrest was "strictly limited" to cases where such a search was necessary.[109] Further, such necessity could not come from the mere existence of a lawful arrest, by itself.[110] Instead, the Court held, there had to "be some other factor in the situation that would make it unreasonable or impracticable to require the arresting officer to equip himself with a search warrant."[111] Applying this legal standard to the facts before it, the Court held that "no reason whatever has been shown why the arresting officers could not have armed themselves during all the weeks of their surveillance of the locus with a duly obtained search warrant—no reason, that is, except indifference to the legal process for search and seizure which the Constitution contemplated."[112]

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[102] *Id.* at 703–04.

[103] *Id.* at 704.

[104] *Id.* at 705.

[105] *Id.* (citing Carroll v. United States, 267 U.S. 132, 156 (1925); Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931)).

[106] *Id.* at 706.

[107] *Id.*

[108] *Id.*

[109] *Id.* at 708.

[110] *Id.*

[111] *Id.*

[112] *Id.*

The Court in *Trupiano* then went on to distinguish the case before it from *Harris*. The Court explained that, unlike *Harris*, the case before it "relate[d] only to the seizure of contraband the existence and precise nature and location of which the law enforcement officers were aware long before making the lawful arrest."[113] The Court held that "[this] circumstance was wholly lacking in the *Harris* case, which was concerned with the permissible scope of a general search without a warrant as an incident to a lawful arrest."[114] The Court went on to state that while "the *Harris* case dealt with the seizure of Government property which could not have been the subject of a prior search warrant, it having been found unexpectedly during the course of a search," the evidence seized in *Trupiano* "could easily have been specified in a prior search warrant."[115] The Court concluded that the factual differences between *Harris* and *Trupiano* were "enough to justify confining ourselves to the precise facts of this case, leaving it to another day to test the *Harris* situation by the rule that search warrants are to be obtained and used wherever reasonably practicable."[116]

If *Trupiano* represented a major victory for civil libertarians, that victory was short-lived.[117] Only two years later, in *United States v. Rabinowitz*, the Supreme Court expressly overruled its holding in *Trupiano*.[118] In *Rabinowitz*, federal agents obtained information that the defendant was dealing in stamps with forged overprints.[119] Based on this information, the agents obtained a warrant for the defendant's arrest.[120] At the time they obtained the arrest warrant, the agents had reason to believe that the defendant probably possessed several thousand altered stamps

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[113] *Id.*

[114] *Id.* at 708–09.

[115] *Id.* at 709.

[116] *Id.*

[117] *See* Tomkovicz, *supra* note 71, at 1425.

[118] United States v. Rabinowitz, 339 U.S. 56, 66 (1950). In the two years between *Trupiano* and *Rabinowitz*, two of the Justices that joined the *Trupiano* majority—Justices Frank Murphy and Wiley Blount Rutledge—died. *See Justice Murphy Dies at 59 in Detroit of Heart Attack*, N.Y. TIMES, July 20, 1949, at 1; *Justice Wiley Rutledge Dies of Brain Hemorrhage at 55*, N.Y. TIMES, Sept. 11, 1949, at 1. They were replaced by Justices Tom Clark and Sherman Minton, respectively. *See* Mark Strasser, *Religion in the Schools: On Prayer, Neutrality, and Sectarian Perspectives*, 42 AKRON L. REV. 185, 201 (2009). Both Justices Clark and Minton joined the majority in *Rabinowitz*. Justice Douglas, another member of the *Trupiano* majority, did not participate in *Rabinowitz*. *Rabinowitz*, 339 U.S. at 66.

[119] *Rabinowitz*, 339 U.S. at 57–58.

[120] *Id.* at 58.

bearing forged overprints.[121] After obtaining the arrest warrant, the agents went to the defendant's one-room office and placed him under arrest.[122] Over the defendant's objection, the agents searched his desk, safe, and filing cabinets for approximately an hour and a half.[123] During their search, the agents "found and seized 573 stamps, on which it was later determined that overprints had been forged."[124]

The defendant was indicted on two counts: one for selling four forged and altered stamps to an undercover agent, and the other for possessing, with intent to defraud, the 573 forged and altered stamps that were found during the search of his office.[125] He moved to suppress the evidence of the stamps found during the search on Fourth Amendment grounds, but his motion was denied by the district court.[126] After he was convicted on both counts, the defendant appealed to the Second Circuit. Relying on the Supreme Court's decision in *Trupiano*, the Second Circuit reversed his conviction on the ground that "since the officers had had time in which to procure a search warrant and had failed to do so the search was illegal, and the evidence therefore should have been excluded."[127]

Undoubtedly to the surprise of many, the Court in *Rabinowitz* reversed the Second Circuit and affirmed the defendant's conviction.[128] Discussing the history of its search incident to arrest jurisprudence, the Court in *Rabinowitz* noted that "[t]he right to search the person incident to arrest always has been recognized in this country and in England. Where one had been placed in the custody of the law by valid action of officers, it was not unreasonable to search him."[129] Finding that the arrest at issue was valid due to the existence of an arrest warrant, the Court first concluded that the defendant's person was lawfully searched, and then considered whether the search of his desk, safe, and filing cabinets was lawful as incident to his arrest.[130] The Court noted that the defendant's desk, safe, and filing cabinets were "all within plain sight of the parties, and all located under respondent's immediate control in his one-room office open to the

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[121] *Id.*
[122] *Id.*
[123] *Id.* at 59.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.* at 66.
[129] *Id.* at 60 (internal citation omitted).
[130] *Id.* at 60–61.

public[.]"[131] The Court cited its decision in *Marron* with approval, and held that its subsequent decisions in *Go-Bart* and *Lefkowitz* did not drain *Marron* of "contemporary vitality."[132]

Applying the law to the facts of the case before it, the Court in *Rabinowitz* held that the search in question "was not general or exploratory."[133] Instead, the Court held, the officers had "probable cause to believe that respondent was conducting his business illegally,"[134] and that the forged stamps were "in the possession of and concealed by respondent in the very room where he was arrested, over which room he had immediate control and in which he had been selling such stamps unlawfully."[135] The Court went on to hold that such a limited search was authorized by *Harris*.[136]

After concluding that the search at issue was reasonable,[137] the Court finally addressed *Trupiano*, acknowledging that, in that case, the Court "first enunciated the requirement that search warrants must be procured when 'practicable' in a case of search incident to arrest."[138] The Court held that, although "[a] rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration," it could not agree "that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search."[139] The Court went on to explain why the rule from *Trupiano* was unworkable:

> It is fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant. Whether there was time may well be dependent upon considerations other than the ticking off of minutes or hours. The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant. Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential.[140]

The Court concluded by overruling *Trupiano* insofar as it required "a search warrant solely upon the basis of the practicability of procuring it rather than

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[131] *Id.* at 61.
[132] *Id.* at 62.
[133] *Id.*
[134] *Id.* at 62–63.
[135] *Id.* at 63.
[136] *Id.*
[137] *Id.* at 63–64.
[138] *Id.* at 64.
[139] *Id.* at 65.
[140] *Id.*

upon the reasonableness of the search after a lawful arrest."[141] The Court held that the important consideration was the reasonableness of the search, not the reasonableness of procuring a search warrant.[142] To determine the reasonableness of the search, "the total atmosphere of the case" had to be examined.[143] As the Court would later note in *Chimel v. California*, "*Rabinowitz* [came] to stand for the proposition . . . that a warrantless search 'incident to a lawful arrest' may generally extend to the area that is considered to be in the 'possession' or under the 'control' of the person arrested."[144]

The next landmark case in the Court's search incident to arrest jurisprudence came in 1969, when the Court decided *Chimel*.[145] The officers in *Chimel*, armed with a warrant authorizing the defendant's arrest for the burglary of a coin ship, arrived at the defendant's home.[146] After knocking on the front door and identifying themselves to the defendant's wife, they were allowed inside, where they waited approximately fifteen minutes for the defendant to return home from work.[147] When the defendant entered the house, one of the officers showed him the arrest warrant and asked if the officers could look around.[148] Although the defendant objected, the officers advised him that they would nevertheless conduct a search "on the basis of the lawful arrest."[149] The officers in *Chimel* had not obtained a search warrant.[150]

The officers conducted a search of the entire three-bedroom house, including the attic, the garage, and a small workshop.[151] Although their search of some rooms "was relatively cursory,"[152] while in the master bedroom and the sewing room, "the officers directed the petitioner's wife to open drawers and 'to physically move contents of the drawers from side to side so that [they] might view any items that would have come from [the]

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[141] *Id.* at 66.

[142] *Id.*

[143] *Id.*

[144] Chimel v. California, 395 U.S. 752, 760 (1969).

[145] For a thorough discussion of the Court's decision in *Chimel*, see Tomkovicz, *supra* note 71, at 1427–30.

[146] *Chimel*, 395 U.S. at 753.

[147] *Id.*

[148] *Id.*

[149] *Id.* at 754.

[150] *Id.* at 754.

