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## Arizona v. Gant: Rethinking the Evidence-Gathering Justification for the Search Incident to Arrest Exception, and Testing a New Approach

# ARIZONA V. GANT: RETHINKING THE EVIDENCE- GATHERING JUSTIFICATION FOR THE SEARCH INCIDENT TO ARREST EXCEPTION, AND TESTING A NEW APPROACH

## INTRODUCTION

The United States Supreme Court's decision in *New York v. Belton*<sup>1</sup> has been subject to recent criticism from scholars<sup>2</sup> and Supreme Court Justices<sup>3</sup> alike, calling for the Court to revisit its broad construction of the search incident to arrest exception to the Fourth Amendment's prohibition against warrantless searches and seizures in the vehicle-search context.

The Court seized the opportunity to reexamine *Belton* in *Arizona v. Gant*.<sup>4</sup> The *Gant* holding, while narrowing the scope of the search incident to arrest exception in some situations, extended its scope in others, perhaps straying from the tenets of the Fourth Amendment.<sup>5</sup>

Part I of this Comment recounts the inconsistent history of the search incident to arrest exception, and the state of the law prior to the *Gant* decision. Part II summarizes the facts, procedural history, and opinions of *Gant*. Part III analyzes *Gant*'s two-part holding, suggests an alternative rule for the second part, and tests the compatibility of the rule with another area of Fourth Amendment jurisprudence—the law relating to inventory searches. The Comment concludes that the Supreme Court should rethink its treatment of the Fourth Amendment's warrant requirement in the vehicle context.

## I. BACKGROUND

### A. Origin of the Search Incident to Arrest Exception

The Fourth Amendment protects individuals from unreasonable searches and seizures.<sup>6</sup> The search incident to arrest exception to the Fourth Amendment's prohibition against warrantless searches provides that, under certain circumstances, law enforcement officers in the field may conduct searches incident to a lawful arrest without a search war-

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1. 453 U.S. 454 (1981).

2. See, e.g., David S. Rudstein, *Belton Redux: Reevaluating Belton's Per Se Rule Governing the Search of an Automobile Incident to an Arrest*, 40 WAKE FOREST L. REV. 1287, 1288 (2005).

3. See, e.g., *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring).

4. 129 S. Ct. 1710 (2009).

5. 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, 1473–74 (2007).

6. U.S. CONST. amend. IV.

rant.<sup>7</sup> The exception originated in the dictum of *Weeks v. United States*.<sup>8</sup> Distinguishing *Weeks* from previous cases, the Court stated that the issue was "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 evidences of crime."<sup>9</sup>

Since *Weeks*, the Supreme Court has wrestled with a satisfactory definition of the scope of authority to search granted by the exception.<sup>10</sup> In that time the proper scope has repeatedly expanded and contracted.

#### B. *United States v. Rabinowitz*<sup>11</sup>

In *Rabinowitz*, federal agents, incident to a lawful arrest for forgery of stamps, searched a desk, safe, and file cabinet in the one-room office where the arrest was made.<sup>12</sup> The Court held that the search was reasonable under the search incident to arrest exception because the search was not "general or exploratory," but sought evidence relevant to the crime of arrest, which the agents had reason to believe was hidden in the office.<sup>13</sup> *Rabinowitz* allowed searches conducted under this evidence-gathering justification to extend beyond the person of the arrestee, and beyond the area immediately surrounding him.<sup>14</sup>

Justice Frankfurter's dissent warned that the search incident to arrest exception was meant to be narrow and based on necessity.<sup>15</sup> Further, and particularly relevant to the *Gant* decision, Justice Frankfurter noted that extending searches beyond the arrestee's person for the purpose of gathering evidence allowed searches without probable cause.<sup>16</sup> The dissent warned that this broad grant of authority to field officers, absent judicial scrutiny through the warrant-issuing process, could lead to a slippery slope and eventually result in a police state.<sup>17</sup>

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7. *Gant*, 129 S. Ct. at 1716.

8. 232 U.S. 383, 392 (1914).

9. *Id.*

10. Tomkovicz, *supra* note 5, at 1421.

11. 339 U.S. 56 (1950).

12. *Id.* at 57-59.

13. *Id.* at 62-63.

14. *See id.* at 61.

15. *Id.* at 72 (Frankfurter, J., dissenting) (citing *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)).

16. *See id.* at 80:

The purpose of the Fourth Amendment was to assure that the existence of probable cause as the legal basis for making a search was to be determined by a judicial officer *before arrest and not after*, subject only to what is necessarily to be excepted from such requirement. The exceptions cannot be enthroned into the rule.

(emphasis added).

17. *Id.* at 82 ("The progress is too easy from police action unscrutinized by judicial authorization to the police state.").

C. *Chimel v. California*<sup>18</sup>

In *Chimel*, police officers arrested Ted Chimel in his home, and proceeded to search the entire three-bedroom house without a search warrant.<sup>19</sup> The Supreme Court held the search was unreasonable, and crafted a narrower search incident to arrest rule that expressly overruled *Rabinowitz*.<sup>20</sup> *Chimel* held that “it is reasonable for the arresting officer to search the person” of the arrestee without a search warrant, as well as the “area ‘within his immediate control.’”<sup>21</sup>

The Court recognized only two justifications supporting use of the search incident to arrest exception: (1) ensuring officer safety by preventing the arrestee from accessing weapons, and (2) thwarting the destruction of evidence by preventing access to such evidence.<sup>22</sup>

D. *New York v. Belton*<sup>23</sup>

In *Belton*, the Supreme Court applied the exception to arrests of vehicle occupants, and established a broad scope of police authority for vehicle searches.<sup>24</sup> The Court held that “when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.”<sup>25</sup> The rule also applied to recent occupants<sup>26</sup> and allowed searches of containers within the passenger compartment, but excluded the trunk from the searchable area.<sup>27</sup>

The Court reasoned that, because no workable definition existed in the vehicle context for the “area within the immediate control of the arrestee,”<sup>28</sup> law enforcement officers needed a straightforward rule for efficient application of the search incident to arrest exception.<sup>29</sup>

In his dissenting opinion, Justice Brennan argued that the Court sacrificed Fourth Amendment principles to obtain a bright-line rule.<sup>30</sup> Justice Brennan attacked the majority’s acceptance of a legal fiction that merely paid lip service to *Chimel*’s twin justifications of protecting offic-

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18. 395 U.S. 752 (1969).

19. *Id.* at 754.

20. *Id.* at 768.

21. *Id.* at 763 (defining “within his immediate control” as “the area from within which he might gain possession of a weapon or destructible evidence”).

22. *Id.*

23. 453 U.S. 454 (1981).

24. *See id.* at 460–61.

25. *Id.* at 460.

26. *See id.*

27. *Id.* at 461 & n.4 (defining “container” as “any object capable of holding another object”).

28. *Id.* at 460.

29. *Id.* at 459–60 (“When 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.”).

