2010

Who is Secure?: A Framework for Arizona v. Gant

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Recommended Citation
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WHO IS SECURE?: A FRAMEWORK FOR
ARIZONA v. GANT

David S. Chase*

In April 2009, the U.S. Supreme Court in Arizona v. Gant narrowed the scope of an automobile search incident to arrest. Prior to Gant, officers were permitted to search the entire automobile passenger compartment incident to the arrest of a vehicle occupant for any offense. The Gant Court rejected this broad interpretation and limited officers' ability to search to two circumstances: (1) when an arrestee is unsecured and within reaching distance of the vehicle or (2) when it is reasonable for officers to believe the vehicle might contain evidence related to the crime of the arrest. The Gant decision raises several new issues including the circumstances required to consider an arrestee secure. Is an arrestee considered unsecure until officers place the arrestee in a police car? Can an arrestee be considered secure if officers do not handcuff the arrestee? How many officers are required to secure an arrestee? What are the relevant factors to consider?

Since the Supreme Court decided Gant, numerous lower courts have cited Gant to determine whether officers secured an arrestee prior to an automobile search incident to arrest. This Note examines how lower courts have inconsistently applied the “secure” aspect of the holding. Additionally, this Note offers a test for determining whether officers have secured an arrestee under Gant in order to clarify the inconsistency among lower courts, to ensure that defendants receive equal treatment, and to prevent confusion among law enforcement officials.

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* J.D. Candidate, 2011, Fordham University School of Law. I would like to thank Professor Martin Flaherty and Professor Bennett Capers for their thoughtful insight and assistance at every stage of this Note. In addition, I would like to thank my wife, parents, brothers, and extended family for their continuous encouragement, love, and support throughout this process.
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INTRODUCTION

Few areas of the law have been as subject to shifting constitutional standards over the last 50 years as that of the search “incident to an arrest.” There has been a remarkable instability in this whole area . . . .

– Justice Byron White

Consider the following two hypothetical fact patterns. John drove his car on a highway on the East Coast of the United States in the middle of the afternoon. An officer observed John driving twenty miles per hour above the speed limit, and the officer pulled him over. The officer asked John for his license and registration, but John’s license had expired three months prior. As a result, the officer directed John to exit the vehicle and placed John under arrest. The officer handcuffed John and led him to the back of the vehicle. After leaving John with another officer at the rear of the vehicle, the officer searched John’s car and discovered a bag containing marijuana. The officer charged John with driving with a suspended license and marijuana possession. At trial, the judge admitted the marijuana as evidence, and the jury convicted John on both charges.

The same day officers arrested John on the East Coast, Mike drove his car on a West Coast highway. One of the brake lights on Mike’s vehicle did not function properly, and an officer pulled him over. The officer asked Mike for his license and registration. However, Mike’s license had expired six months prior. Similar to John’s arrest, the officer directed Mike to exit the car. The officer handcuffed Mike and led him to the rear of the vehicle. After leaving Mike at the back of the vehicle with another officer, the officer searched Mike’s car and discovered a bag of cocaine. The officer charged Mike with driving without a license and cocaine possession. However, unlike John, at Mike’s trial the judge suppressed the cocaine, and the jury found Mike not guilty of drug possession.

Why did one judge admit the evidence and another judge suppress the evidence? Why did the defendants receive unequal treatment? Why were the officers permitted to search one vehicle but not the other vehicle? How are these results fair?

In light of the recent U.S. Supreme Court decision Arizona v. Gant, the inconsistent results of these two hypotheticals are plausible. While such disparate holdings have not yet emerged, in the aftermath of Gant, courts have begun to interpret the new decision inconsistently.

Gant established a new standard for warrantless automobile searches incident to arrest. Warrantless searches are per se unreasonable under the Fourth Amendment, subject to several exceptions. One exception is a search incident to a lawful arrest, which permits officers to search an

3. See infra notes 163–65 and accompanying text.
4. See infra notes 14–28 and accompanying text.
arrestee’s person and the area within the arrestee’s control in order to protect the officers and prevent the destruction of evidence. The Supreme Court applied this exception to the automobile context in New York v. Belton. Following Belton, a majority of lower courts interpreted the holding to permit officers to conduct a search of the passenger compartment of an automobile whenever officers arrested an occupant for any offense.

In Gant, the Supreme Court rejected the broad reading of Belton, and narrowed the automobile search incident to arrest exception to two circumstances: (1) "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or (2) if it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."

Since the Supreme Court issued Gant in April 2009, lower courts have cited the opinion over 400 times as they interpret and implement the new standard. This Note examines lower courts’ inconsistent applications of the “unsecured and within reaching distance” Gant justification. Furthermore, this Note offers a test for determining whether officers have secured an arrestee under Gant in order to resolve the inconsistency among lower courts, to ensure that defendants receive equal treatment, and to prevent confusion among law enforcement officials.

Part I of this Note discusses the search incident to arrest exception and the application of the exception to the automobile context. This part also reviews the requirements of an arrest, police officer considerations, and the new automobile search incident to arrest standard under Gant. Part II reviews several lower court decisions since Gant and examines how lower courts have inconsistently applied the “secure” aspect of the holding. Finally, Part III offers an analysis for determining whether officers secured an arrestee before conducting an automobile search incident to arrest. Whether officers secured an arrestee is relevant because, under Gant, officers are not permitted to search an automobile incident to arrest after securing the arrestee unless the officers reasonably believe they might discover evidence related to the arrest in the vehicle.

I. AUTOMOBILE SEARCH INCIDENT TO ARREST EXCEPTION

Part I discusses the underlying concepts relevant to the automobile search incident to arrest exception. In Part I.A, this Note reviews the development of the search incident to arrest standard. Part I.B analyzes how the Supreme

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5. Gant, 129 S. Ct. at 1716 (citing Chimel, 395 U.S. at 762–63).
7. Gant, 129 S. Ct. at 1718; see infra notes 91–97 and accompanying text.
8. Gant, 129 S. Ct. at 1719.
10. This figure includes cases reported in Lexis Sheppard’s report through February 19, 2010.
12. See supra notes 8–9 and accompanying text.
Court applied the search incident to arrest exception to the automobile context in Belton. Next, Part I.C examines how lower courts implemented the Belton holding. In Part I.D, this Note reviews the new automobile search incident to arrest standard established in Gant. Part I.E discusses how police officers perform searches incident to arrest and the importance of officer safety. Finally, Part I.F reviews the requirements and various interpretations of an arrest.

A. Search Incident to Arrest Exception

Part I.A reviews the Fourth Amendment, the exclusionary rule, and the development of the search incident to arrest exception to the warrant requirement. This section also examines the current search incident to arrest standard.

1. Fourth Amendment and the Exclusionary Rule

The Fourth Amendment protects individuals from unreasonable searches. The Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” The Supreme Court has interpreted the Amendment to bar warrantless searches of items to which individuals have a reasonable expectation of privacy. However, the Fourth Amendment does not bar a reasonable search to accomplish a legitimate governmental purpose.

The exclusionary rule bars the government from introducing evidence obtained in violation of the Fourth Amendment in certain circumstances. The Supreme Court adopted the exclusionary rule in Weeks v. United States for federal prosecutions and applied the rule to the states via the Fourteenth Amendment in Mapp v. Ohio. The Supreme Court has explained on numerous occasions that the purpose of the exclusionary rule is to deter authorities from conducting unreasonable searches. Over time the Court has offered other justifications for the exclusionary rule including

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15. U.S. Const. amend. IV.
20. Id. at 393–94, 398 (excluding evidence of illegal gambling at trial since authorities obtained the evidence in violation of the Fourth Amendment).
22. Terry v. Ohio, 392 U.S. 1, 12 (1968) (noting the purpose of the rule is to deter); Linkletter v. Walker, 381 U.S. 618, 636 (1965) (noting the rule discourages unlawful police action).
preventing the public from losing trust in the government and maintaining judicial integrity. The Supreme Court has established exceptions to the warrant requirement, including a search incident to arrest, discussed in the following section.

2. Development of the Search Incident to Arrest Exception

Although a warrantless search is not permitted under the Fourth Amendment, there are several exceptions to this rule, including a search incident to a lawful arrest. This exception evolved during the first half of the twentieth century as the Supreme Court issued numerous rulings on the permissible scope of a search incident to arrest. These holdings did not provide a clear standard and repeatedly expanded and limited the permissible scope of a search incident to arrest.

In 1950, the Supreme Court in United States v. Rabinowitz again expanded the permissible scope of a search incident to arrest, holding that the test for whether a search is valid "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." In

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23. United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting) (noting the exclusionary rule prevents the government from benefiting at trial from illegally obtained evidence, "thus minimizing the risk of seriously undermining popular trust in government").
24. Elkins v. United States, 364 U.S. 206, 223 (1960) (noting that courts should not serve as "accomplices in the willful disobedience of a Constitution they are sworn to uphold"). However, the Court's view has evolved, and the Court now seems to consider deterrence of police misconduct to be the critical justification. See CLANCY, supra note 14, at 620 & n.42 (citing Hudson v. Michigan, 547 U.S. 586, 610 (2006) (Breyer, J., dissenting)).
25. Katz v. United States, 389 U.S. 347, 357 (1967) (stating that unwarranted searches are unreasonable "subject only to a few specifically established and well-delineated exceptions").
27. Trupiano v. United States, 334 U.S. 699, 705 (1948) (limiting scope of search incident to arrest by suppressing evidence seized during a warrantless search since officers had failed to obtain a search warrant even though they had sufficient time to obtain one); Harris v. United States, 331 U.S. 145, 152 (1947) (expanding permissible scope of search by admitting evidence obtained during a general search of suspect's apartment); United States v. Lefkowitz, 285 U.S. 452, 465-67 (1932) (holding facts distinguishable from prior cases and failing to apply the search incident to arrest exception); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357-58 (1931) (failing to apply the search incident to arrest exception because the facts were distinguishable from prior cases); Marron v. United States, 275 U.S. 192, 199 (1927) (holding evidence officers recovered that was unrelated to the search warrant was admissible because the officers recovered the evidence incident to a lawful arrest); Agnello v. United States, 269 U.S. 20, 30 (1925) (noting in dicta that officers could search the place of arrest); Carroll v. United States, 267 U.S. 132, 158 (1925) (noting officers were permitted to search the area within the arrestee's control incident to a lawful arrest); Weeks v. United States, 232 U.S. 383, 392 (1914) (discussing in dicta that officers may search the suspect after a legal arrest).
28. CLANCY, supra note 14, at 355-56; Lonna Hooks, Exceptions to Requirement of a Search Warrant, Incident to a Lawful Arrest, District of Columbia Court of Appeals Project on Criminal Procedure, 26 How. L.J. 919, 922-26 (1983) ("The next few years [1927-50] were to bring about numerous variations in and expansions of the right and scope of a search incident to a lawful arrest.").
30. Id. at 66.
Rabinowitz, officers suspected the defendant of possessing forged stamps and arrested the defendant at his office.\(^{31}\) The officers failed to obtain a search warrant, but searched the defendant's desk, safe, and cabinets.\(^{32}\) During the search, officers discovered over 500 forged stamps.\(^{33}\) The Supreme Court admitted the stamps and held that the search was reasonable since officers searched the area under Rabinowitz's control\(^{34}\) and the search related to the crime of the arrest.\(^{35}\) As implemented by lower courts, Rabinowitz permitted a warrantless search incident to arrest of any area within the arrestee’s possession or control.\(^{36}\)

