FINISHING WHAT *GANT* STARTED: PROTECTING MOTORISTS' PRIVACY RIGHTS BY RESTRICTING VEHICLE IMPOUNDMENTS AND INVENTORY SEARCHES

INTRODUCTION

In *Arizona v. Gant*, the Supreme Court recognized that warrantless search exceptions in vehicles severely threatened the privacy interests of motorists.[1] *Gant* virtually overruled the nearly thirty-year-old *New York v. Belton* precedent, which permitted warrantless vehicle searches in "the area within the immediate control of the arrestee."[2] The problem with *Belton*, as the *Gant*

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[1] 556 U.S. 332, 345 (2009) (describing New York v. Belton, 453 U.S. 454 (1981), as "[a] rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creat[ing] a serious and recurring threat to the privacy of countless individuals").

[2] *Belton*, 453 U.S. at 460 (holding that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile"). The *Gant* decision highlighted that the "primary object of the Fourth Amendment" is to

Court saw it, was that the rule had morphed from safety-driven searches[3] into a "police entitlement" in which police searched the entire passenger compartment of vehicles contemporaneously with an arrest.[4] In an effort to bolster motorists' privacy rights, the Supreme Court in *Gant* re-defined the parameters of warrantless searches–permitting searches only when an "arrestee [was] unsecured and within reaching distance of the passenger compartment at the time of the search"[5]–and re-affirmed the crime control goal of police work–permitting searches when "it [was] reasonable to believe the vehicle contain[ed] evidence of the offense of arrest."[6]

Not surprisingly, these new parameters failed to end motions to suppress unlawfully obtained evidence from vehicles. These motions continue to bombard courts because alternative search doctrines allow police to circumvent the *Gant* parameters. In *Gant*, the Supreme Court recognized there was a loophole in Fourth Amendment protection of motorists' privacy. Although *Gant* closed the *Belton* loophole, others remain, allowing police to circumvent those protections and subsequently invade motorists' privacy rights.

The origins of two of these additional leaks are (1) vehicle impoundment and (2) the inventory search doctrine. In *Colorado v. Bertine*, the Supreme Court fell short of providing clear rules to guide lower courts' analysis of impoundments and inventory searches.[7] Just as Justice Marshall forewarned in his *Bertine* dissent, lower courts struggle to reconcile the majority holding with Fourth Amendment guarantees of protection against unreasonable searches and seizures.[8]

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protect privacy. Cardwell v. Lewis, 417 U.S. 583, 589 (1974). Here, the Supreme Court said "[t]he decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Id.* (quoting Jones v. United States, 357 U.S. 493, 498 (1958)).

[3] Police were allowed to search to ensure their safety from any dangerous weapon that may have been accessible to a vehicle occupant. *Belton*, 453 U.S. at 460.

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

[5] *Gant*, 556 U.S. at 343.

[6] *Id.* at 351.

[7] 479 U.S. 367 (1987).

[8] *See* Nicholas B. Stampfli, Comment, *After Thirty Years, Is It Time To Change the Vehicle Inventory Search Doctrine?*, 30 SEATTLE U. L. REV. 1031, 1034-36, 1040-44

To end this struggle, the Supreme Court should finish what *Gant* started by protecting motorists' privacy rights in the face of aggressive impoundments and inventory searches. The Court can achieve this by ensuring that only appropriate community caretaking functions justify the impoundments and inventory searches. The Court should require a separate inquiry into the validity of both the impoundment and the inventory search. The inquiry into the validity of the impoundment should (1) weigh the reasonableness of the impoundment and (2) ensure that the impoundment was conducted pursuant to a standard operating procedure. This procedure should present the motorist with other viable options including an option to park and lock the vehicle and waive liability. With regard to the inventory search, the motorist should be permitted to forgo an inventory search by waiving police liability. If the motorist opts to permit an inventory search, then the Court should ensure that the inventory search fully complied with standardized procedure.

Part I of this Comment will follow the Court's transition from *Belton* to *Gant* and describe the Court's unclear *Bertine* holding regarding impoundments and inventory searches. Part II will survey how the circuits have analyzed impoundment and inventory searches since *Bertine* and *Gant*. Part III will emphasize the need for a *Gant*-like modification of *Bertine*. This Comment will propose a new test the Supreme Court should implement to clarify what constitutes a valid impoundment and valid inventory search. Then, this Comment will illustrate how the test will be applied and rebut likely counter-arguments against the test.

(2007). *See generally* Jason S. Marks, *Taking Stock of the Inventory Search: Has the Exception Swallowed the Rule?*, CRIM. JUST., Spring 1995, at 11; Mary Elisabeth Naumann, Note, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 AM. J. CRIM. L. 325 (1999); Chad Carr, Comment, *To Impound or Not to Impound: Why Courts Need to Define Legitimate Impoundment Purposes to Restore Fourth Amendment Privacy Rights to Motorists*, 33 HAMLINE L. REV. 95 (2010); Shauna S. Brennan, Note, *The Automobile Inventory Search Exception: The Supreme Court Disregards Fourth Amendment Rights in* Colorado v. Bertine*–The States Must Protect the Motorist*, 62 NOTRE DAME L. REV. 366 (1987); Edwin J. Butterfoss, *Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications in the Supreme Court's Fourth Amendment Pretext Doctrine*, 79 KY. L.J. 1 (1990).

I. SUPREME COURT PRECEDENT ON MOTORISTS' PRIVACY

The Supreme Court has long recognized that, in comparison to the home, automobiles carry a much lower expectation of privacy.[9] Due to this well-established notion, the Supreme Court placed motorists' privacy interests on the backburner. In place of those interests, the Court ramped up its protections of police actions involving vehicles. But, in *Gant*, the Supreme Court brought motorists' privacy rights back into focus. Unfortunately, several exceptions, including vehicle impoundments and inventory searches, continue to frustrate motorists' privacy rights.

A. The Evolution of Impoundments and Inventory Searches

1. Impoundments: *Opperman* and *Bertine*

Generally, police officers are required to have a warrant to seize property.[10] However, the Supreme Court has recognized exceptions to the warrant requirement.

One of these is the community caretaking exception. This exception works as a balancing test to determine whether police action was reasonable.[11] Courts do this by weighing the government's interests against an individual's interest.[12] Applying the community caretaking exception to vehicles, the Court in *South Dakota v. Opperman* first permitted the impoundment of a vehicle because the vehicle presented a traffic hazard that threatened public safety.[13]

Over a decade later in *Bertine*, the Court chose not to employ the *Opperman* balancing test to determine if a post-impoundment inventory search was reasonable.[14] Instead, the Court upheld the

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[9] *See generally* Carroll v. United States, 267 U.S. 132 (1925). *See also* Chambers v. Maroney, 399 U.S. 42, 49-50 (1970); Cardwell v. Lewis, 417 U.S. 583, 589-90 (1974).

[10] *See* Horton v. California, 496 U.S. 128, 133 n.4 (1990).

[11] *See* Cady v. Dombrowski, 413 U.S. 433, 446-47 (1973).

[12] Naumann, *supra* note 8, at 340.

[13] 428 U.S. 364, 368-69 (1976). In *Opperman*, police impounded a vehicle for a traffic violation. *Id.* at 366. Without a warrant and pursuant to procedure, the police opened an unlocked vehicle to inventory its contents. *Id.* The Court ruled that police are allowed to inventory an impounded car if the procedure is designed to protect the vehicle and its contents. *Id.* at 373.

[14] Colorado v. Bertine, 479 U.S. 367, 375 (1987).

search because the impoundment and subsequent search were conducted pursuant to standardized operating procedures.[15]

In *Bertine*, a police officer arrested Lee Bertine for driving under the influence and "inventoried the contents" of Bertine's van prior to its impoundment.[16] During the inventory search, the officer discovered drugs and drug paraphernalia inside a closed backpack.[17] Bertine moved to suppress the evidence alleging that the search violated the Fourth Amendment.[18]

After perplexing the Colorado courts, the United States Supreme Court granted certiorari to Bertine's case to determine whether this inventory search violated the Fourth Amendment.[19] During its analysis of the search, the Supreme Court did not thoroughly analyze the facts of the case. Not only did the Court neglect to weigh governmental interests against Bertine's privacy interests, but it also failed to first address the seizure of Bertine's car, the impoundment, which led to the inventory search.[20]

Bertine argued the root of the problem was the police procedure that "gave the . . . officers discretion to choose between impounding his van and parking and locking it in a public parking" lot.[21] Giving deference to the procedure, the Court ruled that the existence of and compliance with the procedure validated the impoundment and inventory search.[22]