30. *Id.* at 468 (Brennan, J., dissenting) (“[T]he Court does a great disservice . . . to the policies underlying the Fourth Amendment . . .”).

ers and preserving evidence.<sup>31</sup> Justice Brennan noted that when officers arrest an occupant of a vehicle, “the justifications underlying *Chimel*’s limited exception to the warrant requirement cease to apply,” because the passenger compartment cannot be in the “area within his immediate control” when the arrestee is physically restrained.<sup>32</sup>

Therefore, although the Court insisted its holding “in no way alters the fundamental principles established in the *Chimel* case,”<sup>33</sup> Justice Brennan argued the fiction that “the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car” cannot be reconciled with *Chimel*.<sup>34</sup> Justice Brennan also questioned how much direction the supposed bright-line rule would actually supply, and contended that *Chimel*, unmodified, provided adequate guidance for law enforcement in the vehicle context.<sup>35</sup> Twenty-three years passed before the Court revisited the *Belton* decision.

#### *E. Thornton v. United States*<sup>36</sup>

*Thornton* affirmed and extended *Belton*, holding that an officer had the right to search an arrestee’s vehicle incident to the arrest even when the officer’s first contact with the arrestee occurred outside of the vehicle.<sup>37</sup> Because the arrestee was a “recent occupant” of the vehicle, the Court found the search reasonable.<sup>38</sup> However, five justices expressed dissatisfaction with the state of the law as governed by *Belton* in the search incident to arrest exception for motor vehicles.<sup>39</sup> In addition to the two dissenting justices, Justice O’Connor voiced her disapproval in a concurring opinion,<sup>40</sup> while Justice Scalia, joined by Justice Ginsburg, concurred only in the judgment.<sup>41</sup>

Justice Scalia’s opinion attacked the fiction of using *Chimel*’s twin justifications to support the reasonableness of *Belton* searches.<sup>42</sup> Justice Scalia observed the risk that a handcuffed arrestee, secured in the back of a squad car, might obtain a weapon or destructible evidence from within his vehicle “was remote in the extreme.”<sup>43</sup>

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31. See *id.* at 466.

32. *Id.* at 466.

33. *Id.* at 460 n.3 (majority opinion).

34. See *id.* at 466 (Brennan, J., dissenting).

35. *Id.* at 471–72.

36. 541 U.S. 615 (2004).

37. See *id.* at 623–24 (holding that the arrestee was a “recent occupant” under *Belton* where the arrestee pulled into a parking lot and exited his vehicle before the arresting officer was able to pull him over, and the officer pulled in behind him, exited his vehicle, and initiated contact).

38. *Id.* (“So long as an arrestee is the sort of ‘recent occupant’ of a vehicle such as [the arrestee] was here, officers may search that vehicle incident to the arrest.”).

39. *Id.* at 624, 632.

40. *Id.* at 624 (O’Connor, J., concurring).

41. *Id.* (Scalia, J., concurring).

42. See *id.* at 631.

43. *Id.* at 625.

The concurrence advocated applying the evidence-gathering justification from the overruled *Rabinowitz* case in the vehicle context.<sup>44</sup> Justice Scalia contended warrantless vehicle searches incident to arrest should be valid only “where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”<sup>45</sup> The approach conspicuously required less than probable cause to perform a warrantless search incident to arrest.<sup>46</sup> Yet, the opinion gave several reasons why warrantless vehicle searches should require less than a showing of probable cause, including a reduced expectation of privacy in motor vehicles, and “heightened law enforcement needs” because the mobility of vehicles creates a greater risk that evidence within the vehicle will be lost.<sup>47</sup>

*Thornton* showed the readiness of five justices to alter *Belton*’s broad construction of the search incident to arrest exception as applied to vehicles. Five years after *Thornton*, the Supreme Court changed the scope of the exception in *Arizona v. Gant*.

## II. ARIZONA V. GANT<sup>48</sup>

### A. Facts

On August 25, 1999, Tucson police officers responded to a tip about an illegal drug enterprise operating in a residence.<sup>49</sup> Rodney Gant answered the door, identified himself, and told the officers that the owner of the house would return later.<sup>50</sup> A records check on Gant showed an outstanding warrant for his arrest for driving with a suspended license.<sup>51</sup>

The officers returned the same evening, and had finished arresting and securing a man and a woman near the house when Gant pulled into the residence’s driveway.<sup>52</sup> Gant parked, stepped out of his vehicle, and an officer arrested and handcuffed Gant between ten and twelve feet from the vehicle.<sup>53</sup> After placing the handcuffed Gant in the backseat of a squad car, the officers searched his vehicle and found a gun and a bag of cocaine in a jacket on the backseat.<sup>54</sup>

### B. Procedural History

Facing charges of possession of a narcotic drug for sale and possession of drug paraphernalia, Gant moved to suppress the evidence found

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44. See *id.* at 629 (citing *United States v. Rabinowitz*, 339 U.S. 56, 60–64 (1950)).

45. *Id.* at 632.

46. See *id.*

47. *Id.* at 630–32 (citing *Wyoming v. Houghton*, 526 U.S. 295, 303–04 (1999)).

48. 129 S. Ct. 1710 (2009).

49. *Id.* at 1714.

50. *Id.* at 1714–15.

51. *Id.* at 1715.

52. *Id.*

53. *Id.*

54. *Id.*

during the search of his car, contending the search violated his Fourth Amendment right to be free from unreasonable searches.<sup>55</sup> The trial court found the search reasonable and denied Gant's motion.<sup>56</sup>

The Arizona Supreme Court reversed, holding the search unreasonable under the Fourth Amendment because neither of *Chimel's* twin justifications for a search incident to arrest existed once Gant was handcuffed in the back of a squad car.<sup>57</sup> The Arizona Supreme Court stated it did not purport to "reconsider" *Belton*, and explained that because the rationales of officer safety and evidence preservation were not present to justify the search, the search incident to arrest violated the existing Fourth Amendment law.<sup>58</sup> The Court distinguished *Thornton*, noting that the defendant in *Thornton* never raised the argument that the underlying justifications for the exception were absent, and only contended that it did not apply because he was outside of his vehicle when he first encountered the police.<sup>59</sup> The State of Arizona petitioned the United States Supreme Court for certiorari, and the Court, responding to persistent calls to revisit the *Belton* decision,<sup>60</sup> granted the petition.<sup>61</sup>

### C. Majority Opinion

Justice Stevens delivered the opinion of the Court, which held that the officers conducted an unreasonable search of Gant's vehicle.<sup>62</sup> The Court held that *Chimel's* rationale<sup>63</sup> "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."<sup>64</sup> The Court also held that police may search a vehicle incident to a recent occupant's arrest where it is "'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'"<sup>65</sup>

Because the *Gant* rule treats the exception differently depending on the crime of arrest,<sup>66</sup> the rule is best explained by splitting the holding into its two parts. Professor James Tomkovicz articulates the classifications particularly well, separating crimes of arrest into "evidentiary" and

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55. *Id.*

56. *See id.*

57. *Id.* at 1715–16.

58. *State v. Gant*, 162 P.3d 640, 643 (Ariz. 2007).

