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## Lawful Searches Incident to Unlawful Arrests: A Reform Proposal

MARK A. SUMMERS†

### I. INTRODUCTION

A search incident to a lawful arrest is one of the most potent exceptions to the warrant requirement<sup>1</sup> of the Fourth Amendment to the United States Constitution.<sup>2</sup> During a search incident to arrest, police may, regardless of the offense of arrest, automatically seize evidence unknown to them at the time of arrest and for which there was no probable cause (a usual requirement for exceptions to the warrant requirement).<sup>3</sup> In other words, an officer can seize evidence incident to arrest for which a magistrate could not have authorized her to search. Because of its expansive

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1. See generally Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 225 (1989).

2. U.S. CONST. amend IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

3. See *United States v. Robinson*, 414 U.S. 218, 235 (1973).

nature, commentators have recognized the potential for the abuse of the search incident to arrest exception.<sup>4</sup>

Recently, the United States Supreme Court has decided cases that expand the search incident to arrest exception and cases that restrict it. In one of the “expansion” cases, the Court refused to apply the exclusionary rule to evidence seized during a search incident to an arrest pursuant to a warrant that, unbeknownst to the arresting officer, had been vacated; in other words, an arrest without probable cause.<sup>5</sup> In the other “expansion” case, the Court refused to suppress evidence that was seized during a search incident to an arrest that was the fruit of a *Terry* stop made without reasonable suspicion.<sup>6</sup>

In the “restriction” cases, the Court limited the automatic right to search the passenger compartment of an automobile in which the arrestee had been traveling.<sup>7</sup> And, it required, absent exigent circumstances, a warrant to search the contents of cell phones seized incident to arrest.<sup>8</sup>

This article will focus specifically on searches of the person of the arrestee incident to arrest. It will argue that the scope of the search of a person incident to arrest should be limited to evidence of the offense of arrest. The practical effect of this limitation would be to preclude searches

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4. See, e.g., Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 396–97 (2001).

5. See *Herring v. United States*, 555 U.S. 135, 146 (2009).

6. See *Utah v. Strieff*, 136 S.Ct. 2056, 2064 (2016). Since a prosecution may proceed despite the illegality of the arrest, there are few direct negative consequences to the police or prosecution that flow from the illegality of the arrest. See generally *United States v. Alvarez-Machain*, 504 U.S. 655, 664–70 (1992) (reasoning that, while not performed in a way explicitly permitted, the extradition by forcible abduction did not prohibit his trial). What's at stake in almost all of the legality of arrest cases is a collateral consequence, for example, the suppression of the fruits of the search incident to arrest, see *Robinson*, 414 U.S. at 235, or a post-arrest confession, see *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975).

7. *Arizona v. Gant*, 556 U.S. 332, 351 (2009).

8. *Riley v. California*, 573 U.S. 373, 402–03 (2014).

incident to arrest for evidence in those cases where, because of the nature of the offense, it would be impossible to find any evidence of the offense of arrest.

The article will begin with an analysis of the Supreme Court's decision in *United States v. Robinson* to determine whether there was any basis for its adoption of an unqualified, automatic authority to search incident to arrest, regardless of the probability of finding any evidence of the offense of arrest.<sup>9</sup> It will analyze the pre-*Robinson* Supreme Court cases to see whether they support *Robinson's* categorical approach to searches incident to arrest, and it will discuss other English and American cases cited and not cited in *Robinson* to ascertain whether there was a common law "evidence of the offense of arrest limitation" on searches incident to arrest. Part Two will examine the Court's decision in *Chimel v. California*,<sup>10</sup> decided only four years before *Robinson*. *Chimel* arguably provides the most support for *Robinson's* categorical rule. Part Three will discuss two post-*Robinson* Supreme Court cases which directly impact, and enlarge the scope of, police authority to arrest and therefore to search incident to arrest. Part Four will consider whether the Court's two recent exclusionary rule cases may, coupled with *Robinson's* categorical approach, provide even greater incentives for the police to arrest for minor offenses in order to be able to search incident to arrest. In Part Five, the article will focus on the Court's two decisions that limit *Robinson's* categorical right to search incident to arrest to see how they may bolster the argument for an offense of arrest limitation. The conclusion will argue for my proposed solution.

