

THE “SEARCH-INCIDENT-TO-ARREST
[BUT PRIOR-TO-SECUREMENT]” DOCTRINE:
AN OUTLINE OF THE PAST, PRESENT, AND FUTURE

PRELUDE

You’re a 2L, maybe a 3L. It’s late April or early May 2009—in other words, exam period. You’ve just spent the last four days cramming for your Criminal Procedure exam. For most exams, you spend only a day or two preparing, but your Criminal Procedure professor is known to be a real stickler for perfection. This semester, she even had the nerve to tell the class that, to get an “A,” one “must know and be able to apply” any relevant cases that the Supreme Court may decide between now and the exam. You snickered.

That was ten days ago. It’s now the afternoon of the exam—game-time. You’re ready to get yourself that “A.”¹

“Gimme dat!” you say in excitement as a proctor hands you a copy of the exam.

You’re about to put in your earplugs when a friend stumbles into the room, grabs the empty seat next to you, and asks if you’ve heard about the “very important” Fourth Amendment case that the Supreme Court just decided—*Arizona v. Gant*.² You turn red.

“Are you kidding?” you ask.

“No, it’s a big time search-and-seizure case,” he replies.

With just minutes to spare, you ask him to give you a quick rundown of the case. To start, he tells you that *Gant* effectively abrogates *New York v. Belton*³ and that it may also affect the way courts interpret *Chimel v. California*.⁴

“*Belton* and *Chimel*?” you exclaim. “But both those cases are long-standing Supreme Court precedent.”

“I know,” replies your friend. “It’s dirty.”

Fortunately, you know both cases inside and out. Both deal with the “search-incident-to-arrest” exception to the warrant requirement—*Chimel* in the broad context, *Belton* in the automobile context.

“*Chimel* established that cops, after making an arrest, can search the arrestee and, uh, anything within their immediate control,” you

¹ “At the beginning the people in your class seem[ed] like nice enough folks. But gradually [you began] to realize that [your] only hope of getting a job is to blast the chromosomes out of [your] classmates in the giant zero-sum thermonuclear war game called ‘class standing.’” James D. Gordon III, *How Not To Succeed in Law School*, 100 YALE L.J. 1679, 1685 (1991).

² 129 S. Ct. 1710 (2009).

³ *Id.* at 1719; *New York v. Belton*, 453 U.S. 454 (1981).

⁴ *Gant*, 129 S. Ct. at 1719; *Chimel v. California*, 395 U.S. 752 (1969).

quickly tell your friend, “while *Belton* established that the entire inside of a car is within the arrestee’s immediate control, and can thus be searched, when the arrestee is the car’s recent occupant. Where does *Gant* come into play?”

Just as your friend is about to hit you with some knowledge, the professor walks into the classroom and proclaims, “The exam will begin now. Please stop talking.”

The classroom falls silent. In a last-ditch effort to educate you, your friend whispers, “Just remember that it’s over for the cops—definitely when they arrest car occupants, and maybe across the board, too.” You nod in appreciation. Then you open your exam. Game-time!

Question One:

Suppose police officers obtain a warrant to arrest Dan for, say, an assault that occurred during a fistfight at a neighborhood bar. They go to Dan’s home. His wife lets them in, and they find Dan in his bedroom, in bed. They arrest him, handcuff him behind his back, take him out of the room, and lock him in a police car. Then one of the officers searches the nightstand next to the bed, finding narcotics in the drawer. Dan is charged with possession of illegal narcotics. His lawyer moves to suppress the narcotics. She concedes that the arrest was valid but argues that the narcotics were obtained by an illegal search. The prosecutor makes no claim that the police had a warrant to search the premises, that the police had probable cause to believe that evidence of a crime would be found in the bedroom, that the police searched in order to protect themselves from weapons, or that Dan or his wife consented to the search.

....
According to many appellate decisions, [the] motion[] should be denied, on the ground that the search[] [was] “incident” to the arrest, because the nightstand . . . [was] within Dan’s reach when he was arrested—though not when the search[] took place.⁵

Who wins in the United States Supreme Court in light of its recent *Arizona v. Gant* decision?

INTRODUCTION

The following is a brief overview of Fourth Amendment law as it pertains to this Note. The Fourth Amendment prohibits “unreasonable searches.”⁶ Searches are “per se unreasonable” when they are conducted without a warrant, that is, “without prior approval by [a] judge.”⁷ The Supreme Court was quick to recognize, however, that it is sometimes

⁵ This hypothetical was taken from Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 WIS. L. REV. 657, 657 (2002).

⁶ U.S. CONST. amend. IV.

⁷ *Katz v. United States*, 389 U.S. 347, 357 (1967).

impractical to require law enforcement authorities to obtain a warrant.⁸ In turn, it created several exceptions to the warrant requirement, one of them being the “search-incident-to-arrest” doctrine.⁹

The Court delineated the doctrine’s current version in the 1969 case *Chimel v. California*.¹⁰ There, the Court held that a government official making a lawful custodial arrest, may, as a contemporaneous incident of that arrest, conduct a warrantless search of the arrestee’s person and anything within the arrestee’s immediate control, regardless of the crime for which the arrest was made.¹¹ Put more concisely, a police officer who makes a formal arrest has free rein to search the arrestee’s body and anything within his immediate surrounding area.

The Court defined an arrestee’s immediate surrounding area as “the area . . . within which [the arrestee] might gain possession of a weapon or destructible evidence.”¹² Specifically, if the arrestee is in his house or apartment at the time of the arrest, the officer(s) can search a table or drawer in front of the arrestee, but not neighboring rooms or “[even] all the desk drawers or other closed or concealed areas in that room [where the arrest occurred].”¹³ If the arrestee happens to be a car occupant or recent occupant, the officer(s) can search the car’s passenger compartment and any containers found therein (this is what the aforementioned *New York v. Belton* stands for).¹⁴

As one may have already inferred from above, the Court in *Chimel* gave (and, to this day, continues to give) two justifications for allowing a search incident to arrest: (1) officer safety, that is, to “remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape,” and (2) evidence preservation, that is, to prevent the arrestee from concealing or destroying evidence.¹⁵ The Court in *Chimel* then reiterated its oft-stated maxim that “[a] search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.”¹⁶ In short, no justifications, no search.¹⁷

⁸ *McDonald v. United States*, 335 U.S. 451, 455–56 (1948).