59. *Id.* at 644.

60. *See, e.g., Rudstein, supra* note 2, at 1288 ("Given the dissatisfaction with the *Belton* rule expressed by five Justices in *Thornton*, it is an appropriate time to evaluate again the holding and reasoning of *Belton*.").

61. *Arizona v. Gant*, 128 S. Ct. 1443 (2008) (mem.).

62. *Gant*, 129 S. Ct. at 1724.

63. *Chimel v. California*, 395 U.S. 752, 763 (1969) (recognizing that ensuring officer safety and preventing destruction of evidence are the two justifications underlying use of the search incident to arrest exception).

64. *Gant*, 129 S. Ct. at 1719.

65. *Id.* (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).

66. *Id.*



“nonevidentiary” offenses.<sup>67</sup> An arrest for a nonevidentiary offense supplies no reason to believe that evidence specific to the offense of arrest might be found in the vehicle, while an arrest for an evidentiary offense *does* create a reasonable belief that such evidence might be found.<sup>68</sup>

### 1. Arrests for Nonevidentiary Offenses

The Court distinguished *Belton* and *Thornton* by classifying driving with a suspended license as the type of offense “for which police could not expect to find evidence in the passenger compartment of Gant’s car.”<sup>69</sup> If the offense of arrest is nonevidentiary, only *Chimel*’s twin justifications of ensuring officer safety and preserving evidence validate warrantless searches of vehicles incident to arrest of an occupant or recent occupant, and only then if “the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”<sup>70</sup> The Court’s holding effectively overruled *Belton* for nonevidentiary offenses, establishing a narrow application of the exception.<sup>71</sup>

The Court rejected the State’s argument that *Belton* searches are reasonable even where there is no possibility that the arrestee might access the passenger compartment, and explained that the new rule “correctly balances law enforcement interests, including the interest in a bright-line rule, with an arrestee’s limited privacy interest in his vehicle.”<sup>72</sup> The Court reasoned that a broad reading of *Belton* gives police too much authority to conduct warrantless searches when no reasonable basis exists to believe evidence of the offense might be found in the vehicle.<sup>73</sup> The Court characterized police authority granted under *Belton* to rummage through a person’s private effects as “the central concern underlying the Fourth Amendment.”<sup>74</sup>

### 2. Arrests for Evidentiary Offenses

As proposed by Justice Scalia in *Thornton*, the Court adopted the evidence-gathering justification for vehicle searches incident to arrests

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67. Tomkovicz, *supra* note 5, at 1418.

68. *Gant*, 129 S. Ct. at 1719:

In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. But in others, including *Belton* and *Thornton*[, both drug offenses], the offense of arrest will supply a basis for searching the passenger compartment of an arrestee’s vehicle and any containers therein.

(citations omitted).

69. *Id.*

70. *Id.*

71. *See id.* (“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 . . . . [W]e reject this reading of *Belton*.”).

72. *Id.* at 1720.

73. *Id.*

74. *Id.*

for evidentiary offenses.<sup>75</sup> Justice Stevens suggested drug offenses are evidentiary offenses, referencing the crimes at issue in *Belton* and *Thornton*.<sup>76</sup> Both cases concerned drug offenses, which Justice Stevens contended created a reasonable belief that evidence relevant to those crimes could have been found in the arrestees' respective vehicles.<sup>77</sup> The Court also held an arrest for an evidentiary crime supplies a "basis for searching the passenger compartment and any containers therein."<sup>78</sup> By so holding, the Court retained the physical scope of the *Belton* search,<sup>79</sup> but only in situations giving rise to an evidence-gathering justification to conduct the search.<sup>80</sup>

#### D. Concurring Opinion

Justice Scalia wrote separately in *Gant*, despite the Court having adopted his proposed rule from *Thornton*. Justice Scalia lamented the "charade" of retaining *Chimel*'s justifications in the car search context.<sup>81</sup> As an alternative, he advocated adopting *only* an evidence-gathering justification for warrantless vehicle searches incident to arrests of recent occupants.<sup>82</sup> Justice Scalia reasoned that allowing searches under *Chimel*'s rationale where arrestees are unsecured invites officers to leave the scene unsecured.<sup>83</sup> Interestingly, in *Thornton*, decided just five years earlier, he quickly dismissed the same argument.<sup>84</sup>

#### E. Dissenting Opinion

Justice Alito's dissent, in which Chief Justice Roberts and Justice Kennedy joined, and Justice Breyer joined in part, attacked the Court's insufficient support for its departure from *stare decisis*.<sup>85</sup> The dissent also questioned adopting Justice Scalia's proposed rule from his concurring

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75. See *id.* at 1719; *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring).

76. See *Gant*, 129 S. Ct. at 1719.

77. *Id.*

78. *Id.*

79. Compare *id.* (holding searches of a vehicle's passenger compartment reasonable when incident to evidentiary arrests), with *New York v. Belton*, 453 U.S. 454, 460–61 & n.4 (1981) (defining the area of the "passenger compartment" as encompassing the compartment itself as well as all containers within the compartment, including glove compartments, consoles, luggage, boxes, bags, and clothing, but not the trunk).

80. *Gant*, 129 S. Ct. at 1719.

81. *Id.* at 1724–25 (Scalia, J., concurring).

82. *Id.* at 1725.

83. *Id.* at 1724–25 ("[T]his standard . . . leaves much room for manipulation, inviting officers to leave the scene unsecured . . . in order to conduct a vehicle search.").

84. *Thornton v. United States*, 541 U.S. 615, 627 (2004) (Scalia, J., concurring) ("[I]f an officer leaves a suspect unrestrained nearby just to manufacture authority to search, one could argue that that search is unreasonable *precisely because* the dangerous conditions justifying it existed only by virtue of the officer's failure to follow sensible procedures.").

85. See *Gant*, 129 S. Ct. at 1727 (Alito, J., dissenting).

opinion in *Thornton* without independent explanation of its origin or rationale.<sup>86</sup>

The dissent noted law enforcement's considerable reliance on *Belton*, as evidenced by the fact that it was taught in police academies.<sup>87</sup> The dissent argued that the *Belton* rule offers a more workable alternative than *Gant*'s rule.<sup>88</sup> Justice Alito contended that *Gant*, by narrowing the application of *Chimel*'s justifications,<sup>89</sup> creates a "'perverse incentive for an arresting officer to prolong the period during which the arrestee is kept in an area where he could pose a danger to an officer.'"<sup>90</sup>

Finally, Justice Alito questioned the part of the new rule that requires "reason to believe" rather than probable cause.<sup>91</sup> The dissent concluded that it would simply apply *Belton*, and reverse the holding of the Arizona Supreme Court.<sup>92</sup>

### III. ANALYSIS

#### A. *Gant*'s Abandonment of *Belton* for Nonevidentiary Offenses

The first part of the *Gant* holding, narrowing the scope of vehicle searches incident to arrests for nonevidentiary offenses, presents two concerns: (1) that the new rule abandoned a workable bright-line rule crafted in *Belton*, thwarting the efficiency of law enforcement;<sup>93</sup> and (2) that the change in the rule's wording undermines the justifications it purports to advance.