[151] *Id.*

[152] *Id.*

burglary.'"[153] During the search, which lasted approximately forty-five minutes to an hour, the officers seized various coins, medals, tokens, and other objects.[154] At trial, the defendant objected to the admission of those items into evidence, arguing that they had been unconstitutionally seized.[155] The trial court rejected the defendant's argument and admitted the evidence.[156] The defendant was subsequently convicted of burglary, and his conviction was affirmed by the state court of appeals and the state supreme court.[157] Both courts held that, because the defendant's arrest was lawful, the subsequent search was also lawful as incident to that arrest.[158]

Assuming, without deciding, that the defendant's arrest was valid, the Supreme Court went directly to the question of whether the warrantless search of the defendant's house was justified as incident to that arrest.[159] The Court began with a discussion of the history of its search incident to arrest jurisprudence, noting from the outset that "[t]he decisions of this Court bearing upon that question have been far from consistent, as even the most cursory review makes evident."[160] After discussing the major cases from *Weeks* to *Rabinowitz*,[161] the Court discussed the facts of the case before it and concluded that the search at issue was violative of the Fourth Amendment.[162]

The Court in *Chimel* held that, to the extent that *Rabinowitz* stood for the proposition "that a warrantless search 'incident to a lawful arrest' may generally extend to the area that is considered to be in the 'possession' or under the 'control' of the person arrested," such a holding could withstand "neither historical nor rational analysis."[163] The *Chimel* Court held that the *Rabinowitz* decision was "hardly founded on an unimpeachable line of authority"[164] and that it disregarded "the approach taken in cases such as *Go-Bart*, *Lefkowitz*, and *Trupiano*."[165] The *Chimel* Court further held that the rationale by which the state sought to sustain the search at issue was not

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[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.* at 754–55.
[159] *Id.* at 755.
[160] *Id.*
[161] *Id.* at 755–760.
[162] *Id.* at 768.
[163] *Id.* at 760.
[164] *Id.*
[165] *Id.*

supported "by a reasoned view of the background and purpose of the Fourth Amendment."[166] It went on to discuss the utmost importance of the search warrant and held that "[c]learly, the general requirement that a search warrant be obtained is not lightly to be dispensed with, and 'the burden is on those seeking [an] exemption [from the requirement] to show the need for it . . . .'"[167]

Applying the same analysis utilized by the Court in *Terry v. Ohio*,[168] which was decided one year prior to *Chimel*, the Court held:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.[169]

The Court then noted the lack of justification "for routinely searching any room other than that in which the arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself."[170] The Court held that such searches required a search warrant, absent the applicability of an exception to the warrant requirement.[171]

Moving on to *Rabinowitz* and *Harris*, the Court in *Chimel* held that the result of those two decisions was "to give law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere."[172] After noting that "*Rabinowitz* and *Harris* ha[d] been the subject of critical commentary for many years, and ha[d] been relied upon

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[166] *Id.*

[167] *Id.* at 762 (quoting United States v. Jeffers, 342 U.S. 48, 51 (1951)).

[168] 392 U.S. 1 (1968). For an explanation of the holding in *Terry v. Ohio*, see *infra* note 182.

[169] *Chimel*, 395 U.S. at 762–63 (quoting Preston v. United States, 376 U.S. 364, 367 (1964)).

[170] *Id.* at 763.

[171] *Id.* at 763 (quoting Katz v. United States, 347 U.S. 351, 357 (1967)).

[172] *Id.* at 767.

less and less in [the Court's] own decisions,"[173] the Court overruled both of those cases, holding that "insofar as the principles they stand for are inconsistent with those that we have endorsed today, they are no longer to be followed."[174]

Finally, turning to the facts of the case before it, the Court reversed the defendant's conviction, holding that that search in question "went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him."[175] Because it was conducted without a warrant, the Court declared the search to be unreasonable.[176]

After *Chimel*, an officer, subsequent to an arrest, could search the arrestee "in order to remove any weapons" that the arrestee might use to resist arrest or escape,[177] and search for and seize any evidence on the arrestee's person or in the arrestee's "grab area"—"the area from within which [the arrestee] might gain possession of a weapon or destructible evidence"—in order to prevent its concealment or destruction.[178] However, an officer was not permitted to conduct a routine search of "any room other than that in which an arrest occurs," or search "through all the desk drawers or other closed or concealed areas in that room itself," absent some other exception to the warrant requirement.[179]

Since laying out the general rule to be followed in search-incident-to-arrest cases in *Chimel*, the Court has had many opportunities to clarify that rule. In *United States v. Robinson*, for instance, the Court upheld an officer's full search of the defendant's person after the defendant was placed under arrest for driving on a revoked license.[180] The Court discussed the two rationales behind allowing warrantless searches incident to arrest: "The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial."[181] Based on these "twin rationales," the Court in *Robinson* held that "[t]he standards traditionally governing a search incident

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[173] *Id.* at 768.
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.* at 763.
[178] *Id.*
[179] *Id.*
[180] 414 U.S. 218, 235 (1973).
[181] *Id.* at 234 (citing Agnello v. United States, 269 U.S. 20, 20 (1925)).

to lawful arrest are not, therefore, commuted to the stricter *Terry* standards[182] by the absence of probable fruits or further evidence of the particular crime for which the arrest is made."[183] The Court then stated:

> Nor are we inclined . . . to qualify the breadth of the general authority to search incident to a lawful custodial arrest on an assumption that persons arrested for the offense of driving while their licenses have been revoked are less likely to possess dangerous weapons than are those arrested for other crimes. It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop. This is an adequate basis for treating all custodial arrests alike for purposes of search justification.[184]

Finally, the Court in *Robinson* took issue with the circuit court's suggestion that "there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest."[185] Rejecting this suggestion, the Court noted the "*ad hoc*" nature of a police officer's determination of how and where to search a suspect and held that authority for such a search "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect."[186] The Court went on to hold that "[i]t is the fact of the lawful arrest which establishes the authority to search,"[187] and that such a search is inherently reasonable.[188]

Since *Chimel*, the Court has also addressed the issue of the timing of a search incident to arrest on several occasions. In *Rawlings v. Kentucky*, the Court upheld a search incident to arrest that preceded the actual arrest, holding that "[w]here the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly

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[182] In *Terry v. Ohio*, the Supreme Court held that a police officer may "stop and frisk" a suspect whom the officer has reason to believe is "armed and presently dangerous." 392 U.S. 1, 24 (1968). The Court in *Terry* held that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure" and that "the scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Id.* at 19–20 (quoting Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

[183] *Robinson*, 414 U.S. at 234.

[184] *Id.* at 234–35.

[185] *Id.* at 235.

[186] *Id.*

[187] *Id.*

[188] *Id.*

important that the search preceded the arrest rather than vice versa."[189] Further, in several cases, the Court has upheld delayed searches of the arrestee or the things within the arrestee's possession or control. In *United States v. Edwards*, the Court upheld a search of the defendant's possessions that occurred while he was in custody at the city jail approximately ten hours after his arrest.[190] The Court in *Edwards* held:

> [O]nce the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other.[191]

As noted in more detail in the next two sections, since *Chimel*, the authority of law enforcement officers to conduct warrantless searches incident to arrest has expanded exponentially, with courts oftentimes losing sight of the twin rationales that justify these searches in the first place—the need to disarm the suspect and the need to preserve evidence.[192]

B. AUTOMOBILES AND THE SEARCH INCIDENT TO ARREST EXCEPTION

1. Origins: New York v. Belton.

Twelve years after *Chimel* was decided, the Court was asked to apply the rationale of *Chimel* in the context of an automobile search. In *New York v. Belton*, the Court addressed the following question: "When the occupant of an automobile is subjected to a lawful custodial arrest, does the constitutionally permissible scope of a search incident to his arrest include the passenger compartment of the automobile in which he was riding?"[193] The Court answered that question in the affirmative.[194]

The defendant in *Belton* was one of four passengers in a vehicle pulled over for speeding.[195] After the officer asked to see the driver's license and

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[189] 448 U.S. 98, 111 (1980). It is important to note that, in *Rawlings*, although the search at issue preceded any actual arrest, the officers did have probable cause to arrest the defendant before conducting the search. *Id.* at 100–01.

[190] 415 U.S. 800, 801, 810 (1974).

[191] *Id.* at 807.

[192] *See, e.g.*, Lewis R. Katz, *The Automobile Exception Transformed: The Rise of a Public Place Exemption to the Warrant Requirement*, 36 CASE W. RES. L. REV. 375, 389–97 (1986) (discussing the expansion of the automobile exception post-*Chimel*).

[193] 453 U.S. 454, 455 (1981).

[194] *Id.* at 462–63.

[195] *Id.* at 455.

vehicle registration, he discovered that none of the men in the vehicle owned the vehicle or were related to the vehicle's owner.[196] The officer also smelled burnt marijuana and saw on the car's floor an envelope marked "Supergold," which he knew was associated with marijuana.[197] The officer directed the men to get out of the car and placed them under arrest for possession of marijuana.[198] After patting down each of the men, the officer split them up into four separate areas of the highway so that they would not be next to each other.[199] He then picked up the envelope and found marijuana inside.[200] After reading the men their *Miranda* warnings, the officer searched their persons and the passenger compartment of the vehicle.[201] He found a jacket on the back seat of the vehicle belonging to the defendant and, when he unzipped one of the jacket's pockets, he found cocaine.[202] The officer then placed the defendant's jacket in his patrol car and drove the four men to the police station.[203]

After being indicted for possession of a controlled substance, the defendant moved to suppress the cocaine seized by the officer.[204] The district court denied the defendant's motion to suppress and the defendant pleaded guilty to a lesser included offense.[205] On appeal, the state appeals court upheld the constitutionality of the search and seizure as a lawful search incident to arrest.[206] However, the state supreme court reversed, holding that "[a] warrantless search of the zippered pockets of an unaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article."[207]

The Court in *Belton* began with a discussion of its decision in *Chimel*, which it interpreted as holding that "a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area."[208] The Court

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196 *Id.*
197 *Id.* at 455–56.
198 *Id.* at 456.
199 *Id.*
200 *Id.*
201 *Id.*
202 *Id.*
203 *Id.*
204 *Id.*
205 *Id.*
206 *Id.*
207 People v. Belton, 407 N.E.2d 420, 421 (N.Y. 1980).
208 *Belton*, 453 U.S. 454, 457 (1981).

then discussed the "twin rationales" of *Chimel*—to remove any weapons from the arrestee and to prevent the concealment and destruction of evidence.[209] In relation to those twin rationales, the Court had held that "'[the] scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible.'"[210] The Court then noted that "[a]lthough the principle that limits a search incident to a lawful custodial arrest may be stated clearly enough, courts have discovered the principle difficult to apply in specific cases."[211]

The Court then discussed the advantages of creating a bright-line rule to govern police conduct. It noted that "'[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'"[212] The Court recognized that, although bright-line rules had been created in other areas of search incident to arrest jurisprudence,[213] no bright-line rule had yet been created in the automobile context.[214] Pointing to the state of disarray that had been created by federal circuit and state courts over the issue before it,[215] the Court warned that "[w]hen a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority."[216]

After discussing the need for a bright-line rule in the automobile context, the Court in *Belton* held:

> Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within "the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]." In order to establish the workable rule this category of cases requires, we read *Chimel*'s definition of the limits of the area that may be searched in light of that generalization. Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he

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[209] *Id.*

[210] *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968)).

[211] *Id.* at 458.

[212] *Id.* (quoting Dunaway v. New York, 442 U.S. 200, 213–14 (1979)).

[213] *Id.* at 459 (citing United States v. Robinson, 414 U.S. 218, 235 (1973)).

[214] *Id.*

[215] *Id.*

[216] *Id.* at 459–60.