3. Current Search Incident to Arrest Standard: Chimel v. California

The evolution of the search incident to arrest exception culminated in the 1969 Supreme Court decision Chimel v. California.\(^{37}\) In Chimel, officers executed an arrest warrant at the defendant's house in connection with the defendant's alleged robbery of a coin store.\(^{38}\) The officers requested the defendant's consent to search the house, but the defendant refused.\(^{39}\) Nevertheless, the officers told the defendant they were permitted to search the house "on the basis of the lawful arrest," even though the officers had not obtained a warrant to search the defendant's house.\(^{40}\) The officers searched the defendant's entire house including three bedrooms, the attic, garage, and workshop.\(^{41}\) After completing the roughly one-hour search of the house, the officers seized numerous items including coins, medals, and tokens.\(^{42}\)

In determining whether the officers conducted a valid search, the Court reviewed the legal basis of the Rabinowitz search incident to arrest standard.\(^{43}\) The Court noted that there were serious questions concerning the case law upon which the Rabinowitz Court based the holding.\(^{44}\) Indeed, the Court stressed that the history and purpose of the Fourth Amendment

\(^{31}\) Id. at 58–59.
\(^{32}\) Id.
\(^{33}\) Id. at 59.
\(^{35}\) See Rabinowitz, 339 U.S. at 61–65.
\(^{38}\) Chimel, 395 U.S. at 753.
\(^{39}\) Id.
\(^{40}\) Id. at 753–54.
\(^{41}\) Id. at 754.
\(^{42}\) Id.
\(^{43}\) Id. at 755–62.
\(^{44}\) Id. at 760 (discussing that the legal basis for the Rabinowitz search incident to arrest standard was based on a "'hint' contained in Weeks [that] was, without persuasive justification, loosely turned into dictum and finally elevated to a decision." (quoting United States v. Rabinowitz, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting))).
did not support the *Rabinowitz* standard. The drafters of the Fourth Amendment sought to protect privacy by “interpos[ing] a magistrate between the citizen and the police. . . . so that an objective mind might weigh the need to invade that privacy in order to enforce the law.” The Court held the *Rabinowitz* standard failed to satisfy this privacy requirement since it permitted a warrantless search incident to arrest of areas beyond the arrestee’s immediate control without sufficient justification.

In crafting the new search incident to arrest standard, the Supreme Court reviewed the then-recent decision regarding stop and frisks, *Terry v. Ohio.* In *Terry*, the Supreme Court stressed the presumption that warrants are required prior to conducting a search and that any search must be tied directly to the circumstances that initiated the search. The Court sustained the officer’s unwarranted search in *Terry* since the protective search for weapons was limited in scope to discover weapons to ensure officer safety and was not a general search.

With the *Terry* holding in mind, the Supreme Court in *Chimel* overruled *Rabinowitz* and set forth the twin rationales for a search incident to arrest. Under *Chimel*, when officers arrest a suspect, the officers may search the area within an arrestee’s immediate control in order to (1) remove weapons that might be used against the officers or (2) to prevent concealment or destruction of evidence. Courts have considered several factors in determining whether an area is within an arrestee’s immediate control for the purposes of *Chimel*. Courts examine the distance between

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45. *Id.* (“Nor is the rationale by which the State seeks here to sustain the search of the petitioner’s house supported by a reasoned view of the background and purpose of the Fourth Amendment.”); see also CLANCY, supra note 14, at 40–42.
47. *Chimel*, 395 U.S. at 768; see also supra note 36 and accompanying text.
48. 392 U.S. 1, 30–31 (1968) (holding officers are permitted to conduct brief investigatory stops if they reasonably suspect that an individual is involved in criminal activity, and for their protection the officers may perform limited protective searches for weapons without a warrant).
50. *Id.* (citing *Terry*, 392 U.S. at 19).
52. See *Chimel*, 395 U.S. at 762 (citing *Terry*, 392 U.S. at 29); *cf. id.* (citing *Sibron v. New York*, 392 U.S. 40, 65–67 (1968)) (invalidating a search that discovered drugs since the search was not a protective search limited in scope to discover weapons).
53. *Id.* at 768.
54. See *id.* at 762–63.
55. *Id.; see New York v. Belton*, 453 U.S. 454, 464–65 (1981) (Brennan, J., dissenting) (discussing twin rationales for the *Chimel v. California* holding); see also Hooks, supra note 28, at 929–30. An arrest does not require officers to completely subdue the arrestee, and thus the arrestee may still pose a threat to officers. See infra notes 248–52 and accompanying text.
the arrestee and the area the officers searched; whether officers restrained or handcuffed the arrestee; the ratio of police officers to arrestees; the physical positioning of the officers in relation to the arrestee and the area searched; and whether the arrestee could have easily accessed the area.

B. Automobile Searches Incident to Arrest: New York v. Belton

The following section discusses how the Supreme Court applied the search incident to arrest standard to the automobile context in New York v. Belton. Prior to Belton, courts had inconsistently applied the search incident to arrest exception to automobile searches. Belton established that officers were permitted to search the entire passenger compartment of an automobile incident to an arrest.

58. Id. at 1313 & n.164 (collecting cases where the court considered, inter alia, the distance between arrestee and area searched including United States v. Johnson, 16 F.3d 69, 73 (5th Cir.), aff'd on reh'g, 18 F.3d 293, 295 (5th Cir. 1994) (invalidating search of briefcase eight feet away from arrestee), and State v. Taylor, 875 So. 2d 962, 968 (5th Cir. 2004) (admitting evidence obtained during search of pants found at the foot of the arrestee's bed)).

59. Rudstein, supra note 57, at 1313 & n.165 (collecting cases where the court considered, inter alia, whether officers handcuffed arrestee, including United States v. Myers, 308 F.3d 251, 267 (3d Cir. 2002) (holding area searched not in arrestee's immediate control since officers handcuffed arrestee)). But see Commonwealth v. Netto, 783 N.E.2d 439, 446-47 (Mass. 2003) (upholding search after officers placed arrestee in handcuffs).

60. Rudstein, supra note 57, at 1313-14 & n.166 (collecting cases where the court considered, inter alia, the arrestee-to-officer ratio, including United States v. Blue, 78 F.3d 56, 60 (2d Cir. 1996) (holding search invalid on the ground that the area searched was not in the control of the two arrestees due in part to the presence of four officers), and Commonwealth v. Van Jordan, 456 A.2d 1055, 1060 (Pa. Super. Ct. 1983) (holding search valid on the ground that area searched was in control of arrestees since arrestees outnumbered officers)).

61. Rudstein, supra note 57, at 1314-15 & n.167 (collecting cases where the court considered, inter alia, positioning of arrestees and officers in determining whether area was in arrestee's immediate control, including United States v. Parra, 2 F.3d 1058, 1066 (10th Cir. 1993) (holding area searched within arrestees' immediate control since the two arrestees sat next to the area searched, and the officers were not positioned between area searched and arrestees), and United States v. Mapp, 476 F.2d 67, 80 (2d Cir. 1973) (holding area searched not within arrestees' immediate control since officer stood between arrestee and area searched)).

62. Rudstein, supra note 57, at 1315 & n.168 (collecting cases where the court considered, inter alia, arrestee's ability to access area searched, including Parra, 2 F.3d at 1066 (holding arrestees could easily access pillow on bed and thus the pillow was in arrestee's immediate control), and Castleberry v. State, 678 P.2d 720, 723 (Okla. Crim. App. 1984) (holding automobile's trunk not in arrestee's immediate control since officers possessed keys to locked trunk)).


64. Compare United States v. Sanders, 631 F.2d 1309, 1313-14 (8th Cir. 1980) (upholding warrantless automobile search incident to arrest), and United States v. Dixon, 558 F.2d 919, 922 (9th Cir. 1977) (same), and United States v. Frick, 490 F.2d 666, 669-70 (5th Cir. 1973) (same), with United States v. Rigales, 630 F.2d 364, 367 (5th Cir. 1980) (invalidating warrantless automobile search incident to arrest), and United States v. Benson, 631 F.2d 1336, 1340 (8th Cir. 1980) (same).

65. Belton, 453 U.S. at 460.
In Belton, an officer stopped a speeding vehicle containing four men on the New York State Thruway. Upon asking the driver of the vehicle for his driver's license and vehicle registration, the officer smelled marijuana and discovered that none of the four men owned the vehicle or were related to the owner of the vehicle. Further, the officer saw an envelope labeled “Supergold” on the vehicle floor that he associated with marijuana. The officer directed the four men to exit the vehicle, and arrested them for marijuana possession. The officer separated the men along the highway, read them their Miranda rights, and searched each arrestee. The officer then searched the entire passenger compartment of the vehicle, and discovered cocaine within one of the pockets of Belton’s jacket located on the back seat. Belton was indicted for possession of a controlled substance, and he moved to suppress the cocaine arguing the search violated the Fourth and Fourteenth Amendments.

In determining whether the search of Belton’s vehicle was valid, the Supreme Court established a bright-line rule regarding automobile searches incident to arrest. The Court noted that Chimel justified a search incident to arrest under two rationales—evidence preservation and officer safety—but limited the search to the area within the arrestee’s immediate control. The Court applied this standard to the automobile context and held that the area in an arrestee’s immediate control included any area within the passenger compartment of the vehicle. Thus “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.” Further, the Court held that officers

66. Id. at 455.
67. Id.
68. Id. at 455–56.
69. Id. at 456.
70. Miranda v. Arizona, 384 U.S. 436, 444 (1966) (requiring officers to advise a suspect in custody of his right to remain silent prior to questioning the suspect).
72. Id.
73. Id.
74. Id. at 459–60 (noting that courts have reached different results in similar fact patterns and that a clear rule is desirable to resolve confusion among police authorities and the public); see also CONG. RESEARCH SERV., supra note 37, at 1322; David M. Silk, Comment, When Bright Lines Break Down: Limiting New York v. Belton, 136 U. PA. L. REV. 281, 288 (1987) (noting state and lower courts were split regarding the proper scope of an automobile search incident to arrest).
75. See Belton, 453 U.S. at 457–58 (citing Chimel v. California, 395 U.S. 752, 763 (1969)).
76. Id. at 460 (“Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within ‘the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].’” (quoting Chimel, 395 U.S. at 763)); DAVID S. RUDSTEIN ET AL., CRIMINAL CONSTITUTIONAL LAW § 2.06[4][b], at 2-227 to 2-233 (2009) (discussing how the court applied Chimel to the automobile context).
77. Belton, 453 U.S. at 460.
may search any containers discovered within the passenger compartment whether they were open or closed.\textsuperscript{78}