##### 1. *Gant* Correctly Abandoned *Belton*'s Rule for Nonevidentiary Offenses

###### a. *Belton* Failed to Provide an Adequate Bright-Line Rule

In *Gant*, Justice Stevens noted the inconsistency of lower courts in applying *Belton* to recent occupants of vehicles.<sup>94</sup> The disparities resulted from *Belton*'s failure to provide any instruction in determining the required spatial relationship between arrestee and vehicle at the time of

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86. *Id.* at 1726.

87. *Id.* at 1728.

88. *Id.* at 1729 ("[S]erious problems will also result from the second part of the Court's new rule, which requires officers making roadside arrests to determine whether there is reason to believe that the vehicle contains evidence of the crime of arrest.").

89. *See id.* at 1719 (majority opinion).

90. *Id.* at 1730 (Alito, J., dissenting) (quoting *United States v. Abdul-Saboor*, 85 F.3d 664, 669 (D.C. Cir. 1996)). *But see Thornton v. United States*, 541 U.S. 615, 627 (2004) (Scalia, J., concurring) ("The weakness of this argument is that it assumes that, one way or another, the search must take place. But conducting a *Chimel* search is not the Government's right; it is an exception—justified by necessity—to a rule that would otherwise render the search unlawful.").

91. *Gant*, 129 S. Ct. at 1731 (Alito, J., dissenting) ("Why . . . is the standard for this type of evidence-gathering search 'reason to believe' rather than probable cause?").

92. *Id.* at 1732.

93. *See id.* at 1729.

94. *Id.* at 1721 (majority opinion).

arrest, and the temporal relationship between the time of arrest and time of search.<sup>95</sup> In other words, how close to the vehicle did an arrest have to occur to authorize a search of the vehicle incident to the arrest, and how soon after the arrest must police search the vehicle?

In 1986, the Supreme Court of Connecticut held a search unreasonable that continued after police removed the arrestee from the scene.<sup>96</sup> Eight years later, the First Circuit Court of Appeals upheld a search continuing after police removed the arrestee from the scene.<sup>97</sup> Other decisions have wrestled with finding a required spatial relationship between arrestee and vehicle at the time of arrest.<sup>98</sup> A rule creating opposite results in similar situations offers no workable bright line.

In *Gant*, the Court specified the required spatial<sup>99</sup> and temporal<sup>100</sup> relationships for a reasonable vehicle search incident to arrest for a non-evidentiary offense. The majority correctly found that *Belton's* bright line only worked to confuse lower courts and breed inconsistent decisions.<sup>101</sup>

#### b. Balancing the Interest in Efficient Law Enforcement Against the Protections of the Fourth Amendment

In *Thornton*, Justice O'Connor characterized lower courts' application of *Belton* as treating "the ability to search a vehicle incident to the arrest of a recent occupant as a police *entitlement*."<sup>102</sup> In *Gant*, the Court stated that the fact that law enforcement relied on *Belton's* broad construction of search authority to the point of treating it as an entitlement could not outweigh the constitutionally guaranteed individual privacy interest.<sup>103</sup>

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95. See *id.* at 1720–21 & nn.6–7; see also *Thornton*, 541 U.S. at 622 (establishing that the exception applies when an officer makes initial contact with the arrestee outside of the vehicle).

96. *State v. Badgett*, 512 A.2d 160, 169 (Conn. 1986).

97. *United States v. Doward*, 41 F.3d 789, 793 & n.3 (1st Cir. 1994).

98. Compare *United States v. Caseres*, 533 F.3d 1064, 1072 (9th Cir. 2008) (declining to apply *Belton* when police approached arrestee after he had left his vehicle and reached his residence), with *Black v. State*, 810 N.E.2d 713, 713–14, 716 (Ind. 2004) (applying *Belton* when arrestee was apprehended inside a shop while his vehicle was parked outside), and *Rainey v. Commonwealth*, 197 S.W.3d 89, 94–95 (Ky. 2006) (upholding a vehicle search incident to the arrest of its recent occupant, where police apprehended the occupant fifty feet from the vehicle).

99. *Gant*, 129 S. Ct. at 1719 (holding the *Chimel* rationale applies only when an arrestee is "within reaching distance of the passenger compartment").

100. *Id.* (holding the arrestee must be "within reaching distance of the passenger compartment at the time of the search" (emphasis added)).

101. See *id.* at 1720–21 & nn.6–7. But see *id.* at 1729 (Alito, J., dissenting) ("The first part of the new rule . . . reintroduces the same sort of case-by-case, fact-specific decisionmaking that the *Belton* rule was adopted to avoid.").

102. *Thornton v. United States*, 541 U.S. 615, 624 (2004) (O'Connor, J., concurring) (emphasis added).

103. *Gant*, 129 S. Ct. at 1723 (majority opinion).

Justice Alito based his dissent on the fact that police officers had relied on *Belton*'s rule for over twenty-five years.<sup>104</sup> However, length of reliance on a rule should not matter if that rule allows activity which unlawfully diminishes a constitutional protection.<sup>105</sup> In *Gant*, the Court properly concluded that the interest in efficient law enforcement cannot outweigh the importance of the Fourth Amendment's protection against unreasonable searches and seizures for nonevidentiary crimes.

## 2. The Change from "Area into Which an Arrestee Might Reach"<sup>106</sup> to "Within Reaching Distance"<sup>107</sup> Undermines *Chimel*'s Twin Justifications

Under *Gant*, the arrestee must be "unsecured and *within reaching distance* of the passenger compartment at the time of the search" in order for the officer to search the vehicle based on *Chimel*'s justifications.<sup>108</sup> In a situation where an officer is outnumbered by unsecured arrestees outside the reaching distance of the vehicle,<sup>109</sup> the officer can reasonably fear the arrestees may attempt to overpower the officer and access weapons or destructible evidence within the vehicle. But a court applying the *Gant* rule might hold a vehicle search under these facts unreasonable, because the arrestees are not in "reaching distance of the passenger compartment."<sup>110</sup> *Chimel*'s phrasing<sup>111</sup> offers more room to argue that the passenger compartment *is* in the area within the immediate control of the arrestees in such a situation.

In a footnote in *Gant*, the Court recognizes the unlikelihood of a situation where an officer cannot complete an arrest by securing the arrestee or arrestees in handcuffs,<sup>112</sup> but argues that a search incident to arrest would be reasonable in these situations.<sup>113</sup> Yet, the Court's rephrasing of *Chimel*'s rule, and its qualifying footnote, unnecessarily muddle a once-clear rule statement. Even considering the footnote's recognition of situa-

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104. *Id.* at 1728 (Alito, J., dissenting).

105. *See id.* at 1723 (majority opinion):

If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement 'entitlement' to its persistence . . . [N]one of the dissenters in *Chimel* or the cases that preceded it argued that law enforcement reliance interests outweighed the interest in protecting individual constitutional rights so as to warrant fidelity to an unjustifiable rule.