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9. *Robinson*, 414 U.S. at 235.

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

## II. THE AUTOMATIC RIGHT TO SEARCH INCIDENT TO ARREST

Willie Robinson was arrested by a police officer who knew that he was operating his vehicle with an invalid operator's license.<sup>11</sup> It was undisputed that there was probable cause for the arrest, and that in making a "full custody arrest," the officer followed standard police procedures.<sup>12</sup> The officer, after a "patdown" for weapons, felt an object but he "couldn't tell what it was."<sup>13</sup> The officer removed a crumpled cigarette pack from Robinson's pocket, felt there was something inside that was not cigarettes, opened the pack and removed fourteen gelatin capsules containing heroin.<sup>14</sup> It was clear that, prior to the search, the officer had all the evidence there was of the offense of arrest because Robinson had given him his fraudulent driver's license.<sup>15</sup> It was also conceded by the government that extracting and opening the cigarette pack exceeded the permissible scope of a *Terry* frisk for weapons.<sup>16</sup>

The D.C. Circuit's en banc opinion in *Robinson* limited the right to search incident to arrest to evidence of the crime of arrest for which "the arresting officer has probable cause to believe will be found on the person . . ."<sup>17</sup> In cases of minor offenses, such as traffic violations, "no search of the

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11. *Robinson*, 414 U.S. at 220.

12. *See id.* at 221–23 n.1–2.

13. *Id.* at 223 (quoting the officer's hearing testimony).

14. *Id.*

15. *United States v. Robinson*, 471 F.2d 1082, 1094 (D.C. Cir. 1972) (en banc).

16. *See Terry v. Ohio*, 392 U.S. 1, 16 n.12 (1968); *Robinson*, 471 F.2d at 1089. The Supreme Court has repeatedly stated that *Terry* does not permit searches for evidence. *See, e.g., Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987).

17. *Robinson*, 471 F.2d at 1094. This article does not address the D.C. Circuit's limitations on the right to search for weapons in those instances where a custodial arrest is pursuant to regulations and when the weapons search is limited to a *Terry* frisk. Both limitations were rejected by the Supreme Court in *Robinson* and its companion case, *Gustafson v. Florida*, 414 U.S. 260, 266 (1973) (holding that the unqualified, automatic right to search incident to arrest applies to discretionary custodial arrests).

person for evidence may be allowed at all because no evidence exists to be found.”<sup>18</sup>

The Supreme Court reversed, concluding that there is an automatic, unqualified right to search incident to a lawful, custodial arrest for any weapons or any evidence, regardless of the offense for which the defendant was arrested.<sup>19</sup> It reached this conclusion in part because in its prior cases “no doubt ha[d] been expressed as to the unqualified authority of the arresting authority to search the person of the arrestee.”<sup>20</sup> Next, it said that it was not bound by “principles of *stare decisis*” because “[v]irtually all of the statements of this Court affirming the existence of an unqualified authority to search incident to a lawful arrest are dicta.”<sup>21</sup> Because there was no binding Supreme Court precedent, the *Robinson* Court examined other cases to determine whether they supported the Court of Appeals’ holding and opined: “While these earlier authorities are sketchy, they tend to support the broad statement of the authority to search incident to arrest found in the successive decisions of this Court, rather than the restrictive one which was applied by the Court of Appeals in this case.”<sup>22</sup> This section of the article will examine in detail the *Robinson* Court’s analysis of, and reliance on, prior case law.

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18. *Robinson*, 471 F.2d at 1094.

19. *Robinson*, 414 U.S. at 235.