The Court established a bright-line rule regarding automobile searches incident to arrest for several reasons. Police officers are not legal scholars,\textsuperscript{79} and bright-line rules provide officers clear guidance for determining when a search or arrest is permissible.\textsuperscript{80} Officers only have a limited time to decide whether to arrest a suspect, and, as opposed to nuanced legal rules, officers can easily apply bright-line rules without extensive analysis.\textsuperscript{81} The average citizen also benefits from bright-line rules since such rules inform the citizen of his or her constitutional rights.\textsuperscript{82} Further, easy-to-apply bright-line rules are preferable to difficult-to-apply complicated rules.\textsuperscript{83} As discussed by one commentator, "a readily understood and easily applied rule which would bring about the theoretically correct conclusion 90\% of the time,"\textsuperscript{84} is preferred over "a complicated rule which in a theoretical sense produces the desired result 100\% of the time, but which well-intentioned police could be expected to apply correctly in only 75\% of the cases."\textsuperscript{85} Indeed, "an ounce of application is worth a ton of abstraction."\textsuperscript{86}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 460–61.
\item Motion for Leave to File and Brief of Amicus Curiae National Association of Police Organizations, Inc. in Support of Petitioner at 7, Arizona v. Gant, 129 S. Ct. 1710 (2009) (No. 07-542) ("Law enforcement officers . . . are not generally possessed of a recent law degree . . . . Our nation's officers face an already challenging task in learning, knowing and remembering the many rules and exceptions that control their enforcement and investigative activities. They surely do not need to have the bright-line rule of Belton and Thornton replaced with an amorphous contingency.").
\item Dunaway v. New York, 442 U.S. 200, 213–14 (1979) ("A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.").
\item United States v. Robinson, 414 U.S. 218, 235 (1973) ("A police officer's determination [whether to search] a suspect whom he has arrested is necessarily a quick \textit{ad hoc} judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search."); Wayne R. LaFave, "Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 SUP. CT. REV. 127, 141 ("A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.'" (quoting United States v. Robinson, 471 F.2d 1082, 1122 (D.C. Cir. 1972) (Wilkey, J., dissenting))).
\item Belton, 453 U.S. 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 . . . .").
\item Id.
\item Id.
\item Id. But see Albert W. Alschuler, Bright Line Fever and the Fourth Amendment, 45 U. PITT. L. REV. 227, 231 (1984) ("[C]ategorical fourth amendment rules often lead to substantial injustice; in addition, their artificiality commonly makes them difficult, not easy, to apply."); LaFave, supra note 83, at 325–26 (discussing questions courts should review before creating bright-line rules).
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In dissent, Justice William J. Brennan, Jr., argued that the majority had abandoned *Chimel’s* twin rationales of officer safety and evidence preservation in favor of a bright-line rule. In Justice Brennan’s view, the majority had endorsed a fiction by holding “that the interior of a car is always within the immediate control of an arrestee who has recently been in the car.” In contrast to the majority’s bright-line rule for determining the area within an arrestee’s immediate control, Justice Brennan advocated for a more nuanced and fact-specific approach. The test promoted by Justice Brennan would weigh several factors, including “the relative number of police officers and arrestees, the manner of restraint placed on the arrestee, and the ability of the arrestee to gain access to a particular area or container.”

C. Implementation of New York v. Belton

The following section discusses how lower courts implemented the *Belton* holding. The first section reviews how a majority of lower courts broadly interpreted *Belton*, permitting an automobile search incident to any arrest. The second section discusses the minority of holdings, which either declined to follow *Belton* or applied a narrower interpretation of *Belton* that was more consistent with *Chimel*.

1. Broad Interpretations

Most lower courts broadly interpreted the *Belton* holding. Indeed, *Belton* was “widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there [was] no possibility the arrestee could gain access to the vehicle at the time of the search.” Whether Justice Brennan’s dissent in *Belton* influenced lower courts, many lower courts clearly applied the holding broadly. Lower courts upheld

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88. *Id.* at 466.
89. See *id.* at 471; see also Rudstein, *supra* note 57, at 1360 (advocating against a *per se* rule and arguing that an automobile search incident to arrest should only be permissible when “the interior of the vehicle is actually within the immediate control of the arrestee at the time of the search”).
91. See *Gant*, 129 S. Ct. at 1718–19.
92. *Id.* at 1718.
93. See *supra* notes 87–90 and accompanying text. Justice Brennan argued that under the majority opinion, an automobile search would be permitted incident to any arrest since the majority held an arrestee always had immediate control over the automobile’s passenger compartment, *Belton*, 453 U.S. at 466 (Brennan, J., dissenting), and “the result would presumably be the same even if [the officer] had handcuffed Belton and his companions in the patrol car’ before conducting the search.” *Gant*, 129 S. Ct. at 1718 (quoting *Belton*, 453 U.S. at 468 (Brennan, J., dissenting)).
automobile searches incident to arrest conducted after officers handcuffed
the suspect, or even after officers secured the suspect in a police car. Further, courts permitted searches of locked containers such as glove
compartments during a search incident to arrest even though the suspect
would never be able to access the items contained in the locked containers.

2. Narrow Interpretations

In United States v. Vasey, the U.S. Court of Appeals for the Ninth Circuit declined to follow other federal courts and instead applied a narrow
interpretation of Belton. In Vasey, an officer observed the defendant
speeding in a vehicle and pulled him over. The officer requested the
defendant’s license and radioed another officer to perform a warrants
check. The warrants check showed an outstanding warrant for a drug
offense, and the officer arrested the defendant, handcuffed him, and placed
him in the police car. The officer asked the defendant for consent to
search the vehicle, and the defendant refused. Another officer arrived,
and the two officers partially searched the defendant’s vehicle thirty to
forty-five minutes after the officer placed the defendant in the police car.
The trial court convicted the defendant based upon the evidence discovered
during the search.

The defendant appealed the conviction, and the Ninth Circuit held the
search invalid. The court noted that Belton applied Chimel’s search
incident to arrest standard to the automobile context and that such searches
were limited to the area within the arrestee’s control. In determining
whether the car was within the arrestee’s control, the court reviewed United
States v. McConney for factors to consider including “the number of
persons being arrested, the number of officers present, the officer(s)’
physical positioning with regard to the arrestee and the place searched, the

95. RUDSTEIN, supra note 76, § 2.06[4][b], at 2-237 & n.148; see also United States v. Broadie, 452 F.3d 875, 878, 883 (D.C. Cir. 2006); State v. Canezaro, 957 So. 2d 136, 140 (La. 2007).
96. RUDSTEIN, supra note 76, § 2.06[4][b], at 2-237 & n.149; see also United States v. Mans, 999 F.2d 966, 968 (6th Cir. 1993).
97. RUDSTEIN, supra note 76, § 2.06[4][b], at 2-236 & nn.142-43; see also United States v. Woody, 55 F.3d 1257, 1269–70 (7th Cir. 1995); United States v. McCrady, 774 F.2d 868, 872 (8th Cir. 1985).
98. 834 F.2d 782 (9th Cir. 1987).
99. Id. at 784.
100. Id.
101. Id.
102. Id.
103. Id.
104. Id. at 785.
105. Id. at 787–88.
106. Id. at 786 (noting the court adhered “to the narrow scope of the search incident to arrest exception espoused in Chimel”).
107. 728 F.2d 1195 (9th Cir. 1984). The search in United States v. McConney was not a vehicle search; the officers searched the defendant in his home. Id. at 1198.
display of guns by the officers, and the distance between the arrestee and the place searched. In applying the McConney factors, the Vasey court found the officers did not limit the search to the area within the defendant's control since the search occurred after the officers handcuffed the defendant and placed him in a police vehicle, two armed officers performed the search, and the officers had ensured that the defendant could not escape the vehicle. Thus, unlike other federal courts, the Ninth Circuit did not broadly interpret Belton and, instead, applied an analysis more consistent with Chimel.

Similar to Vasey, several state supreme courts declined to apply a broad Belton interpretation. For example, in Commonwealth v. White, the Pennsylvania Supreme Court narrowly applied Belton. In White, officers received an anonymous tip that White sold illegal drugs. The officers placed White under surveillance and stopped him in his automobile. The officers removed White from the vehicle, patted him down for weapons, moved him ten feet from the vehicle, then positioned an officer between him and the vehicle. After removing White from the vehicle, two officers partially entered the vehicle and saw a marijuana cigarette on the front console and a brown paper bag containing cocaine between the front seats.

The court ruled the vehicle search illegal, stressing that incident to arrest officers may only search “the arrestee’s person and the area in which the person is detained in order to prevent the arrestee from obtaining weapons or destroying evidence.” Here, the officers removed White from the vehicle, White stood ten feet from the vehicle, and an officer stood between White and the vehicle. Since the court found that under those circumstances the search was not incident to arrest, the search was illegal.


108. Vasey, 834 F.2d at 787 (citing McConney, 728 F.2d at 1207).
109. But see id. at 787–88 (“We do not hold that once an arrestee is handcuffed, all rights to search the vehicle vanish. Rather, the circumstances of the arrest dictate whether the search was proper and conducted contemporaneously with the arrest.”).
110. Id. at 787 (“It was readily apparent to the officers and to this court that [the defendant] had virtually no opportunity to reach into his vehicle at the time the search occurred. . . . Chimel does not allow the officers to presume that an arrestee is superhuman.”).
112. 669 A.2d 896.
113. Id. at 902; Shapiro, supra note 111, at 142–43.
114. White, 669 A.2d at 898.
115. Id.
116. Id. at 902–03 & n.6.
117. Id. at 898.
118. Id. at 902; Shapiro, supra note 111, at 142–43.
119. White, 669 A.2d at 902–03 & n.6.
circumstances White could not have accessed the vehicle to destroy evidence or threaten officers, the court held the vehicle search invalid.120

In *State v. Pierce*,121 the New Jersey Supreme Court also declined to implement *Belton* broadly. In *Pierce*, Officer Rette stopped a vehicle driven by Grass containing two passengers, Pierce and Bernardo.122 During the stop, Officer Rette discovered that Grass’s license had been suspended.123 Officer Rette removed Grass from the vehicle, searched him, handcuffed him, and placed him in a police car.124 Officer Rette then ordered Pierce and Bernardo out of the vehicle, requested identification, and searched them for weapons.125 After additional officers arrived, Officer Rette left Grass and Bernardo at the rear of the vehicle with the other officers and performed a search of the vehicle.126 He discovered a large knife, a .357 magnum handgun, and a bag containing traces of cocaine within the pocket of Pierce’s jacket.127 The officers then arrested Pierce and Bernardo, and the three were indicted for unlawful possession of a weapon without a permit, receiving stolen property, and possession of cocaine.128 The trial court denied Pierce’s motion to suppress the evidence obtained during the vehicle search, and she pled guilty to cocaine possession.129

Pierce appealed to the New Jersey Supreme Court, and the court held that under the New Jersey Constitution, “*Belton* shall not apply to warrantless arrests for motor-vehicle offenses.”130 The court noted that *Chimel’s* twin rationales justifying the *Belton* holding were diminished in the context of an automobile stop for a traffic violation since most vehicle stops involve unarmed drivers.131 Further, officers remove and secure drivers after arrest,132 and “the officer’s justification for searching the vehicle and the passengers’ clothing and containers is minimal.”133 Thus, the court declined to interpret *Belton* broadly and suppressed the cocaine.