106. *Chimel v. California*, 395 U.S. 752, 763 (1969).

107. *Gant*, 129 S. Ct. at 1719.

108. *Id.* (emphasis added).

109. This was the case in *Belton*: there, the arresting officer, lacking enough handcuffs to secure the four arrestees, instructed the arrestees to stand in four different areas of the road while he conducted a search of their persons and then the passenger compartment. *See New York v. Belton*, 453 U.S. 454, 456 (1981).

110. *Gant*, 129 S. Ct. at 1719.

111. *Chimel*, 395 U.S. at 763 (the area "within [the arrestee's] immediate control").

112. *Gant*, 129 S. Ct. at 1719 n.4 (citing 3 WAYNE R. LAFAYE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.1 (4th ed. 2004)).

113. *See id.* (holding that a search is reasonable where an officer is unable to perform an arrest because a real possibility exists that the arrestee might gain access to the passenger compartment).

tions analogous to *Belton*, a strong argument exists that “reaching distance” simply means an arm’s length.

The *Gant* rule creates potential situations where an arresting officer cannot search a vehicle, even where the facts implicate the justifications for the exception. The *Chimel* construction of the rule offers a workable solution to unusual fact patterns like *Belton*, while recognizing any exception to the Fourth Amendment’s warrant requirement must be narrow and well-delineated. Returning to *Chimel*’s original wording best serves the exception’s justifications because it governs the situation, however unlikely, where an arrestee outside reaching distance of the vehicle threatens either officer safety or preservation of evidence.<sup>114</sup>

### *B. A Suggested Approach for Applying the Exception to Evidentiary Crimes*

The second part of *Gant*’s holding allows police to perform a warrantless search of a vehicle incident to an arrest when a reasonable belief exists that evidence relevant to the offense of arrest could be found in the vehicle.<sup>115</sup> As the dissent noted, the new rule for evidentiary crimes substitutes “reason to believe” for probable cause as the standard for performing a search under the Fourth Amendment.<sup>116</sup>

While valid reasons support establishing a broad scope for evidence-gathering searches incident to arrest in the vehicle context,<sup>117</sup> an expansive construction of the exception raises equally valid concerns.<sup>118</sup> The relevant consideration is whether the government interest in effective law enforcement outweighs the individual privacy interest in being free from unreasonable searches under the Fourth Amendment.

Perhaps less intrusive methods exist to further the government’s interests. If the Court considers the interest of ensuring successful prosecutions important enough to disregard constitutionally protected rights in

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114. See *Belton*, 453 U.S. at 471 (Brennan, J., dissenting) (“[R]elevant factors [in determining the area within the arrestee’s immediate control] would surely include the relative number of police officers and arrestees . . . and the ability of the arrestee to gain access to a particular area or container.”).

115. *Gant*, 129 S. Ct. at 1719 (citing *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).

116. *Id.* at 1731 (Alito, J., dissenting).

117. See *Thornton*, 541 U.S. at 631 (Scalia, J., concurring) (advancing a “reduced expectation of privacy” and “heightened law enforcement needs” as justifications for allowing evidence-gathering searches); see also *Gant*, 129 S. Ct. at 1720 (“[A] motorist’s privacy interest in his vehicle is less substantial than in his home . . . .”); *Wyoming v. Houghton*, 526 U.S. 295, 304 (1999) (“[T]he ‘ready mobility’ of an automobile creates a risk that the evidence or contraband will be permanently lost while a warrant is obtained.” (quoting *California v. Carney*, 471 U.S. 386, 390 (1985))).

118. See *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting) (discussing the importance of adhering to the Fourth Amendment’s purpose that any invasion into one’s privacy must be judicially sanctioned); Tomkovicz, *supra* note 5, at 1471–72 (characterizing the allowance of warrantless vehicle searches incident to arrest under an evidence-gathering justification without a probable cause requirement as a worrisome grant of unchecked power to law enforcement officers in the field).

pursuit of evidence, it should at least consider a rule that serves these interests *without* violating the reasonableness mandate of the Fourth Amendment. This mandate is served either by procuring a warrant based on sufficient probable cause, or acting within the scope of an exception sufficiently tied to the justifications upon which it is based.<sup>119</sup>

1. The Suggested Rule for Applying the Vehicle Search Incident to Arrest Exception to Evidentiary Crimes

The *Gant* rule works on an assumption that, because of the mobility of vehicles, there is no time to reasonably procure a search warrant for the vehicle an officer desires to search. An ideal rule would preserve the Fourth Amendment's search warrant requirement, and still recognize an evidence-gathering justification in the vehicle context. The rule would read: Before searching a vehicle incident to the arrest of an occupant or recent occupant for the purpose of gathering evidence relevant to the crime of arrest, an arresting officer "must secure and use search warrants wherever reasonably practicable."<sup>120</sup>

The rule would recognize that, because of the ready mobility of vehicles, there will often be instances where obtaining a search warrant is not reasonably practicable. Where obtaining a search warrant is not reasonably practicable—and there is reason to believe that relevant evidence inside the vehicle will be transported or destroyed—an officer may temporarily restrict access to the vehicle<sup>121</sup> until a search warrant can be obtained.

This rule attempts to protect the government's interest in gathering evidence to ensure successful prosecutions, and to satisfy the Fourth Amendment's purpose that an objective, judicial mind determines whether the situation justifies an intrusion into the arrestee's privacy.<sup>122</sup> Existing Fourth Amendment law regarding impounded vehicles, however, necessitates further analysis to determine the plausibility of the rule in situations where obtaining a search warrant would *not* be reasonably practicable.

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119. See *Katz v. United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."). But see *Groh v. Ramirez*, 540 U.S. 551, 572–74 (2004) (Thomas, J., dissenting) (arguing that the Fourth Amendment does not contain an explicit warrant requirement, and requires only "reasonableness" in the search).

120. *Trupiano v. United States*, 334 U.S. 699, 705 (1948) (citing *Johnson v. United States*, 333 U.S. 10, 14, 15 (1948); *Taylor v. United States*, 286 U.S. 1, 6 (1932); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 358 (1931); *Carroll v. United States*, 267 U.S. 132, 156 (1925)).

121. Impounding the vehicle would constitute a temporary restriction of access.

122. See *McDonald*, 335 U.S. at 455 ("[The warrant requirement was created] so that an objective mind might weigh the need to invade . . . privacy in order to enforce the law.").