> may, as a contemporaneous incident to that arrest, search the passenger compartment of that automobile.[217]

The Court also held that officers could search any containers found in a vehicle's passenger compartment, regardless of whether such a container was open or closed.[218] Importantly, the Court in *Belton* defined the word "container" extremely broadly, as "any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like."[219] The Court noted, however, that its holding "encompasse[d] only the interior of the passenger compartment of an automobile and d[id] not encompass the trunk."[220]

As if its holding was not broad enough already, and seemingly losing sight of the twin rationales justifying searches incident to arrest laid out in *Chimel*, the Court in *Belton* recognized "that these containers will sometimes be such that they could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested."[221] Despite this acknowledgement, the Court held that such containers could nevertheless be searched because the appropriateness of such a search could not depend on a court's subsequent hindsight determination of the probability that weapons or evidence would be found.[222]

In concluding that the search at issue was constitutionally valid, the Court noted that the searched jacket was located in the passenger compartment of the car in which the defendant had been a passenger just before he was arrested.[223] Apparently not finding it relevant that, at the time of the actual search, the defendant was nowhere near the vehicle's

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[217] *Id.* at 460 (quoting Chimel v. California, 395 U.S. 752, 763 (1969)) (citation omitted). In a footnote, the Court in *Belton* clarified its holding: "Our holding today does no more than determine the meaning of *Chimel*'s principles in this particular and problematic context. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." *Id.* at 460 n.3.

[218] *Id.* at 460–61.

[219] *Id.* at 460 n.4.

[220] *Id.* As discussed more below, this limitation has little practical effect. This is because police may search a vehicle's trunk as part of an inventory search subsequent to arrest. *See* Colorado v. Bertine, 479 U.S. 367, 370 (1987). The availability of inventory searches, combined with the inevitable discovery rule, *see, e.g.*, Nix v. Williams, 467 U.S. 431, 446 (1984), means that courts will often uphold the search of a locked trunk despite the limitation discussed in *Belton*. *See infra* note 378 (discussing *Nix v. Williams*).

[221] *Belton*, 453 U.S. at 461.

[222] *Id.* (quoting United States v. Robinson, 414 U.S. 218, 235 (1973)).

[223] *Id.* at 462.

passenger compartment,[224] the Court held that "[t]he jacket was thus within the area which we have concluded was 'within the arrestee's immediate control' within the meaning of the *Chimel* case."[225]

The dissent in *Belton*, authored by Justice Brennan and joined by Justice Marshall, criticized the majority's opinion for ignoring the twin rationales that justified searches incident to arrest in the first place, calling the majority's bright-line rule arbitrary.[226] Noting that the *Chimel* exception was narrowly tailored to address the twin concerns discussed in that case,[227] the dissenters stated that *Chimel* "places a temporal and a spatial limitation on searches incident to arrest, excusing compliance with the warrant requirement only when the search 'is substantially contemporaneous with the arrest and is confined to the *immediate* vicinity of the arrest.'"[228] In a statement that would eventually become the law nearly thirty years later,[229] Justice Brennan stated, "When the arrest has been consummated and the arrestee safely taken into custody, the justifications underlying *Chimel*'s limited exception to the warrant requirement cease to apply: at that point there is no possibility that the arrestee could reach weapons or contraband."[230]

Justice Brennan referred to the majority's belief that the interior of a car is always within the immediate control of an arrestee who had recently been in that car as a fiction,[231] and stated that the majority "substantially expands the permissible scope of searches incident to arrest by permitting police officers to search areas and containers the arrestee could not possibly reach at the time of arrest."[232] In conclusion, Justice Brennan opined that the majority was establishing a "dangerous precedent," which was contrary to *Chimel* and the Court's other search-incident-to-arrest cases, as well as to the doctrine of *stare decisis* and the Fourth Amendment itself.[233] In a separate dissenting opinion, Justice White expressed his belief that, with respect to a container located in an automobile, there exists a separate

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[224] In his dissent, Justice Brennan cited the state court's recitation of the facts, which clearly indicate that the search in question came *after* the defendant was placed under arrest outside of the searched vehicle. *Id.* at 467 (Brennan, J., dissenting).

[225] *Id.* at 462 (majority opinion).

[226] *Id.* at 463 (Brennan, J., dissenting).

[227] *Id.* at 464–65.

[228] *Id.* at 465 (quoting Shipley v. California, 395 U.S. 818, 819 (1969)).

[229] Arizona v. Gant, 129 S. Ct. 1710, 1719 (2009).

[230] *Belton*, 453 U.S. at 465–66 (Brennan, J., dissenting).

[231] *Id.* at 466.

[232] *Id.*

[233] *Id.* at 468–69.

interest of privacy, and that, even when the police are justified in conducting a search of the vehicle incident to arrest, they are not necessarily also justified in searching containers found therein.[234]

After *Belton*, upon arresting the occupant of an automobile, a police officer was permitted, incident to that arrest, to search the vehicle's passenger compartment.[235] An officer could also "examine the contents of any containers found within the passenger compartment," whether the container was open or closed, including glove compartments, consoles, luggage, boxes, bags, and clothing.[236] This was true even if the container in question was "such that [it] could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested."[237]

2. Limiting Belton*:* Knowles v. Iowa

The Court's decision in *Belton* dealt only with situations where a custodial arrest was made. Seventeen years later, the Court was asked to decide whether police could lawfully search a vehicle's passenger compartment when the driver is given a citation instead of being placed under arrest. In *Knowles v. Iowa*, a police officer stopped the defendant for speeding, but chose to issue him a citation rather than placing him under arrest.[238] After issuing the citation, the officer conducted a full search of the defendant's car.[239] Under the driver's seat, the officer found a bag of marijuana and a pipe.[240] The defendant was arrested and charged with possession of a controlled substance.[241]

Before trial, Knowles moved to suppress the evidence obtained during the search, arguing that the search could not be sustained under the search incident to arrest exception because he had not actually been placed under arrest.[242] The officer admitted at the suppression hearing that he had neither the defendant's consent nor probable cause to conduct the search.[243] Based on a state law that permitted an officer to conduct what the court referred to as a "search incident to citation," the trial court denied the defendant's

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[234] *Id.* at 472 (White, J., dissenting).

[235] *Id.* at 460.

[236] *Id.* at 460–61 & n.4.

[237] *Id.* at 461.

[238] 525 U.S. 113, 114 (1998). The Court in *Knowles* noted that the officer had the right, under Iowa law, to arrest the driver. *Id.*

[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] *Id.*

[243] *Id.* at 114–15.

motion to suppress and found him guilty.[244] The state supreme court affirmed.[245]

In a unanimous decision reversing the state supreme court and finding that the search at issue was unconstitutional under the Fourth Amendment, the Court in *Knowles* began by discussing the twin rationales of *Chimel* and holding that neither rationale justified the search in question.[246] Although the Court recognized the legitimacy and importance of the first rationale—officer safety[247]—it went on to note that the threat associated with issuing a traffic citation was not as great as the threat associated with an arrest.[248] The Court held that "while the concern for officer safety in this context may justify the 'minimal' additional intrusion of ordering a driver and passengers out of the car, it does not by itself justify the often considerably greater intrusion attending a full field-type search."[249]

The Court in *Knowles* noted that, even without the search authority urged by the state in the case before it, officers had other ways to protect themselves: An officer could order individuals to exit a vehicle, conduct pat-downs with reasonable suspicion, and conduct full searches pursuant to an arrest.[250] As to the second justification behind the search incident to arrest exception—the need to discover and preserve evidence—the Court in *Knowles* concluded that the state had not shown the presence of this concern either.[251] Specifically, the Court held that "[o]nce Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car."[252]

After *Knowles*, police officers were no longer permitted to conduct searches incident to arrest when the suspect was issued a citation in lieu of arrest.[253] Officers could still, however, order a vehicle's occupants to exit the vehicle and perform a *Terry* pat-down on those occupants if there

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[244] *Id.* at 115.
[245] *Id.* at 115–16.
[246] *Id.* at 116–17.
[247] *Id.* at 117 (citing Maryland v. Wilson, 519 U.S. 408, 412 (1997)).
[248] *Id.*
[249] *Id.*
[250] *Id.* at 117–18.
[251] *Id.* at 118.
[252] *Id.*
[253] *Id.* at 117.

existed reasonable suspicion that an occupant was dangerous and might gain immediate control of a weapon.[254]

3. Expanding Belton*:* Thornton v. United States

If civil libertarians and defense attorneys criticized the Supreme Court's expansive holding in *Belton*, then they surely savaged the Court when it expanded that holding even further twenty-three years later in *Thornton v. United States*.[255] The Court in *Thornton* granted certiorari to determine "whether *Belton*'s rule is limited to situations where the officer makes contact with the occupant while the occupant is inside the vehicle, or whether it applies as well when the officer first makes contact with the arrestee after the latter has stepped out of his vehicle."[256] The Court concluded that "*Belton* governs even when an officer does not make contact until the person arrested has left the vehicle."[257]

The defendant in *Thornton* was driving a vehicle when he came upon a police car traveling in the same direction.[258] The officer grew suspicious when the defendant slowed down so as to avoid driving next to the officer.[259] After running a check on the defendant's license plates, the officer learned that the tags had been issued to another vehicle.[260] After the defendant drove into a parking lot, parked, and got out of the car, the officer approached him and asked for his driver's license.[261] Because the defendant appeared nervous, and out of concern for his safety, the officer conducted a pat-down search of the defendant's person, to which the defendant had consented.[262] That pat-down search resulted in the discovery of both marijuana and cocaine on the defendant's person.[263] The officer handcuffed the defendant, informed him that he was under arrest, and placed him in the back seat of his patrol car.[264] The officer then conducted

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[254] *Id.* at 118.

[255] 541 U.S. 615 (2004); *see* Tomkovicz, *supra* note 71, at 1437 (discussing continuing expansion of exception between *Belton* and *Thornton*).

[256] *Thornton*, 541 U.S. at 617.

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] *Id.* at 617–18.