2. Inventory Searches: *Lafayette*, *Opperman*, and *Bertine*

As with property seizures, police officers are prohibited from searching without a warrant with notable exceptions. In *Illinois v. Lafayette*, the Court ruled that station-house inventory searches of arrestees are reasonable practices conducted to protect jail guards and other prisoners.[23] In fact, the Court held that the police need not consider "less intrusive" means to ensure guard and prisoner safety because these legitimate governmental interests are

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[15] *Id.* at 375-76.
[16] *Id.* at 368-69.
[17] *Id.* at 369.
[18] *Id.*
[19] *Id.* at 370-71.
[20] *Id.* at 373-74.
[21] *Id.* at 375.
[22] *Id.*
[23] 462 U.S. 640, 648 (1983).

resolved in the most practical manner by standardized station-house inventory searches.[24]

Following the same balancing test of governmental interests, the *Opperman* Court created an exception permitting police to conduct warrantless inventory searches of lawfully impounded vehicles.[25] By conducting an inventory search, the Court said that law enforcement was protecting (1) motorist's property, (2) police against claims of lost or stolen property, and (3) police from danger.[26]

When the Court revisited the question of vehicular inventory searches in *Bertine*, it assumed that government interests presumptively outweighed "the strength of the individual's privacy interest" when conducting an inventory search.[27] Under this assumption, the Court upheld inventory searches so long as standardized procedures were followed and investigatory motives were not the "sole purpose[s]" of the searches.[28] Having previously concluded that police compliance with established routine tends to "ensure that [an] intrusion [into the individual's privacy is] limited in scope to the extent necessary to carry out the caretaking function," the Court did not investigate the reasonableness of the standardized procedure itself.[29]

3. The *Bertine* Dissent

In his dissent, Justice Marshall accused the majority of allowing weak government interests to justify the intrusion of Bertine's privacy.[30] Furthermore, Justice Marshall pointed out that inventory searches are reasonable pursuant to standardized

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[24] *Id.*

[25] South Dakota v. Opperman, 428 U.S. 364, 372 (1976); *see also Bertine*, 479 U.S. at 371-72.

[26] *Opperman*, 428 U.S. at 369 (stating that the inventory practice is a "response to three distinct needs: the protection of the owner's property while it remains in police custody, the protection of the police against claims or disputes over lost or stolen property, and the protection of the police from potential danger") (citations omitted); *see also Bertine*, 479 U.S. at 372.

[27] *Bertine*, 479 U.S. at 374.

[28] *Id.* at 372, 375.

[29] *Opperman*, 428 U.S. at 375 (citing Cady v. Dombrowksi, 413 U.S. 433 (1973)).

[30] *Bertine*, 479 U.S. at 377 (Marshall, J., dissenting).

operating procedure only if the procedure omits police discretion.[31] The officer was permitted to (1) "allow a third party to take custody" of the car, (2) park and lock the car in the "nearest public parking facility," or (3) impound and catalogue inventory.[32] Justice Marshall argued that parking and locking the car in an adjacent lot would have been more feasible and appropriate than impounding the car under the circumstances.[33] But because the majority gave deference to the police officer's exercise of discretion, the reasonableness of the decision was not even considered.[34]

Justice Marshall also criticized the standard operating procedure for failing to provide specific guidelines to conduct an inventory search–adding to the officer's range of discretion.[35] Justice Marshall denounced the idea that stating the phrase "conducted pursuant to standard procedure" had become a magic wand that made all police actions per se reasonable.[36] To counteract this dubious assumption, Justice Marshall suggested the majority should have applied the balancing test used in *Opperman* to weigh the government's interests against the individual's expectation of privacy.[37]

Finally, Justice Marshall lambasted the majority for "overstat[ing] the justifications for the inventory exception."[38] "[S]ecure impoundment facilities effectively eliminate[]" the need to protect police against claims.[39] And in this case, the inventory

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[31] *Id.* Marshall relies on *Opperman* and *Illinois v. Lafayette* to support his contention. *Id.* at 377-78 (citing *Opperman*, 428 U.S. at 369, 372, 376; Illinois v. Lafayette, 462 U.S. 640, 646-48 (1983) (Marshall, J., concurring in judgment)). Marshall charged the majority with "attempt[ing] to evade . . . clear prohibitions on unfettered police discretion by declaring that 'the discretion afforded the . . . police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it.'" *Id.* at 378. This assertion, Marshall critiqued, was contradicted when the officer testified that deciding to impound and search, rather than "park and lock" the car, was "his 'own individual discretionary decision.'" *Id.*

[32] *Id.* at 379-80.

[33] *Id.* at 378-80.

[34] *Id.*

[35] *Id.* at 381.

[36] *Id.*

[37] *Id.* at 382.

[38] *Id.*

[39] *Id.*

search would not have aided in such protections because the officer failed to catalogue all the items in the car.[40]

In addition, "there is little danger associated with impounding unsearched vehicles"[41] and "opening closed containers to inventory the contents can only increase the risk."[42] Therefore, "only the government's interest in protecting the owner's property actually justifies an inventory search," but not under these circumstances.[43] In *Bertine*, since the owner was present at the scene, the police could have asked if he even "wanted them to 'safeguard' his property."[44]

B. New York v. Belton*: An Expansive Search Incident to Arrest Doctrine in Vehicles*

In *Belton*, the defendant moved to supress evidence seized from his vehicle arguing that the search incident to arrest of his vehicle violated the Fourth Amendment.[45] In this case, an officer pulled a car over for speeding.[46] After the stop, the officer smelled marijuana coming from the vehicle and saw an envelope in the car that he suspected might contain marijuana.[47] After directing all the occupants out of the car and placing them under arrest, the officer searched the passenger compartment of the car.[48] The officer found a jacket that belonged to Belton and discovered cocaine in the pocket.[49]

The Court emphasized that warrantless searches contemporaneous with an arrest within the immediate area surrounding the arrestee "have long been considered valid because of the need" to protect officers from weapons accessible to the arrestee and to prevent the arrestee from destroying evidence.[50]

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[40] *Id.* at 383.

[41] *Id.* (quoting South Dakota v. Opperman, 428 U.S. 364, 378 (1976)).

[42] *Id.* at 384.

[43] *Id.*

[44] *Id.* at 385 (citing *Opperman*, 428 U.S. at 375).

[45] New York v. Belton, 453 U.S. 454, 456 (1981).

[46] *Id.* at 455.

[47] *Id.* at 455-56. The envelope was on the floor of the car and was marked "Supergold." *Id.* at 456.

[48] *Id.* at 456.

[49] *Id.*

[50] *Id.* at 457.

The Court supported these searches because they provide police with a "single, familiar standard" to guide searches, which, in turn, provides predictability and easy application.[51] With those justifications, the Court held that following "lawful custodial arrest[s]" of vehicle occupants, police "may . . . search the [vehicle's] passenger compartment."[52]

In his dissent, Justice Brennan, joined by Justice Marshall, argued that the bright-line rule adopted by the majority opinion "fail[ed] to reflect [the] underlying . . . justifications" of police safety and preservation of evidence.[53] Brennan emphasized that the limitations on the scope of the search in *Chimel v. California* were based on both space and time,[54] asserting that the arrestee must actually be present in the area being searched at the time of the search in order to implicate the justifications of police safety and evidence preservation.[55]

C. Arizona v. Gant*: Narrowing* Belton *to Protect Privacy*

In *Gant*, a case factually similar to *Belton*, the Court ruled that the search was unreasonable because the warrantless search incident to arrest exception was not applicable under the circumstances.[56] In this case, Rodney Gant, caught driving with a suspended license, was arrested and secured in a patrol car.[57]

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[51] *Id.* at 458-59 (quoting Dunaway v. New York, 442 U.S. 200, 213-14 (1979)).

[52] *Id.* at 460. In addition to the compartment search, police were also allowed to search any containers found within the compartments. *Id.*

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

[54] *Id.* (citing Chimel v. California, 395 U.S. 752 (1969)). Safety and evidentiary justifications "are absent where a search is remote in time or place from the arrest." *Chimel*, 395 U.S. at 764 (quoting Preston v. United States, 376 U.S. 364, 367 (1964)). In *Chimel* the police came to the defendant's home with an arrest warrant for an alleged burglary. *Id.* at 753. The police asked permission to "look around" the house. *Id.* The defendant refused the request, and the police proceeded to search the home. *Id.* at 753-54. The Court ruled that incident to a lawful arrest, a search of any area beyond the arrestee's immediate control is unlawful under the Fourth Amendment unless there is a clear danger that evidence may be destroyed or there is an imminent threat of harm to the arresting officers. *Id.* at 768.

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

[56] Arizona v. Gant, 556 U.S. 332, 344 (2009).