## 2. Impounded Vehicles and the Fourth Amendment: The Inventory Search

### a. Background of Inventory Searches of Impounded Vehicles

The authority of police to inventory lawfully impounded vehicles is a well-defined exception to the Fourth Amendment's search warrant and probable cause requirements.<sup>123</sup> However, inventory searches must be reasonable under the circumstances, complying with the Fourth Amendment's prohibition against unreasonable searches.<sup>124</sup> A vehicle must be properly impounded, giving police lawful custody over it, for an inventory search to be reasonable.<sup>125</sup>

The Supreme Court recognizes three administrative, "community caretaking functions"<sup>126</sup> as the justifications for inventory searches of impounded vehicles: (1) to protect the owner's property within the vehicle; (2) to protect police from claims or disputes regarding lost or stolen property; and (3) to protect the police and the public from potential danger.<sup>127</sup> The presence of any of these justifications authorizes a warrantless inventory search of an impounded vehicle.<sup>128</sup>

Officers must perform an inventory search in good faith and in furtherance of the above-mentioned administrative functions, as the inventory "must not be a ruse for a general rummaging in order to discover incriminating evidence."<sup>129</sup> Conducting the search in accordance with standardized police procedure normally satisfies the good faith requirement.<sup>130</sup> A court will likely find an inventory search reasonable so long as standardized procedures allow the scope of the search employed by an officer.<sup>131</sup> And, even if an officer suspects the existence of evidence of a

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123. See, e.g., *South Dakota v. Opperman*, 428 U.S. 364, 367-76 (1976) (identifying the "inherent mobility of automobiles" and a diminished privacy interest in vehicles—as opposed to the home—as the two reasons for the exception to the warrant requirement); see also *Colorado v. Bertine*, 479 U.S. 367, 371 (1987); *Illinois v. Lafayette*, 462 U.S. 640, 643 (1983).

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

125. See *Opperman*, 428 U.S. at 371 n.5; see also *Woodford v. State*, 752 N.E.2d 1278, 1281 (Ind. 2001) (holding impoundments are proper and recognizing lawful custody where the impoundment is part of the "administrative caretaking functions of the police," or where "authorized by state statute").

126. *Opperman*, 428 U.S. at 368 (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)).

127. *Id.* at 368-69.

128. See *Bertine*, 479 U.S. at 373 (holding that where police took a vehicle to a secure, lighted storage facility, the fact that there existed little risk of theft or vandalism of property in the vehicle did not eliminate the need for an inventory because the other two justifications for an inventory search were still present).

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

130. *Bertine*, 479 U.S. at 374-75.

131. See *Wells*, 495 U.S. at 4 ("[P]olicies of opening all containers or of opening no containers [within the vehicle] are unquestionably permissible . . .").



crime in the vehicle, it does not preclude the police from inventorying the vehicle so long as they follow the standardized procedure.<sup>132</sup>

The scope of a reasonable vehicle inventory includes a search of any area of the vehicle that serves the government community caretaking interests.<sup>133</sup> Supreme Court decisions hold the scope of a reasonable inventory search extends to an unlocked glove compartment,<sup>134</sup> and to containers in the passenger compartment.<sup>135</sup> Therefore, the scope of an inventory search at least matches the scope of a search incident to arrest, and perhaps exceeds it,<sup>136</sup> assuming *Gant* retained *Belton*'s prohibition on trunk searches incident to arrest.<sup>137</sup>

b. Plausibility of the Suggested Approach in Light of the Inventory Search Doctrine

Assuming, for the purpose of testing the suggested rule, that an impoundment incident to the arrest of a vehicle occupant constitutes a proper impoundment and authorizes an inventory of the vehicle, the suggested rule likely fails. The existence and pervasiveness of the inventory search exception to the Fourth Amendment's warrant requirement hinders the suggested rule's effectiveness where "obtaining a search warrant is not reasonably practicable."<sup>138</sup> The inventory search exception frustrates the purpose of the suggested rule because Supreme Court decisions recognize the inventory search as a routine police activity incident to impoundment,<sup>139</sup> and if a vehicle in fact contains evidence of a crime, police will inevitably discover it via a warrantless search regardless of the reasons behind that search. However, while the existence of the inventory search may negate any exclusionary remedy for evidence found during an unconstitutional application of the search incident to arrest exception, it does not preclude victims of such unconstitutional searches

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132. See *United States v. Petty*, 367 F.3d 1009, 1013 (8th Cir. 2004) ("[P]olice 'may keep their eyes open for potentially incriminating items that they may discover in the course of an inventory search, as long as their sole purpose is not to investigate a crime . . .'" (quoting *United States v. Marshall*, 986 F.2d 1171, 1176 (8th Cir. 1993))); see also *State v. Ture*, 632 N.W.2d 621, 629 (Minn. 2001) (holding that, if an officer has an investigatory motive for conducting an inventory search, the search remains reasonable so long as it is coupled with a non-investigatory motive).

133. See *South Dakota v. Opperman*, 428 U.S. 364, 376 n.10 (1976).

134. *Id.* (holding the search of a glove compartment reasonable in order to prevent theft, and to protect the police and public if "vandals" found a firearm).

135. See *Wells*, 495 U.S. at 4 (holding that a standardized police policy allowing officers to open all containers in the course of an inventory search would be reasonable).

136. See, e.g., *United States v. Duncan*, 763 F.2d 220, 223 (6th Cir. 1985) (holding that an inventory search extending to a trunk was reasonable because of the interest in police protecting themselves from false claims of stolen or lost property). But see *United States v. Wilson*, 636 F.2d 1161, 1165 (8th Cir. 1980) ("[T]he needs of the government in conducting an inventory search may be ordinarily accomplished without the serious intrusion into the locked trunk of an automobile.").

137. *New York v. Belton*, 453 U.S. 454, 461 n.4 (1981).

138. See *supra* Part III.B.1.

139. See *Opperman*, 428 U.S. at 392 (Marshall, J., dissenting) ("The court's result authorizes indeed it appears to require the routine search of nearly every car impounded.").

from bringing suit for violations of their constitutional rights.<sup>140</sup> Therefore, while the suggested rule may protect the Fourth Amendment right of individuals to be free from unreasonable searches in this setting, it would likely have little effect on any exclusionary remedy available to a criminal defendant.

i. An Inventory Search Will Reveal Any Evidence that Officers Would Have Found by Conducting a Vehicle Search Incident to Arrest

Because the inventory search is virtually routine procedure, and because the scope of the search matches that of the vehicle search incident to arrest exception, the result is the same as if *Gant*'s rule for evidentiary crimes remained unmodified: police will search the vehicle without a warrant and discover any existing evidence which would have been discovered by a search incident to arrest.

The suggested rule only precludes warrantless vehicle searches incident to arrest under an evidence-gathering justification. However, once impounded, police will still search the same vehicle without a warrant under administrative justifications.

The suggested rule would only pay lip service to the Fourth Amendment's objectives.<sup>141</sup> It would prohibit warrantless searches under an evidence-gathering justification, but would not change the fact that the same warrantless search, with the same result, will take place under administrative justifications. In reality, is a defendant awaiting prosecution for a drug offense concerned whether police found the drugs in his car under an evidentiary or administrative rationale? Or is the defendant simply concerned that police found the drugs in his car?

ii. The Inevitable Discovery Rule

The inevitable discovery rule works as a catch-all in an exclusionary analysis, tying together the exceptions to the warrant requirement. The prosecution invokes the inevitable discovery rule as a challenge to exclusion of evidence unconstitutionally obtained by the government.<sup>142</sup> If the prosecution can establish by a preponderance of the evidence that the evidence would have inevitably been discovered by lawful means, then the evidence is admissible.<sup>143</sup>

The inevitable discovery doctrine defeats any exclusionary goal of the suggested rule. Picture a situation requiring impoundment because

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140. 42 U.S.C. § 1983 (1996).