⁹ *Chimel v. California*, 395 U.S. 752, 762–63 (1969).

¹⁰ *Id.*

¹¹ *See id.* As mentioned, the doctrine only applies to custodial arrests. A custodial arrest is one that involves “the taking of a suspect into custody and transporting him to the police station.” *United States v. Robinson*, 414 U.S. 218, 235 (1973). Conversely, the doctrine does not apply when an officer stops a motorist for a traffic infraction and issues him a citation rather than arresting him. *Knowles v. Iowa*, 525 U.S. 113, 118–19 (1998).

¹² *Chimel*, 395 U.S. at 763.

¹³ *Id.*

¹⁴ *New York v. Belton*, 453 U.S. 454, 462–63 (1981); *accord Arizona v. Gant*, 129 S. Ct. 1710, 1714 (2009).

¹⁵ *Chimel*, 395 U.S. at 763.

¹⁶ *Id.* at 762 (citing *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

Notwithstanding the limited justifications enumerated above, however, many courts have interpreted *Chimel* to allow a search incident to arrest *after* the officer has handcuffed the arrestee and placed him in the back of his squad car.¹⁸ In other words, courts (and law enforcement authorities alike) have widely understood *Chimel* to allow a search incident to arrest even if the justifications underlying the doctrine cease to exist, that is, in instances in which “there [was] no possibility the arrestee could gain access” to weapons or evidence.¹⁹ In fact, in 2004, the Supreme Court even implicitly approved of such a search.²⁰

In their defense, the courts had reason to construe *Chimel* in this manner. In general, police officers are taught to handcuff the arrestee and secure him in the backseat of a squad car before searching the immediate surrounding area²¹ because “[c]ustodial arrests are dangerous in themselves, and [handcuffing and securing the arrestee] is one step . . . that officers can take to secure their [own] safety.”²² Therefore, for those courts that have instead construed *Chimel* to prohibit searches of the arrestee’s immediate surrounding area after the arrestee was secured, “the *Chimel* rule . . . [is] a specialty rule, applicable to only a few unusual cases.”²³ Astoundingly, the Court never addressed this practical ambiguity of *Chimel* (at least not in a majority opinion)—that is, until this past April, in *Arizona v. Gant*.²⁴

In *Gant*, the Court did more than address the ambiguity—some might even say it threw *Belton* out the window. The Court ruled:

If there is no possibility that an arrestee could reach into the [passenger compartment of the car], both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.

¹⁷ Even if an officer cannot justify a search incident to arrest, he may be able to justify a search pursuant to other established exceptions to the warrant requirement.

¹⁸ See *Gant*, 129 S. Ct. at 1718 (observing that the “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*” (quoting *Thornton v. United States*, 541 U.S. 615, 624 (2004) (O’Connor, J., concurring in part)), and “although it is improbable that an arrestee could gain access to weapons stored in his vehicle after he has been handcuffed and secured in the backseat of a patrol car, cases allowing a search in this ‘precise factual scenario . . . are legion” (quoting *Thornton*, 541 U.S. at 628 (Scalia, J., concurring))).

¹⁹ *Id.*

²⁰ *Thornton*, 541 U.S. at 617.

²¹ Moskowitz, *supra* note 5, at 663, 665–66; see also *Gant*, 129 S. Ct. at 1719 n.4 (“[I]t will be a 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.”); *id.* at 1730 (Alito, J., dissenting) (“[B]ecause it is safer for an arresting officer to secure an arrestee before searching, it is likely that this is what arresting officers do in the great majority of cases.”).

²² Transcript of Oral Argument at 30, *Gant*, 129 S. Ct. 1710 (No. 07-542).

²³ *Gant*, 129 S. Ct. at 1730 (Alito, J., dissenting).

²⁴ *Id.* at 1719 (majority opinion).

....

Accordingly, we reject [the broad] reading of *Belton* and hold 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.²⁵

The Court, however, avoided making *Chimel* a "specialty rule" (at least in its application to the automobile context) by giving police another means to conduct a vehicular search incident to arrest: "Although it does not follow from *Chimel*, we also conclude 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.'"²⁶

In other words, the Court created a two-part rule: Police may search a vehicle incident to arrest when it is reasonable to believe that either (1) there is a realistic possibility the arrestee could access the vehicle, or (2) the vehicle contains evidence of the crime of arrest.

The Court, however, seemingly left many questions unanswered (an example of which follows the hypothetical posed in this Note's Prelude). As to the first part of the Court's new rule, does it apply to contexts other than that of "vehicle occupants and recent occupants"?²⁷ Put differently, in light of *Gant*, are police officers allowed to search a secured arrestee's former immediate surrounding area incident to his arrest if that area is, say, a room in the arrestee's house or apartment rather than his car?

As to the second part of the Court's new rule, how is "reason to believe" defined?²⁸ Is it a lower standard than probable cause? Also, why did the Court restrict this type of search to evidence of the crime of arrest, rather than also includes evidence of a crime other than the crime of arrest?²⁹ And finally, why is this type of search "unique to the automobile context"?³⁰

While all of these questions are worth exploring, this Note is devoted to only the first one: whether the Supreme Court should apply *Gant* to all contexts, and not just vehicular contexts.³¹ The answer is "no."

²⁵ *Id.* at 1716, 1719.

²⁶ *Id.* at 1719 (quoting *Thornton v. United States*, 541 U.S. 615, 632 (Scalia, J., concurring)).

²⁷ *Id.* at 1731 (Alito, J., dissenting).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 1714 (majority opinion).

³¹ This question was presented in the hypothetical posed in the Prelude.

Before giving the reasons for the answer in Part II, however, Part I outlines the doctrine's checkered past. Part II also analyzes the future impact of the first part of *Gant's* new rule.