20. *Id.* at 225; *but see* *Trupiano v. United States*, 334 U.S. 699, 708 (1948):

A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest. The mere fact that there is a valid arrest does not *ipso facto* legalize a search or seizure without a warrant.

21. *Robinson*, 414 U.S. at 230.

22. *Id.* at 232–33. The Court of Appeals had limited searches incident to arrest to “finding evidence which the arresting officer has probable cause to believe will be found on the person . . .” *Robinson*, 471 F.2d at 1094.

A. *There is No Doubt About the Unqualified Right to Search the Person Incident to Arrest*

In one sense it is true there is no doubt that there is an unqualified right to search the person incident to a lawful, custodial arrest. In none of its own cases cited by the *Robinson* Court was the search of the person incident to arrest invalidated.<sup>23</sup> And the cases consistently affirmed the right to search for weapons that might be used to harm the officer or effectuate an escape.<sup>24</sup> There was, however, in these same cases much doubt about how much searching could be done in the vicinity where the arrest took place.<sup>25</sup> Nonetheless, where the question was raised, there was virtual agreement that the scope of the search incident to arrest for evidence was not “unqualified.” It was limited to evidence of the offense of arrest.<sup>26</sup> Despite this clear line of authority, the *Robinson* Court did not accept the “evidence of the offense of arrest limitation,” and it discussed in detail

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23. See *Robinson*, 414 U.S. at 227–29 (citing *Terry v. Ohio*, 392 U.S. 1, 21–22, 24–25 (1968); *Peters v. New York*, 392 U.S. 40, 66 (1968)).

24. See, e.g., *Preston v. United States*, 376 U.S. 364, 367 (1964).

25. See *Chimel v. California*, 395 U.S. 752, 756–59 (1969) and cases discussed therein.

26. See generally *Peters v. New York*, 392 U.S. 40, 67 (1968) (quoting *Preston*, 376 U.S. at 367) *Preston v. United States*, 376 U.S. 364, 367 (1964) (stating that one of the purposes of the search incident to arrest is “the need to prevent the destruction of evidence of the crime”); *United States v. Rabinowitz*, 339 U.S. 56, 61 (1950) (noting “the longstanding practice of searching for other proofs of guilt within the control of the accused found upon arrest”); *Harris v. United States*, 331 U.S. 145, 153 (1947) (stating “[t]he search was not a general exploration but was specifically directed to the means and instrumentalities by which the crimes charged had been committed”); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 358 (1931) (condemning “a general exploratory search in the hope that evidence of crime might be found”); *Marron v. United States*, 275 U.S. 192, 198–99 (1927) (similarly describing the search incident to arrest as for “things used to carry on the criminal enterprise”); *Agnello v. United States*, 269 U.S. 20, 30 (1925) (describing what may be seized incident to arrest as “things connected with the crime as its fruits or as the means by which it was committed”); *Carroll v. United States*, 267 U.S. 132, 158 (1925) (holding that searches incident to arrest are limited to evidence “which may be used to prove the offense”); *Weeks v. United States*, 232 U.S. 383, 392 (1914) (describing the “right” to search incident to arrest for the “fruits or evidences of crime”).



only one of its cases where the evidence of the offense of arrest limitation was imposed.

In *Peters v. New York*,<sup>27</sup> the Court found that a search incident to arrest for attempted burglary was justified in part by the “need to prevent the destruction of evidence of the crime.”<sup>28</sup> The *Peters* Court held that the search was “reasonably limited in scope by these purposes” because “Officer Lasky did not engage in an unrestrained and thorough-going examination of Peters and his personal effects.”<sup>29</sup> The *Robinson* Court described this statement as “a novel limitation” on an “established doctrine.”<sup>30</sup>

It is clear that the Supreme Court in *Peters* was merely applying to searches incident to arrest the analytic framework for assessing reasonableness that it had just enunciated in *Peters*’ companion case, *Terry v. Ohio*.<sup>31</sup> The *Robinson* Court eschewed this approach.<sup>32</sup> But the *Terry* Court made it clear that its test for assessing the reasonableness of searches and seizures applies to arrests as well as *Terry* stops<sup>33</sup> because both are seizures and searches subject to the Fourth Amendment.<sup>34</sup> The *Terry* Court stated that “in determining whether the seizure and search were ‘unreasonable’ our inquiry is a dual one—whether the

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27. 392 U.S. 40 (1968) (a companion case to *Terry*).