[57] *Id.* at 335. Additional facts of the case probably made the Court more suspicious of the search. The police recognized Gant from a previous encounter after which they ran his record, which revealed "an outstanding warrant for his arrest for driving with a suspended license." *Id.* at 336. Later that day, the police arrested Gant immediately

Afterward, "police officers searched his car and discovered cocaine in the pocket of a jacket [found] on the backseat."[58] Addressing concerns described in the *Belton* dissent, the Court agreed with Gant's reasoning that because he had no access to his car at the time of the search, he "posed no threat to the officers."[59] Moreover, "because he was arrested for a traffic offense[,] for which no evidence could be found in his vehicle," there could be no evidence in need of preserving.[60]

In its ruling, the Court did not go so far as to say that *Belton* was wrong; rather, the Court felt that the *Belton* rule created uncertainty, which allowed police and courts to misconstrue its applicability.[61] Ultimately, the Court agreed with the Arizona Supreme Court's holding that *Belton* implied warrantless vehicle searches were only permissible "when the passenger compartment is within an arrestee's reaching distance."[62] However, circuit court decisions demonstrated that the *Belton* decision left room for improper interpretation.[63] So, the Court seized the opportunity presented by *Gant* to clarify that warrantless vehicle searches incident to arrest were only justifiable if (1) the arrestee was unsecured and within reaching distance during the search, or (2) there was reason to believe evidence related to the offense of arrest was in the vehicle.[64]

The *Gant* majority rebutted the dissent's claim that "*stare decisis* require[d] adherence to . . . *Belton*" by arguing that the doctrine is not compelling in the the face of past decisions that have justified "unconstitutional police practice."[65] Moreover, the majority countered the dissent's argument that police reliance on the bright-line reading of *Belton* demands the continuation of those search practices.[66] *Gant* asserted that police reliance on

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after he parked and got out of his car at the residence where police were investigating. *Id.* "When asked at the suppression hearing why the search was conducted, [the officer] responded: 'Because the law says we can do it.'" *Id.* at 336-37.

[58] *Id.* at 335.

[59] *Id.* at 336.

[60] *Id.*

[61] *Id.* at 342-44.

[62] *Id.* at 341 (emphasis omitted).

[63] *Id.* at 342-43.

[64] *Id.* at 344.

[65] *Id.* at 348.

[66] *Id.* at 349.

previously permissible unwarranted vehicle searches "could [not] outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected."[67]

II. THE LEGACY OF *BERTINE*: CONFUSION IN THE CIRCUITS

The holding in *Bertine* proved to be open to a variety of interpretations regarding impoundments and inventory searches. Some legal scholars have described the varied application of *Bertine* within the circuits.[68] This newly compiled survey presents a systematic collection of those variations.

A. Circuit Split on Impoundments

The *Bertine* Court chose not to elaborate on the analysis of vehicle impoundments. In the absence of this analysis, circuits established their own impoundment analysis. The three main variations include the Reasonableness Test, the Standard Operating Procedure Test, and a combination of the two.

1. The Reasonableness Test

Although *Bertine* did not impose "reasonableness" as a factor in impoundment analysis, the First, Second, Third, Fourth, Fifth, and Tenth circuits held that impoundments satisfy "the Fourth Amendment . . . so long as . . . [they are] reasonable under the circumstances."[69] These circuits[70] did not read a standard

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[67] *Id.*

[68] *See, e.g.*, Marks, *supra* note 8, at 14, 50; Naumann, *supra* note 8, at 353-54.

[69] United States v. Coccia, 446 F.3d 233, 239 (1st Cir. 2006). Police must be able to "follow 'sound police procedure,'" meaning "there is no need for them to show that they followed explicit criteria . . . to impound" as long as their choice was "within the universe of reasonable choices." *Id.* (quoting United States v. Rodriguez-Morales, 929 F.2d 780, 787 (1st Cir. 1991)). In *Coccia*, the court accepted that vehicle safekeeping and public safety concerns in addition to the absence of "obvious alternative means" to remove the car provided sufficient evidence for the reasonableness of the impound. *Id.* at 240.

[70] *See, e.g.*, United States v. McKinnon, 681 F.3d 203, 208 (5th Cir. 2012) (reading *Opperman* and *Bertine* to mean that "inquiry [into] the reasonableness of the vehicle impoundment for . . . community caretaking purpose[s] [does not require] reference to any standardized criteria"); United States v. Barrios, 374 F. App'x 56, 57 (2d Cir. 2010); United States v. Smith, 522 F.3d 305, 312 (3d Cir. 2008) (comparing the First Circuit's reasonableness approach to the D.C. and Eighth Circuits' accordance with standardized procedures approach, and coming down on the side of applying a

impoundment procedure requirement in *Bertine* because "standard protocols" could not cover "the numerous and varied circumstances in which impoundment decisions must be made."[71] Instead, courts employed a more *Opperman*-like test. The courts concluded that when impoundments were employed in light of community caretaking "hazard[s]," they were sufficiently reasonable to pass muster under the Fourth Amendment.[72] With that, the courts released the police from any need to consider whether "less intrusive alternative[s]" to impoundment existed.[73]

The circuits employing reasonableness analysis have upheld impoundments under a variety of circumstances. The Second Circuit upheld an officer's inventory search even though the officer subsequently permitted a third party to remove the vehicle.[74] The court held that even though the vehicle was not impounded, the officer, having originally intended to impound the car, "properly acted to safeguard the car and eliminate the possibility of a later claim of lost property."[75]

The Third Circuit affirmed the lower court's holding that the officer's decision to impound was reasonable because the defendant had "a suspended driver's license, no valid insurance, and no registration for the car."[76] In accordance with the police department's policy, those violations of vehicle code constituted valid impoundment.[77] The Fourth Circuit found impoundment to be "reasonable as a sound police practice to protect both the owner from loss and the city from damage claims."[78]

Expounding on its reasonableness analysis, the Fourth Circuit emphasized that "[t]he question . . . is not whether there was a need for the police to impound [the] vehicle but, rather,

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reasonableness standard); United States v. Moraga, 76 F. App'x 223, 227-28 (10th Cir. 2003) (upholding the district court's ruling that impoundment is "justified [under officer] caretaking responsibilities" without an inquiry into the existence of a standardized procedure).

[71] *Coccia*, 446 F.3d at 239 (citing *Rodriguez-Morales*, 929 F.2d at 787).

[72] *Id.* at 239-40.

[73] Naumann, *supra* note 8, at 336.

[74] United States v. Henderson, 439 F. App'x 56, 59 (2d Cir. 2011).

[75] *Id.*

[76] United States v. Valentine, 451 F. App'x 87, 88 (3d Cir. 2011).

[77] *Id.* at 89.

[78] Cabbler v. Superintendent, Va. State Penitentiary, 528 F.2d 1142, 1147 (4th Cir. 1975).

whether the . . . officer's decision to impound was reasonable under the circumstances."[79]

The Fifth Circuit held that an impoundment was reasonable because "leaving the vehicle locked and parked presented a risk of theft or vandalism."[80] The Tenth Circuit deemed impoundments to be reasonable when the driver of the car could not lawfully operate the vehicle and there was no third person who could immediately take custody of the car[81] and when police "were concerned about vandalism" and "the owner was clearly unable to drive."[82]

2. The Standard Operating Procedure Test

When ruling on the validity of an impoundment, the D.C., Sixth, Seventh, Eighth, and Eleventh Circuits employ the *Bertine* standard operating procedure requirement. These circuits uphold impoundments when an officer complies with standard operating procedures[83] that provide "the circumstances in which a car may be impounded."[84] The D.C. Circuit declined to accept the

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[79] United States v. Brown, 787 F.2d 929, 932 (4th Cir. 1986).

[80] United States v. McKinnon, 681 F.3d 203, 208 (5th Cir. 2012) (agreeing with the government).

[81] United States v. Haro-Salcedo, 107 F.3d 769, 771 (10th Cir. 1997).

[82] United States v. Johnson, 734 F.2d 503, 505 (10th Cir. 1984).