I. WEEKS TO GANT: THE NINETY-FIVE-YEAR PENDULUM

A. 1914–1930: Creation and Expansion

The Court first acknowledged the government's right to conduct a warrantless search incident to a lawful arrest some ninety-five years ago, in *Weeks v. United States*.³² There, the Court noted in *dictum* that the government's right "to search the *person* of the accused when legally arrested to discover and seize the fruits or evidences of crime. . . . ha[d] been uniformly maintained in many cases."³³

Conspicuously absent from *Weeks*, however, was a reference to the right to search the *place* where an arrest occurs. Eleven years later, in *Carroll v. United States*, the Court subtly referenced such a right: "When 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."³⁴

Later that year, in *Agnello v. United States*, the Court directly acknowledged the right, albeit again in *dictum*.³⁵ The Court wrote that the government may conduct a warrantless search of "the place where the arrest is made in order to find and seize things connected with the crime . . . as well as weapons and other things to effect an escape from custody."³⁶

Two years later, in *Marron v. United States*, the Court seemingly precedentized the right.³⁷ In that case, government officials obtained a search warrant for premises where alcohol was supposedly being unlawfully sold; the warrant authorized the seizure of liquor and materials used for its manufacturing.³⁸ When the officials arrived on the scene, they executed the warrant and arrested the person in charge.³⁹ While conducting their search, the officials found and seized an

³² 232 U.S. 383, 392 (1914). For support, however, the Court cited to just *one* case—*Dillon v. O'Brien*, [1887] 20 L.R. 300, 317–18 (Ir.).

³³ *Weeks*, 232 U.S. at 392 (emphasis added).

³⁴ 267 U.S. 132, 158 (1925) (emphasis added).

³⁵ 269 U.S. 20, 30 (1925).

³⁶ *Id.* (citing *Carroll*, 267 U.S. at 158).

³⁷ 275 U.S. 192, 199 (1927).

³⁸ *Id.* at 193–94.

³⁹ *Id.*

incriminating ledger that was not covered by the warrant.⁴⁰ The Court, in upholding the ledger's seizure, wrote that the officials "had a right without a warrant . . . to search the place in order to find and seize the things used to carry on the criminal enterprise. . . . as an incident of the arrest."⁴¹

Up to this point, the government's right to conduct a warrantless search incident to a lawful arrest had only expanded. As a search incident to an arrest, government officials presumably had the right to conduct a warrantless search of an arrestee's person and the place where the arrest occurred and, in conjunction therewith, seize both "things connected with the crime" and "weapons and other things [that could be used] to effect an escape from custody."⁴² On its face, the right was pretty broad. That would soon change.

B. 1931–1968: Constriction, Expansion, Ditto

In 1931, the Court decided *Go-Bart Importing Co. v. United States*,⁴³ in which it evidently made "the *Marron* opinion . . . not [to] mean all that it seemed to say."⁴⁴

In *Go-Bart*, government agents went to the company's office and lawfully arrested its president and treasurer for conspiring to order, sell, and transport liquor illegally.⁴⁵ The agents, by threat of force, compelled the president to open a locked desk and safe; the agents then searched them, seizing account books, among other things.⁴⁶ The Court held the search and seizure to be unreasonable.⁴⁷ In doing so, the Court first noted that the agent in charge had sufficient "information and time to swear out a valid [search] warrant, [but] failed to do so."⁴⁸ The Court then distinguished the case from *Marron* and wrote as follows: "[In *Marron*, the] things [seized] were visible and accessible and in the offender's immediate custody. There was no threat of force or general search or rummaging of the place."⁴⁹

A year later, the Court further qualified its holding in *Marron*. The case was *United States v. Lefkowitz*,⁵⁰ and its facts were very similar to

⁴⁰ *Id.* at 194.

⁴¹ *Id.* at 199.

⁴² *Agnello v. United States*, 269 U.S. 20, 30 (1925).

⁴³ 282 U.S. 344 (1931).

⁴⁴ *Chimel v. California*, 395 U.S. 752, 757 (1969).

⁴⁵ 282 U.S. at 349.

⁴⁶ *Id.* at 349–50.

⁴⁷ *Id.* at 358.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 285 U.S. 452, 465 (1932).

those in *Go-Bart*: Government agents lawfully arrested defendants for conspiring to order, sell, and transport liquor illegally, and incident to that arrest, they searched defendants' desks, seizing various incriminating papers.⁵¹ Yet there was one possibly meaningful difference between the searches in the two cases. Unlike *Go-Bart*, the desks and cabinets in *Lefkowitz* were unlocked, so the agents did not have to threaten the defendants to gain access to them.⁵²

The Court, however, still held the search and seizure unreasonable, but again refused to overrule *Marron*.⁵³ It distinguished the case from *Marron* on two grounds.⁵⁴ First, the ledger seized in *Marron* was in plain view and was found without an additional search; conversely, the search in *Lefkowitz* was "exploratory and general."⁵⁵ Second, the ledger in *Marron* was actually used to "carry on the criminal enterprise," while the papers in *Lefkowitz*, "[t]hrough intended to be used to solicit orders for liquor in violation of the Act . . . were in themselves unoffending."⁵⁶

Note that before the Court decided *Go-Bart* and *Lefkowitz*, government officials had an incident-to-arrest right to search a place without a warrant and seize "things used to carry on the criminal enterprise."⁵⁷ After *Go-Bart* and *Lefkowitz*, it was no longer clear what the government's right was. If a government official wanted to be sure that a search-and-seizure incident to an arrest was lawful, the search would have had to be particularized rather than exploratory and general,⁵⁸ yet done without time and information sufficient to swear out a valid search warrant.⁵⁹ Moreover, the thing seized would have needed to be "visible and accessible and in the offender's immediate custody,"⁶⁰ and the offender would have had to have already used the thing in commission of the crime rather than merely have intended to use it.⁶¹ What are the chances of meeting those criteria? The Court (particularly Justice Butler, who authored both opinions) really did a number on the doctrine in the early 1930s.

Some fifteen years later, in *Harris v. United States*, the pendulum swung to the other side.⁶² There, FBI agents arrested Harris at his four-

⁵¹ *Id.* at 458–59.

⁵² *Id.* at 460.

⁵³ *Id.* at 465.

⁵⁴ *See id.* at 465.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Marron v. United States*, 275 U.S. 192, 199 (1927).

⁵⁸ *See Lefkowitz*, 285 U.S. at 465.

⁵⁹ *See Go-Bart Importing Co. v. United States*, 282 U.S. 344, 358 (1931).

⁶⁰ *Id.*

⁶¹ *See Lefkowitz*, 285 U.S. at 465.