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120. *Id.* at 902; Shapiro, *supra* note 111, at 143 (“*Chimel’s* two justifications of preventing access to weapons and the destruction of evidence permit only the search of the immediate area occupied by the arrestee during his custody.”).
122. *Id.* at 948.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 948–49.
129. *Id.* at 949. The charges against Bernardo were dismissed and Grass received four years imprisonment after pleading guilty to possession of a firearm without a permit. *Id.*
130. *Id.* at 959.
131. *Id.* at 960; Shapiro, *supra* note 111, at 155 (“The court emphasized that the twofold rationale underlying *Chimel* is significantly diminished when the basis for the arrest is a routine violation of a motor vehicle statute.”).
133. *Id.*
D. New Standard for Automobile Searches Incident to Arrest: Arizona v. Gant

Since *Belton*, a significant portion of the legal community expressed dissatisfaction in how lower courts applied the holding. Justice Sandra Day O'Connor noted that "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*." Further, Justice Scalia advocated for abandoning the *Chimel* rationale for justifying *Belton* searches. Indeed, enough Supreme Court Justices appeared dissatisfied with *Belton* that the Court became receptive to reexamining the holding altogether. Numerous academics advocated for the Supreme Court to revisit the decision, and many state supreme courts had rejected the *Belton* rule. The Supreme Court noted, "The chorus that has called for us to revisit *Belton* includes courts, scholars, and Members of this Court who have questioned that decision's clarity and its fidelity to Fourth Amendment principles." Thus, twenty-eight years after *Belton*, the Supreme Court reexamined the automobile search incident to arrest standard in the landmark case *Arizona v. Gant*. In a 5-4 decision, the Court rejected the lower courts' broad interpretation of *Belton* and instead established a narrow standard for automobile searches incident to arrest.

In *Gant*, officers received an anonymous tip that individuals sold illegal drugs at a house in Tucson, Arizona. When officers approached the house, Gant answered the door and informed the officers that the house's owner would return later. The officers left the house and conducted a background check revealing that Gant's driver's license had been suspended and Gant had an outstanding warrant for driving without a license.

136. Id. at 631 (Scalia, J., concurring) ("*Belton* cannot reasonably be explained as a mere application of *Chimel*. Rather, it is a return to the broader sort of search incident to arrest that we allowed before *Chimel* ... "); see also CLANCY, supra note 14, at 361–62.
137. See CLANCY, supra note 14, at 361.
139. See supra note 111 and accompanying text.
141. Id. at 1719.
142. See infra notes 163–65 and accompanying text.
143. *Gant*, 129 S. Ct. at 1714.
144. Id. at 1714–15.
145. Id. at 1715.
The officers returned to the house that evening and arrested a man for providing a false name and a woman for possessing drug paraphernalia. The officers handcuffed and placed the two individuals in different patrol cars. Soon after the officers arrested the two individuals, Gant parked a car in the driveway and exited the vehicle. One of the officers approached Gant, and handcuffed and arrested him for driving without a license. After another police car arrived, the officers placed Gant in the patrol car and searched his vehicle. One officer discovered a gun and the other officer found cocaine in a jacket located in the rear of the vehicle.

The officers charged Gant with possession of drug paraphernalia and possession of a narcotic for sale. At trial, Gant moved to suppress the evidence found during the search, arguing that the search violated the Fourth Amendment. Gant argued that Belton did not justify the search since he posed no threat to the officers once the officers had handcuffed and placed him in a police car. Further, because the officers arrested him for a traffic offense—driving without a license—the officers could not have expected to find evidence related to the traffic offense during the search. The trial court denied Gant’s motion to suppress the evidence, and a jury convicted Gant, who was sentenced to three years in prison.

On appeal, the Arizona Supreme Court overturned the trial court’s decision. The court held that Belton only concerned “the permissible scope of a vehicle search incident to arrest and concluded that it did not answer 'the threshold question whether the police may conduct a search incident to arrest at all once the scene is secure.'” Having ruled that Belton did not apply, the court noted that Chimel’s twin rationales permitting a search incident to arrest—officer safety and preservation of evidence—did not justify the search of Gant’s automobile. Officers had secured Gant in the police car; thus Gant did not pose a threat to the officers or to destroy evidence. In dissent, Justice W. Scott Bales argued that only the U.S. Supreme Court could overturn Belton. Additionally, Justice Bales offered several alternative Belton rules if the U.S. Supreme Court reconsidered Belton, including the following: “a Belton search is

146. Id.
147. Id.
148. Id.
149. Id.
150. Id.
151. Id.
152. Id.
153. Id.
154. Id.
155. Id.
156. Id.
157. Id.
158. Id. (quoting State v. Gant, 162 P.3d 640, 643 (Ariz. 2007)).
159. Gant, 162 P.3d at 643.
160. Id.
161. Id. at 646 (Bales, J., dissenting).
never justified as 'incident to arrest' if it occurs after a suspect is handcuffed outside the vehicle."\textsuperscript{162}

The State appealed to the U.S. Supreme Court, and the Court issued the landmark \textit{Gant} decision that narrowed the automobile search incident to arrest standard. The Court noted that the broad \textit{Belton} interpretation was inconsistent with \textit{Chimel}'s twin rationales for permitting searches incident to arrest.\textsuperscript{163} In narrowing the automobile search incident to arrest standard, the Court held that only two circumstances justified an automobile search incident to arrest: (1) "the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search"\textsuperscript{164} or (2) "it is reasonable to believe the vehicle contains evidence of the offense of arrest."\textsuperscript{165}

In applying its new standard to the facts, the \textit{Gant} Court found the search invalid.\textsuperscript{166} The search could not be justified under the first rationale because officers handcuffed and secured Gant in a police car, and he was not within reaching distance of the automobile.\textsuperscript{167} Further, because officers had arrested Gant for driving without a license prior to the search, the search could not be justified under the second rationale because the officers could not reasonably believe the vehicle contained evidence of that crime.\textsuperscript{168}

In a concurring opinion, Justice Scalia advocated for completely abandoning the \textit{Belton} rationale of officer safety to justify automobile searches incident to arrest.\textsuperscript{169} He noted that officers "virtually always have a less intrusive and more effective means of ensuring their safety—and a means that is virtually always employed: ordering the arrestee away from the vehicle, patting him down in the open, handcuffing him, and placing him in the squad car."\textsuperscript{170} Further, Justice Scalia argued that automobile searches conducted after officers place a handcuffed arrestee in a police car

\begin{itemize}
  \item[\textsuperscript{162}] \textit{Id.} at 649.
  \item[\textsuperscript{163}] \textit{Gant}, 129 S. Ct. at 1719. In addition, the Court noted that a broad \textit{Belton} interpretation directly conflicted with the \textit{Belton} opinion. \textit{Id.} (noting that the \textit{Belton} opinion specifically stated that it "'in no way alters the fundamental principles established in the \textit{Chimel} case regarding the basic scope of searches incident to lawful custodial arrests.")'(quoting New York v. Belton, 453 U.S. 454, 460 n.3 (1981))).
  \item[\textsuperscript{164}] \textit{Id.} Subsequently in the opinion, the holding does not mention "unsecured" and states only "if the arrestee is within reaching distance of the passenger compartment at the time of the search." \textit{Id.} at 1723. The Court noted "it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains." \textit{Id.} at 1719 n.4. However, several courts have ruled on this issue within the past year. \textit{See infra} Part II.
  \item[\textsuperscript{165}] \textit{Gant}, 129 S. Ct. at 1723.
  \item[\textsuperscript{166}] \textit{Id.} at 1719.
  \item[\textsuperscript{167}] \textit{Id.}
  \item[\textsuperscript{168}] \textit{Id.}
  \item[\textsuperscript{169}] \textit{See id.} at 1725 ("In my view we should simply abandon the \textit{Belton-Thornton} charade of officer safety and overrule those cases.").
  \item[\textsuperscript{170}] \textit{Id.} at 1724.
\end{itemize}
do not increase officer safety.\textsuperscript{171} Indeed, Arizona failed to provide an example of a previously restrained arrestee who escaped and injured an officer with a weapon retrieved from the arrestee's vehicle.\textsuperscript{172} Additionally, Justice Scalia noted that the majority opinion did not provide sufficient guidance to officers and that the standard could be manipulated.\textsuperscript{173} In contrast to the majority, he argued that an automobile search incident to arrest is ""reasonable' only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred."\textsuperscript{174} Nonetheless, Justice Scalia decided to join the majority opinion rather than leave the Court with a fractured and uncertain 4-1-4 decision.\textsuperscript{175}

In dissent, Justice Alito provided several arguments against the majority opinion. He noted the majority had overruled \textit{Belton} without providing an adequate justification for declining to apply stare decisis.\textsuperscript{176} Additionally, he argued that because the Court overruled \textit{Belton}, the Court should also reexamine \textit{Chimel} since \textit{Belton} was an extension of \textit{Chimel}.\textsuperscript{177} Finally, Justice Alito argued that the second prong of the \textit{Gant} test advocated for by Justice Scalia "raises doctrinal and practical problems that the Court makes no effort to address."\textsuperscript{178}

In \textit{Gant}, the Court rejected the broad interpretation of \textit{Belton} and narrowed the automobile search incident to arrest standard.\textsuperscript{179} The Court held that officers could only perform an automobile search incident to arrest when either the arrestee was unsecured\textsuperscript{180} or it was reasonable to believe the automobile contained evidence related to the arrest.\textsuperscript{181} While the holding provides guidance regarding when officers may search an automobile incident to arrest, \textit{Gant} also raises several new issues, including the circumstances required to consider an arrestee secured.\textsuperscript{182}

\begin{footnotes}
\item 171. See id. (stating that the threat to officer safety "is not at all reduced by allowing a search of the stopped vehicle after the driver has been arrested and placed in the squad car").
\item 172. See id. ("I observed in \textit{Thornton} that the government had failed to provide a single instance in which a formerly restrained arrestee escaped to retrieve a weapon from his own vehicle[,] . . . Arizona and its amici have not remedied that significant deficiency in the present case." (citing \textit{Thornton} v. United States, 541 U.S. 615, 626 (2004))). \textit{But see infra} notes 206–07 and accompanying text.
\item 173. \textit{Gant}, 129 S. Ct. at 1724–25 ("I believe that this standard fails to provide the needed guidance to arresting officers and also leaves much room for manipulation, inviting officers to leave the scene unsecured (at least where dangerous suspects are not involved) in order to conduct a vehicle search.").
\item 174. Id. at 1725.
\item 175. Id.
\item 176. Id. at 1726, 1728–29 (Alito, J., dissenting) (asserting that law enforcement relied on \textit{Belton}, no changed circumstances justified a departure from \textit{Belton}, \textit{Belton} still provided a workable rule, and subsequent cases had not undermined \textit{Belton}).
\item 177. Id. at 1731.
\item 178. Id.
\item 179. See id. at 1719 (majority opinion).
\item 180. Id.
\item 181. Id. at 1723.
E. Law Enforcement Considerations

This section first reviews techniques officers employ when conducting a search incident to arrest. This Note draws upon this discussion to develop and support the proposed test for determining whether officers secured an arrestee under *Gant*. This section then discusses the significant dangers that officers confront when performing a search incident to arrest. The proposed test in Part III takes into account officer safety concerns and the threat that arrestees pose to officers during a search incident to arrest.

1. Search Incident to Arrest Procedures

Law enforcement agencies do not make officer training materials available to the general public in order to prevent criminals from learning the strategies officers use to combat crime. Thus, there are few sources available regarding how officers are trained to perform a search incident to arrest. Professor Myron Moskovitz conducted one of the few studies on police procedures by requesting information from over one hundred law enforcement agencies. He "received enough information to conclude that, in general, police officers are taught to handcuff an arrestee (preferably behind his back) before searching the area around him." Indeed, several law enforcement agencies specifically responded that officers should handcuff an arrestee before conducting a search.