[83] Regarding the question of what counts as standardized procedures, many circuits have explicitly stated that in addition to written protocols, officer testimony is sufficient. For example, the Eighth Circuit held that "[t]estimony can be sufficient to establish police [impoundment] procedures . . . . So long as the officer's residual judgment is exercised based on legitimate concerns related to the purposes of an impoundment, his decision to impound a particular vehicle does not run afoul of the Constitution." United States v. Arrocha, 713 F.3d 1159, 1163 (8th Cir. 2013) (quoting United States v. Petty, 367 F.3d 1009, 1012 (8th Cir. 2004)). The officer "testified that the police had an informal agreement with [the business in whose parking lot the vehicle was parked] that vehicles abandoned in its . . . parking lot because of an arrest would be towed." *Id.* The court found this to be a sufficient demonstration of "standardized police procedure." *Id.* Similarly, the Eleventh Circuit held that the "government must . . . demonstrate that 'an established routine' . . . exists authorizing impoundment." United States v. Foskey, 455 F. App'x 884, 890 (11th Cir. 2012). Thus, "the government need not show that a written policy, city ordinance, or state law supports the impoundment." *Id.*

[84] United States v. Duguay, 93 F.3d 346, 351 (7th Cir. 1996). The court pointed out that "[t]he lack of a written policy" is not damning to the decision to impound because "a well-honed department routine may be sufficient." *Id.* However, the court found that the testimony of the officers in this case did not demonstrate that this police department "employ[ed] a standardized impoundment procedure." *Id.*

argument that *Bertine* should be interpreted to mean "impoundment is reasonable so long as it 'serves the government's "community caretaking" interests.'"[85] Instead, the court read *Bertine* to require compliance with existing standardized impoundment procedures.[86] Similarly, the Sixth Circuit announced that *Bertine* meant that impoundments are permissible "so long [as the decision is made] according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity."[87]

Some of these circuits supplement their standard operating procedure analysis with an inquiry into the reasonableness of the impoundment.[88] However, none of these circuits demand reasonableness as a pre-requisite for a valid impoundment decision. Perhaps the circuits choose not to require a reasonableness test because they find that *Bertine*'s standard operating procedure test is generally sufficient. Or perhaps they choose not to explicitly require reasonableness to avoid direct conflict with the absence of such analysis in *Bertine*. Either way, this is another demonstration of the confusion resulting from the *Bertine* decision.

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[85] United States v. Proctor, 489 F.3d 1348, 1354 (D.C. Cir. 2007). Officers pulled Proctor over for failing to stop at a red light. *Id.* at 1350. After detecting signs of intoxication, the officer arrested Proctor. *Id.* The police inventoried the car before having it impounded in a private lot. *Id.* at 1350-51. Proctor argued that the standard operating procedure specifically stated that "[i]f a vehicle classified as prisoner's property is disposed of so that it is not taken to a police facility, it shall not be inventoried in any way." *Id.* at 1351 (citing D.C. METRO. POLICE DEP'T, GENERAL ORDER 602.1: AUTOMOBILE SEARCHES AND INVENTORIES (1972), *available at* https://go.mpdconline.com/GO/GO_602_01.pdf).

[86] *Id.* at 1354.

[87] United States v. Richards, 56 F. App'x 667, 670 (6th Cir. 2003) (quoting Colorado v. Bertine, 479 U.S. 367, 375 (1987)). In this case, the officer failed to follow standardized procedures because the car "was not rendered unattended as a result of . . . police action." *Id.* at 670.

[88] *See, e.g.*, Collins v. Nagle, 892 F.2d 489, 494 (6th Cir. 1989) ("[The Fourth Amendment] inquiry does not require a determination of whether there was in fact a need . . . to impound the truck; instead we are required to determine whether the . . . decision to impound was reasonable under the circumstances."); United States v. Griffin, 729 F.2d 475, 480 (7th Cir. 1984) (agreeing with the district court's finding that it was reasonable to tow a vehicle that "would have been otherwise left unattended, possibly for an extended period, in close proximity to the traveled portion of a busy, high speed roadway").

3. Dual Testing: Reasonableness and Standard Operating Procedure

The Ninth Circuit is currently the only circuit that explicitly requires that decisions to impound be both reasonable *and* in compliance with standard operating procedures.[89] In *United States v. Cervantes*, the court stated that mere compliance with standard operating procedure "is insufficient to justify an impoundment under the community caretaking exception."[90] Elaborating on sufficient justifications, the court said that "the decision to impound" must undergo a balancing test of the community caretaking functions and privacy interests at stake.[91]

B. Circuit Rulings on Inventory Searches

Based on the guidelines provided in *Bertine*, most circuits have permitted blanket acceptance to inventory searches. The following examples illustrate the circuits' deference to police discretion, reliance on standard procedures, and acceptance of less-than-full compliance to standard procedures.

The Sixth Circuit upheld a search despite the fact that the standard policy left "it to the towing officer's discretion to either remove the property, or document it on the inventory supplement form."[92] The Fourth Circuit ruled that an officer is "not required to follow the . . . procedures word-for-word."[93] Similarly, the Seventh

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[89] Miranda v. City of Cornelius, 429 F.3d 858, 864 (9th Cir. 2005) ("[T]he decision to impound pursuant to the authority of a city ordinance and state statute does not, in and of itself, determine the reasonableness of the seizure under the Fourth Amendment . . . .").

[90] 703 F.3d 1135, 1142 (9th Cir. 2012).

[91] *Id.* (citing *City of Cornelius*, 429 F.3d at 865). The court said that the officers "must consider the location of the vehicle, and whether the vehicle was actually 'impeding traffic or threatening public safety and convenience.'" *Id.* (quoting South Dakota v. Opperman, 428 U.S. 364, 369 (1976)).

[92] United States v. Hughes, 420 F. App'x 533, 540 (6th Cir. 2011). The court accepted the government interpretation that the policy "authorize[d], rather than mandate[d], that certain valuables be removed from the vehicle." *Id.* To support this interpretation, the court said the policy was "consistent with the stated purpose" of the search, "which is 'to protect citizens and the division from false claims.'" *Id.*

[93] United States v. Battle, 370 F. App'x 426, 429-30 (4th Cir. 2010). The procedure stated that "[p]rior to towing, the officer shall ask the owner or operator of the vehicle to remove, if possible, all valuables from the vehicle prior to impoundment." *Id.* at 429. But, the court disregarded this mandatory directive because the officer's inventory search was administered with good faith. *Id.* at 430.

Circuit held that although the officer did not fully comply with inventory search policy, "failure to do so does not undermine the proposition that the police would inevitably have found the gun through a lawful inventory search."[94]

C. Circuit Analysis of Impoundments with Respect to Inventory Searches

1. Conflating Analysis of Impoundments and Inventory Searches

In *Bertine*, the Court did not separately analyze the impoundment and inventory search. In fact, it appears as if the Court failed to recognize the distinction between the impoundment–a seizure of property–from the search of that property.

As a result, some circuits, following in *Bertine*'s footsteps, continue to combine the analysis of these two analytically distinct practices. Instead of first testing the reasonableness of the impoundment and following up with a separate examination of the inventory search, the Eighth Circuit said that under the "totality of the circumstances" the impoundment and inventory search were proper without distinguishing the legality of the seizure of the car from the search of the car.[95] Similarly, the Fifth Circuit overlooked the difference between the impoundment and inventory when it ruled that, because the impoundment was "executed in accordance with standard procedures," the "officer's 'ulterior motive to search' [did] not invalidate [the] . . . impoundment."[96]

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[94] United States v. Cartwright, 630 F.3d 610, 616 (7th Cir. 2010). When the officer testified that he did not list all inventory simply "because he found nothing of importance," the court did not rule that this non-compliance with the inventory search procedure made the search invalid. *Id.* at 612, 616. *But see* United States v. Taylor, 636 F.3d 461, 464-65 (8th Cir. 2011) (ruling that the inventory search failed to comply with the standard inventory search procedure because the officer failed to write down "general descriptions of the commonplace tools" or "take any other steps in an attempt to create a detailed inventory").

[95] United States v. Arrocha, 713 F.3d 1159, 1164 (8th Cir. 2013) (quoting United States v. Frasher, 632 F.3d 450, 454 (8th Cir. 2011)).

[96] United States v. Rodriguez, 514 F. App'x 445, 446 (5th Cir. 2013) (citing United States v. McKinnon, 681 F.3d 203, 210 (5th Cir. 2012)); *see also* People v. Padilla, 992

2. Separating Analysis of Impoundments and Inventory Searches

Despite the absence of separate analysis in *Bertine*, some courts clearly understand that impoundments as seizures have to be analyzed separately as a predicate to the inventory search.[97] The separate analysis employed by these circuits provides a template for developing a comprehensive framework to properly analyze impoundments and inventory searches. The test this Comment proposes utilizes such a framework to ensure that inventory searches follow only valid impoundments.

III. IN LIGHT OF *GANT*, THE SUPREME COURT SHOULD RE-EXAMINE *BERTINE*

A. The Promise of Gant*: Protecting Motorists' Privacy Rights*

Gant's decision to permit searches only when the arrestee is within reach of the area to be searched fulfilled the Fourth Amendment guarantee to be free from unreasonable searches. This decision harkened back to the *Chimel* decision, which allowed warrantless residential searches only when justified by concerns for the officer's safety or evidence preservation. However, unlike the *Gant* Court, the *Chimel* Court did not limit these searches to unsecured arrestees.[98]

This heightened restriction of searches incident to arrest in the vehicle context signifies that the *Gant* Court stepped away from the vehicle-residence distinction.[99] This move suggests that

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N.E.2d 414, 416 (N.Y. 2013) (a state case with a holding similar to the Fifth Circuit's holding).