⁶² 331 U.S. 145, 152–53 (1947).

room apartment pursuant to two valid arrest warrants that charged him with intent to defraud certain banks.⁶³ After handcuffing Harris, the agents searched the entire apartment for approximately five hours (the agents claimed that they carried out the search to find two canceled checks that were used in the fraud).⁶⁴ Near the end of the search, one of the agents found and opened a sealed envelope marked "George Harris, personal papers."⁶⁵ The envelope contained documents that were "in no way related to the crimes for which [Harris] was initially arrested," but were nonetheless used to secure his conviction in the lower court for other criminal acts.⁶⁶

Harris claimed that the search and seizure were unconstitutional, but the Court rejected his argument.⁶⁷ Instead of overruling *Go-Bart* and *Lefkowitz*, however, the Court attempted to distinguish the searches in those cases on the grounds that they were "exploratory," while the search here in *Harris* was "specifically directed to the means and instrumentalities by which the crimes charged had been committed, particularly the two canceled checks."⁶⁸

Just over a year later, however, the *Harris* holding took a hit. In *Trupiano v. United States*,⁶⁹ federal agents raided the site of an illegal distillery that they had been monitoring for over two months without a warrant.⁷⁰ During the raid, the agents noticed one of the offenders operating the distillery and arrested him.⁷¹ Contemporaneously, the agents seized the still, alcohol, and other equipment.⁷² This time, the Court found the seizure unreasonable, and again without overruling any of its previous decisions.⁷³ It stated that "[i]t is a cardinal rule that . . . law enforcement agents must secure and use search warrants whe[n]ever reasonably practicable."⁷⁴ The Court then noted how the agents had "an abundance of time during which such a warrant could have been secured," because they had been monitoring the distillery for over two months.⁷⁵ The *Harris* case, on the other hand, "dealt with the

⁶³ *Id.* at 148. The warrants also listed other charges. *Id.*

⁶⁴ *Id.* at 148–49.

⁶⁵ *Id.* at 149.

⁶⁶ *Id.*

⁶⁷ *Id.* at 152–53.

⁶⁸ *Id.* at 153.

⁶⁹ 334 U.S. 699 (1948).

⁷⁰ *Id.* at 701–03.

⁷¹ *Id.* at 702.

⁷² *Id.* at 703–04.

⁷³ *Id.* at 705.

⁷⁴ *Id.* (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)).

⁷⁵ *Id.* at 706.

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.”⁷⁶

Two short years later, the Court had yet another opportunity to clarify its precedents in *United States v. Rabinowitz*.⁷⁷ And for the first time in its warrantless search jurisprudence, it seized that opportunity and overruled *Trupiano*.⁷⁸

In *Rabinowitz*, federal officers obtained an arrest warrant for Rabinowitz after being informed that he was selling canceled stamps that bore forged overprints.⁷⁹ The officers then arrested Rabinowitz at his one-room business office, and incident thereto, conducted an hour-and-a-half search of the desk, safe, and filing cabinets.⁸⁰ They found and seized 573 incriminating stamps that were later admitted at trial in which Rabinowitz was convicted.⁸¹ The Court affirmed Rabinowitz’s conviction⁸²—and it would have affirmed the conviction even if the officers had had enough time to obtain a search warrant but failed to do so.⁸³ In doing so, the Court rejected *Trupiano*’s holding and instead held that “[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.”⁸⁴ It then reiterated *Agnello*’s *dictum*: It is reasonable for officials to search a place in which a lawful arrest is made to seize evidence that has to do with the crime.⁸⁵

With *Rabinowitz*, the doctrine came to a culmination. Officers were legally able to conduct warrantless searches of all areas under the arrestee’s “control,” not just the place where the arrest occurred, incident to a lawful arrest.⁸⁶ Moreover, officials were able to seize things merely “connected with the crime”—including evidence of other crimes for which the officers may not have had probable cause to arrest.⁸⁷

Nineteen years later, however, *Rabinowitz* was overruled in part and substantially restricted by *Chimel v. California*.

⁷⁶ *Id.* at 709.

⁷⁷ 339 U.S. 56 (1950).

⁷⁸ *Id.* at 66.

⁷⁹ *Id.* at 57–58.

⁸⁰ *Id.* at 58–59.

⁸¹ *Id.* at 59.

⁸² *Id.* at 63–64.

⁸³ *See id.* at 64.

⁸⁴ *Id.* at 66.

⁸⁵ *Id.* at 61 (quoting *Agnello v. United States*, 269 U.S. 20, 30 (1925)).

⁸⁶ *Id.* at 60–61; *see also* *Chimel v. California*, 395 U.S. 752, 760 (1969) (“*Rabinowitz* has come to stand for the proposition, *inter alia*, that a warrantless search ‘incident to a lawful arrest’ may generally extend to the area . . . under the ‘control’ of the person arrested.”).

⁸⁷ *See Rabinowitz*, 339 U.S. at 61 (quoting *Agnello*, 269 U.S. at 30).

C. 1969–2009

1. *Chimel v. California*—A Firm Circumscription of *Harris* and *Rabinowitz*

As mentioned above, forty years ago in *Chimel*, the Court announced the doctrine’s current version.⁸⁸ There, police officers arrested Chimel at his house pursuant to a valid arrest warrant.⁸⁹ Without first obtaining a search warrant and over Chimel’s objection, the officers searched Chimel’s entire three-bedroom house.⁹⁰ They found and seized numerous items that were later admitted into evidence at trial.⁹¹ Chimel was convicted, and his conviction was subsequently upheld by both the California Court of Appeal and the California Supreme Court.⁹²

The U.S. Supreme Court, however, reversed the state courts’ decisions.⁹³ It held that when a policeman makes a lawful custodial arrest, he may, as a contemporaneous incident of that arrest, search the arrestee’s person and the immediate surrounding area.⁹⁴ The Court defined immediate surrounding area as the area “within which [the arrestee] might have obtained either a weapon or something that could have been used as evidence against him.”⁹⁵ In similar fashion, the Court provided two justifications for the exception: (1) the officer’s safety, and (2) evidence preservation.⁹⁶

By the same token, the Court also held that “[t]here is no comparable justification . . . for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself.”⁹⁷ It continued that “[s]uch searches . . . may be made only under the authority of a search warrant.”⁹⁸

In short, *Chimel* circumscribed the power of the police to conduct a warrantless search incident to arrest and fortified Fourth Amendment

⁸⁸ 395 U.S. at 763.