28. *Robinson*, 414 U.S. at 228–29 (quoting *Peters*, 392 U.S. at 67).

29. *Id.* at 229 (quoting *Peters*, 392 U.S. at 67).

30. *Id.*

31. 392 U.S. 1, 16–17 (1968); see *Robinson*, 471 F.2d at 1092 (concluding that in *Peters*, “the Supreme Court applied [*Terry*’s] scope limitation principle to an arrest based search”).

32. *Robinson*, 414 U.S. at 228 (“*Terry*, therefore, affords no basis to carry over to a probable-cause arrest the limitations this Court placed on a stop-and-frisk search permissible without probable cause.”).

33. *Terry*, 392 U.S. at 20 (stating that “the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context . . . [i]n order to assess the reasonableness of Officer McFadden’s conduct . . .”).

34. See *id.* at 16–17.

officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."<sup>35</sup> This dual inquiry requires a court to assess not only the legitimacy of the seizure of the person, but also any search that is carried out as a result, and it is clear that if either crosses the line of reasonableness, its fruits must be excluded from evidence.<sup>36</sup> Applied to the facts in *Robinson*, the *Terry* test would have compelled the conclusion that the search for evidence was unreasonable because no evidence of the offense of arrest could have been found or destroyed.

It is also difficult to reconcile *Robinson's* rejection of an offense of arrest limitation with another Rehnquist opinion, *Knowles v. Iowa*.<sup>37</sup> In *Knowles*, the Court refused to extend the unqualified, automatic right to search incident to arrest to traffic offenses where the driver was issued only a citation, even though there was probable cause and the state statute gave the officer the discretion to arrest.<sup>38</sup> In finding that that state had not satisfied the "second justification for the authority to search incident to arrest—the need to discover and preserve evidence," the Court stated:

Once Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car.

Iowa nevertheless argues that a "search incident to citation" is justified because a suspect who is subject to a routine traffic stop may attempt to hide or destroy evidence related to his identity (e.g., a driver's license or vehicle registration), or destroy evidence of another, as yet undetected crime. As for the destruction of evidence relating to identity, if a police officer is not satisfied with

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35. *Id.* at 19–20.

36. *See id.* at 18 (citing cases that have held that "a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope").

37. 525 U.S. 113 (1998).

38. *See id.* at 114–16.

the identification furnished by the driver, this may be a basis for arresting him rather than merely issuing a citation. As for destroying evidence of other crimes, the possibility that an officer would stumble onto evidence wholly unrelated to the speeding offense seems remote.<sup>39</sup>

It is hard to see why this reasoning does not apply with equal force to *Robinson*. The difference between *Robinson* and *Knowles* is custody,<sup>40</sup> but in either case the likelihood of finding evidence of the offense of arrest was the same—zero.

B. *Statements Affirming an Unqualified Authority to Search Incident to Arrest in the Court's Prior Cases Are Dicta*

The *Robinson* Court used the premise that its prior cases were dicta, and therefore not precedent binding on the D.C. Circuit, as a springboard “to see whether the sort of qualifications imposed by the Court of Appeals . . . were in fact intended by the Framers of the Fourth Amendment or recognized in cases decided prior to *Weeks*.”<sup>41</sup> Finding little or nothing in Founding Era sources such as Blackstone, the Court identified five cases which it concluded “tend to support the broad statement of the authority to search incident to arrest found in the successive decisions of this Court, rather than the restrictive one which was applied by the Court of Appeals . . . .”<sup>42</sup> An examination of these authorities belies this conclusion, and an analysis of other English and American cases finds substantial support for an evidence of the offense of arrest limitation.