[97] The Seventh Circuit emphasized that in order to "meet the strictures of the Fourth Amendment . . . the decision to impound . . . [must be] properly analyzed as distinct from the decision to inventory." United States v. Duguay, 93 F.3d 346, 351 (7th Cir. 1996) (internal citation omitted).

[98] Angad Singh, Comment, *Stepping Out of the Vehicle: The Potential of* Arizona v. Gant *to End Automatic Searches Incident to Arrest Beyond the Vehicular Context*, 59 AM. U. L. REV. 1759, 1776 (2010).

[99] This shift from the vehicle-residence distinction followed an earlier Supreme Court decision that limited the scope of post-arrest searches in the home to "the area 'within [the] immediate control'" of the arrestee. Chimel v. California, 395 U.S. 752, 763 (1969). *Chimel* discredited the nearly two decade long ruling in *United States v. Rabinowitz* that permitted law enforcement to search an arrestee's entire residence,

motorists' expectation of privacy should be no less sacred than the privacy expectation in residential settings. Futhermore, it demonstrates that the Court recognized that the motorists needed more protection of their privacy rights than what had, until then, been provided. In other words, courts need to reel in the application of the warrantless search exceptions that continue to diminish motorists' privacy rights to follow through with *Gant*'s overarching message.

Beyond *Gant*'s butressing of motorists' privacy rights, courts should note that the Fourth Amendment did not omit the "right of the people to be secure in their" vehicles "against unreasonable searches and seizures" because the drafters thought there were no privacy rights in vehicles.[100] Rather, this omission hinged on the rarity of vehicles; in the late 1700s vehicles were not as ubiquitous and ingrained in the fabric of society as they are today.

Although *Gant* may have signified a shift in the Court's belief in the importance of motorists' privacy, application of the *Gant* rule has been too limited in scope to sufficiently protect motorists' privacy.

B. The Limits of Gant*'s Promise: Police Discretion Circumvents Privacy Protection*

"The best laid plans of mice and men often go awry."[101]

This Comment will demonstrate that courts, while determining whether to admit evidence seized from vehicles, are missing a major step in their transition from one recently quashed warrantless search exception to the next available exception. This gap in analysis is not a failure of *Gant*; *Gant* adequately plugged a major hole in the protective shield around motorist privacy rights. Instead, this gap in analysis originates from the lack of guidance in *Bertine*. Had *Bertine* required a more thorough examination of both impoundment and inventory search practices, these

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without a warrant, when the person was arrested at his or her residence. 339 U.S. 56, 61-63 (1950).

[100] U.S. CONST. amend. IV.

[101] ROBERT BURNS, *To a Mouse*, *in* THE POEMS OF ROBERT BURNS 35 (DeLancey Ferguson ed., 1965) (paraphrased).

warrantless search exceptions would not be as presumptively applicable as suggested by many lower court holdings.

Although *Gant* successfully instituted protections for the privacy rights of motorists, the ruling was not broad enough to provide all the protections necessary. *Gant* foreshadowed the current state of vehicle search exceptions by pointing out that police could still admit otherwise inadmissible evidence at trial by "show[ing] that another exception to the warrant requirement applie[d]."[102] Therein lies the problem. Although the *Gant* decision intended to rein in unwarranted police searches of vehicles, other exceptions to the warrant requirement, like vehicle impoundment and inventory search, have allowed police to circumvent *Gant*'s search parameters.[103]

The majority of circuits completely bypass analysis of the validity of warrantless vehicle searches under *Gant*. Those that analyze the search under *Gant* demonstrate that an inevitable post-impoundment inventory search circumvents the *Gant* restrictions. For example, in *United States v. Hairston*, the defendant contended that the search of his vehicle incident to arrest was unconstitutional because he was already secured away from the vehicle before the search took place.[104] The following quotation demonstrates how the Fourth Circuit allowed police to circumvent *Gant*'s analysis by recognizing that a post-impoundment inventory search could have been (although was not) implemented:

> However, we need not reach the *Gant* issue as the evidence obtained from the vehicle search is admissible under the inevitable discovery doctrine. . . . In this case, if the officer had not conducted a search incident to arrest, an inventory search of the car would have been conducted, wherein the evidence in question would have been discovered. Because the

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[102] Arizona v. Gant, 556 U.S. 332, 351 (2009).

[103] An abundance of post-*Gant* legal literature demonstrates that the application of impoundment and inventory searches as a way to circumvent the *Gant* holding was inevitable. *See generally* Myron Moskovitz, *The Road to Reason:* Arizona v. Gant *and the Search Incident to Arrest Doctrine*, 79 MISS. L.J. 181 (2009); Justin Casson, Comment, Arizona v. Gant*: Just Another Speed Bump?*, 45 GONZ. L. REV. 797 (2010); Seth W. Stoughton, Note, *Modern Police Practices:* Arizona v. Gant*'s Illusory Restriction of Vehicle Searches Incident to Arrest*, 97 VA. L. REV. 1727 (2011).

[104] 409 F. App'x 668, 670 (4th Cir. 2011).

> items seized would have been inevitably discovered, the district court was correct in denying Hairston's motion to suppress.[105]

In a similar scenario, the Ninth Circuit stated that "in light of *Gant*" the search incident to arrest could not be upheld in the absence of officer safety or evidentiary justifications.[106] However, the court agreed with the district court that "an alternative basis existed to uphold the validity of the search."[107] Since "no one was available to remove the vehicle from the freeway . . . impoundment would [have] follow[ed]" the arrest.[108] Therefore, "the evidence would inevitably have been discovered as police inventoried the vehicle upon impound."[109] To convince itself of the propriety of its holding the court concluded that "the deterrent rationale for the exclusionary rule is not applicable where the evidence would have ultimately been discovered during a police inventory of the contents of [the defendant's] car."[110]

The Seventh Circuit followed suit, stating that even though the new *Gant* parameters made the officer's search incident to arrest invalid, the *Gant* decision also "emphasized . . . [the validity of] other exceptions to the warrant requirement for vehicle searches," including inventory searches.[111] These circuit court examples highlight another problematic exception to the warrant requirement, the inevitable discovery doctrine. Although peripheral to this Comment, this problem accentuates how lower courts use *Bertine*'s impoundment and inventory search interpretations to effortlessly circumvent the unlawfulness of some vehicle searches. This Comment's proposed test will ensure the validity of impoundments and inventory searches and will effectively solve this problem.

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105 *Id.*

106 United States v. Ruckes, 586 F.3d 713, 718 (9th Cir. 2009).

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.* at 719.

111 United States v. Martin, 360 F. App'x 686, 689 (7th Cir. 2010); *see also* United States v. Cartwright, 630 F.3d 610, 613 (7th Cir. 2010) (agreeing with the government "that *Gant* made [the] search incident to arrest improper but . . . the police would have inevitably discovered the gun pursuant to the inventory search").

C. The Failures of Bertine *Make It Ripe for Reconsideration*

1. *Bertine* Fails to Protect Privacy

The *Bertine* decision has been criticized for "fail[ing] to recognize a motorist's expectation of privacy."[112] By choosing to base the validity of inventory searches on compliance with standardized police procedure, instead of applying the traditional balancing test, the Court has essentially overlooked the text of the Fourth Amendment.

The Fourth Amendment specifically protects "against unreasonable searches and seizures."[113] This language indicates that the validity of any search or seizure hinges on the reasonableness of that action. Therefore, when confronted with alleged violations of the Fourth Amendment through impoundments and inventory searches, the Court should first determine if those police actions were reasonable under the circumstances.

Although the *Opperman* Court provided guidelines for reasonableness–balancing the government's interests of protecting police and the public with the motorists' interests of privacy[114]–the *Bertine* Court failed to consider this constitutional factor. By skipping over the reasonableness analysis, the Court essentially presumed that the police procedure was reasonable. The Court should use *Gant*'s revision of *Belton* as a template to prioritize motorists' privacy rights over deference to police discretion.

2. *Bertine* Fails to Conform to Stare Decisis

In the absence of clear and proper guidelines, states and circuits have carried the burden of navigating *Bertine* to provide adequate protection of motorists' privacy–some being more successful than others.

Problems stemming from *Bertine* have been abundant. First, having established an incorrect precedent that impoundments and

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[112] Brennan, *supra* note 8, at 366.

[113] U.S. CONST. amend. IV.

[114] *See generally* South Dakota v. Opperman, 428 U.S. 364 (1976).

inventory searches do not require separate analysis,[115] some courts conflate their analysis of these analytically distinct actions. Second, by not clearly mandating whether impoundments *must* be conducted pursuant to standard criteria, lower courts had to decide for themselves whether standard impoundment procedures were optional or mandatory.