141. *McDonald v. United States*, 335 U.S. 451, 455 (1948) (defining the objective of the Fourth Amendment as interposing "an objective mind" between the citizenry and law enforcement to determine whether the interest in enforcing the law justifies an invasion into privacy).

142. See *Nix v. Williams*, 467 U.S. 431, 442-43 (1984).

143. See *id.* at 442-44.

obtaining a warrant is not reasonably practicable. Impoundment will eventually result in an inventory of the vehicle. Any evidence officers find will be admissible under the inevitable discovery rule because an inventory would have eventually revealed the evidence lawfully in the absence of the illegal search. While the illegal search would potentially open officers to civil liability,<sup>144</sup> the damage to the vehicle owner is done if contraband is actually found.

The suggested rule<sup>145</sup> serves the Fourth Amendment's purpose of allowing a judicial mind to determine the validity of police invasions into privacy in terms of establishing a defined constitutional protection under the search incident to arrest exception. However, one way or another, it allows the same result it was designed to curtail—a police invasion of privacy supported neither by a search warrant, nor by probable cause, in the form of an inventory search. Similarly, under the *Gant* rule, it appears that where an arrest of a vehicle occupant requires an impoundment, the prosecution will have access to evidence obtained by an officer exceeding the lawful scope of the search.

### 3. The Inventory Search Doctrine Is Insufficiently Tied to the Justifications for its Existence, and Therefore Must Be Reconsidered

The inventory search is an unnecessarily intrusive—and fairly ineffective—method of furthering the caretaking needs on which it is based, making it the type of thinly veiled general rummage that the Fourth Amendment sought to eliminate.<sup>146</sup> Although the Supreme Court holds that an inventory search does not require a warrant or probable cause,<sup>147</sup> the three administrative needs on which the inventory search is based fail to justify an exception to the warrant requirement.<sup>148</sup> Also, alternative methods exist to serve these needs and still adhere to the Fourth

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144. For example, a claim brought pursuant to 42 U.S.C. § 1983 (2006).

145. See *supra* Part III.B.1:

Before searching a vehicle incident to the arrest of an occupant or recent occupant for the purpose of gathering evidence relevant to the crime of arrest, an arresting officer 'must secure and use search warrants wherever reasonably practicable.' . . . Where obtaining a search warrant is not reasonably practicable, and there is reason to believe that a danger exists that relevant evidence inside the vehicle will be transported or destroyed, an officer may temporarily restrict access to [impound] the vehicle until a search warrant can be obtained.

(quoting *Trupiano v. United States*, 334 U.S. 699, 705 (1948)).

146. See *New York v. Belton*, 453 U.S. 454, 464 (1981) (Brennan, J., dissenting) ("[I]n determining whether to grant an exception to the warrant requirement, courts should carefully consider the facts and circumstances of each search and seizure, focusing on the reasons supporting the exception . . . ." (citing *Sibron v. New York*, 392 U.S. 40, 59 (1968))); see also *Terry v. Ohio*, 392 U.S. 1, 19 (1968) ("The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." (quoting *Warden v. Hayden* 387 U.S. 294, 310 (1967) (Fortas, J., concurring))).

147. See *South Dakota v. Opperman*, 428 U.S. 364, 371 n.5 (1976).

148. *Id.* at 389 (Marshall, J., dissenting).

Amendment by protecting individuals from arbitrary invasions of privacy by law enforcement.<sup>149</sup>

a. Protection of the Vehicle Owner's Property

Protecting property within an impounded vehicle from theft and vandalism appears to be a benevolent reason for conducting an inventory search.<sup>150</sup> However, this rationale ignores owners who do not wish to have their vehicles searched for this purpose.<sup>151</sup> Further, without probable cause<sup>152</sup> of the presence of property in the vehicle worthy of protection, the search becomes a mere rummage through the property of another. This type of search does not further any caretaking objective and derives its only support from a general curiosity about the contents of the vehicle. This for-your-own-protection rationale<sup>153</sup> for the vehicle inventory search exception, in the absence of an owner's consent, should not outweigh the individual privacy interest implicated in the search.

As an alternative to inventory searches, perhaps police can increase security around impound lots in order to better protect the property within the vehicles. And, although *Opperman* contends that additional security measures—such as posting a guard around impound lots—could be “prohibitively expensive” for smaller jurisdictions,<sup>154</sup> this unproven prediction hardly qualifies as a circumstance of “such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible.”<sup>155</sup>

b. Protection of Police from False Claims of Stolen or Lost Property

*South Dakota v. Opperman*, the seminal case upholding warrantless inventories of impounded vehicles, advanced the protection of police from false claims of stolen or lost property as one justification for the exception.<sup>156</sup> But, as the dissent noted, South Dakota state law absolved the police in *Opperman* from any obligation other than inventorying items in plain view and locking the car, thus obviating any further police action for the purpose of protecting themselves from claims of stolen

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149. *Contra Illinois v. Lafayette*, 462 U.S. 640, 647 (1983) (“The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative ‘less intrusive’ means.”).

150. *See Opperman*, 428 U.S. at 369.

151. *Id.* at 392 (Marshall, J., dissenting) (“[I]t is obvious that not everyone whose car is impounded would want it to be searched.”).

152. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968) (“[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”).

153. *See Opperman*, 428 U.S. at 389 (Marshall, J., dissenting).

154. *Id.* at 379 (Powell, J., concurring).

155. *Id.* at 367 (majority opinion) (citing *Carroll v. United States*, 267 U.S. 132, 153–54 (1925)).

156. *Id.* at 369.

property.<sup>157</sup> Even if other jurisdictions lack similar provisions, the *Opperman* decision, upon which later Supreme Court holdings are based,<sup>158</sup> erred in reasoning that the search protected police from false claims of theft. Inventory searches do not effectively protect police from false claims<sup>159</sup>: a claimant can still assert that an officer stole an item before the inventory occurred, or that officers intentionally omitted an item's presence from their records.<sup>160</sup>

In the *Opperman* dissent, Justice Marshall offered a more effective, less intrusive method of security from false claims.<sup>161</sup> Justice Marshall suggested placing seals on the trunk and doors of the vehicle, where an unbroken seal signified that the car was unopened during police custody.<sup>162</sup> This too leaves police open to false claims, as owners might claim police broke a seal, and then replaced it. However, if the police used individually numbered seals, provided the numbers to the arrestee, and placed the seals on the vehicle in his presence, the arrestee would have no claim of stolen property if the seal remains unbroken.