Professor Moskovitz’s study also investigated law enforcement procedures in performing an automobile search incident to arrest. "Not a

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183. See infra Part III.
184. See infra Part III.
185. See Moskovitz, supra note 138, at 663.
186. See id. (discussing the difficulty in obtaining police officer training materials).
187. See id. at 663–64.
188. Id. at 665; Myron Moskovitz, The Road to Reason: Arizona v. Gant and the Search Incident to Arrest Doctrine, 79 Miss. L.J. 181, 183 (2009) (“I asked police departments around the country what they tell their officers to do with the suspect after an arrest. The response was pretty much unanimous: ‘Cuff him and get him out of there.’”).
189. Moskovitz, supra note 138, at 665–66 & nn.30–34 (discussing responses from several law enforcement agencies—including the Baltimore County Police Department, Boston Police Academy, Boston Police Department, Illinois State Police, and Kansas City Police Department—instructing that officers should handcuff and incapacitate the arrestee prior to performing a search incident to arrest); see also id. at 665–66 & n.32 (“A search should not be initiated in arrest situations until the individual is handcuffed and incapacitated as much as possible.”) (quoting BALT. COUNTY POLICE DEP'T, EMPLOYMENT & BASIC TRAINING DIV., LESSON PLAN: SELF DEFENSE TACTICS, SEARCHING AND PAT DOWNS 1 (2000)).
190. See id. at 675–76.
single respondent said or even suggested that a police officer should search a vehicle while the arrestee is in the vehicle or unsecured.\textsuperscript{191} Indeed, many responses specifically mentioned that an officer should secure the suspect before performing an automobile search incident to arrest.\textsuperscript{192}

\textit{Gant} permits officers to search an automobile incident to arrest if the officers did not secure the arrestee prior to the search.\textsuperscript{193} As evident from Professor Moskovitz’s study, however, officers are instructed to secure the arrestee before performing a search incident to arrest.\textsuperscript{194} Thus, \textit{Gant} may conflict with common police practices as the holding could create “a perverse incentive for officers to leave arrestees unsecured, in order to justify searches of the arrestees’ vehicles.”\textsuperscript{195} Furthermore, officers could manipulate \textit{Gant} by leaving an arrestee unsecured in order to justify a search incident to arrest.\textsuperscript{196} This Note proposes a solution to these potential issues.\textsuperscript{197}

\section{2. Officer Safety}

Police officers have an inherently dangerous job, and an arrest presents an extremely unsafe situation.\textsuperscript{198} Indeed, between 1999 and 2008, 122 of the 530 police officers in the United States who were feloniously killed were killed during an arrest situation.\textsuperscript{199} In addition, of the approximately

\begin{itemize}
\item\textsuperscript{191} Id. at 676.
\item\textsuperscript{192} See id. at 675–76 & nn.86–92 (listing responses from several law enforcement agencies—including the Maryland Police and Correctional Training Commission, Kansas City Police Department, North Carolina Department of Crime Control and Public Safety, New Mexico Department of Public Safety, Oakland Police Department, and Sacramento Police Department—instructing that officers should take steps such as removing vehicle occupants, standing near arrestees, or handcuffing arrestees in order to secure arrestees before performing a vehicle search incident to arrest); see also id. at 675 & n.86 ("A vehicle search shall not be done until all occupants of the vehicle have been secured.").
\item\textsuperscript{193} Arizona v. Gant, 129 S. Ct. 1710, 1719 (2009).
\item\textsuperscript{194} See supra notes 187–92 and accompanying text.
\item\textsuperscript{195} Jeffrey B. Welty, \textit{Constitutional Limits on Officers’ Authority To Search Vehicles}, \textit{Popular Gov’t}, Fall 2009, at 22, 23.
\item\textsuperscript{196} See \textit{Gant}, 129 S. Ct. at 1724–25 (Scalia, J., concurring) (noting the standard “leaves much room for manipulation, inviting officers to leave the scene unsecured (at least where dangerous suspects are not involved) in order to conduct a vehicle search”); Craig M. Bradley, \textit{Two and a Half Cheers for the Court}, \textit{Trial}, Aug. 2009, at 48, 49 ("[T]he Court seems to invite the police to engage in the dubious practice of leaving the arrestee ‘unsecured’ and ‘within reaching distance of the passenger compartment’ so that they can search the car.").
\item\textsuperscript{197} See \textit{infra} Part III.
\item\textsuperscript{198} Washington v. Chrisman, 455 U.S. 1, 7 (1982) (“Every arrest must be presumed to present a risk of danger to the arresting officer.”); United States v. Robinson, 414 U.S. 218, 234 n.5 (1973) ("The danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty 

58,000 police officers in the United States who were assaulted in 2008, approximately 10,000 were assaulted during an arrest situation.\textsuperscript{200} Traffic stops also present a significant danger to police officers.\textsuperscript{201} Between 1999 and 2008, 101 officers were killed during traffic stops,\textsuperscript{202} and during 2008, over 6000 officers were assaulted during traffic stops.\textsuperscript{203}

These statistics confirm that arrests and traffic stops present significant dangers to police officers.\textsuperscript{204} As a result, officers take precautions such as handcuffing arrestees to reduce the potential threat.\textsuperscript{205} However, merely handcuffing an arrestee and placing the arrestee in a police car does not always neutralize the danger.\textsuperscript{206} Indeed, though unusual, handcuffed arrestees have escaped from the backseat of police cars and injured officers.\textsuperscript{207}

The Court in \emph{Gant} narrowed the search incident to arrest standard, holding a broad \emph{Belton} interpretation was unnecessary to promote officer safety.\textsuperscript{208} Nevertheless, the Court still considered officer safety a significant issue, and \emph{Gant} permits an automobile search incident to arrest when the arrestee is unsecured.\textsuperscript{209} The test offered in this Note for determining whether officers secured an arrestee under \emph{Gant} also accounts

\begin{itemize}
\item \textsuperscript{201} Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977); see also Petitioner’s Brief on the Merits at 24, \emph{Gant}, 129 S. Ct. 1710 (No. 07-542).
\item \textsuperscript{202} FBI TABLE 19, supra note 199.
\item \textsuperscript{203} FBI TABLE 69, supra note 200.
\item \textsuperscript{204} See supra notes 198–203 and accompanying text.
\item \textsuperscript{205} See supra notes 187–92 and accompanying text.
\item \textsuperscript{206} Petitioner’s Reply Brief on the Merits at 16, \emph{Gant}, 129 S. Ct. 1710 (No. 07-542) (“In 2007 alone there were at least ninety-three reported instances of handcuffed arrestees escaping after being secured in the back seat of a police car.” (citing Okl. Highway Patrol, Trooper Trap: 2007-Publicized Escapes, http://www.oktrooper.com/examples-2007.html (last visited 2008)). There are several recent examples in the news of handcuffed individuals escaping. See Bill Braun, \emph{Felon Given Life Term for Arson}, TULSA WORLD, Nov. 21, 2009, at A10; Stephanie Farr, \emph{3 Killed, 2 Injured in Weekend Violence}, PHILA. DAILY NEWS, Nov. 2, 2009, at 14.
\item \textsuperscript{207} See Plakas v. Drinski, 19 F.3d 1143, 1144–46 (7th Cir. 1994) (stating that handcuffed suspect placed in the backseat of a police car escaped from car and confronted officers); United States v. Sanders, 994 F.2d 200, 210 & n.60 (5th Cir. 1993) (citing additional examples where handcuffed arrestees killed officers); Brief for the United States as Amicus Curiae Supporting Petitioner at 23 n.2, \emph{Gant}, 129 S. Ct. 1710 (No. 07-542) (citing examples of handcuffed arrestees escaping police car and harming officers). \textit{But see Gant}, 129 S. Ct. at 1724 (Scalia, J., concurring) (noting that the Government in \emph{Thornton v. United States} “failed to provide a single instance in which a formerly restrained arrestee escaped to retrieve a weapon from his own vehicle” (citing Thornton v. United States, 541 U.S. 615, 626 (2004) (Scalia, J., concurring)); Transcript of Oral Argument at 10, \emph{Gant}, 129 S. Ct. 1710 (No. 07–542) (noting that none of the ninety-three handcuffed arrestees cited from 2007 had injured an officer with a weapon retrieved from their car after escaping from a police vehicle).
\item \textsuperscript{208} \emph{Gant}, 129 S. Ct. at 1721. For a discussion of additional reasons why the Court narrowed the \emph{Belton} standard, see Part I.D.
\item \textsuperscript{209} \emph{Gant}, 129 S. Ct. at 1719.
\end{itemize}
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for officer safety. 210 While part one of the test considers an arrestee secured once officers handcuff the arrestee, part two of the test permits officers to perform a search if a handcuffed arrestee escapes and officer safety is at stake. 211

F. "Arrest" Definitions and Relevance to Gant

In order to conduct a valid search incident to arrest under Gant, by definition, officers must first arrest the individual. 212 Indeed, "[i]n order to search incident to arrest, the arrest itself must be a full custodial arrest, and a valid arrest made by an officer with authority to make the arrest." 213 However, whether an alleged search incident to arrest is valid may be difficult to determine since there is no agreed-upon definition for the term arrest. 214 The Fourth Amendment does not contain the term arrest, 215 and the Supreme Court has provided several definitions. 216 The following section reviews the various requirements of an arrest, discusses Supreme Court precedent regarding the arrest definition, and reviews the Supreme Court decision California v. Hodari 217 to describe how an arrestee can be considered not secured.

1. Requirements of an "Arrest"

Courts have provided various arrest definitions, 218 but they generally agree on several requirements for an arrest. In order to arrest a suspect, an officer must seize the suspect. 219 An officer seizes a suspect when the officer either exerts physical control over the suspect, 220 or the suspect submits to the officer "in response to a show of authority that a reasonable person would interpret as a demonstration of the officer’s intent to seize." 221 Courts have held that officers seized a suspect in numerous cases.

210. See infra Part III.
211. See infra notes 341–42 and accompanying text.
213. Id.
214. CLANCY, supra note 14, at 222; JOHN WESLEY HALL, SEARCH AND SEIZURE § 16.12, at 877 (3d ed. 2009) ("No formula exists for determining the precise moment an arrest has occurred for purposes of the search incident doctrine.").
215. U.S. CONST. amend. IV; CLANCY, supra note 14, at 220.
216. CLANCY, supra note 14, at 222 ("Remarkably, the Supreme Court has never defined the word arrest with any precision . . . .").
218. See infra notes 230–46 and accompanying text.
219. RESTATEMENT (SECOND) OF THE LAW OF TORTS § 112 (1965); CLANCY, supra note 14, at 226; 2 WILLIAM E. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 23:2 (2d ed. 2009); RUDSTEIN, supra note 76, § 2.05[1], at 2-192.3.
220. Hodari, 499 U.S. at 626; RUDSTEIN, supra note 76, § 2.03[1], at 2-32 ("A 'seizure' of the person occurs when a police officer ‘by means of physical force or show of authority, terminates or restrains [a person’s] freedom of movement through means intentionally applied.’" (quoting Brendlin v. California, 551 U.S. 249, 254 (2007))).
221. CLANCY, supra note 14, at 153; see also Florida v. Royer, 460 U.S. 491, 502–03 (1983) (discussing the fact that officers seized defendant and he was not free to leave); United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("[A] person has been 'seized'
situations including when officers formally arrested and processed a suspect at a police station, performed a traffic stop, or briefly detained a suspect for investigatory purposes.