These difficulties show that *Bertine*, like *Belton*'s bright-line search rule, is ripe for reconsideration. The *Bertine* holding has produced widely varying interpretations and unjustifiable police actions, resulting in a myriad of problems.

First, the circuit courts' varying interpretations create unreliable outcomes. A defendant's motion to suppress evidence obtained during a post-impoundment inventory search may be granted or dismissed based on which court has jurisdiction.

Second, as Justice Marshall forewarned,[116] the rule does not limit impoundments only to circumstances triggering police community caretaking functions. Nor does it limit inventory searches only to the extent that police may be concerned about liability for the contents of the vehicle. Without proper justifications underlying the use of impoundments and inventory searches, the rule is unworkable. If impoundments and inventory searches can be justified for reasons beyond their necessity, nothing keeps the police from using impoundment and inventory searches as investigatory tools.

Third, the Court should not succumb to the argument, similar to that presented by *Gant*'s dissenters, that because police have relied on the *Bertine* rule for more than twenty-five years, the rule cannot be changed. Instead, the Court should be more concerned about protecting the Fourth Amendment, which has endured for over two centuries, and in restoring the integrity of the judicial institution, which has for over a quarter of a century permitted motorists' privacy rights to be violated through the abuse of vehicular inventory searches and impoundments. Finally,

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[115] Proper application of the balancing test would have determined that "[t]he government's interest in protecting a motorist's property is not compelling enough to require an extensive inventory search" because (1) if present, an owner may be willing to leave the vehicle, and the "Court should not assume that the motorist would want police to do more," and (2) police are "sufficiently protected" against false claims "by the law of bailments." Brennan, *supra* note 8, at 372.

[116] *See supra* notes 30-44 and accompanying text.

the Court should consider that ultimately *Bertine* overruled the more workable precedent from *Opperman*, which applied the traditional reasonableness test to determine the validity of impoundments and inventory searches by weighing privacy interests with government interests.[117]

Under the doctrine of stare decisis, these issues of unreliability and "unworkability" provide sufficient proof that the *Bertine* decision needs a thorough revision.

D. New Approach Building on Justice Marshall's Dissent and Ninth Circuit Dual Testing

Only a few states and circuits have deciphered *Bertine* and formed a viable impoundment and inventory search test. As a result, motorists have been vulnerable to unconstitutional impoundments and inventory searches because the *Bertine* holding allows police to "implement a broad version of [these] doctrine[s] that . . . infringe upon Fourth Amendment rights."[118]

To protect motorists' privacy, the Court should apply the two-part, two-pronged test set out below. This test employs *Gant*'s efforts to re-prioritize motorists' privacy interests over deference to police action and builds on Justice Marshall's *Bertine* dissent and the dual-testing analysis presented by the Ninth Circuit.

Unlike the *Bertine* holding which allowed police to conduct inventory searches as "automatic consequence[s] of . . . valid impoundment[s],"[119] the test laid out in this Comment recognizes that impoundments and inventory searches are two distinct actions that require "analytically distinct" review.[120] Ergo, the test divides its analysis into two parts; Part I analyzes the impoundment while Part II analyzes the inventory search. Both parts are further divided into two-pronged inquiries. Under this test, if the Court deems the impoundment to be invalid, the inventory search will be presumptively invalid.

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[117] *See supra* note 13 and accompanying text.

[118] Naumann, *supra* note 8, at 327.

[119] *Id.* at 338.

[120] United States v. Sanchez, 612 F.3d 1, 4 (1st Cir. 2010) (citing United States v. Duguay, 93 F.3d 346, 351 (7th Cir. 1996)). Failing to separately analyze the impoundment prior to the inventory search would be like admitting evidence from a post-arrest search of one's person when the arrest itself was unconstitutional.

1. A Two-Pronged Test for Impoundments

The first prong of the first part of the test requires that the Court first review the decision to impound by applying a traditional Fourth Amendment "balancing test." By re-introducing the reasonableness inquiry, omitted in *Bertine*, the Court can ensure that impounds will be upheld "[o]nly where the governmental interests outweigh the individual's privacy interest."[121] If the Court finds the impoundment to be unreasonable, the analysis can stop, and the motion to suppress the evidence should be permitted.

To determine whether governmental interests outweigh privacy interests, the Court should ask whether less intrusive alternatives to impoundment are available. The argument the *Lafayette* Court used to quash a requirement of less intrusive means is not applicable to impoundments. In *Lafayette*, the Court upheld station-house inventory searches because these searches were the most practical way to protect guards and prisoners.[122] But with impoundments, there are no legitimate concerns that could not be addressed by less intrusive alternatives.

Less intrusive alternatives should provide motorists with the option "to make alternative arrangements where possible."[123] Such alternatives should include permitting a properly licensed passenger to drive the car away, permitting the motorist or passenger to re-locate the car to a nearby spot to eliminate the traffic hazard the vehicle may have presented, or simply permitting the motorist to opt to leave the car in its current location. In addition, the motorist could also consent to the impoundment of their vehicle.

Each of these alternatives keeps community caretaking functions as well as police liability concerns in mind. For example, if the motorist opts to re-locate the car to a nearby spot or leave the car in its current location, he should relieve the police from liability by signing a waiver in the event that his vehicle is vandalized or subject to theft.[124] Not only does this eliminate the

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[121] Brennan, *supra* note 8, at 378.

[122] *See generally* Illinois v. Lafayette, 462 U.S. 640 (1983).

[123] Brennan, *supra* note 8, at 378.

[124] *Id.* at 379.

concern for police liability–one of the oft-cited justifications for allowing impoundments–it also reduces costs to the police department, city, and tax payers. With fewer impounded vehicles, police departments will no longer need to maintain large impoundment lots or pay private lots to house the vehicles.

If the Court determines that no less intrusive alternative to impoundment was available or if the motorist consented to the impoundment, the Court should move on to the second prong of Part I of the impoundment analysis. This prong ensures that the police sufficiently complied with a standard procedure. The government must demonstrate that a procedure existed and that the officer complied with that procedure. This demonstration can include providing documentation from the police department or testimony of a police officer describing the established procedure and how it was carried out.

If, after analyzing the impoundment, the Court determines that the impoundment was reasonable and conducted pursuant to standard procedure, then the Court will move on to Part II of the test to analyze the inventory search.

2. A Two-Pronged Test for Inventory Searches

Before jumping into Part II of the inventory search analysis, the Supreme Court should reconsider the automatic triggering of inventory searches following an impoundment. Similar to the way *Belton* led law enforcement to automatically search the entire passenger compartment of a vehicle incident to arrest, *Bertine* has led police to automatically conduct inventory searches following impoundments. But, this logic is flawed. *Bertine* relied on the notion that the inventory search (1) protected the motorists' property, (2) protected the police from claims against lost or stolen items, and (3) protected police against danger.[125]

Each of these three concerns can be approached differently. First, as Justice Marshall suggested, the Court should not presume that the motorist wants the police to protect his property if it can only be done through an intrusion of his privacy.[126] If an owner is available to make alternative arrangements for her

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

[126] *Id.* at 385 (Marshall, J., dissenting).

belongings, police should determine whether she even wants the police to "'safeguard' [her] property."[127]

Second, regarding concerns for police liability, police departments could implement "consent or waiver" protocols similar to those mentioned above for impoundments.[128] For example, if the motorist cannot make alternative arrangements for their vehicle or if the motorist consents to the impoundment, the police could advise the motorist they have a right to opt out of an inventory search. The officer could ask: Would you like to have the property in your vehicle inventoried prior to impoundment? If not, the department asks that you relieve police from liability, by signing this waiver, for any damage to or loss of property during the impoundment. This would be a secondary level of protection for those police departments who do not maintain their own impoundment lots. In those situations, once the police turn the car over to the private impoundment lot, that business, and not the police, would be responsible for the property.

Third, once a vehicle is impounded, the police have full custody of the vehicle. This means that the motorist will no longer have access to the vehicle or any dangerous item that may be in the vehicle. Thus, the items in the vehicle can no longer present a danger.[129] This comports with the justification used in *Gant* to eliminate warrantless searches in vehicles once an arrestee was

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[127] *Id.*

[128] A Washington court announced in dicta the notion that inventory searches require consent. State v. Williams, 689 P.2d 1065, 1071 (Wash. 1984) (stating "it is doubtful that the police could have conducted a routine inventory search without asking [the defendant] if he wanted one done"). Later, the Washington Supreme Court acknowledged, in dicta, that inventory searches should be consent-based and car owners should be permitted to deny consent. State v. White, 958 P.2d 982, 987 n.11 (Wash. 1998).