### c. Protection of Police and the Public from Potential Danger

While protection from potential danger undoubtedly represents a legitimate interest, the Supreme Court's broad construction of the exception allows inventory searches where no specific circumstances indicate the presence of a specific danger.<sup>163</sup> Specific facts should be required to implicate this justification because impoundment alone creates no reasonable belief of danger.<sup>164</sup> While situations implicating a safety rationale may arise, it cannot logically justify the search of *every* impounded vehicle.<sup>165</sup> However, the Supreme Court accepts this rationale, even where the "danger" is invented.<sup>166</sup> Using the *Opperman* Court's logic allowing searches based on the unsubstantiated presence of danger, what

157. See S.D. CODIFIED LAWS § 43-39-11 (2009) (implying that when police are in possession of an impounded car, they are acting as gratuitous depositors); *State v. Opperman*, 228 N.W.2d 152, 159 (S.D. 1975) (holding that as gratuitous depositors, police are protected from civil tort claims if they remove objects from the vehicle in plain view, close the windows, and lock the doors).

158. See, e.g., *Florida v. Wells*, 495 U.S. 1, 4 (1990); *Colorado v. Bertine*, 479 U.S. 367, 374-75 (1987); *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983).

159. *Opperman*, 428 U.S. at 378-79 (Powell, J., concurring) ("It is not clear . . . that inventories are a completely effective means of discouraging false claims . . .").

160. *Id.* at 379.

161. See *id.* at 391 n.10 (Marshall, J., dissenting).

162. *Id.*

163. See, e.g., *Wells*, 495 U.S. at 2 (arrest for driving under the influence); *Bertine*, 479 U.S. at 367 (arrest for driving under the influence); *Opperman*, 428 U.S. at 365 (police impounded vehicle for parking violations).

164. *Opperman*, 428 U.S. at 378 (Powell, J., concurring) ("Except in rare cases, there is little danger associated with impounding unsearched automobiles.").

165. *Id.* at 389-90 (Marshall, J., dissenting) ("Even aside from the actual basis for the police practice in this case, however, I do not believe that any blanket safety argument could justify a program of routine searches of the scope permitted here.").

166. See *id.* at 376 n.10 (majority opinion) (holding a police inventory search of a vehicle impounded for a traffic violation reasonable for the purpose of protecting the public from vandals who might find a firearm).

is to stop police from inventorying parked cars on the street in the off chance that one of them contains a weapon?<sup>167</sup>

An argument exists that an arrest for an evidentiary crime and subsequent impoundment of the arrestee's vehicle provide probable cause that the vehicle contains evidence relevant to the crime of arrest. Combined with other specific facts offering a certain location and a certain item to search for, this is likely true. However, without specific facts showing that a specific item within a vehicle presents a danger, the exception becomes unhinged from the safety rationale, and reverts to a general rummage, unconnected to the reason for its existence.

#### 4. A Suggested Course of Action

In reconsidering the inventory search, the Court should heed the advice of Justice Scalia: If a search is for an evidence-gathering purpose, then the Court should at least admit that purpose, and then test it against the Fourth Amendment.<sup>168</sup> But if the inventory search exception exists to serve the needs listed in *Opperman*, then the Court should narrowly tailor the grant of police authority to fulfill those needs. The above-mentioned alternatives<sup>169</sup> are viable ways to further the two interests in protecting vehicle owners from theft and protecting police from false claims of stolen property. The safety rationale simply cannot logically or constitutionally justify warrantless, broad-scope searches of *every* impounded vehicle.<sup>170</sup>

Adopting the suggested rule for evidentiary crimes and using less intrusive alternatives<sup>171</sup> to address administrative needs provides a workable framework. It acknowledges the importance of administrative interests—and the interests in gathering evidence to aid prosecution of suspected criminals—yet remains loyal to the purpose of the Fourth Amendment by adhering more closely to its warrant requirement. The increased costs these rules would place on police departments are concededly a burden. But this burden does not outweigh the importance of protecting the privacy of citizens from arbitrary rummages by government officials.

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167. See *id.* at 391 n.8 (Marshall, J., dissenting) ("If this asserted rationale justifies search of all impounded automobiles, it must logically also justify the search of [a]ll automobiles, whether impounded or not, located in a similar area, for the argument is not based on the custodial role of the police.").

168. *Thornton v. United States*, 541 U.S. 615, 631 (2004) (Scalia, J., concurring) ("[I]f we are going to continue to allow *Belton* searches . . . we should at least be honest about why we are doing so.").

169. See *supra* Part III.B.3.a–b.

170. *Opperman*, 428 U.S. at 389–91 (Marshall, J., dissenting).

171. See *supra* Part III.B.3.a–b (suggesting increased security at impound lots and the use of numbered seals as alternatives that would protect property within vehicles and protect police from false claims).

## CONCLUSION

The Supreme Court's decision in *Gant* cuts two ways. First, it returns to a narrow search incident to arrest exception for nonevidentiary crimes, although its wording might result in confused application of the rule by lower courts. Second, and more troubling, it reflects a continuing trend placing higher value on successful prosecution of suspected criminals than on the intent of the Fourth Amendment's framers. The *Gant* rule applied to evidentiary crimes in the vehicle context, by adopting an evidence-gathering justification with no probable cause requirement, effectively removes the judicial mind from the process and grants officers in the field the discretion to determine whether an invasion of privacy is justified. This is exactly what the framers sought to prevent.<sup>172</sup>

While the rule suggested above provides an alternative to warrantless vehicle searches incident to arrest, it does so only until tripping over the next exception to the warrant requirement. The existence and breadth of the inventory search exception virtually ensure that, under the proposed improvement, warrantless search is inevitable.

In the context of vehicle searches after the arrest of an occupant, the exceptions to the Fourth Amendment's warrant requirement have enveloped the rule. After an arrest, it is difficult to imagine a situation where the vehicle search would take place under authority of a search warrant. Whether the search is conducted incident to an arrest or as an inventory, the paths circumventing that set forth by the Fourth Amendment have become the most traveled. The Court's treatment of the Fourth Amendment in the vehicle context deserves a better explanation than the oft-repeated diminished privacy interest in vehicles,<sup>173</sup> because "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away."<sup>174</sup> Courts must avoid treating the Fourth Amendment as a "nuisance, [and] a serious impediment in the war against crime,"<sup>175</sup> and instead temper the need for effective law enforcement with the directives issued in the Bill of Rights.

To be sure, other freedoms in the Constitution might engender more support than Fourth Amendment protection from unreasonable search and seizure—the individuals who invoke the protection are often accused criminals. But, to quote Justice Frankfurter, "[I]t is precisely because the appeal to the Fourth Amendment is so often made by dubious characters that its infringements call for alert and strenuous resistance."<sup>176</sup>

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172. *Arizona v. Gant*, 129 S. Ct. 1710, 1720 (2009) ("[T]he central concern underlying the Fourth Amendment [is] the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.").

173. See, e.g., *United States v. Chadwick*, 433 U.S. 1, 12–13 (1977).

174. *Coolidge v. New Hampshire*, 403 U.S. 443, 461 (1971).

175. *Harris v. United States*, 331 U.S. 145, 157 (1947) (Frankfurter, J., dissenting).

176. *Id.* at 156.

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