Courts and authorities agree that not every seizure constitutes an arrest. To arrest an individual, the officer must have probable cause that the suspect performed or is performing an illegal activity. A brief investigatory stop—a seizure performed with less than probable cause—may be performed under reasonable suspicion. Additional factors that determine whether a seizure constitutes an arrest or an investigatory stop include the length of the stop and the extent of intrusion.

2. Inconsistency in “ Arrest” Definitions

Since 1968, the Supreme Court has decided numerous cases concerning arrests in the context of the Fourth Amendment. However, the Court has

within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

222. Terry v. Ohio, 392 U.S. 1, 16 (1968); RUDSTEIN, supra note 76, § 2.03[1], at 2-39 & n.31.

223. Brendlin, 551 U. S. at 263; RUDSTEIN, supra note 76, § 2.03[1], at 2-39 & n.31.1.

224. Davis v. Mississippi, 394 U. S. 721, 726–27 (1969); RUDSTEIN, supra note 76, § 2.03[1], at 2-39 to 2-40 & n.32.

225. Dunaway v. New York, 442 U. S. 200, 207–16 (1979); Terry, 392 U. S. at 16; CLANCY, supra note 14, at 218; RUDSTEIN, supra note 76, § 2.05[1], at 2-192.3.

226. RUDSTEIN, supra note 76, § 2.05[2], at 2-192.5 (“Probable cause to arrest an individual exists where the facts and circumstances are sufficient to warrant a reasonably prudent person in believing that the individual has committed or is committing an offense.”); PHILLIP A. HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK 187 (2005).

227. CLANCY, supra note 14, at 479 (“Articulable suspicion is ‘considerably less’ than proof of wrongdoing by a preponderance of the evidence. It is ‘obviously less demanding’ than probable cause.” (quoting Illinois v. Wardlow, 528 U. S. 119, 123 (2000); United States v. Sokolow, 490 U. S. 1, 7 (1989))); see also id. at 478 n.77 (“‘Reasonable’ suspicion and ‘articulable’ suspicion are equivalent terms.”); HUBBART, supra note 226, at 187; Dana M. Van Beek, Note, United States v. Bloomfield: Handcuffing Law Enforcement in Performing Its Duties and Preventing Crime, 40 S. D. L. REV. 102, 116 (1995) (“Since a stop is a less intrusive seizure than an arrest, it need only be based on reasonable suspicion.”).

228. HALL, supra note 214, § 22.3, at 5 (“Not all contact between police and citizens constitutes an arrest, for the police are free to direct questions to a person on the street without arresting him. Stops on reasonable suspicion are entirely proper, but they cannot be turned into an arrest without probable cause.”); RUDSTEIN, supra note 76, § 2.05[1], at 2-192.4 (“The difference between a seizure of the person that requires probable cause (an ‘arrest’) and one that can be undertaken on less than probable cause (an ‘investigatory stop’) is ‘in the duration and degree of intrusion resulting from the interference with the person’s freedom of movement.’” (quoting People v. Tottenhoff, 691 P.2d 340, 343 (Colo. 1984))).

not established a definitive standard for the term arrest. Indeed, the Court has provided "numerous 'visions' of what constitutes an arrest... with little or no attempt to harmonize the concept set forth in one case with competing visions in other cases."

Prior to 1968, the Court considered when an arrest had occurred on only two occasions. These cases followed the common-law view that an arrest required only two elements: "1) the obtaining of custody over the suspect by a police officer; with 2) the intent by the officer to do so." Under the common law, essentially all seizures were considered arrests. The pre-1968 cases appeared to establish that an arrest did not require officers to book the arrestee at a police station or to declare that the suspect was under arrest.

In 1968, the Supreme Court offered differing views of the requirements of an arrest. In Terry v. Ohio, the Supreme Court separated seizures into two categories—arrests and investigatory stops. One commentator noted that in distinguishing between the two seizures, the Terry Court characterized an arrest as involving a trip to the police station and as the initial step in a prosecution. However, in Peters v. New York, the Court characterized an arrest as a seizure supported by probable cause. Thus, in determining whether the officer arrested the suspect, Peters did not require the officer to transport the suspect to a police station or to declare the suspect under arrest. Although Chief Justice Earl Warren authored both Terry and Peters, "the two opinions had vastly different visions of an arrest. Terry portrayed an arrest as a trip to a police station but Peters seemed to require only a detention based on probable cause."

231. Id.
235. Clancy, supra note 230, at 144.
236. 392 U.S. 1 (1968).
237. Id. at 26 (discussing the differences between an arrest and a brief investigatory stop); Clancy, supra note 230, at 146-47; supra notes 225-28 and accompanying text.
238. Clancy, supra note 230, at 147 ("[F]rom Terry comes the vision that an arrest involves a seizure, a trip to a police station, and is the initial stage of prosecution of the crime.").
240. Id. at 67.
241. Clancy, supra note 230, at 148 ("In Peters, there was no showing that [the officer] had told the suspect that he was under arrest... The Court premised the authority to search based on [the officer's] physical seizure of the suspect, which was supported by probable cause. . . ."").
242. Id. at 149.
The Supreme Court also considered the requirements of an arrest in *Hodari*. In *Hodari*, the Court held that to constitute an arrest, an officer must exert physical force over the arrestee, or the arrestee must submit to the officer's show of authority. Furthermore, in discussing the level of force required to effect an arrest, the Court noted that an arrest required "the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee." Thus, under *Hodari* an arrest does not require that the officer fully restrain the arrestee.

As evident from the preceding discussion of arrests, the Supreme Court has articulated several arrest definitions. An automobile search incident to arrest under *Gant* is predicated on a valid arrest; thus the lack of a definitive arrest definition confuses the analysis for determining whether such a search is legal. While this Note does not advocate for a specific arrest definition, the following section demonstrates how the *Gant* "secure" prong remains relevant under the arrest definition articulated in *Hodari*.

3. Distinction Between "Arrest" and "Secure"

Arrestees are not considered secure merely because officers arrest them. Although several arrest definitions require the officer to exert a degree of physical control over the arrestee, not all arrest definitions require complete physical restraint. Indeed, the *Hodari* arrest definition specifically notes that an arrest does not require the officer to subdue the arrestee. *Hodari* only requires that the officer exert a level of physical force over the arrestee, but the officer is not required to successfully secure the arrestee to effect an arrest. Thus an officer can arrest an individual without actually securing the arrestee.

The *Gant* secure prong remains relevant under the *Hodari* arrest definition since *Hodari* does not require officers to fully secure a suspect at arrest. Thus, an arrestee could still potentially access the automobile to destroy evidence or threaten the officer with a weapon. However, the *Gant* secure prong is irrelevant under an arrest definition that requires officers to

244. Id. at 626.
245. Id. at 624; RUDSTEIN, supra note 76, § 2.05[1], at 2-192.3 ("An arrest occurs when a police officer, for the purpose of making an arrest, grasps or applies physical force to an individual, regardless of whether he succeeds in subduing the individual.").
247. PARSONS, supra note 212, at 123.
248. See supra notes 233–45 and accompanying text.
249. See supra notes 243–46 and accompanying text.
251. Id. at 626.
252. Id. at 624–25.
253. Id. (stating that an arrest does not require the officer to successfully subdue the arrestee); see supra notes 243–52 and accompanying text.
completely restrain arrestees to eliminate the possibility of escape, since all arrestees would be considered secure.\textsuperscript{254}

II. INCONSISTENT APPLICATION OF GANT: WHETHER THE ARRESTEE IS SECURED AND WITHIN REACHING DISTANCE OF THE AUTOMOBILE

The Supreme Court decided \textit{Gant} roughly one year ago, yet lower courts have cited the holding over 400 times.\textsuperscript{255} Lower courts have cited \textit{Gant} over seventy-five times when the validity of a search turned on whether officers secured the arrestee.\textsuperscript{256} Additionally, courts have frequently cited \textit{Gant} when the validity of a search turned on whether officers could have reasonably believed the automobile contained evidence related to the crime,\textsuperscript{257} and cited the holding numerous times to remand a case in light of \textit{Gant}.

Clearly, \textit{Gant} has had a far-reaching impact, yet courts have inconsistently implemented the new standard. Indeed, one aspect of the holding that courts have determined inconsistently is whether the arrestee is secured and within reaching distance of the vehicle.\textsuperscript{258} The following section reviews courts' inconsistent interpretations of this aspect of the \textit{Gant} holding.\textsuperscript{259}

\textsuperscript{255} This figure includes cases reported in Lexis Sheppard's report through February 19, 2010.
\textsuperscript{256} See, e.g., United States v. Ruckes, 586 F.3d 713, 718 (9th Cir. 2009) (holding search invalid because officers secured handcuffed defendant in police vehicle); United States v. Goodwin-Bey, 584 F.3d 1117, 1119–20 (8th Cir. 2009) (holding search valid since officers did not secure arrestee due to presence of other vehicle occupants and prior police report); United States v. Gonzalez, 578 F.3d 1130, 1131–32 (9th Cir. 2009) (holding search invalid because officers secured handcuffed defendant in police vehicle); United States v. Chavez, No. 2:09-cr-0033 FCD, 2009 U.S. Dist. LEXIS 116924, at *13–15 (E.D. Cal. Nov. 24, 2009) (holding search of vehicle invalid as a search incident to arrest after defendant fled and, thus, did not pose risk to officers or to destroy evidence); United States v. Kennedy, No. 3:09-cr-00055 (VLB), 2009 U.S. Dist. LEXIS 69665, at *8 (D. Conn. Aug. 10, 2009) (holding search invalid because officers secured handcuffed defendant in police vehicle).
\textsuperscript{259} The Government, in arguing \textit{Gant}, noted the \textit{Gant} secure prong could be interpreted inconsistently. See Petitioner’s Brief on the Merits at 33–35, \textit{Gant}, 129 S. Ct. 1710 (No. 07-542). Additionally, after \textit{Gant}, commentators noted it was uncertain what factors courts would consider in determining whether officers secured an arrestee. See Anderson & Cole, \textit{supra} note 182, at 17; Eldridge, \textit{supra} note 182, at 30; Kerr, Apr. 21, \textit{supra} note 182.

\textsuperscript{260} This Note does not focus on the second prong of the \textit{Gant} standard, but disagreement exists regarding whether “reasonable to believe” is equivalent to the \textit{Terry} reasonable to believe standard or the probable cause standard. See Kerr, Apr. 22, \textit{supra} note 182.
A. Court Held Officers Secured Arrestee

The following section reviews several cases where the court either held or noted in dicta that the officers secured the arrestee prior to the search.

1. Arrestee Handcuffed

In State v. Carter, the court held officers secured the defendant and suppressed evidence obtained during an automobile search incident to arrest. In Carter, an officer observed the defendant driving suspiciously at 1:30 a.m. in a neighborhood known for criminal activity. The officer stopped the defendant after noticing the defendant’s registration for a temporary tag was old and worn. After requesting the defendant’s license and registration, the officer discovered the addresses on the license and registration did not match and the registration had expired. The officer returned to the police car and called for backup. Once the additional officers arrived, they arrested the defendant for the traffic offenses, removed him from the vehicle, and placed him in handcuffs. The officer sat the defendant on the curb, and another officer remained nearby the defendant. The officer then conducted a search of the vehicle and discovered torn-up papers that appeared to be a change of address form for a credit card belonging to a person other than the defendant. Due to the discovery of the credit card change of address documents, the officers charged the defendant, inter alia, with financial identity fraud.