[129] *See supra* note 41 and accompanying text. This harkens back to Justice Marshall's argument in his *Bertine* dissent in which he said that once vehicles are impounded, items in the car can no longer pose a threat to officers. *Bertine*, 479 U.S. at 383-84 (Marshall, J., dissenting). A counter-argument may be made if a bomb with a timing device is located in the impounded car because, in that instance, completing an inventory search would actually present a public safety exception. However, this argument is weak for two main reasons. First, if there is a bomb in a car, it is likely that the police stopped the car under circumstances other than a minor traffic violation and that the police would have probable cause to search the car. Second, the probability that the car contains a bomb is minimal, and such a minimal risk should not outweigh the privacy interests of a motorist.

secured and not in reaching distance of the vehicle. As in *Terry v. Ohio*, "[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."[130]

Now that the inventory search is no longer viewed as an "automatic consequence" to impoundment, the Court will need to implement Part II of this Comment's analysis to determine if the inventory search was constitutional under the Fourth Amendment.

Under the first prong of Part II of the test, the Court should ensure that a standardized procedure existed and was used to determine whether an inventory search should be conducted. To reduce the need for inventory searches and curtail allegations of invalid inventory searches, police departments should incorporate the "consent or waiver" option into their inventory search procedure.[131] Similar to the *Bertine* holding, police officers could demonstrate the existence of a standardized procedure either with a written document, or through an officer's testimony about an established routine.

Once the Court has confirmed the existence of a standardized procedure–complete with a "consent or waiver" option–then the Court should require that the government prove the inventory search complied fully with the procedure that was "designed to properly catalogue the contents" of the vehicle.[132] If, for example, the officer failed to list all the items on the inventory form, the Court will conduct an inquiry into why this failure occurred and whether this demonstrates there was evidence of an investigative motive for the search.

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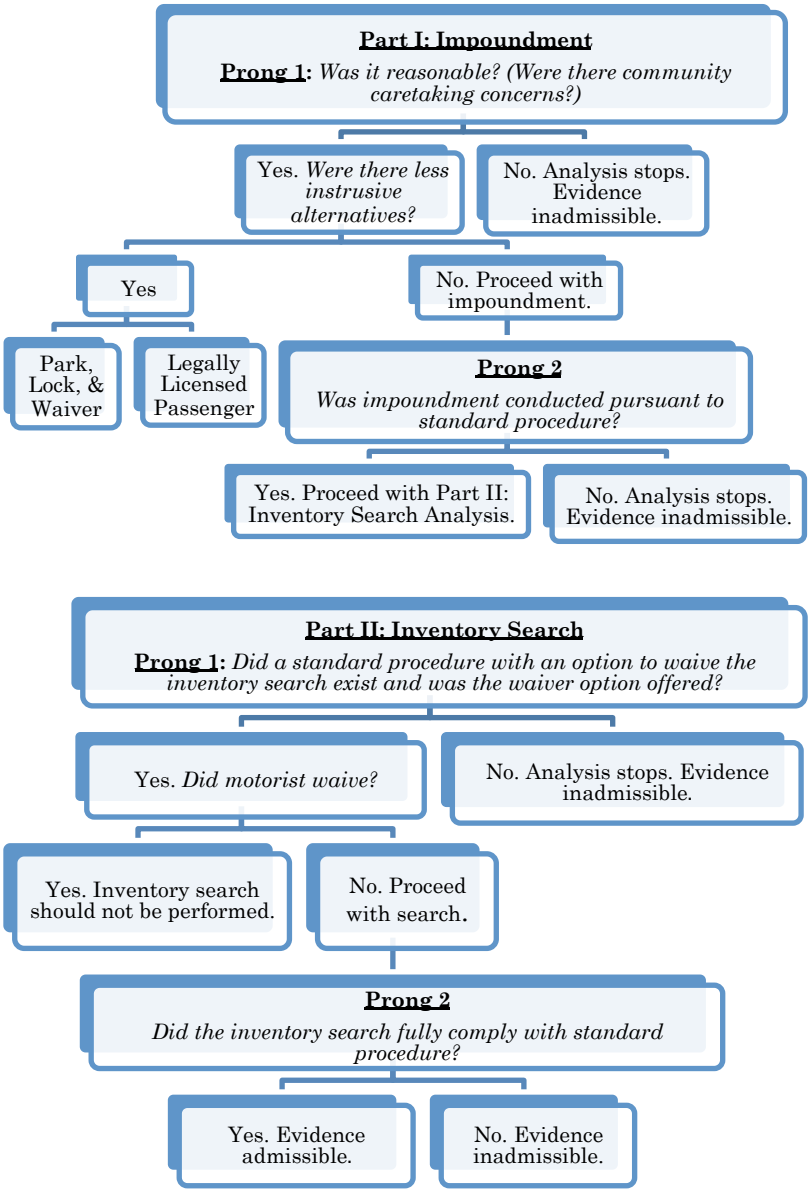
[130] Chimel v. California, 395 U.S. 752, 762 (1969) (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968)).

[131] Consent implies that the motorist assumes the risk of the officer finding incriminating evidence. Therefore, any motion to suppress evidence after a consent-based inventory search will be denied.

[132] People v. Padilla, 992 N.E.2d 414, 416 (N.Y. 2013) (quoting People v. Johnson, 803 N.E.2d 385, 387 (N.Y. 2003)).

3. A Test Flowchart



E. Illustrations of the New Approach

1. The Park, Lock, & Waiver Alternative

In *United States v. Cartwright*, a police officer pulled Cartwright over because his rear license plate was not illuminated.[133] Cartwright, accompanied by a passenger and her small child, stopped his vehicle in a "grocery store parking lot . . . between two rows of parking spaces, . . . not in a designated spot."[134] Having "failed to produce a . . . license" and after providing a false name, the officer arrested Cartwright.[135] After removing the passenger and her child from the vehicle, the police searched the back seat and found a gun.[136] Later, the police conducted an inventory search in preparation for impoundment and only catalogued keys on the inventory listing because, as the officer testified, "he found nothing of importance."[137]

Cartwright filed a motion to suppress.[138] At trial, the passenger, who did not have a license, testified that she asked the police "to allow her to have someone else" remove the vehicle because she would be unable to pay to "retrieve the car from impoundment."[139] The police impounded the car anyway, and the court, supporting the officer's impoundment and inventory search, denied Cartwright's motion to dismiss.[140]

If the court had applied the test laid out in this Comment, it would have come to a different conclusion. First, the impoundment would be deemed unreasonable. The car was in a parking lot, as opposed to the roadside. Thus, the car did not present a traffic hazard and could not be impounded under the guise of a community caretaking function.

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133 630 F.3d 610, 612 (7th Cir. 2010).

134 *Id.*

135 *Id.*

136 *Id.* This encounter was pre-*Gant*, so the search of the vehicle incident to arrest that revealed the gun was technically permissible at the time. *Id.* at 613. However, the district court applied the *Gant* rule retro-actively to find the search improper. *Id.* Nevertheless, the court determined that pursuant to the impoundment and inventory search, the gun would have inevitably been discovered. *Id.*

137 *Id.* at 612.

138 *Id.* at 613.

139 *Id.*

140 *Id.* at 612-13.

Second, standard procedure should require that the officers present other viable options to the motorist instead of automatically impounding the vehicle. The facts of this case show that the defendant and passenger were willing to do anything to avoid impoundment because they would not be able to afford the impound recovery fee. Even though the passenger could not legally drive the car away, the police could have simply re-aligned the car in a parking spot and allowed the motorist to waive liability with respect to anything that might have happened to the car while it remained in the parking lot.[141]

If the motorist was unwilling to waive liability or circumstances had, in fact, made the impoundment valid, the police should not have automatically conducted an inventory search. Instead, pursuant to proper procedure, the officer should have presented the motorists with an option to waive the search by signing a waiver relieving police from liability while the car and its contents remained in impound.

Had the motorist decided not to waive liability, this inventory search would have still failed the test because the officer failed to *fully* comply with the search procedure by cataloguing only the keys and failing to catalogue the other items in the car.

2. The Legally Licensed Passenger Alternative

In *State v. Arellano*, a recent state appellate court case, the defendant was stopped for speeding, and the officer discovered that he did not have a valid driver's license.[142] Even though his girlfriend, riding as passenger, did have a valid driver's license, the police would not allow her to drive; instead the police impounded the car.[143] During the post-impoundment inventory search, the officer discovered narcotics.[144]

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[141] However, permitting the police to get into the vehicle to re-align the car will make the motorist vulnerable to the plain view exception. For example, the officer gets in the car to move it, pulls down the visor because the sun is in his eyes, and the motorist's bag of marijuana falls into the officer's lap. The bag of marijuana would be admissible at trial under the plain view exception, and the officer could also conduct a full search of the car because he would then have reason to believe there may be other drugs or paraphernalia in the vehicle.