⁸⁹ *Id.* at 753.

⁹⁰ *Id.* at 753–54.

⁹¹ *Id.* at 754.

⁹² *Id.*

⁹³ *Id.* at 768.

⁹⁴ *Id.* at 763.

⁹⁵ *Id.* at 768.

⁹⁶ *Id.* at 763. These have come to be known as *Chimel*’s “twin rationales.” See *Arizona v. Gant*, 129 S. Ct. 1710, 1718 (2009); *Thornton v. United States*, 541 U.S. 615, 624 (2004) (O’Connor, J., concurring).

⁹⁷ *Chimel*, 395 U.S. at 763; see also *id.* at 773 (White, J., dissenting) (asserting that the justifications “do not apply to the search of areas to which the accused does not have ready physical access”).

⁹⁸ *Id.* at 763 (majority opinion).

principles. Police no longer had the power “to rummage at will . . . in search of whatever will convict [the arrestee].”⁹⁹

2. *New York v. Belton*—An Extension of *Chimel* to Automobiles

In the years following *Chimel*, courts had difficulty applying the doctrine in specific cases. For one, many courts were unsure of the proper scope of a search of the arrestee’s person incident to a custodial arrest.¹⁰⁰ The Court addressed this uncertainty in the 1974 case of *United States v. Robinson*; therein, it authorized a “full search” of the arrestee’s person.¹⁰¹

Seven years later, in *New York v. Belton*, the Court answered another question: Is an automobile’s passenger compartment within the arrestee’s immediate surrounding area when the arrestee is the automobile’s occupant or recent occupant?¹⁰²

In that case, Belton was in a car with three other men when a policeman pulled over the driver for speeding.¹⁰³ When the officer approached the car, he smelled burnt marijuana and noticed an envelope on the car floor marked “Supergold,” which the officer associated with marijuana.¹⁰⁴ The officer then ordered the four men out of the car and arrested them for possession of marijuana, but the men were not handcuffed.¹⁰⁵ The officer then began to search the car’s interior.¹⁰⁶ First, he opened the envelope and found marijuana.¹⁰⁷ Then he searched the car’s passenger compartment and found a jacket belonging to Belton.¹⁰⁸ He unzipped one of the jacket pockets and found cocaine.¹⁰⁹ At trial, Belton moved to suppress the cocaine; the court denied the motion and Belton was convicted.¹¹⁰

The Supreme Court upheld Belton’s conviction and wrote that a car’s passenger compartment is “in fact generally, even if not inevitably, within ‘the area into which an arrestee might reach in order to grab a

⁹⁹ *Id.* at 767 (quoting *United States v. Kirschenblatt*, 16 F.2d 202, 203 (1926)).

¹⁰⁰ *See, e.g.*, *New York v. Belton*, 453 U.S. 454, 460 (1981).

¹⁰¹ 414 U.S. 218, 235 (1973).

¹⁰² 453 U.S. at 455.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 455–56.

¹⁰⁵ *Id.* at 456.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

weapon or evidentiary ite[m].”¹¹¹ As such, the Court ruled 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.”¹¹²

The Court rationalized its ruling in part on the need for a “workable rule,”¹¹³ or, in other words, a “single familiar standard . . . 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.”¹¹⁴ From here on, courts would be able to avoid the issue of whether a weapon or evidence was in the arrestee’s “immediate control.”

The majority’s bright-line rule, however, caused Justice Brennan to dissent.¹¹⁵ Justice Brennan presumed that the majority would have ruled the same way even if the officer had handcuffed Belton and the other men and placed them in the patrol car before conducting the search.¹¹⁶ He then argued that “[w]hen [an] 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,” and so a search incident to arrest would be unreasonable.¹¹⁷ In turn, Justice Brennan concluded that “the crucial question under *Chimel* is not whether the arrestee could *ever* have reached the area that was searched, but whether he could have reached it *at the time of arrest and search*.”¹¹⁸

¹¹¹ *Id.* at 460–63 (alteration in original) (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)).

¹¹² *Id.* The Court further provided the contents of any containers in the passenger compartment may also be investigated regardless of whether they were open or closed. *Id.* at 460–61.

¹¹³ *Id.* at 460.

¹¹⁴ *Id.* at 458 (quoting *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979)).

¹¹⁵ *See id.* at 463 (Brennan, J., dissenting) (“The Court today turns its back on the product of [its *Chimel*] analysis, formulating an arbitrary ‘bright-line’ rule applicable to ‘recent’ occupants of automobiles that fails to reflect *Chimel*’s underlying policy justifications.”).

¹¹⁶ *Id.* at 468. Remember, the officer in *Belton* did not handcuff Belton or any of his companions before searching the vehicle. *See id.* at 455–56 (majority opinion).

¹¹⁷ *Id.* at 465–66 (Brennan, J., dissenting).

¹¹⁸ *Id.* at 469 (emphasis added).

3. *Thornton v. United States*—A Subtle Expansion of *Belton*¹¹⁹

Because *Belton* applies to both car occupants and recent occupants¹²⁰ but did not define those terms, in the years following *Belton*, courts differed on how to define recent occupant. Some courts allowed officers to search an automobile incident to arrest only when the officer first initiated contact while the person still occupied the vehicle.¹²¹ Conversely, other courts examined the arrestee's proximity to the vehicle and how much time had passed between the arrestee's exit from the car and his contact with the officers.¹²²

In *Thornton*, the Court addressed the split of authority; specifically, it decided whether *Belton* applied to situations "when the officer first makes contact with the arrestee after the latter has stepped out of his vehicle."¹²³ It answered with an emphatic yes.¹²⁴

The officer in this case was tailing Thornton because the license tags did not match the vehicle he was driving.¹²⁵ Before the officer could pull Thornton over, however, Thornton pulled into a parking lot and exited the vehicle.¹²⁶ In response, the officer parked his patrol car, accosted Thornton, patted him down, and found narcotics in one of his pockets.¹²⁷ The officer then handcuffed Thornton and secured him in the back of the squad car.¹²⁸ Immediately thereafter, the officer searched Thornton's car and found a handgun under the driver's seat.¹²⁹

¹¹⁹ In the twenty-three years between *Belton* (1981) and *Thornton* (2004), the Court decided few cases that significantly affected the "search-incident-to-arrest" doctrine. For those cases that did make a noteworthy impact on the doctrine, see *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (holding that officers, as long as they have probable cause, can make *custodial* arrests for "even a very minor criminal offense," and can thus carry out a search incident to such an arrest); *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (holding that *non-custodial* arrests (that is, those in which the officer does not take the person into custody, but merely stops him or issues him a traffic citation) do not trigger the power to conduct any automatic search of the arrestee or his surrounding area); *Maryland v. Buie*, 494 U.S. 325, 330, 334 (1990) (holding that as an incident to arrest, officers may (without a warrant, probable cause, or even reasonable suspicion) conduct a "protective sweep" of a home for dangerous persons following a lawful-in home arrest, and that in doing so, officers may "look in closets and other spaces immediately adjoining the place of arrest"). In short, the Court modestly, but consistently, increased the scope of the "search-incident-to-arrest" doctrine between 1981 and 2004.