The court held that the search of the defendant’s car was unlawful under Gant and suppressed the evidence obtained during the search. The court found that the officers had secured the defendant before conducting the search notwithstanding the fact that the officers did not place the defendant in a police car before conducting the search. Here, the officers

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262. Id. at 417, 420–21.
263. Id. at 418 (discussing the fact that defendant attempted to evade officer’s detection by changing directions and driving away from the officer).
264. Id.
265. Id.
266. Id.
267. Id. at 418, 421.
268. Id. at 421. The defendant’s supplemental brief states that during the search the defendant sat either in a patrol car or on the curb. See Defendant-Appellant’s Supplemental Brief at 4, Carter, 682 S.E.2d 416 (No. COA07-1156). However, this Note assumes the defendant sat on the curb during the search since the court described the defendant as sitting on the curb.
269. The opinion does not state whether the other officer remained near the defendant as the defendant sat on the curb, but the State’s Supplemental Brief notes that the officer “left [the defendant] in the custody of the backup officer” when he conducted the search of the vehicle. State’s Supplemental Brief Following Remand from the Supreme Court of the United States at 4, Carter, 682 S.E.2d 416 (No. COA07-1156).
270. Carter, 682 S.E.2d at 418.
271. Id.
272. Id. at 417, 420–21.
273. See id at 421.
handcuffed the defendant and directed him to sit on a curb near the vehicle,\footnote{274} and one officer remained close to the defendant during the search.\footnote{275}

2. Arrestee Not Handcuffed

In \textit{United States v. Herman},\footnote{276} an officer stopped the defendant after observing him drive erratically.\footnote{277} The officer directed the defendant to exit the vehicle because the officer suspected the defendant was intoxicated and might possess a controlled substance.\footnote{278} The officer conducted a pat-down search and arrested the defendant after discovering a spoon that the defendant likely used to administer methamphetamine.\footnote{279} The officer did not handcuff or place the defendant in a police car.\footnote{280} The officer only left him standing at the rear of the vehicle next to an officer when he searched the automobile incident to arrest.\footnote{281}

In deciding whether to suppress the evidence, the court specifically noted that the first justification under \textit{Gant} did not apply since the officers had secured the defendant and he was not within reaching distance of the vehicle.\footnote{282} However, the officers did not handcuff the defendant or place him in a police car.\footnote{283} Instead, the officer performed a pat-down search and left the defendant standing at the rear of the vehicle next to an officer.\footnote{284}

3. Arrestee Handcuffed and Placed in Police Car

In \textit{Gant}, the Supreme Court held that the officers had secured Gant since the officers handcuffed and placed him in a police car.\footnote{285} In many cases decided since \textit{Gant}, lower courts have similarly held that officers secured the arrestee when the officers handcuffed and placed the arrestee in a police car.\footnote{286}

\begin{itemize}
    \item \footnote{274}{\textit{Id.}}
    \item \footnote{275}{State's Supplemental Brief Following Remand from the Supreme Court of the United States, \textit{supra} note 269, at 4.}
    \item \footnote{276}{No. CR-08-146-LRS, 2009 U.S. Dist. LEXIS 83243 (E.D. Wash. Sept. 11, 2009).}
    \item \footnote{277}{\textit{Id.} at *5.}
    \item \footnote{278}{See \textit{id.} at *8.}
    \item \footnote{279}{\textit{Id.} at *4–5.}
    \item \footnote{280}{\textit{Id.} at *2.}
    \item \footnote{281}{\textit{Id.}}
    \item \footnote{282}{\textit{Id.} at *1–2. The court upheld the search, concluding that the officer could have reasonably believed the vehicle contained evidence of the arresting offense. \textit{Id.} at *15–16.}
    \item \footnote{283}{\textit{Id.} at *2.}
    \item \footnote{284}{\textit{Id.}}
    \item \footnote{285}{Arizona v. Gant, 129 S. Ct. 1710, 1719 (2009); \textit{see supra} notes 166–67 and accompanying text.}
\end{itemize}
B. Court Held Officers Did Not Secure Arrestee

The following section reviews several cases where the court either held or noted in dicta that the officers had not secured the arrestee prior to the search.

1. Arrestee Handcuffed

In *United States v. Davis*, the U.S. Court of Appeals for the Sixth Circuit upheld the admission of evidence discovered during an automobile search. In *Davis*, officers misidentified the defendant as the fugitive they were attempting to apprehend when the defendant exited a building the fugitive allegedly frequented. After leaving the building, the defendant drove roughly a half mile before stopping. When the defendant exited the vehicle, the officers approached the defendant with weapons drawn, instructed the defendant to get on the ground, and then handcuffed and frisked the defendant. One officer brought the defendant to his feet and controlled him, while the other officer looked in the front windshield to determine whether the vehicle contained any passengers. After failing to identify any passengers through the front window, the officer looked through the open car door for other passengers. The officer saw a handgun in the cup holder and informed the defendant he was under arrest. Upon reviewing the defendant’s identification, the officers discovered the defendant was not the fugitive.

The officers charged the defendant with being a felon in possession of a firearm and with possessing a stolen weapon. The Sixth Circuit denied the defendant’s motion to suppress the evidence discovered during the search, holding the officers were permitted to stop the defendant since they reasonably believed the defendant was the fugitive. While the defendant did not challenge the search under *Gant*, the Sixth Circuit nevertheless noted in dicta that the search would be valid under *Gant*. The court discussed that the defendant could have still accessed the vehicle since the

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288. *Id.* at *4*.
289. *Id.* at *1–2*.
290. *Id.* at *2*.
291. *Id.*
292. *Id.* at *2–3*. The court noted that the vehicle had dark tinted windows, and the officer did not identify any passengers through the front windshield. *Id.* at *2*.
293. *Id.* at *3*.
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.* at *4–5*.
298. *Id.* at *7–8 n.2*. The Court noted that this search was a protective search incident to an investigative detention (rather than incident to arrest) and that they did not determine here whether the *Gant* search incident to arrest analysis applied to such searches. However, assuming *Gant* did apply, the defendant could have accessed his car. *Id.*
officers had not placed the defendant in the police car.299 Thus, if the court had applied the Gant analysis, the court would have upheld the search since the officers had not secured the defendant.300 This case is significant because lower courts may cite the Sixth Circuit’s dicta regarding Gant in support of a finding that officers did not secure a handcuffed defendant.301

2. Arrestee Not Handcuffed

In United States v. Robinson,302 an officer observed the driver of a vehicle stare at the officer and act suspiciously.303 The officer stopped and arrested the driver after discovering that the driver did not have a license.304 After securing the driver in a police car,305 the officer instructed the defendant to exit the vehicle and seized a knife containing a white residue from the defendant.306 A second officer arrived and during a search of the vehicle, the first officer discovered a digital scale with a white residue.307 During the search, the defendant was not handcuffed, but the second officer stood next to the defendant at the rear of the vehicle.308

The court denied the defendant’s motion to suppress the evidence the officers discovered during the search on several grounds, including the search incident to arrest standard under Gant.309 The court held that the search was justified under Gant since the officers had not secured the defendant.310 Before the search the officers did not handcuff the defendant.

299. Id. However, the officers handcuffed the defendant and an officer controlled him. Id. at *2–3.
300. Id. at *7–8 n.2.
303. See id. at *3.
304. Id. at *3–4.
305. Id. at *4.
306. Id. at *5.
308. Id. at *6, *38.
309. Id. at *1, *35–36 & n.4 (citing Brendlin v. California, 551 U.S. 249, 251 (2007)) (holding passengers may challenge the validity of a vehicle search during a traffic stop).
310. Id. at *38–39. Similar to United States v. Robinson, the court in State v. Gilbert, 2009-Ohio-5528 (Ohio Ct. App.), determined whether officers secured the defendants prior to a search in a situation involving multiple defendants and friends of the defendants at the scene. See id. ¶¶ 5–6. After stopping a vehicle containing four people, the officers arrested the driver for driving without a license and arrested another passenger for an outstanding warrant for robbery. Id. The officers removed the defendant and another occupant from the car and performed a pat-down search. Id. ¶ 6. The officer left the defendant and the other occupant without handcuffs next to an officer as other officers searched the car. Id. In contrast to Robinson, the court held the officers had secured all of the vehicle occupants. See id. ¶ 33. The court may have reached a different result in Gilbert since, unlike Robinson, the officers had not arrested the defendant before the search. Id. ¶ 6. However, the officers may
or place him in a police car\textsuperscript{311}: The defendant stood at the rear of the vehicle next to an officer, but he could have possibly accessed the vehicle to grab a weapon.\textsuperscript{312} In addition, the defendant’s sister and girlfriend stood near the vehicle and distracted the officers.\textsuperscript{313} Further, the defendant did not cooperate with the officers during the pat-down search.\textsuperscript{314}

III. ANALYSIS TO DETERMINE WHETHER OFFICERS SECURED ARRESTEE

As discussed in Part II, courts have applied \textit{Gant} inconsistently when determining whether officers secured an arrestee before conducting an automobile search incident to arrest.\textsuperscript{315} Part III offers an analytical framework to determine whether officers secured an arrestee.

In order to determine whether an officer secured an arrestee, courts should apply the following two-part test. First, an arrestee is considered secure if the officer handcuffed the arrestee.\textsuperscript{316} Second, assuming the officer did not handcuff the arrestee,\textsuperscript{317} the court should consider several factors to determine whether the officer secured the arrestee, including the distance between the arrestee and the area the officers searched; the ratio of police officers to arrestees; the physical positioning of the officers in relation to the arrestee and the area searched; how difficult the area was for the arrestee to access; whether officers physically restrained the arrestee or attempted to handcuff the arrestee; and whether officers displayed guns.

A. Officers Handcuffed Arrestee

When an officer handcuffs an arrestee courts should consider the arrestee secure and not within reaching distance of the vehicle.\textsuperscript{318} Courts should apply this rule even if the officer did not place the arrestee in a police car after handcuffing the arrestee. As described in Professor Moskovitz’s study of police procedures, officers are trained to secure an arrestee before conducting a search incident to arrest.\textsuperscript{319} Many law enforcement organizations that participated in Professor Moskovitz’s study noted that placing an arrestee in handcuffs is an effective means of securing an

\begin{itemize}
\item[311.] \textit{Robinson}, 2009 U.S. Dist. LEXIS 60467, at *38.
\item[312.] \textit{Id.} at *39.
\item[313.] \textit{Id.} at *38–39.
\item[314.] See \textit{id.} at *9–12.
\item[315.] See supra Part II.
\item[316.] This prong also applies when officers encounter multiple vehicle occupants and are unable to handcuff all arrestees.
\item[317.] In his dissent in \textit{State v. Gant}, 162 P.3d 640, 649 (Ariz. 2007) (Bales, J., dissenting), Justice W. Scott Bales offered this rule as a possible alternative to \textit{Belton}. See supra notes 161–62 and accompanying text.
\item[319.] See supra notes 187–92 and accompanying text.
\end{itemize}
arrestee.\textsuperscript{320} In certain situations when handcuffs are insufficient to secure an arrestee, the officer also takes other protective measures such as placing a handcuffed arrestee in a police car.\textsuperscript{321} If the officer only handcuffed the arrestee without placing the arrestee in a police car, it is logical to assume the officer believed he had secured the arrestee.\textsuperscript{322} Following this rationale, an officer cannot justify an automobile search by arguing he had not secured a handcuffed arrestee. An officer would not stop and search a vehicle after handcuffing an arrestee if the officer thought the arrestee posed a threat.\textsuperscript{323} Instead, the officer would continue to secure the arrestee by taking other protective measures such as placing the arrestee in a police car.\textsuperscript{324} Further, a handcuffed arrestee is not within reaching distance of a vehicle since the arrestee’s arms are immobilized and thus a handcuffed arrestee cannot reach the vehicle.