[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] *Id.*

a search of the defendant's vehicle and found a handgun under the driver's seat.[265]

After being indicted on the charges of possession of cocaine, possession of a firearm by a convicted felon, and possession of a firearm in furtherance of a drug trafficking crime, the defendant moved to suppress the evidence of the firearm as the fruit of an unconstitutional search.[266] The district court denied this motion, holding that the search was constitutional pursuant to *Belton* and, alternatively, that the officer could have conducted an inventory search.[267] After the defendant was convicted and sentenced to 180 months in prison, he appealed, arguing that *Belton* only applied where the initial contact by the officer with the arrestee occurred while the arrestee was still in the vehicle.[268] The Fourth Circuit rejected this argument and held that the justifications for searches incident to arrest did not necessitate such a limitation.[269]

Affirming the Fourth Circuit, the Court in *Thornton* began its analysis by discussing the rules from *Chimel* and *Belton*.[270] The Court noted that, in declaring the search at issue in *Belton* constitutional, the Court in that case did not focus on the fact that the officer made contact with the suspects while they were still in the vehicle.[271] The Court continued:

> Nor do we find such a factor persuasive in distinguishing the current situation, as it bears no logical relationship to *Belton*'s rationale. There is simply no basis to conclude that the span of the area generally within the arrestee's immediate control is determined by whether the arrestee exited the vehicle at the officer's direction, or whether the officer initiated contact with him while he remained in the car . . . .
>
> In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle . . . . The stress is no less merely because the arrestee exited his car before the officer initiated contact, nor is an arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle.[272]

The Court in *Thornton* went on to note that "*Belton* allows police to search the passenger compartment of a vehicle incident to a lawful custodial

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[265] *Id.*
[266] *Id.*
[267] *Id.* at 618–19.
[268] *Id.* at 619.
[269] *Id.* (quoting United States v. Thornton, 325 F.3d 189, 195–96 (4th Cir. 2003)).
[270] *Id.* at 620.
[271] *Id.*
[272] *Id.* at 620–21.

arrest of both 'occupants' *and* 'recent occupants.'"[273] The Court further observed that:

> Indeed, the respondent in *Belton* was not inside the car at the time of the arrest and search; he was standing on the highway. In any event, while an arrestee's status as a "recent occupant" may turn on his temporal or spatial relationship to the car at the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car at the moment that the officer first initiated contact with him.[274]

Interestingly, the majority in *Thornton* expressly acknowledged a flaw in its rationale: "To be sure, not all contraband in the passenger compartment is likely to be readily accessible to a 'recent occupant.' It is unlikely in this case that petitioner could have reached under the driver's seat for his gun once he was outside of his automobile."[275] However, the Court held that a bright-line rule was nevertheless needed.[276] In conclusion, the majority in *Thornton* set forth the following rule: "So long as an arrestee is the sort of 'recent occupant' of a vehicle such as petitioner was here, officers may search that vehicle incident to the arrest."[277]

Justice Scalia filed a concurrence in *Thornton*, which was joined by Justice Ginsburg.[278] In his concurrence, Justice Scalia opined that *Belton* should not be expanded to include situations in which the arrestee was handcuffed and secured in the back of a patrol car at the time of the search.[279] He noted that "[t]he risk that [the defendant in this case] would nevertheless 'grab a weapon or evidentiary ite[m]' from his car was remote in the extreme,"[280] and that "[t]he Court's effort to apply our current doctrine to this search stretches it beyond its breaking point."[281] In Justice Scalia's opinion, the search at issue instead could have been upheld as a "more general sort of evidence-gathering search" permitted by cases like *Rabinowitz*.[282] He cited a variety of cases that referred to "the general interest in gathering evidence related to the crime of arrest with no mention of the more specific interest in preventing its concealment or

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[273] *Id.* at 622 (emphasis added).

[274] *Id.*

[275] *Id.*

[276] *Id.* at 622–23.

[277] *Id.* at 623–24.

[278] Justice O'Connor filed a separate concurrence, criticizing the willingness of lower courts to expand *Belton* where the twin rationales justifying searches incident to arrest were not present. *Id.* at 625 (O'Connor, J., concurring).

[279] *Id.* at 625 (Scalia, J., concurring).

[280] *Id.*

[281] *Id.*

[282] *Id.* at 629.

destruction."[283] He concluded by stating that it was reasonable for the officer in *Thornton* "to believe that further contraband or similar evidence relevant to the crime for which [the defendant] had been arrested might be found in the vehicle from which he had just alighted and which was still within his vicinity at the time of arrest,"[284] and that the circuit court's decision should have been affirmed on this ground.[285] Justice Scalia also opined that *Belton* should be limited to cases "where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[286]

Dissenting, Justice Stevens, joined by Justice Souter, stated that the search at issue was not justified by *Chimel* or *Belton*.[287] According to Justice Stevens, "*Belton* was demonstrably concerned only with the narrow but common circumstance of a search occasioned by the arrest of a suspect who was seated in or driving an automobile at the time the law enforcement official approached."[288] He continued by stating that "[t]he bright-line rule crafted in *Belton* is not needed for cases in which the arrestee is first accosted when he is a pedestrian, because *Chimel* itself provides all the guidance that is necessary."[289] He also pointed out some of the flaws in the majority's decision, including the majority's failure to clarify exactly what degree of temporal or special relationship with a vehicle would be required to justify a search.[290] Justice Stevens noted that this lack of clarity would lead to the subject of a search not knowing if or how he is protected by the Constitution, and to a law enforcement officer not knowing the limits of his authority.[291] Justice Stevens concluded by stating: "Without some limiting principle, I fear that today's decision will contribute to 'a massive broadening of the automobile exception,' when officers have probable cause to arrest an individual but not to search his car."[292]

After *Thornton*, an officer could conduct a vehicle search incident to arrest even when the occupants exited the vehicle prior to the officer

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[283] *Id.* at 629–30.
[284] *Id.* at 632.
[285] *Id.*
[286] *Id.*
[287] *Id.* at 634 (Stevens, J., dissenting).
[288] *Id.* at 635.
[289] *Id.* at 636.
[290] *Id.*
[291] *Id.*
[292] *Id.* (internal citation omitted).

initiating contact.[293] This rule applied regardless of the likelihood that the vehicle's recent occupants could reach for a weapon or contraband.[294]

4. The Effect of Belton *and* Thornton *on Automobile Searches Incident to Arrest*

In the years following *Belton* and *Thornton*, the concerns expressed by Justice Stevens in his dissenting opinion in *Thornton* seem to have come true. In case after case, lower courts upheld searches conducted well after the arrestee was placed under arrest, handcuffed, and secured.[295] In *United States v. Hrasky*, for example, the Eighth Circuit upheld a search conducted an hour after the arrestee was apprehended and after he had been handcuffed and placed in the back of a patrol car.[296] Similarly, in *United States v. Weaver*, the Ninth Circuit upheld a search conducted ten to fifteen minutes after the arrest was made, again after the arrestee had already been handcuffed and secured in the back of a police vehicle.[297] In support of this holding, the Ninth Circuit stated:

> Although contemporaneity is important, we have made clear that it is not the sole inquiry. "The relevant distinction turns not upon the moment of arrest versus the moment of the search but upon whether the arrest and search are so separated in time or by intervening acts that the latter cannot be said to have been incident to the former." Indeed, "[t]here is no fixed outer limit for the number of minutes that may pass between an arrest and a valid, warrantless search that is a contemporaneous incident of the arrest."[298]

Although the Ninth Circuit suggested that the Supreme Court should re-examine its holding in *Belton* because "the *Belton* rule [was] broader than its stated rationale,"[299] it nevertheless felt compelled to uphold the search at issue pursuant to *Belton* and its progeny.[300] Moreover, in dozens of other cases, courts upheld searches incident to arrest that were conducted after the arrestee was already handcuffed and secured in a patrol car.[301] A

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[293] *Id.* at 620–21.

[294] *Id.* at 622–23.

[295] *See* Arizona v. Gant, 129 S. Ct. 1710, 1718 n.2 (2009) (collecting circuit cases).

[296] 453 F.3d 1099, 1100, 1103 (8th Cir. 2006).

[297] 433 F.3d 1104, 1107 (9th Cir. 2006).

[298] *Id.* at 1106 (citations omitted).

[299] *Id.* at 1107.

[300] *Id.*

[301] *See, e.g.*, United States v. Murphy, 221 F. App'x 715, 717 (10th Cir. 2007); United States v. Williams, 170 F. App'x 399, 401 (6th Cir. 2006); United States v. Dorsey, 418 F.3d 1038, 1041 (9th Cir. 2005); United States v. Osife, 398 F.3d 1143, 1144 (9th Cir. 2005); United States v. Sumrall, 115 F. App'x 22, 24 (10th Cir. 2004).

few years later, however, the Supreme Court followed the Ninth Circuit's advice and revisited its holding in *Belton*.

III. REINING IT IN: *ARIZONA V. GANT*

Just when one might have thought that a police officer's authority to search an automobile incident to a custodial arrest had no limits, the Supreme Court issued its decision in *Arizona v. Gant*.[302] Based on an anonymous tip that drugs were being sold from a particular residence, the officers in *Gant* traveled to that residence and encountered the defendant as he drove his car into the driveway.[303] Based on a previous encounter with the defendant earlier that day, the officers knew that the defendant's license had been suspended and that there was an outstanding warrant for his arrest for driving with a suspended license.[304] After the officers confirmed that the driver of the car was the defendant by shining a flashlight into the car as it drove by, the defendant parked at the end of the driveway, got out of his car, and shut the door.[305] One of the officers called to the defendant and after they approached each other, the officer immediately placed the defendant under arrest and handcuffed him.[306] After additional officers arrived on the scene, the defendant was placed in the back seat of a patrol car.[307]

After the defendant had been handcuffed and placed in the back of a patrol car, the officers searched his vehicle, finding a gun and a bag of cocaine.[308] The bag of cocaine was found in the pocket of a jacket located in the back seat.[309] After being charged with two drug offenses, the defendant moved to suppress the evidence seized from his car on Fourth Amendment grounds.[310] The defendant argued that the search was not authorized by *Belton* "because he posed no threat to the officers after he was handcuffed in the patrol car and because he was arrested for a traffic offense for which no evidence could be found in his vehicle."[311] The trial court denied the motion to suppress, concluding that the search was

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[302] 129 S. Ct. 1710 (2009).
[303] *Id.* at 1715.
[304] *Id.*
[305] *Id.*
[306] *Id.*
[307] *Id.*
[308] *Id.*
[309] *Id.*
[310] *Id.*
[311] *Id.*

permissible as a search incident to arrest.[312] The defendant was found guilty by a jury and sentenced to three years in prison.[313]