¹²⁰ 453 U.S. at 460; *see also* discussion Section I.C.2.

¹²¹ *See, e.g., United States v. Strahan*, 984 F.2d 155, 159 (6th Cir. 1993).

¹²² *See, e.g., United States v. Thornton*, 325 F.3d 189, 196 (4th Cir. 2003).

¹²³ 541 U.S. 615, 617 (2004).

¹²⁴ *Id.*

¹²⁵ *Id.* at 618.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

The prosecution submitted the handgun into evidence at Thornton’s trial in which he was convicted for possession of a firearm, *inter alia*.¹³⁰ Thornton appealed on one ground—that the search of his car violated his Fourth Amendment rights.¹³¹

The Court upheld Thornton’s conviction notwithstanding the fact that it was “unlikely . . . that [Thornton] could have reached under the driver’s seat for his gun once he was outside of his automobile.”¹³² It provided that:

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. . . .

. . . [T]he 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. . . . [A]n arrestee [is not 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. In either case, the officer faces a highly volatile situation. It would make little sense to apply two different rules to what is, at bottom, the same situation.¹³³

In sum, *Thornton* reaffirmed *Belton*’s holding that officers have the authority to search an automobile’s entire passenger compartment incident to the lawful arrest of the automobile’s occupant or recent occupant. In addition, it made clear that officers hold such authority irrespective of whether the arrestee is in the vehicle when the officer first makes contact.

On a final note, the Court declined to address whether *Belton* was limited to cases of “recent occupant[s]’ who are within ‘reaching distance’ of the car.”¹³⁴ Instead, it simply noted that “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.”¹³⁵

4. *Arizona v. Gant*—An Unexpected “Clarification” of *Belton*

Between 1969 and April 2009, the Court steadily expanded the “search-incident-to-arrest” doctrine. The question remained, however, whether an officer could carry out a search incident to an arrest

¹³⁰ *Id.* at 618–19.

¹³¹ *Id.* at 619.

¹³² *Id.* at 622, 624.

¹³³ *Id.* at 620–21.

¹³⁴ *Id.* at 622 n.2. The Court refused to address the issue because it was outside the question on which it granted certiorari. *Id.*

¹³⁵ *Id.* at 622.

regardless of the arrestee's ability to access weapons and evidence *at the time of the search*. *Gant* presented the Court with an opportunity to answer that question, at least insofar as it pertained to the automobile context.

In *Gant*, shortly after parking and exiting his vehicle, the defendant was arrested for driving with a suspended license.¹³⁶ The police handcuffed and secured him in a squad car.¹³⁷ They then searched his car and found a firearm and cocaine therein.¹³⁸ *Gant* argued that the search violated his Fourth Amendment rights because it was not possible for him to access his vehicle at the time of the search.¹³⁹

The majority agreed with *Gant* and, for the first time, espoused the view previously posited by Justice Brennan¹⁴⁰ and Justice Scalia.¹⁴¹ First, the Court stressed the importance of the justifications underlying *Chimel* (officer safety and evidence preservation).¹⁴² It then held that “[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.”¹⁴³ Put differently, “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.”¹⁴⁴

The Court then noted how “it will be [a] 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.”¹⁴⁵ And so to avoid rendering the exception in the automobile context obsolete, the Court provided another ground on which officers may search a vehicle incident to arrest: “when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’”¹⁴⁶

In short, it created a two-part rule: Police may search a vehicle incident to arrest when it is reasonable to believe that either (1) there is

¹³⁶ *Arizona v. Gant*, 129 S. Ct. 1710, 1715 (2009).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See supra* Section I.C.2.

¹⁴¹ *See Thornton v. United States*, 541 U.S. 615, 628–29 (2004) (Scalia, J., concurring) (arguing that “[i]f *Belton* searches are justifiable [when an arrestee is handcuffed and secured in the back of a squad car], it is not because the arrestee might grab a weapon or evidentiary item from his car, but simply because the car might contain evidence relevant to the crime for which he was arrested”).

¹⁴² *Gant*, 129 S. Ct. at 1716.

¹⁴³ *Id.* at 1716 (citing *Preston v. United States*, 376 U.S. 364, 367–68 (1964)).

¹⁴⁴ *Id.* at 1719 (emphasis added).

¹⁴⁵ *Id.* n.4.

¹⁴⁶ *Id.* at 1719 (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring)).

a realistic possibility the arrestee could access the vehicle, or (2) the vehicle contains evidence of the crime of arrest.

II. BEYOND *GANT*: THE PENDULUM SHOULD STOP

Gant has had a major impact on the daily operations of law enforcement authorities around the country. At the very least, police must now often refrain from conducting searches following vehicular arrests when such arrests are for traffic violations or outstanding arrest warrants, even when the arrestee appears to be engaged in criminal activity, because there often will not be sufficient reason to believe that the vehicle contains evidence relevant to the crime.¹⁴⁷

Some jurisdictions, however, may construe *Gant* as far more limiting. Regardless, *Gant* clearly left some unanswered questions. Justice Alito's dissent was quick to point this out:

The Court . . . leaves the law relating to searches incident to arrest in a confused and unstable state. The first part of the Court's new two-part rule—which permits an arresting officer to search the area within an arrestee's reach at the time of the search—applies, at least for now, only to vehicle occupants and recent occupants

The second part of the Court's new rule . . . raises doctrinal and practical problems that the Court makes no effort to address. Why, for example, is the standard for this type of evidence-gathering search "reason to believe" rather than probable cause? And why is this type of search restricted to evidence of the offense of arrest? . . .