B. Officers Did Not Handcuff Arrestee

When officers do not handcuff an arrestee, courts should engage in a case-by-case analysis to determine whether officers secured the arrestee before the automobile search incident to arrest. Courts should review several factors to determine whether the overall circumstances indicate that the officers secured the arrestee. While the following list is not exhaustive, relevant factors to consider include the following: the distance between the arrestee and the area the officers searched;\textsuperscript{325} the ratio of police officers to arrestees;\textsuperscript{326} the physical positioning of the officers in relation to the arrestee and the area searched;\textsuperscript{327} how difficult the area was for the arrestee to access;\textsuperscript{328} whether officers physically restrained the arrestee or attempted to handcuff the arrestee;\textsuperscript{329} and whether officers displayed guns.\textsuperscript{330}

The proposed analysis for determining whether officers secured an arrestee without handcuffs is comparable to several other analyses regarding whether an arrestee immediately controlled an area under Chimel. For example, the test is similar to the analysis Justice Brennan offered in his Belton dissent regarding whether an arrestee immediately controlled a

\begin{itemize}
\item \textsuperscript{320} See supra notes 187–92 and accompanying text.
\item \textsuperscript{321} See supra notes 187–92 and accompanying text.
\item \textsuperscript{322} See supra notes 187–92 and accompanying text.
\item \textsuperscript{323} See Moskovitz, supra note 138, at 676 (“Not a single respondent said or even suggested that a police officer should search a vehicle while the arrestee is in the vehicle or unsecured.”); supra notes 187–92 and accompanying text.
\item \textsuperscript{324} See RUDSTEIN, supra note 76, § 2.06[4][a], at 2-227 (“[T]he failure of the police to handcuff the arrestee or take other protective measures indicates a lack of apprehension towards him . . .”); supra notes 187–92 and accompanying text.
\item \textsuperscript{325} See supra notes 58, 106–10, 118–20 and accompanying text.
\item \textsuperscript{326} See supra notes 60, 89–90, 106–10 and accompanying text.
\item \textsuperscript{327} See supra notes 61, 106–10, 118–20 and accompanying text.
\item \textsuperscript{328} See supra notes 62, 89–90 and accompanying text.
\item \textsuperscript{329} See supra notes 59, 89–90 and accompanying text.
\item \textsuperscript{330} See supra notes 106–10 and accompanying text.
\end{itemize}
vehicle. Additionally, the test is similar to Professor David S. Rudstein’s argument for reexamining Belton published several years prior to Gant. The analysis is also comparable to the analysis used by courts to determine whether an area was in the arrestee’s immediate control under Chimel. Furthermore, the test draws upon the analyses used by courts that narrowly interpreted Belton. Each of these fact-specific analyses review several factors in order to determine whether the overall circumstances indicate that the officers secured the arrestee or whether the area was within the arrestee’s immediate control.

C. Benefits and Potential Criticisms of the Two-Part Test

The two-part test does not entirely establish a bright-line rule since part two requires courts to weigh several factors in determining whether officers secured an arrestee without handcuffs. However, a majority of the cases will be resolved under part one of the test, since most officers are trained to handcuff a suspect before conducting a search incident to arrest. Since part one establishes a bright-line rule regarding handcuffed arrestees, the overall analysis will provide many of the benefits of a bright-line rule.

In addition to offering guidance for deciding the rare case when officers do not handcuff an arrestee, the two-part test also ensures that Gant does not encourage officers to leave an otherwise secured arrestee without handcuffs in order to justify a search. As discussed in Part I, the Gant holding could create perverse incentives by encouraging officers to leave nonthreatening arrestees unsecured in order to justify a search. However, under the proposed analysis, if officers did not handcuff a nonthreatening arrestee in order to justify a search, a court would determine that officers had secured the arrestee under part two of the test. Thus, the two-part test prevents this potential problem.

Critics of the two-part test may argue that it prevents officers from making quick decisions and that the test negatively impacts officer safety. However, the two-part test accounts for officer safety in several ways. Officers are always permitted to search incident to arrest if the arrestee is

331. See supra notes 87–90 and accompanying text. Additionally, a commentator has suggested that courts review Justice Brennan’s factors for guidance in determining whether officers secured an arrestee without handcuffs. See Eldridge, supra note 182, at 30.
332. Professor David S. Rudstein also advocated for an approach more consistent with Chimel, and similar to the rationale offered by Justice Brennan in his Belton dissent. See supra notes 87–90 and accompanying text.
333. See supra notes 54–62 and accompanying text.
334. See supra notes 98–133 and accompanying text.
335. See supra notes 54–62, 87–90, 98–133 and accompanying text.
336. See supra notes 185–92 and accompanying text.
337. See supra notes 79–86 and accompanying text (discussing benefits of bright-line rules, including providing officers clear guidance and easy-to-apply rules for determining whether a search is permissible, and informing citizens of their rights).
338. See supra notes 193–97 and accompanying text.
339. See supra notes 193–97 and accompanying text.
340. See supra notes 325–30 and accompanying text.
unsecured in order to ensure officer safety and preserve evidence. As previously discussed, the test only restricts a search after an officer handcuffs an arrestee since handcuffs typically secure an arrestee. Further, officers may search incident to arrest when they are unable to handcuff or secure an arrestee. Additionally, in the rare situation where an arrestee escapes handcuffs and threatens an officer, a search would be justified since the arrestee is no longer secure.

Critics may also argue that the test could encourage officers to manipulate Gant by not handcuffing arrestees to justify a search. However, part two of the test prevents such perverse incentives. Under part two, a court could find that officers secured the arrestee due to other factors including the arrestee’s ability to access the vehicle, the officer-to-arrestee ratio, the positioning of officers in relation to the arrestee, or the distance between the arrestee and the area searched.

Finally, critics may argue that the two-part test is unnecessary since courts already review many of the factors advocated here when determining whether officers secured an arrestee. However, the two-part test offers courts an organized framework for considering the various factors. Further, the two-part test ensures Gant’s secure prong remains relevant by preventing courts and officers from presuming an arrestee has “superhuman” qualities such as the ability to access weapons in an automobile after being handcuffed.

In Gant, the Court held that Chimel’s twin rationales of officer safety and evidence preservation permit an automobile search incident to arrest if the arrestee is unsecure and within reaching distance of the vehicle. However, Gant did not provide a framework for determining whether officers secured an arrestee, and courts are inconsistently applying the holding. The two-part test outlined here provides an analysis for determining whether the arrestee is secure and is consistent with Chimel because the test prohibits searches where the arrestee is secured—and thus unable to destroy evidence or injure officers.

D. Application of the Two-Part Test

The following section applies the two-part test to cases discussed in Part II.

341. See supra notes 185–92 and accompanying text.
342. See supra notes 206–07 and accompanying text.
343. See supra notes 62, 87–90 and accompanying text.
344. See supra notes 60, 87–90, 106–10 and accompanying text.
345. See supra notes 61, 106–10, 118–20 and accompanying text.
346. See supra notes 58, 106–10, 118–20 and accompanying text.
348. See supra Part II.B.1.
349. See supra notes 54–62 and accompanying text.
350. See supra note 164 and accompanying text.
351. See supra Part II.
1. State v. Carter

A court applying the two-part test to Carter would find the officers secured the defendant. Under part one of the test, the officers had secured the defendant since the officers placed the defendant in handcuffs before the search.\textsuperscript{352} Assuming the officers did not handcuff the defendant, the defendant would still be considered secure under part two of the test. The officers outnumbered the defendant two to one, and one officer remained close to the defendant while the defendant sat on a curb during the search.\textsuperscript{353}

2. United States v. Herman

If a court applied the two-part test to the facts of Herman, the court would find that the officers had secured the defendant prior to the search. Since the officers did not handcuff or place the defendant in a police car,\textsuperscript{354} the court would review the factors under part two of the test. In Herman, the officers outnumbered the defendant two to one, the defendant stood at the rear of the vehicle, an officer stood next to the defendant during the search, and the defendant and the officers did not struggle.\textsuperscript{355} Thus, the overall circumstances indicate that the officers secured the defendant prior to the search.

3. Arizona v. Gant

A court applying the two-part test to Gant would determine that under part one of the test, the officers secured the arrestee since the officers handcuffed and placed the arrestee in a police car.\textsuperscript{356}

4. United States v. Davis

If a court applied the two-part test to Davis, the court would determine that officers secured the defendant. The officers had placed the defendant in handcuffs,\textsuperscript{357} and thus they had secured the defendant under part one of the test. Assuming the officers had not placed the defendant in handcuffs, the defendant would still be considered secure under part two of the test since the officers outnumbered the defendant two to one, they approached the defendant with weapons drawn, during the search one officer controlled the defendant, and the officers did not struggle to subdue the defendant.\textsuperscript{358}

\textsuperscript{352} See supra note 267 and accompanying text.  
\textsuperscript{353} See supra notes 267–69 and accompanying text.  
\textsuperscript{354} See supra note 280 and accompanying text.  
\textsuperscript{355} See supra notes 278–81 and accompanying text.  
\textsuperscript{356} See supra notes 149–50 and accompanying text.  
\textsuperscript{357} See supra note 291 and accompanying text.  
\textsuperscript{358} See supra notes 291–92 and accompanying text.
5. United States v. Robinson

Under the two-part test, the defendant in Robinson would not be considered secure. Since the officers did not handcuff or place the defendant in a police car, the case falls under part two of the test. Here, the defendant stood at the rear of the vehicle without handcuffs, the defendant and relatives outnumbered the officers, the defendant’s sister and girlfriend distracted the officers, and the officers had discovered that the defendant possessed a knife. Thus, the overall circumstances indicate the officers had not secured the defendant and he still posed a threat.

CONCLUSION

In Gant, the Supreme Court narrowed the permissible scope of an automobile search incident to arrest to two circumstances: (1) when an arrestee is not secured or (2) it is reasonable for officers to believe the vehicle might contain evidence related to the crime of the arrest. The Gant decision raises several new issues including the circumstances required to consider an arrestee secure. As this Note discussed, lower courts have inconsistently interpreted the Gant secure prong. Due to the inconsistent application of Gant, defendants will receive unequal treatment and officers will be uncertain regarding the criteria required to consider an arrestee secured. Courts should resolve these issues by adopting an analytical framework similar to the two-part test offered in this Note.

359. See supra notes 305–14 and accompanying text.
Notes & Observations