The *Robinson* Court placed the most emphasis on a

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39. *Id.* at 118 (emphasis added).

40. See Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 433 (2001) (rejecting duration of contact between arrestee and police as “too indefinite and open-ended to qualify as a constitutional criterion” for when a custodial arrest has taken place).

41. *United States v. Robinson*, 414 U.S. 218, 230 (1973).

42. *Id.* at 230–33.

nineteenth century Irish case, *Dillon v. O'Brien*.<sup>43</sup> *Dillon* was a civil suit for trespass brought against the “peace officers” who had obtained the warrant for his arrest and who had arrested him and searched him incident to arrest.<sup>44</sup> The issue in *Dillon* was whether the search incident to arrest rule applied to misdemeanors. The warrant authorizing the arrest of the defendant was for a misdemeanor common law conspiracy. When the officers arrived on the scene, the plaintiff was committing acts in furtherance of the conspiracy which included collecting rents, making records of the receipt of the rents, and possession of a telegram, all of which were evidence of a conspiracy.<sup>45</sup>

At common law, and for much of the history of the United States, a judge could not issue a warrant authorizing the seizure of “mere evidence.”<sup>46</sup> Warrants were limited to the instrumentalities and fruits of a crime, weapons that could be used to effectuate an escape, and contraband.<sup>47</sup> A warrant protected the officer who executed it from civil suit.<sup>48</sup> Although there was a warrant in *Dillon*, the plaintiff argued that the officers were liable because an arrest warrant for a misdemeanor carried with it “no authority at common law to seize any property in the possession of a person charged with a misdemeanor.”<sup>49</sup>

The *Dillon* Court distinguished searches pursuant to a warrant based on “mere suspicion” from searches incident to arrest upon “an allegation of actual guilt, and a lawful apprehension of the guilty party.”<sup>50</sup> The *Dillon* Court placed

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43. 16 Cox C.C. 245 (Exch. Div. Ir. 1887).

44. *Id.* at 247.

45. *Id.*

46. *See* *Warden v. Hayden*, 387 U.S. 294, 294 (1967).

47. *See id.* at 300–02.

48. *See* AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 16–17 (1997).

49. *Dillon*, 16 Cox C.C. at 245.

50. *Id.* at 251.

the famous English case, *Entick v. Carrington*,<sup>51</sup> in the “mere suspicion” category and *Dillon* in the “actual guilt” category (*Dillon* had been caught in flagrante delicto.): “The right here claimed is not to take all the plaintiff’s papers, but those only which are evidence of his guilt . . . .”<sup>52</sup> Thus, when *Dillon* held that the search incident to arrest rule applied to misdemeanors it effectively incorporated the evidence of the offense limitation.<sup>53</sup>

This portion of *Dillon* is, however, not mentioned in *Robinson*. Instead it quoted a vague statement which provides no clear support for the proposition that the authority to search incident to arrest is unqualified and automatic:

But the interest of the State in the person charged being brought to trial in due course necessarily extends, as well to *the preservation of material evidence of his guilt or innocence*, as to his custody for the purpose of trial. His custody is of no value if the law is powerless to prevent the abstraction or destruction of this evidence, without which a trial would be no more than an empty form. But if there be a right to production or preservation of this evidence, I cannot see

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51. (1765) 95 Eng. Rep. 807; 19 How. St. Tr. 1029. *Entick* and another famous English case, *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489, both of which condemned general warrants and searches of private papers, were much on the minds of the founders at the time the Fourth Amendment was included in the Bill of Rights. AMAR, *supra* note 48, at 11; *see also* *Boyd v. United States*, 116 U.S. 616, 626–27 (1886) (describing *Entick v. Carrington* as a “monument of English freedom” which “it may confidently be asserted [was] in the minds of those who framed the Fourth Amendment to the Constitution”).