. . . [And, finally,] why [is] an evidence-gathering search incident to arrest . . . restricted to the passenger compartment[?]¹⁴⁸

This Part of the Note analyzes the future impact of the first part of the Court's new rule. Specifically, it purports to answer whether the Court should apply *Gant* to "virtually all situations where an arrestee is handcuffed, in effect creating another bright-line rule—that no search incident to arrest may proceed once the arrestee is [fully secured.]"¹⁴⁹

¹⁴⁷ See *supra* Section I.C.4; see also JENNIFER G. SOLARI, FEDERAL LAW ENFORCEMENT TRAINING CENTER, THE UNITED STATES SUPREME COURT'S RULING IN *ARIZONA V. GANT*: IMPLICATIONS FOR LAW ENFORCEMENT OFFICERS, available at <http://www.fletc.gov/training/programs/legal-division/the-informer/research-by-subject/4thamendment/ArizonaVsGant.pdf>.

¹⁴⁸ *Gant*, 129 S. Ct. at 1731 (Alito, J., dissenting).

¹⁴⁹ Dale Anderson & Dave Cole, *Search and Seizure After Arizona v. Gant*, 46 ARIZ. ATT'Y 14, 16 (2009).

A. Lower Court Reactions to Searches Following a Non-Vehicular Arrest

1. The “Time-of-Arrest” Approach

Prior to *Gant*, many jurisdictions permitted officers to search the place of arrest even after the arrestee had been handcuffed and removed from the area, so long as the area was within the arrestee’s control at the time of the arrest.¹⁵⁰ This is known as the “time-of-arrest” approach.¹⁵¹

In *United States v. Tejada*, for example, the United States Court of Appeals for the Seventh Circuit noted how many circuit courts hold that “if the search is limited to the area under the defendant’s control at the time of his arrest, the fact that it is no longer under his control at the time of the search does not invalidate the search.”¹⁵²

In *Tejada*, more than a dozen undercover agents came into the defendant’s apartment to arrest him for intent to distribute narcotics.¹⁵³ The agents pushed the defendant onto the floor and handcuffed his hands behind his back.¹⁵⁴ Some of the agents then searched the defendant’s apartment, including an entertainment center in the living room.¹⁵⁵ Therein, the agents discovered a blue travel bag that they unzipped only to find another bag containing cocaine.¹⁵⁶ The Seventh Circuit found it “inconceivable” that the defendant would have had time to unzip the travel bag after being arrested without being immobilized yet again by dozen or more agents.¹⁵⁷ Nevertheless, it found the search constitutional.¹⁵⁸

There are two basic rationales behind the “time-of-arrest” approach. First, “if the police could lawfully have searched the [arrestee’s] grabbing radius at the moment of arrest, he has no legitimate complaint if, the better to protect themselves from him, they first put him outside that radius.”¹⁵⁹ Second, to hold otherwise creates “a perverse incentive for an

¹⁵⁰ See, e.g., *United States v. Tejada*, 524 F.3d 809, 812 (7th Cir. 2008); *United States v. Currence*, 446 F.3d 554, 557 (4th Cir. 2006); *United States v. Hudson*, 100 F.3d 1409, 1419 (9th Cir. 1996); *United States v. Abdul-Saboor*, 85 F.3d 664, 668 (D.C. Cir. 1996).

¹⁵¹ See *Moskovitz*, *supra* note 5, at 682 (citing *United States v. Turner*, 926 F.2d 883, 887 (9th Cir. 1991)).

¹⁵² *Tejada*, 524 F.3d at 812.

¹⁵³ *Id.* at 811.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 812.

¹⁵⁸ *Id.* at 814.

¹⁵⁹ *Id.* at 812 (citing *United States v. Abdul-Saboor*, 85 F.3d 664, 669 (D.C. Cir. 1996)); see also *People v. Summers*, 86 Cal. Rptr. 2d 388, 393 (Ct. App. 1999) (Bedsworth, J., concurring) (asserting that “[t]he right to search attaches at the moment of arrest” and

arresting officer to prolong the period during which the arrestee is kept [unsecured] in an area where he could pose a danger to the officer.”¹⁶⁰

2. The “Time-of-Search” Approach

On the other hand, some other jurisdictions have required the state to show that the area searched was accessible to the arrestee at the time of the search.¹⁶¹ This is known as the “realistic” or “time-of-search” approach.¹⁶² These jurisdictions are quick to point out that a secured arrestee has neither “the skill of Houdini [nor] the strength of Hercules.”¹⁶³ Thus because the arrestee is rarely able to reach into the area in question at the time of the search, the two justifications underlying *Chimel* do not exist, and thus a search incident to an arrest is per se unreasonable.

B. The “Right” Approach: How the United States Supreme Court Should React to Searches Following a Non-Vehicular Arrest in Light of Its Ruling in Gant

In *Gant*, the Court expressly adopted a “time-of-search” approach for searches incident to *vehicular* arrests.¹⁶⁴ As to non-vehicular arrests, the dissent in *Gant* asserted that the majority opinion did not apply;¹⁶⁵ however, that might not have been the majority’s intent. The majority stated that “[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications

that “the Constitution is not offended by allowing police to delay exercise of that right until they can do so safely”).

¹⁶⁰ *Abdul-Saboor*, 85 F.3d at 669; see also *United States v. Griffith*, 537 F.2d 900, 904 (7th Cir. 1976) (“*Chimel* does not permit the arresting officers’ . . . to create a situation which [gives] them a pretext for searching beyond the area of defendant’s immediate control.”).

For those jurisdictions that do hold otherwise, the search in connection to the search-incident-to-arrest doctrine is “almost *never* [upheld] . . . This is to be expected, of course, because police officers are not fools. As the answers to my inquiries revealed, they will normally restrain and remove the arrestee from the scene of arrest as soon as possible in order to protect themselves.” Moskowitz, *supra* note 5, at 687.

¹⁶¹ See, e.g., *United States v. Myers*, 308 F.3d 251, 267 (3d Cir. 2002) (noting that an arrestee who was handcuffed behind his back while lying face down on the floor and “covered” by two armed policemen while a third policeman searched his bag would have to possess supernatural abilities to reach the bag at the time of the search).

¹⁶² Moskowitz, *supra* note 5, at 685–87.