On appeal, the Arizona Supreme Court reversed the trial court, concluding that the search conducted was unreasonable under the Fourth Amendment.[314] The Arizona Supreme Court discussed *Belton*, but distinguished *Belton* from the case before it.[315] The court held that the analysis in *Belton* did not apply where, as in the case at bar, the search occurred after the scene was secure.[316] Citing *Chimel*'s twin rationales, the Arizona Supreme Court held:

> [W]hen . . . the justifications underlying *Chimel* no longer exist because the scene is secure and the arrestee is handcuffed, secured in the back of a patrol car, and under the supervision of an officer, the warrantless search of the arrestee's car cannot be justified as necessary to protect the officers at the scene or prevent the destruction of evidence.[317]

The United States Supreme Court granted certiorari and affirmed the state supreme court by a margin of five to four. The majority opinion was authored by Justice Stevens, who was joined by Justices Scalia, Souter, Thomas, and Ginsburg. Justice Scalia also filed a concurring opinion. Two dissenting opinions were filed: one by Justice Breyer and another by Justice Alito, the latter of which was joined by Chief Justice Roberts, Justice Kennedy and, in part, by Justice Breyer. The majority in *Gant* began its discussion by noting that "[t]he chorus that has called for us to revisit *Belton* includes courts, scholars, and Members of this Court who have questioned that decision's clarity and its fidelity to Fourth Amendment principles."[318] The Court then went through a history of its search incident to arrest jurisprudence, including its decisions in *Chimel* and *Belton*.[319]

Citing the Arizona Supreme Court's interpretation of its holding in *Belton*, the Court in *Gant* stated:

> The Arizona Supreme Court read our decision in *Belton* as merely delineating "the proper scope of a search of the interior of an automobile" incident to an arrest. That is, *when* the passenger compartment is within an arrestee's reaching distance, *Belton*

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[312] *Id.*
[313] *Id.*
[314] *Id.* (citing State v. Gant, 162 P.3d 640, 644 (Ariz. 2007)).
[315] *Gant*, 162 P.3d at 642–43.
[316] *Id.* at 643.
[317] *Id.* at 644.
[318] *Gant*, 129 S. Ct. at 1716.
[319] *Id.* at 1716–18.

> supplies the generalization that the entire compartment and any containers therein may be reached.[320]

The Court continued:

> Despite the textual and evidentiary support for the Arizona Supreme Court's reading of *Belton*, our opinion has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search.[321]

Discussing the effects of *Belton*, the Court in *Gant* echoed the concerns expressed by Justice O'Connor in her *Thornton* concurrence—that "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*."[322]

The Court went on to criticize the prevailing interpretation of its decision in *Belton*:

> Under this broad reading of *Belton*, a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search. To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with our statement in *Belton* that it "in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests."[323]

The Court expressly rejected this broad interpretation of *Belton* and held that "the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."[324] In a footnote, the Court noted that "[b]ecause officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains."[325] Next, the Court held that "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'"[326] The Court noted that, "[i]n many cases, as when a recent occupant is arrested for a

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[320] *Id.* at 1718 (citation omitted).

[321] *Id.*

[322] *Id.* (citing Thornton v. United States, 541 U.S. 615, 624 (O'Connor, J., concurring)).

[323] *Id.* at 1719 (internal citations omitted).

[324] *Id.*

[325] *Id.* at 1719 n.4.

[326] *Id.* at 1719 (citing *Thornton*, 541 U.S. at 632 (Scalia, J., concurring)).

traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence."[327] "But in others," the Court continued, "including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein."[328]

Turning to the facts of the case before it, the Court in *Gant* held that "[n]either the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case."[329] The Court explained that Gant "clearly was not within reaching distance of his car at the time of the search,"[330] and that the offense for which Gant was arrested—driving with a suspended license—was "an offense for which police could not expect to find evidence in the passenger compartment of Gant's car."[331] The Court found that, "[b]ecause police could not reasonably have believed either that Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable."[332]

The Court in *Gant* rejected the state's argument that *Belton* searches were reasonable regardless of the possibility of access, holding that the state "seriously undervalue[d] the privacy interests at stake,"[333] and "exaggerate[d] the clarity that its reading of *Belton* provides."[334] The Court held that, contrary to the state's suggestion, "a broad reading of *Belton* is also unnecessary to protect law enforcement safety and evidentiary interests."[335] The Court explained:

> Under our view, *Belton* and *Thornton* permit an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand . . . .
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> These exceptions together ensure that officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search.[336]

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[327] *Id.*
[328] *Id.*
[329] *Id.*
[330] *Id.*
[331] *Id.* (citing Knowles v. Iowa, 525 U.S. 113, 118 (1998)).
[332] *Id.*
[333] *Id.* at 1720.
[334] *Id.*
[335] *Id.* at 1721.
[336] *Id.*

Finally, the Court responded to the dissenters' accusation that the majority was ignoring the doctrine of *stare decisis*.[337] Although it recognized the importance of *stare decisis*, the majority held that it could not rely on the doctrine "to justify the continuance of an unconstitutional police practice,"[338] and that it "would be particularly loath to uphold an unconstitutional result in a case that is so easily distinguished from the decisions that arguably compel it."[339] The majority also rejected the dissenters' argument that "consideration of police reliance interests require[d] a different result," [340] holding that "[i]f it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement 'entitlement' to its persistence."[341]

Concurring, Justice Scalia focused on "traditional standards of reasonableness,"[342] and stated that "those standards do not justify what I take to be the rule set forth in [*Belton*] and [*Thornton*]: that arresting officers may always search an arrestee's vehicle in order to protect themselves from hidden weapons."[343] Justice Scalia went on to state:

> When an arrest is made in connection with a roadside stop, police virtually always have a less intrusive and more effective means of ensuring their safety—and a means that is virtually always employed: ordering the arrestee away from the vehicle, patting him down in the open, handcuffing him, and placing him in the squad car.[344]

Although Justice Scalia recognized that police officers face a risk of being shot whenever they initiate a traffic stop, he went on to note that the risk "is *not at all* reduced by allowing a search of the stopped vehicle after the driver has been arrested and placed in the squad car."[345] Justice Scalia noted that the state had "failed to provide a single instance in which a formerly restrained arrestee escaped to retrieve a weapon from his own vehicle."[346]

Despite agreeing with the majority's outcome, however, Justice Scalia disagreed with its reasoning. Specifically, he stated that *Belton* and *Thornton* should be overruled and that a new rule should be established under which "a vehicle search incident to arrest is *ipso facto* 'reasonable'

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[337] *Id.* at 1722.
[338] *Id.*
[339] *Id.*
[340] *Id.*
[341] *Id.* at 1723.
[342] *Id.* at 1724 (Scalia, J., concurring).
[343] *Id.*
[344] *Id.*
[345] *Id.* (emphasis in original).
[346] *Id.*

only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred."[347] Justice Scalia explained that, under his proposed rule, the search at issue in *Gant* would be deemed unlawful.[348] As to the dissenters' *stare decisis* argument, Justice Scalia stated that there was "ample reason" for abandoning prior precedent in this context: "the precedent was badly reasoned and produces erroneous (in this case unconstitutional) results."[349]

Dissenting, Justice Breyer stated that the Court's holding in *Belton* was "best read as setting forth a bright-line rule that permits a warrantless search of the passenger compartment of an automobile incident to the lawful arrest of an occupant—regardless of the danger the arrested individual in fact poses."[350] Because of his belief that "the rule c[ould] produce results divorced from its underlying Fourth Amendment rationale,"[351] Justice Breyer stated that he "would look for a better rule—were the question before us one of first impression."[352] However, he went on to state that the question was not one of first impression "and that fact makes a substantial difference."[353] Based on the doctrine of *stare decisis*, Justice Breyer expressed his unwillingness to abandon a well-established legal precedent that had been relied upon considerably by other courts.[354]

Justice Alito's separate dissent, joined by Chief Justice Roberts, Justice Kennedy, and in part by Justice Breyer, expressed concern that the majority's holding might "endanger arresting officers,"[355] "confuse law enforcement officers and judges for some time to come,"[356] and "cause the suppression of evidence gathered in many searches carried out in good-faith reliance on well-settled case law."[357] Justice Alito criticized the majority's attempt at narrowing the holding of *Belton*, and stated that *Belton* stood for

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[347] *Id.* at 1724–25.
[348] *Id.* at 1725.
[349] *Id.*
[350] *Id.* (Breyer, J., dissenting).
[351] *Id.*
[352] *Id.* at 1725–26.
[353] *Id.* at 1726.
[354] *Id.*
[355] *Id.* (Alito, J., dissenting).
[356] *Id.*
[357] *Id.*

the broader proposition that arresting officers "may always search an arrestee's vehicle in order to protect themselves."[358]

IV. *GANT*'S AFTERMATH AND INEVITABLE DISCOVERY

Pursuant to the majority's holding in *Gant*, a police officer may search a vehicle incident to a recent occupant's arrest in only two situations: (1) "if the arrestee is within reaching distance of the passenger compartment at the time of the search";[359] or (2) if "it is reasonable to believe the vehicle contains evidence of the offense of arrest."[360] The first category excludes any arrestee who is handcuffed or otherwise secured or outside of reaching distance of the passenger compartment at the time of the search.[361] As the Court itself noted in *Gant*, "[b]ecause officers have many means of ensuring the safe arrest of vehicle occupants," it will be the rare situation where this is not the case.[362] Therefore, in practical effect, *Gant* limits lawful searches incident to arrest to the second category, which excludes arrests for traffic violations or other offenses for which evidence would not reasonably be found in the vehicle.[363]

In theory, the Court's holding in *Gant* represents a landmark in Fourth Amendment jurisprudence. After twenty-eight years of expanding police authority in the context of automobile searches incident to arrest, the Court finally placed a significant limitation on the scope of permissible police activity. And the Court did so out of concern over and respect for the important constitutional interests that a motorist has in his vehicle.[364]

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[358] *Id.* at 1727. Justice Alito also criticized the majority for abandoning *Belton*'s bright-line rule, and stated that the majority could not justify its departure from the normal rule of *stare decisis. Id.* He also criticized the majority for "leav[ing] the law relating to searches incident to arrest in a confused and unstable state." *Id.* at 1731.

[359] *Id.* at 1723.

[360] *Id.*

[361] *Id.* at 1719 & n.4.