52. *Dillon*, 16 Cox C.C. at 251. Seizure of mere evidence, either incident to arrest or during the execution of a warrant, is analogous to the modern-day plain view doctrine. *See id.* at 248 (quoting *Crozier v. Cundy*, (1827) 108 Eng. Rep. 439, 439, that stated that items not mentioned in the warrant could have been taken if they “had been likely to furnish evidence of the identity of the articles stolen and mentioned in the warrant . . .”).

53. *See Dillon*, 16 Cox C.C. at 250. At the time *Dillon* was decided, all attempts were misdemeanors. Limiting the search incident to arrest power to felonies would have resulted in the “absurdity” that, for example, in cases of attempted murder, “the right of the constable to [search for and seize evidence of the offense] would depend, not upon the commission of the act which results in death, but upon the victim having actually ceased to breathe.” *Id.*

how it can be enforced otherwise than by capture.<sup>54</sup>

Presumably, the pertinent part of this quotation relates to obtaining the evidence by “capture.” But when placed in context, it is clear that the ability to “capture” evidence was limited to evidence of the offense of arrest.<sup>55</sup>

The other cases relied on by the *Robinson* Court fare little better. In one, *Holker v. Hennessey*,<sup>56</sup> the language quoted by the Court expressly affirms the common law evidence of the offense of arrest limitation.<sup>57</sup> In another, *Spalding v. Preston*,<sup>58</sup> the Court found that partially-finished counterfeit coins could be retained by the sheriff “for the double purpose of being used, as evidence, upon the trial of Russell, and also of preventing their being put in circulation.”<sup>59</sup> *Spalding* thus stands for the unremarkable proposition that contraband may be seized incident to arrest and held as evidence, and that the state need not return it.<sup>60</sup> In a third case, *Closson v. Morrison*,<sup>61</sup> the Court quoted

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54. *Id.* (emphasis added). This excerpt is also clearly *dictum* since it was not central to the court’s holding that the search incident to arrest rule applied to misdemeanors.

55. The cases cited in the *Dillon* opinion also support the evidence of the offense of arrest limitation. *Regina v. Frost* (1839) 173 Eng. Rep. 771, 773 (ordering return of money seized incident to arrest that was not evidence of the crime of treason); *Rex v. Barnett* (1829) 172 Eng. Rep. 563, 564 (ordering return of money seized from a defendant charged with murder because it was not relevant to the charge and not alleged to have been stolen); *Crozier v. Cundy* (1827) 108 Eng. Rep. 439, 439 (ordering return of items seized during execution of a search warrant which were not listed in the warrant and not related to the offense).

56. 42 S.W. 1090, 1093 (1897) (stating that “in the absence of a statute, an officer has no right to take any property from the person of the prisoner except such as may afford evidence of the crime charged”).

57. *See* *United States v. Robinson*, 414 U.S. 218, 232 (1973).

58. 21 Vt. 9 (1848).

59. *Id.* at 10.

60. In *Spalding* the Supreme Court of Vermont reversed a lower court’s ruling in favor of the plaintiff in an action for trover. Trover was a common law cause of action for the value of property in the possession of another. *Id.* at 12.

61. 47 N.H. 482 (1867).

language containing the also unremarkable proposition that due to the safety of the officer and the public, incident to arrest an officer can seize and hold “any deadly weapon” even though it had not been used in the offense of arrest.<sup>62</sup> The other language from *Closson* quoted by the Court also reflects another well-established principle of the common law rule of search incident to arrest—the authority to seize articles, including money, with which the prisoner might be able to effectuate an escape.<sup>63</sup> Thus, there is nothing in *Closson* supporting a common law rule of unqualified, automatic search incident to arrest.