¹⁶³ *Thornton v. United States*, 541 U.S. 615, 625–26 (2004) (Scalia, J., concurring) (quoting *United States v. Frick*, 490 F.2d 666, 673 (5th Cir. 1973) (Goldberg, J., concurring in part and dissenting in part)).

¹⁶⁴ See *supra* Section I.C.4.

¹⁶⁵ *Arizona v. Gant*, 129 S. Ct. 1710, 1731 (2009) (Alito, J., dissenting).

for the search-incident-to-arrest exception are absent and the rule does not apply.”¹⁶⁶

“Notably, the Court did not limit its elaboration of *Chimel* to the vehicular context,”¹⁶⁷ and, “[t]hus, one can make a persuasive argument that all searches incident to arrest under *Chimel*—whether of persons, places, or things—are reasonable *only* when circumstances give rise to a possibility that the arrestee might gain access to a weapon [or] evidence.”¹⁶⁸ Unquestionably, defense counsel will do just this, arguing that *Gant* applies to non-vehicular contexts.¹⁶⁹

Therefore, a time will inevitably come when the Court will expressly espouse one of the two approaches with respect to the non-vehicular context: the “time of arrest” approach or the “time of search” approach. Which will it be? At first glance, “there is no logical reason why the [“time-of-search”] rule should not apply to all arrestees.”¹⁷⁰ In addition to what was mentioned above, most non-vehicular searches would be conducted at the arrestee’s home, and one has a greater privacy interest in his home than he does in his vehicle.¹⁷¹

But if the Court were to adopt the “time-of-search” rule for non-vehicular arrests, the Court would effectively eviscerate the “search-incident-to-arrest” rule as it pertains to such. Why? Because first, the arrestee is nearly always handcuffed and secured before the officers conduct the search and thus there is no realistic possibility that he might reach into nearby areas.¹⁷² In turn, the justifications underlying *Chimel* would cease to exist. Second, unlike in the vehicular context, the non-vehicular context provides no alternative ground on which to conduct the search.¹⁷³ For these two reasons, the “search-incident-to-arrest” exception would rarely apply in non-vehicular contexts. And arguably, the Supreme Court did not intend its ruling in *Chimel* to be eviscerated.¹⁷⁴

¹⁶⁶ *Id.* at 1716 (citing *Preston v. United States*, 376 U.S. 364, 367–68 (1964)).

¹⁶⁷ Angad Singh, Comment, *Stepping Out of the Vehicle: The Potential of Arizona v. Gant To End Automatic Searches Incident to Arrest Beyond the Vehicular Context*, 59 AM. U. L. REV. 1759, 1778 (2010).

¹⁶⁸ SOLARI, *supra* note 147.

¹⁶⁹ Anderson & Cole, *supra* note 149, at 16.

¹⁷⁰ *Gant*, 129 S. Ct. at 1731 (Alito, J., dissenting).

¹⁷¹ See *New York v. Class*, 475 U.S. 106, 112–13 (1986).

¹⁷² Moskowitz, *supra* note 5, at 665 (describing what police generally do upon making an arrest).

¹⁷³ See *Gant*, 129 S. Ct. at 1719 (holding that “[a]lthough it does not follow from *Chimel*, we also conclude 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’”) (emphasis added) (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).

¹⁷⁴ Moskowitz, *supra* note 5, at 689–90.

In short, barring the extension of the second part of *Gant*'s rule (that police may search a vehicle incident to arrest when it is reasonable to believe that the vehicle contains evidence of the crime of arrest) to non-vehicular arrests, a “time-of-search” rule would eviscerate the “search-incident-to-arrest” doctrine as it applies to non-vehicular contexts.

This alone may prompt some courts to adopt or maintain the “time-of-arrest” approach for non-vehicular searches incident to arrests. But there is a concrete justification as well. It is true that if the arrestee is handcuffed and secured, the two *Chimel* justifications—to prevent the arrestee from lunging for a weapon or destroying evidence—cease to exist, but one justification for conducting a non-vehicular search incident to arrest *does* exist: to prevent a *third party* (say, the arrestee's spouse or friend) from concealing or destroying evidence. Although this justification is a lot less substantial in the vehicular context because the vehicle is most often impounded and searched in conjunction therewith (an “inventory search”),¹⁷⁵ when the arrest occurs in a home, the home remains unattended and unguarded, and thus “other people can go in and maybe find weapons and contraband.”¹⁷⁶

CONCLUSION

For two significant reasons, the Supreme Court should not apply *Gant*'s “time-of-search” rule in non-vehicular contexts; rather, it should expressly adopt a “time-of-arrest” rule for such. First, although the two *Chimel* justifications may not exist after an arrestee is fully secured, a search incident to a non-vehicular arrest is still justified by the need to prevent third parties (for example, the arrestee's spouse) from concealing or destroying evidence.¹⁷⁷ This justification is less glaring in the vehicular context because a vehicle is often impounded after its driver is arrested.¹⁷⁸ Second, to apply the “time-of-search” rule to non-vehicular contexts would either (1) create “a perverse incentive for an arresting officer to prolong the period during which the arrestee is kept [unsecured] in an area where he could pose a danger to the officer,”¹⁷⁹ or (2) eviscerate the “search-incident-to-arrest” doctrine as it pertains to non-vehicular contexts.¹⁸⁰ As Justice Alito intuitively put it:

I do not think that . . . the *Chimel* Court intended [a “time-of-search” rule]. Handcuffs were in use in 1969. The ability of arresting officers to secure arrestees before conducting a search—and their

¹⁷⁵ Transcript of Oral Argument, *supra* note 22, at 24.

¹⁷⁶ *Id.* at 12.

¹⁷⁷ *See supra* Section II.B.

¹⁷⁸ *See supra* Section II.B.

¹⁷⁹ *United States v. Abdul-Saboor*, 85 F.3d 664, 669 (D.C. Cir. 1996).

¹⁸⁰ *See supra* Section II.B.

incentive to do so—are facts that can hardly have escaped the Court’s attention. I therefore believe that the *Chimel* Court intended that its new rule apply in cases in which the arrestee is handcuffed before the search is conducted.¹⁸¹

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¹⁸¹ *Arizona v. Gant*, 129 S. Ct. 1710, 1730 (2009) (Alito, J., dissenting).

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