[362] *Id.* at 1719.

[363] *Id.* It remains open whether an arrest for driving under the influence of alcohol or drugs would fall into the same category as other traffic violations that do not permit searches incident to arrest. There is an argument that the second holding in *Gant* would include these types of arrests because, unlike arrests for driving on a suspended license, it might be reasonable to believe that the vehicle contains evidence related to the offense of arrest such as open containers of alcohol, drugs, or drug paraphernalia. *See* Eric H. Sills & Erin H. Gerstenzang, *Column: DWI*, CHAMPION MAG., December 2009, at *56. On the other hand, because possession is not an element of driving under the influence, it could be argued that such evidence, even if found, would not be "evidence of the offense of arrest." The author could not find any cases discussing *Gant*'s effect on DUI arrests. As this is not the focus of this Article, it is enough to raise the issue without further analysis.

[364] *Gant*, 129 S. Ct. at 1720.

However, in the months following the Court's decision in *Gant*, it became clear that the Court's landmark decision left something to be desired in terms of practical real-world effect. This is because in order to avoid exclusion of evidence based on the Court's holding in *Gant*, it is often only necessary for the government or police to characterize the search, post hoc, as an inventory search rather than a search incident to arrest, or to argue that the tainted evidence should not be excluded because it inevitably would have been discovered during a later inventory search.

In *South Dakota v. Opperman*, the Supreme Court held that, as long as certain safeguards are met, the police may, consistent with the Fourth Amendment, conduct a warrantless search of an arrestee's vehicle as part of the impoundment procedure.[365] In order for an inventory search to be lawful, the subject vehicle "must first be in the lawful custody of the police," and the "search must be conducted pursuant to standardized police procedures."[366] The Court has stated that inventory searches "serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard police from danger."[367] Based on these legitimate interests, the Court has "accorded deference to police caretaking procedures designed to secure and protect vehicles and their contents within police custody."[368] Because of the nature of the very specific interests justifying inventory searches, however, courts have held that the purpose of an inventory search "must be to identify and secure personal property inside the vehicle and not to gather incriminating evidence against the vehicle's occupants."[369]

After *Opperman* was decided, several lower federal and state courts attempted to limit the authority of police to conduct inventory searches. For instance, the Supreme Court of Colorado once deemed an inventory search unlawful where the arrestee could have made alternative arrangements for the safekeeping of his property.[370] Reversing the Supreme Court of Colorado, however, the United States Supreme Court noted that "[t]he reasonableness of any particular governmental activity does not necessarily

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[365] 428 U.S. 364, 374–75 (1976).

[366] United States v. Battle, No. 09-4169, 2010 U.S. App. LEXIS 5427, at *7 (4th Cir. Mar. 16, 2010).

[367] Colorado v. Bertine, 479 U.S. 367, 372 (1987).

[368] *Id.*

[369] *Battle*, 2010 U.S. App. LEXIS 5427, at *7. For a more detailed history of the inventory search exception to the warrant requirement, see Steven M. Christenson, Colorado v. Bertine *Opens the Inventory Search to Containers*, 73 IOWA L. REV. 771 (1998).

[370] People v. Bertine, 706 P.2d 411, 418 (Colo. 1985), *rev'd*, 479 U.S. 367 (1987).

or invariably turn on the existence of alternative 'less intrusive' means."[371] 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."[372]

Although the Court has repeatedly held that, in order to be lawful, an inventory search must "be conducted according to standardized criteria,"[373] this does not mean that an officer cannot be given discretion to choose between several reasonable alternatives. In *Bertine*, the petitioner argued that the inventory search of his vehicle was unconstitutional because "departmental regulations gave the police officers discretion to choose between impounding his van and parking and locking it in a public parking place."[374] The Court rejected this argument, holding that "[n]othing in *Opperman* . . . prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of criminal activity."[375] In terms of scope, inventory searches are similar to the searches incident to arrest that were permitted under *Belton*. Not only can police search the passenger compartment of the impounded vehicle but, so long as department policy allows it, they may also search any containers located within the vehicle, whether open or closed.[376] Police may also search a locked trunk during an inventory search.[377]

The Court's holding in *Gant*, while severely limiting searches incident to arrest, did nothing to affect the availability or scope of inventory searches. If the subject vehicle is in the lawful custody of the police, and the search is conducted pursuant to standardized police procedures, police may conduct a search of the vehicle's passenger compartment, trunk, and any containers located therein, whether open or closed, as part of their impoundment procedures. Post-*Gant*, even if a police officer conducts a search that is not authorized as a search incident to arrest, the prosecution

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[371] *Bertine*, 479 U.S. at 374 (quoting Illinois v. Lafayette, 462 U.S. 640, 647 (1983)).

[372] *Id.*

[373] *Id.* at 374 n.6.

[374] *Id.* at 375.

[375] *Id.*

[376] Florida v. Wells, 495 U.S. 1, 4 (1990); *see* Christenson, *supra* note 369, at 783.

[377] United States v. Wright, No. 4:08-cr-18, 2010 U.S. Dist. LEXIS 19676, at *16 (E.D. Tenn. Feb. 5, 2010) (citing United States v. Jemison, 310 F. App'x 866, 871 (6th Cir. 2009)); *see also* United States v. Long, 705 F.2d 1259, 1262 (10th Cir. 1983); United States v. Bosby, 675 F.2d 1174, 1179 (11th Cir. 1982); United States v. Edwards, 577 F.2d 883, 893 (5th Cir. 1978), *cert. denied* 439 U.S. 968 (1978).

can argue that the evidence found during such a search inevitably would have been discovered during a later inventory search and, therefore, should not be suppressed.[378] Provided the prosecution can establish this by a preponderance of the evidence, the tainted evidence will be admissible notwithstanding its illegality under *Gant*.[379]

In many recent cases, lower courts have avoided application of *Gant* either by characterizing the search at issue as an inventory search rather than a search incident to arrest, or by holding that the evidence inevitably would have been discovered during a later inventory search.[380] The former approach was taken by the Tenth Circuit in *United States v. Sand*.[381] In *Sand*, there was a question as to whether the search at issue was a search incident to arrest or an inventory search.[382] Although the search was characterized as a search incident to arrest in some places in the record, in concluding that the search was a permissible inventory search, the court in *Sand* focused on the fact that the officer who conducted the search testified that it was an inventory search and that the vehicle was being prepared for towing.[383] The court acknowledged that, had the search been a search incident to arrest as opposed to an inventory search, it may have been illegal under *Gant*.[384]

The latter approach—using the inevitable discovery rule to save evidence discovered during a search that is otherwise illegal under *Gant*—

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[378] In *Nix v. Williams*, 467 U.S. 431, 444 (1984) [hereinafter *Williams II*], the Court established the inevitable discovery rule, holding that "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means," then the evidence should not be excluded. The Court in *Williams II* rejected a rule that would have required the prosecution to prove the absence of bad faith by the police. *Id.* at 445.

[379] *Id.* at 444. The reason this did not work to save the evidence in *Gant* itself is because, in *Gant*, the officers "had no intention of impounding Gant's car until after they searched the passenger compartment and found the contraband." State v. Gant, 162 P.3d 640, 646 (Ariz. 2007).

[380] *See infra* notes 384–389 and accompanying text.

[381] 329 F. App'x 794 (10th Cir. 2009).

[382] *Id.* at 798 n.1.

[383] *Id.* at 798.

[384] *Id.*; *see also* United States v. Allen, No. 4:08-cr-40, 2009 U.S. Dist. LEXIS 95383, at *4–6 (E.D. Tenn. Oct. 13, 2009) (upholding search of vehicle as lawful inventory search unaffected by *Gant*); United States v. McCullum, No. 3:07-cr-128, 2009 U.S. Dist. LEXIS 93377, at *5 (W.D.N.C. Oct. 5, 2009) (same); United States v. Gilbert, No. 2:08-cr-0094, 2009 U.S. Dist. LEXIS 56826, at *23 n.6 (W.D. Pa. July 2, 2009) (same); United States v. Elliot, No. 09cr0082, 2009 U.S. Dist. LEXIS 40222, at *5–6 (S.D. Cal. May 8, 2009) (declining to reach the *Gant* issue because search was lawful inventory search).

was utilized by the Ninth Circuit in *United States v. Ruckes*.[385] The court in *Ruckes* found that the search at issue did not meet the requirements of a search incident to arrest under *Gant*.[386] However, the court affirmed the defendant's conviction because the evidence seized "would have been uncovered during a routine inventory search of the vehicle upon impound."[387] Although the court in *Ruckes* applied the inevitable discovery rule to save the evidence seized in that case, it noted that "the inevitable discovery doctrine will not always save a search that has been invalidated under *Gant*. The government is still required to prove, by a preponderance of the evidence, that there was a lawful alternative justification for discovering the evidence."[388] A simple Sherpardizing of *Gant* reveals that there is an abundance of other cases in which courts have reached the same result.[389]

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[385] 586 F.3d 713 (9th Cir. 2009).

[386] *Id.* at 715.

[387] *Id.*

[388] *Id.* at 719. In a subsequent case, *United States v. Avendano*, No. 08-50505, 2010 U.S. App. LEXIS 6836, at *4–5 (9th Cir. Apr. 1, 2010), the Ninth Circuit cited this language from *Ruckes* and held that, in the case before it, the Government could not rely on the inevitable discovery rule to save a search made unlawful by *Gant* where the Government "failed to meet its burden of proving standardized local procedure and compliance with that procedure." *Id.* at *4; *see also* United States v. Chavez, No. 2:09-cr-0033, 2009 U.S. Dist. LEXIS 116924, at *19-21 (E.D. Cal. Nov. 24, 2009) (same).