The last case discussed by the Court in this portion of its opinion is *People v. Chiagles*,<sup>64</sup> an opinion authored by then-Judge Cardozo sitting on the New York Court of Appeals. In *Chiagles*, the defendant, who had been charged with arson, argued that papers seized from him incident to his arrest had to be returned. All his other papers had been returned, except those the prosecutor intended to use as evidence at the trial.<sup>65</sup> In essence, the defendant was arguing that the “mere evidence” limitation which applied to warrants should apply also to searches incident to arrest. The court rejected that argument, stating that “[w]e find no support for a like restriction upon search incidental to arrest.”<sup>66</sup> In language quoted by the *Robinson* Court, Judge Cardozo stated:

Search of the person is unlawful when the seizure of the body is a trespass, and *the purpose of the search is to discover grounds as yet unknown for arrest or accusation* (citing *Entick v. Carrington*). Search of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of

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62. *Robinson*, 414 U.S. at 231.

63. *Id.*

64. 237 N.Y. 193 (1923). One commentator noted that *Chiagles* “apparently lends some support to the position which the [*Robinson*] court takes.” Thomas C. Marks, Jr., *United States v. Robinson and Gustafson v. Florida: Extending the Boundaries in Search and Seizure*, 1975 DET. C. L. 211, 215 n.30.

65. 237 N.Y. at 195.

66. *Id.* at 196.

subjecting the body of the accused to its physical dominion.<sup>67</sup>

*Chiagles* only bolsters the conclusion that the evidence of the offense of arrest limitation was part of the common law rule by rejecting the proposition that a lawful search could be made for evidence of crimes unknown to the arresting officer, while at the same time reinforcing that portion of the common law rule which allowed searches incident to arrest for “mere evidence.”<sup>68</sup>

Thus, what we get from an analysis of the older cases discussed in *Robinson* is strong support for the common law rule permitting searches incident to arrest and seizures of evidence of the crime of arrest. An examination of other authorities not mentioned in *Robinson* only strengthens this conclusion,<sup>69</sup> especially when no evidence of the offense of arrest could be found.<sup>70</sup> The formulation in Bishop’s treatise is “typical”<sup>71</sup> of the common law limitation on the scope of a

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67. *Id.* at 197 (emphasis added).

68. *See, e.g., supra* note 46 and accompanying text.

69. *See* United States v. Wilson, 163 F. 338 (S.D.N.Y. 1908); Thatcher v. Weeks, 79 Me. 547 (1887); Smith v. Jerome, 93 N.Y.S. 202 (S. Ct. 1905); Thornton v. State, 117 Wis. 338 (1903); Regina v. Frost (1839) 173 Eng. Rep. 771, 773 (ordering the return of money unrelated to the charge of treason); Rex v. Kinsey (1836) 173 Eng. Rep. 198, 199 (ordering return of items seized incident to arrest because “[they] ha[ve] nothing to do with the charge. [They] ought not to have been taken.”); Rex v. O’Donnell (1835) 173 Eng. Rep. 61 (ordering money taken from the defendant incident to arrest returned because it was not connected to the robbery charge. In summing up, the trial judge noted, “I believe constables are too much in the habit of taking everything they find upon a prisoner, which is certainly not right.”). *See also* JOEL PRENTISS BISHOP, NEW CRIMINAL PROCEDURE OR NEW COMMENTARIES ON THE LAW OF PLEADING AND EVIDENCE AND THE PRACTICE IN CRIMINAL CASES § 211 (4th ed. 1895); FRANCIS WHARTON, A TREATISE ON CRIMINAL PLEADING AND PRACTICE § 61 (8th ed. 1880).

70. *See* Leigh v. Cole, 6 Cox Crim. Cas. 329, 332 (Oxford Cir. 1853) (A defendant arrested for being drunk and disorderly must not necessarily “submit to the degradation of being searched.”); Bessell v. Wilson, 118 Eng. Rep. 518, 520 n.a (1853) (Lord Campbell, the Chief Judge, strongly reprobated the city police’s invariable practice of searching arrestees. The plaintiff had been charged with a copyright violation and was arrested on a warrant to appear and show cause.).