[142] No. 1CA-CR12-0440, 2013 WL 3893284, at *1 (Ariz. Ct. App. July 25, 2013).

[143] *Id.*

[144] *Id.*

At trial, the defendant argued the police had no valid justification for impounding the car because it was not necessary, as there was a person present who could have legally driven.[145] The court dismissed the motion to suppress because Arizona state law permits officers to turn over driving privileges to a passenger *only* when that passenger is the driver's spouse.[146]

Application of this Comment's test would have yielded a different outcome. Although the impoundment complied with state law, the law itself would not pass the reasonability test. The law–as it stands–demonstrates a balancing of governmental and privacy interests. By permitting spouse-passengers to take the wheel, the vehicle will no longer pose a traffic hazard nor will there be concern for theft or vandalism resulting from leaving the vehicle unattended. However, the law's distinction between spouse-passengers and other passengers who would legally be able to take the wheel is arbitrary, and thus, not reasonable.[147]

The facts of both *Cartwright* and *Arellano* demonstrate why impoundments should be a last resort rather than something to be checked off a list of permissible police actions. In either case, had these motorists been presented with alternatives to impoundment, it seems that both would have picked completely reasonable options that should have been available to them. In *Cartwright*, simply realigning the car in a parking spot would have sufficed. And, in *Arellano*, permitting the girlfriend to drive the car would have eliminated any traffic hazard the car may have presented on the side of the road.

3. The Option to Decline an Inventory Search

Considering the facts of another case, *People v. Padilla*, will demonstrate a more thorough understanding of the application of this Comment's new test when presented with an intoxicated driver.[148] In this case, Padilla was driving under the influence,

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[145] *Id.*

[146] *Id.* (citing ARIZ. REV. STAT. ANN. § 28-3511(D) (2014)).

[147] Take, for example, states who deny same-sex couples the right to marry. Using marital status to determine whether a passenger may move a vehicle threatened with impoundment would arbitrarily deny same-sex partners the right or option to move a vehicle.

[148] 992 N.E.2d 414, 415 (N.Y. 2013).

and his car was impounded.[149] There were no passengers who could have driven the car away, and police protocol mandated that vehicles be impounded after taking DUI offenders into custody.[150] The concern in this situation was that if the driver opted out of an impoundment or inventory search, he may later call into question the validity of the waiver of police liability. The driver could allege that he was too incapacitated to knowingly waive those rights.

At first glance, an intoxicated individual's inability to comprehend the alternatives to impoundment presents a challenge to the proposed test. However, this issue has been thoroughly vetted through challenges made against *Miranda* waivers made by intoxicated or allegedly intoxicated individuals. Courts agree that intoxication is a factor used to judge the validity of a waiver but have often found valid waivers even when the suspect was intoxicated.[151]

Therefore, under this precedent, there is no justification that warrants upholding police protocols requiring vehicles of intoxicated individuals be impounded. Since courts would find even intoxicated waivers permissible, governmental interests would still fail to outweigh the privacy interests to permit impoundment and inventory search.[152]

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[149] *Id.*

[150] *Id.*

[151] DAVID M. NISSMAN & ED HAGEN, LAW OF CONFESSIONS § 2:9 (2d ed. 2012). *See, e.g.*, United States v. Phillips, 506 F.3d 685, 687 (8th Cir. 2007) (holding that the waiver was voluntary despite the defendant's claimed intoxication from "four ecstasy pills and . . . a . . . cup of brandy"); United States v. Shan Wei Yu, 484 F.3d 979, 985-86 (8th Cir. 2007) (holding that the waiver was voluntary despite the defendant's argument that he was on prescription medicine and should have received notice of his rights in Chinese); United States v. Gaddy, 532 F.3d 783, 788 (8th Cir. 2008) (holding that intoxication and fatigue are relevant factors but do not necessarily make waiver involuntary); United States v. Burson, 531 F.3d 1254, 1256 (10th Cir. 2008) (holding that the waiver was valid despite the defendant's claim that it was involuntary because he was exhausted and high on methamphetamine); United States v. Smith, 606 F.3d 1270, 1276-77 (10th Cir. 2010) (finding that the interview was conducted after the defendant had apparently sobered up); State v. Wilson, 535 N.W.2d 597, 603 (Minn. 1995) (holding that the waiver was voluntary despite the defendant's 0.29 blood alcohol content, since he was able to speak coherently and draw diagrams).

[152] However, searches of vehicles contemporaneous with a DUI would likely fit under the second prong of *Gant* in which officers may search the passenger compartment when they have reason to believe evidence related to the arresting-offense is in the vehicle. Thus, the officer would have reason to believe that there may

Completing Part II of this test, had the driver agreed to the impoundment, the inventory search would have failed this analysis. During the post-impoundment inventory search, the officer looked "for evidence of narcotics in a place where [he knew] criminals hid[] narcotics," and removed the trunk speakers which revealed a bag that contained a gun and ammunition.[153] Then, the officer, lacking "authority . . . to remove property . . . and give it to a family member," allowed the motorist's relative to retrieve certain items from the car and failed to record the details of this transaction on the inventory list.[154]

The second prong of the inventory search requires that proper search procedure limits officer discretion both in the methodology of the search and cataloguing of the items the search revealed. For example, the search should be limited to areas in plain view.[155] In addition, the officer should catalogue all items found and not selectively choose items to be turned over to family members. Failing to do either, like the officer in *Padilla*, would deem the search invalid and result in the suppression of the evidence.

F. Counter-Arguments Fall Short Against Gant*-like Analysis*

The Court's analysis in *Gant* regarding *Belton* adequately addresses any potential dissent against this Comment's test. The *Bertine* ruling, similar to the *Belton* ruling narrowed by *Gant*, improperly justifies "unconstitutional police practice."[156] Just because police have relied on a system that rashly permits impoundments and automatically triggers inventory searches does

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be open containers of alcohol in the vehicle, directly related to the DUI arrest. But, it is important to recognize that this would not be considered an inventory search subsequent to an impoundment that would require a waiver option. Similarly, waivers would likely not be appropriate if the driver is a teenager driving his parents' car because he would not have the authority or be of the age to waive liability.

153 *Padilla*, 992 N.E.2d at 415.

154 *Id.*

155 Removing the trunk speakers to search behind would, as Justice Marshall emphasized in his *Bertine* dissent, present an increased risk of danger to the police, just as opening closed containers would. Colorado v. Bertine, 479 U.S. 367, 384 (1987) (Marshall, J., dissenting). Therefore, there is no "police-protection" justification that would make such searches valid.

156 Arizona v. Gant, 556 U.S. 332, 348 (2009).

not mean that the system should remain in place.[157] Police reliance on previously permissable unwarranted vehicle searches should not "outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected."[158]

Other counter-arguments launched against the proposed test will likely be related to the uncertainty that "reasonableness" balancing tests may present and any increased litigation that may arise from that uncertainty. But these arguments fail to describe a legitimately significant concern. As it stands, *Bertine* is already responsible for widespread legal uncertainty and allegations of Fourth Amendment violations seen in courts nationwide.

In addition, other Supreme Court precedents can address arguments against the hard and fast requirements set forth by this test to inform the motorists of alternative arrangements and obtain signed waivers relieving the police from liability. *Miranda v. Arizona*, mandating that police inform arrestees of their right to remain silent, provides a platform from which the Court could base the requirement to inform.[159]

Courts and police should recognize that this new test does not take away police power to investigate and search when police have probable cause to search a vehicle. Instead, it ensures that motorists' privacy interests are protected, by making police follow the constitutional channels of search and seizure instead of using impoundment and inventory search as a pre-textual shortcut.

CONCLUSION

Gant may have been the first step in the Court's re-evaluation of warrantless searches involving vehicles, but the Court should not stop there. To finish what *Gant* started, the Court should extend *Gant*'s efforts to protect arrestees from unconstitutional police practices to also protect those motorists who face vehicular impoundments and inventory searches.

This Comment's test proposes a multi-tiered protection of motorists from unreasonable searches and seizures. First, like the

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157 *Id.* at 349.

158 *Id.*

159 *See generally* 384 U.S. 436 (1966).

narrowing of *Belton* searches in *Gant*, the test narrows the circumstances that trigger impoundments. If, for example, a vehicle posed a traffic hazard, but could easily be relocated to eliminate such a hazard, an impoundment would be deemed unreasonable. If, however, the hazard could not be eliminated through less intrusive alternatives, then an impoundment would be proper.

Second, only after an impoundment is properly vetted as reasonable and conducted pursuant to standard procedure, the subsequent inventory search will undergo a separate analysis. This test adds an additional layer of protection against inventory searches by suggesting that these searches require consent. Thus only a consent-and-standard-operating-procedure-based inventory search would fulfill all the requirements for constitutionality.

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