[389] United States v. Stotler, 591 F.3d 935, 940 (7th Cir. 2010) (holding that, even if search was unlawful under *Gant*, evidence was admissible because it would have inevitably been discovered during later inventory search); Davis v. Smith, No. 3:09CV274, 2010 U.S. Dist. LEXIS 5163, at *13–14 (E.D. Va. Jan. 22, 2010) (applying same reasoning in civil case for unlawful arrest and false imprisonment); United States v. Bradford, No. 09-CR-71, 2009 U.S. Dist. LEXIS 110385, at *11 (E.D. Wis. Nov. 5, 2009) ("[E]ven if the search of the car exceeded the bounds set by *Gant*, the government demonstrated that the gun would inevitably have been discovered pursuant to the inventory search."); United States v. Morillo, No. 08 CR 676, 2009 U.S. Dist. LEXIS 94396, at *6–7, 23 (E.D.N.Y. Oct. 9, 2009) (despite violation of *Gant*, evidence was admissible because it would have inevitably been discovered during inventory search); United States v. Maxwell, No. 4:09CR299, 2009 U.S. Dist. LEXIS 77454, at *7–8 (E.D. Mo. Aug. 31, 2009) (holding that search was permissible under *Gant* and, alternatively, that evidence would have inevitably been discovered during inventory search); United States v. Owen, No. 1:09cr38HSO, 2009 U.S. Dist. LEXIS 85929, at *11–12 (S.D. Miss. August 28, 2009) (same); Humphreys v. State, No. S09P1428, 2010 Ga. LEXIS 227, at *32–33 (Ga. Mar. 15, 2010) ("We need not determine whether the search of the [vehicle] after [the defendant]'s arrest was valid under *Gant*, however, because it is apparent that the evidence seized from the vehicle would have been discovered during the subsequent inventory of the vehicle and that it was therefore admissible under the inevitable discovery rule."); People v. Reyes, No. B214107, 2009 Cal. App. Unpub. LEXIS 9935, at *15 (Cal. Ct. App. Dec. 17, 2009) (Mosk, J., concurring) (discussing possible application of inevitable discovery rule in *Gant* context).

The Court's holding in *Gant*, while a good first step towards ensuring Fourth Amendment protection in the automobile search context, does not go far enough to protect a motorist's privacy interest in his vehicle, an interest that the Court in *Gant* specifically recognized as important.[390] In order to give its holding in *Gant* some teeth, the Court will need to follow up with decisions limiting either the inventory search exception to the warrant requirement, or the inevitable discovery rule. The former option—that of limiting the inventory search exception—seems highly unlikely given the Court's prior decisions regarding that exception to the warrant requirement and the legitimate interests served by allowing inventory searches.[391] The latter option then—limiting the inevitable discovery rule—appears to be the only realistic way in which the loophole around the holding in *Gant* eventually might be closed.

There are several ways in which the Court reasonably could limit the inevitable discovery rule, each finding support under the laws of various states. The first option would be to make a distinction between "primary" and "secondary" evidence and to hold that the inevitable discovery rule applies to save the latter from exclusion, but not the former.[392] This would limit the rule by only allowing evidence completely untainted by the illegal search while recognizing the deterrence rationale behind the exclusionary rule. One of the leading jurisdictions to follow this approach is New York. In *People v. Stith*,[393] officers initiated a stop of the defendants' truck tractor for speeding.[394] When the defendants could not locate the truck's registration, one of the officers ordered them out of the truck and climbed into the driver's side of the truck to conduct his own search.[395] After removing a portfolio sticking out of a bag, the officer noticed the butt of a revolver inside the bag's side pocket.[396] The defendants were arrested for criminal possession of a weapon and transported to the local jail.[397] On the

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[390] Arizona v. Gant, 129 S. Ct. 1710, 1720 (2009) ("Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home . . . the former interest is nevertheless important and deserving of constitutional protections.").

[391] *See supra* notes 365–377 and accompanying text.

[392] For a detailed argument of why the inevitable discovery rule should be applied only to secondary, and not primary, evidence, see Jessica Forbes, *The Inevitable Discovery Exception, Primary Evidence, and the Emasculation of the Fourth Amendment*, 55 FORDHAM L. REV. 1221 (1987).

[393] 506 N.E.2d 911 (N.Y. 1987).

[394] *Id.* at 912.

[395] *Id.*

[396] *Id.*

[397] *Id.*

way to the jail, the officers learned that the defendant's license had expired and that the truck was stolen.[398] The defendants were then charged with criminal possession of stolen property.[399]

Prior to trial, the defendants moved to suppress the gun found during the search, but the trial court denied the motion.[400] On appeal, the appellate division affirmed this denial.[401] Both of those courts held that, even though the search and seizure were in violation of the defendants' constitutional rights, the evidence should not be excluded pursuant to the inevitable discovery rule because the gun inevitably would have been discovered during an inventory search following the defendants' arrest when the police learned that the truck was stolen.[402]

On appeal, the Court of Appeals of New York reversed, concluding that application of the inevitable discovery rule was not proper in that case.[403] The court held that, while New York courts had recognized the inevitable discovery rule for several years, the courts had "never applied the rule where, as here, the evidence sought to be suppressed is the very evidence obtained in the illegal search."[404] The court noted that in all of the cases in which the inevitable discovery rule had been applied, "the evidence saved from suppression by the inevitable discovery rule was not evidence illegally obtained during or as the immediate consequence of the challenged police conduct,"[405] but instead was "evidence obtained indirectly as a result of leads or information gained from that primary evidence."[406] Interestingly, not only did the court in *Stith* cite other New York court decisions to support this proposition, but it also cited the United States Supreme Court's decision in *Williams II*, noting that the evidence saved from suppression in that case was secondary, rather than primary, evidence.[407]

In support of its holding that the inevitable discovery rule should apply only to secondary evidence, the court in *Stith* noted that:

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398 *Id.* at 912–13.
399 *Id.* at 913.
400 *Id.* at 912.
401 *Id.*
402 *Id.*
403 *Id.*
404 *Id.* at 913–14.
405 *Id.* at 914.
406 *Id.*
407 *Id.*

> When the inevitable discovery rule is applied to secondary evidence . . . the effect is not to excuse the unlawful police actions by admitting what was obtained as a direct result of the initial misconduct. It is not the tainted evidence that is admitted, but only what comes from it as a result of further police investigation. The rationale is that when the secondary evidence would have been found independently in any event, "the prosecution [should not be] put in a *worse* position simply because of some earlier police error or misconduct.[408]

The court went on to hold that the same reasoning did not apply when it came to the admission of primary evidence:

> In contrast, when the inevitable discovery rule is applied to primary evidence, as was done here, the result is quite different. It is the tainted evidence itself and not the product of that evidence which is saved from exclusion. Permitting its admission in evidence effects what amounts to an after-the-fact purging of the initial wrongful conduct, and it can never be claimed that a lapse of time or the occurrence of intervening events has attenuated the connection between the evidence ultimate acquired and the initial misconduct. The illegal conduct and the seizure of the evidence are one and the same.[409]

The court concluded that application of the inevitable discovery rule to save primary evidence from suppression "would be an unacceptable dilution of the exclusionary rule," because it would "defeat a primary purpose of that rule, deterrence of police misconduct."[410]

The New York approach as established by *Stith* has been utilized by New York courts post-*Gant* to reject application of the inevitable discovery rule where a search incident to arrest violates the holding of *Gant*. In *People v. Derrell*,[411] for instance, the court found that the search at issue was illegal under *Gant* and then rejected the Government's argument that the inevitable discovery rule should apply.[412] Citing *Stith*, the court in *Derrell* held that the inevitable discovery rule did not apply in the case before it because the evidence sought to be suppressed was primary, as opposed to secondary, evidence.[413] Courts in Oregon and Pennsylvania have also applied the primary–secondary evidence distinction applied by the New York courts.[414] The distinction has been rejected by the courts of several other states.[415]

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[408] *Id.* (quoting *Williams II*, 467 U.S. 431, 444 (1984)).

[409] *Id.*

[410] *Id.*

[411] 889 N.Y.S.2d 905 (N.Y. Sup. Ct. 2009).

[412] *Id.* at 920.

[413] *Id.* at 920–21.

[414] State v. Crossen, 536 P.2d 1263, 1264 (Or. Ct. App. 1975) ("The inevitable discovery rule has been applied only to purge the taint from derivative, not primary, evidence and we see no reason in this case to extend it to the latter."); Commonwealth v. Guillespie, 745 A.2d

Although the United States Supreme Court has never recognized this primary–secondary evidence distinction, the Court's prior decisions dealing with the inevitable discovery rule in no way foreclose the option of it doing so in a future case. As the New York Court of Appeals in *Stith* correctly noted, *Williams II*, the very case in which the Supreme Court adopted the inevitable discovery rule, dealt with secondary, and not primary, evidence.[416] Importantly, the Court in *Williams II* cited the deterrence rationale of the exclusionary rule,[417] but went on to find that, in the case before it, admission of the derivative evidence would not further this rationale.[418] This makes sense in the context of secondary or derivative evidence—admission of such evidence would in no way work against deterring a police officer from conducting an illegal search because such secondary evidence is too attenuated from the illegal search to be properly

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654, 662 n.5 (Pa. Super. Ct. 2000) (holding that for inevitable discovery rule to be applicable, prosecution must "prove that the secondary evidence . . . was gathered by means sufficiently distinguishable from any illegality so as to be 'purged of its primary taint' rather than deriving from exploitation of the illegality").

In addition, there is some support for recognition of the primary–secondary evidence distinction in at least two federal district court decisions. In *United States v. Massey*, for example, the district court noted that the inevitable discovery rule—which at that time had not yet been recognized by the Supreme Court—"would allow *indirect* evidence to be introduced, notwithstanding its derivative connection to the excluded *direct* evidence resulting from unconstitutional conduct by law enforcement officers, if it were inevitable that such *indirect* evidence would have been discovered and acquired from an independent source in any event." 437 F. Supp. 843, 855 n.3 (M.D. Fla. 1977) (emphasis added). Although the *Massey* decision's refusal to apply the inevitable discovery rule would eventually be overturned by the Supreme Court's decision in *Williams II*, this does not mean that the *Massey* decision's characterization of that rule is no longer applicable. Similarly, in *United States v. Guarino*—a case decided after *Williams II*—the district court stated in dicta that "[a]nalysis of the application of the inevitable discovery exception depends upon a weighing of the facts and a determination of whether the *secondary evidence* was obtained by an independent source or by official exploitation of the primary illegality." 610 F. Supp. 371, 379 (D.R.I. 1984) (emphasis added).

[415] *See, e.g.*, People v. Burola, 848 P.2d 958, 962 (Colo. 1993) ("[T]he inevitable discovery exception to the exclusionary rule applies to both primary and secondary evidence"); Commonwealth v. O'Connor, 546 N.E.2d 336, 339 (Mass. 1989) (same); State v. Sincell, No. 19073, 2002 Ohio App. LEXIS 1656, at *7–8 (2002) (same); State v. Flippo, 575 S.E.2d 170, 188 n.22 (W. Va. 2002) (same).

[416] In *Williams II*, the defendant argued that because his confession to murder violated his Sixth Amendment right to counsel and was therefore inadmissible, the derivative evidence obtained as a result of the information learned during that confession—the location and condition of the victim's body—should also be excluded from evidence. 467 U.S. 431, 437 (1984). The Court in *Williams II* rejected this, and held that the derivative evidence—i.e., the body—was admissible under the inevitable discovery rule. *Id.* at 447–50.

[417] *Id.* at 444.

[418] *Id.* at 446.

referred to as a direct consequence of that search. With primary evidence, on the other hand—i.e., "the very evidence obtained in the illegal search"[419]—admission of such evidence works directly against the exclusionary rule's deterrence rationale by allowing police to conduct an illegal search knowing that, if they find contraband, the evidence will be admitted despite the initial illegality of the search. As the Oregon Court of Appeals noted in *State v. Crossen*, failing to exclude wrongfully obtained primary evidence "would encourage unlawful searches in the hope that probable cause would be developed after the fact."[420] Further, prior to the Court adopting the inevitable discovery rule in *Williams II*, the majority of lower federal courts and state courts that had applied the rule did so with respect to secondary evidence only.[421] This may suggest that, when deciding *Williams II*, the Court intended for the inevitable discovery rule to continue to apply only to secondary evidence as it had before.

Adopting New York's primary–secondary evidence distinction would allow the Court to balance the competing interests at play: on the one hand acknowledging and respecting the deterrence rationale behind the exclusionary rule while, on the other hand, recognizing the prosecution's interest in admitting evidence that is removed from, and untainted by, an illegal search. Or, as Professor Llewellyn would put it, this approach would apply the exclusionary rule where the reasons for it—deterrence of illegal activity on the part of police—are present, while refusing to apply the exclusionary rule where the reasons for it are no longer applicable—where the admitted evidence is attenuated from and untainted by the illegal search. Adopting this primary–secondary evidence distinction would also decrease, if not completely eliminate, the possibility of police and prosecution making an end-run around the Court's holding in *Gant* by arguing for application of the inevitable discovery rule to save the very evidence found during the illegal search. And it would do all of this without having to overrule any of the Court's prior inevitable discovery decisions.

There are at least two other ways in which the Court could conceivably limit the inevitable discovery rule. Although these options are less likely to be applied by the Court—because the Court would have to overrule its prior precedent in order to do so—these options have been utilized in several states and are therefore worth discussing briefly. The first of these

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[419] People v. Stith, 506 N.E.2d 911, 914 (N.Y. 1987).

[420] 536 P.2d 1263, 1264 (Or. Ct. App. 1975).

[421] *See* Stephen H. LaCount & Anthony J. Girese, *The "Inevitable Discovery" Rule, an Evolving Exception to the Constitutional Exclusionary Rule*, 40 ALB. L. REV. 483, 508 (1975).

alternative approaches is to raise the burden of proof that the prosecution must meet in order to benefit from the inevitable discovery rule.[422] In *Williams II*, the Court set that burden as a preponderance of the evidence.[423] The Court did so based on prior precedent in which it held that "the controlling burden of proof at suppression hearings should impose *no greater burden* than proof by a preponderance of the evidence."[424] The Court in *Williams II* stated that it was "unwilling to impose added burdens on the already difficult task of proving guilt in criminal cases by enlarging the barrier to placing evidence of unquestioned truth before juries."[425] The defendant in *Williams II* argued that the preponderance standard, which was used by Iowa state courts, was inconsistent with the Supreme Court's decision in *United States v. Wade*, where the Court required clear and convincing evidence of an independent source for an in-court identification.[426] The Court in *Williams II* rejected this argument, holding that, unlike the problems that come with in-court identifications, "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment and does not require a departure from the usual burden of proof at suppression hearings."[427] This aspect of the Court's holding in *Williams II* has received substantial criticism. For instance, former prosecutor Professor Steven Grossman has stated:

> When the Court imposes a relatively low burden of proof upon the prosecution regarding the likelihood of discovery, it comes closer to requiring a showing that the evidence *could* have been discovered as opposed to requiring that the evidence *would* have been discovered. A showing of the former does not break the casual chain between the initial illegality and the ultimate discovery of the evidence, and use of the inevitable discovery exception in such a situation makes the Court's analogy to the independent source doctrine particularly suspect.[428]

The dissent in *Williams II*, authored by Justice Brennan and joined by Justice Marshall, also disagreed with the majority's holding that inevitable discovery need only be established by a preponderance of the evidence, and

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[422] For a more detailed discussion on the burden of proof required for inevitable discovery, and an argument in support of raising that burden, see Steven P. Grossman, *The Doctrine of Inevitable Discovery: A Plea for Reasonable Limitations*, 92 DICK. L. REV. 313, 351–52 (1987).

[423] *Williams II*, 467 U.S. 431, 444 (1984).

[424] *Id.* at 444 n.5 (quoting United States v. Matlock, 415 U.S. 164, 178 n.14 (1974)).

[425] *Id.*

[426] 388 U.S. 218, 240 (1967).

[427] *Williams II*, 467 U.S. at 444 n.5.

[428] Grossman, *supra* note 422, at 353.

held that an increased burden of "clear and convincing evidence" should instead be applied.[429] Further, several states have rejected the preponderance standard applied by the majority in *Williams II* and applied the more exacting clear and convincing standard advocated by Justice Brennan in his dissent.[430] Although abandoning the preponderance standard in favor of the clear and convincing evidence requirement would certainly narrow the pool of cases in which evidence that was otherwise illegally seized would nevertheless be deemed admissible, it is unlikely that the Court will overrule its holding in *Williams II* in favor of a more stringent quantum of proof.

Another less-likely path the Supreme Court could follow to limit the applicability of the inevitable discovery rule would be to require the prosecution to prove that the police did not act in bad faith to hasten discovery of the challenged evidence. This, however, would require the Court to overrule its holding in *Williams II* expressly rejecting imposition of this additional burden.[431] The Court in *Williams II* warned that imposition of such a requirement "would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity."[432] The Court went on to hold that imposing upon the prosecution the burden of proving the absence of bad faith would "wholly fail[] to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice."[433] Despite the Court's rejection of this burden in *Williams II*, however, the courts of several states require the prosecution to prove the absence of bad faith in order to take advantage of the inevitable discovery

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[429] *Williams II*, 467 U.S. at 459 (Brennan, J., dissenting).

[430] *See, e.g.*, Smith v. State, 948 P.2d 473, 479–80 (Alaska 1997) (following Justice Brennan's view in *Williams II* dissent and holding that prosecution must prove inevitable discovery by clear and convincing evidence); State v. Lopez, 896 P.2d 889, 907 (Haw. 1995) (same); State v. Sugar, 495 A.2d 90, 103-04 (N.J. 1985) (applying clear and convincing evidence standard); *see also* Proferes v. State, 13 P.3d 955, 958 (Nev. 2000) (seemingly applying clear and convincing evidence standard, although also discussing preponderance standard); State v. Garner, 417 S.E.2d 502, 512 (N.C. 1992) (Frye, J., concurring) (criticizing majority's rule that inevitable discovery must be proved by preponderance of evidence, and advocating for clear and convincing standard).

[431] 467 U.S. at 445. For a detailed argument of why the Court should reconsider its holding in *Williams II* and impose a good faith requirement, see Hon. John E. Fennelly, *Refinement of the Inevitable Discovery Exception: The Need For a Good Faith Requirement*, 17 WM. MITCHELL L. REV. 1085 (1991).

[432] *Williams II*, 467 U.S. at 445.

[433] *Id.*

rule.[434] Further, several legal scholars, including Professor LaFave, have suggested that this additional burden be imposed.[435] Again, however, in light of *Williams II* and the reasons set forth in that decision, it is unlikely that the Court will impose such a burden on the prosecution.

V. CONCLUSION

After expanding police authority in the context of automobile searches incident to arrest for nearly thirty years, the Court finally placed a significant limitation on this type of search in *Arizona v. Gant*. While the Supreme Court's decision in *Gant* represents a major paradigm shift as to what is permissible when it comes to searches incident to arrest, the decision's effect is more theoretical and scholarly than practical. Despite the fact that the Court in *Gant* dramatically limited the authority of police officers to conduct these searches, evidence discovered as a result of searches made illegal by *Gant* is often admitted notwithstanding that decision. This is because prosecutors are often able to get around the *Gant* holding by proving that the evidence at issue inevitably would have been discovered had the illegal search not been conducted. Further, prosecutors need only make this showing by a preponderance of the evidence, and the rule applies regardless of whether the police were acting in bad faith.

If the Court wants to give its holding in *Gant* more practical effect, it should adopt the approach taken by the courts of several states under which the inevitable discovery rule cannot be applied when the evidence sought to be saved from suppression is "primary evidence"—the very evidence illegally obtained during or as the immediate consequence of the challenged police conduct. Under this approach, the inevitable discovery rule applies only when the evidence in question is "secondary evidence"—evidence obtained indirectly as a result of leads or information gained from the primary evidence. Although the Supreme Court has never expressly recognized this primary–secondary evidence distinction, none of the Court's prior inevitable discovery decisions foreclose the possibility that it could in a future case. Adopting this approach would undoubtedly make it harder, if not impossible, for the prosecution to admit evidence obtained as a direct result of a search made illegal by *Gant*. This, in turn, would further the privacy interest that a motorist has in his vehicle—an interest that the Court expressly referred to as important in *Gant*. Other options would be to raise the burden of proof placed on the prosecution to prove inevitable

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[434] *See, e.g.*, *Smith*, 948 P.2d at 481; Commonwealth v. Sbordone, 678 N.E.2d 1184, 1190 (Mass. 1997).

[435] *See* 5 WAYNE R. LAFAVE, SEARCH & SEIZURE § 11.4(a), at 244 (3d ed. 1996).

discovery from a preponderance standard to a clear and convincing evidence standard, or to require the prosecution to prove the absence of bad faith before the inevitable discovery rule is applied. However, both of these latter approaches would require reversal of prior inevitable discovery precedent and are therefore unlikely to be followed. One thing is for certain: until the Court does something to limit the applicability of the inevitable discovery rule, police will have little incentive to comply with its holding in *Gant*.