71. This is how Justice Scalia characterized nearly identical language quoted from the 1872 version of Bishop’s treatise. Thornton v. United States, 541 U.S. 615, 630 (2004) (Scalia, J., concurring).



search incident to arrest to evidence of the offense of arrest:

The arresting officer ought to consider the nature of the accusation; then if he finds on the prisoner's person, or otherwise in his possession, either goods or money which he reasonably believes to be connected with the supposed crime, as its fruits, or as the instruments with which it was committed, or as supplying proofs relating to the transaction, he may take and hold them to be disposed of as the court directs.<sup>72</sup>

### C. Chimel

What we are left with is the *Robinson* Court's reliance on *Chimel v. California*.<sup>73</sup> At least superficially, *Chimel* does provide some support for the *Robinson* Court's conclusion that there is no evidence of the offense limitation. The central issue in *Chimel*, however, did not involve the scope of the search of a person incident to arrest. Instead its focus was on the permissible scope of a search of the location where the person was arrested,<sup>74</sup> a question on which the Court had

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72. Bishop, *supra* note 69, at § 211.

73. 395 U.S. 752 (1969). The *Robinson* Court cites one other case, *Adams v. Williams*, 407 U.S. 143 (1972), to support its conclusion that there are no restrictions on the right to search incident to arrest. The main issue in *Adams* was the legality of the seizure of a weapon pursuant to a *Terry* frisk based on an informant's tip. Finding that the seizure was legal and, therefore, that there was probable cause for the arrest for unlawful possession of a weapon, the Court concluded that "the search of [the defendant's] person and of the car incident to that arrest was lawful." *Id.* at 149. The search revealed heroin on the defendant's person and in the car, a machete and a second revolver, all items falling squarely within the common law right to search for and seize contraband and weapons during a search incident to arrest. *Id.* at 145. Since the defendant had been arrested in a car with a gun based on a tip that he was a drug dealer, *Adams* does not involve a search incident to arrest where it would be impossible to discover any evidence of the offense of arrest.

74. The cases discussed in *Chimel* involved searches incident to arrest of the area surrounding the location where the defendant was arrested. See *United States v. Rabinowitz*, 339 U.S. 56 (1950) (room where arrest took place); *Trupiano v. United States*, 334 U.S. 699 (1948) (distillery); *Harris v. United States*, 331 U.S. 145 (1947) (four room apartment, including bedroom bureau drawer); *United States v. Lefkowitz*, 285 U.S. 452 (1932) (room where arrest took place, including desks, file cabinets, waste baskets and towel cabinet); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931) (office including desk and safe); *Marron v. United States*, 275 U.S. 192 (1927) (closet near location of arrest); *Agnello v.*

flip-flopped for years.<sup>75</sup> In limiting the incident to arrest search to the grabbing area in the vicinity of the arrestee, the Court stated:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize *any* evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule.<sup>76</sup>

By using the adjective “any” to describe the evidence that may be seized incident to arrest, the *Chimel* Court appears to countenance a search for any evidence that could be destroyed and not just evidence of the offense of arrest. Of course, this is true if the value of the item as evidence is “immediately apparent” to the seizing officer.<sup>77</sup> *Chimel* does not, however, authorize a general exploratory search for evidence.<sup>78</sup> It was just this type of search that *Chimel* sought

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United States, 269 U.S. 20 (1925) (house several blocks from scene of arrest); *Carroll v. United States*, 267 U.S. 132 (1925) (automobile); *Weeks v. United States*, 232 U.S. 383 (1914) (house and office).

75. *Compare* *Trupiano v. United States*, 334 U.S. 699 (1948) (disallowing seizure of distilling equipment found in the vicinity where the defendant was arrested), *with* *United States v. Rabinowitz*, 339 U.S. 56 (1950) (approving the seizure of counterfeit stamps after a thorough search of the defendant's office).

76. *Chimel*, 395 U.S. at 762–63 (emphasis added). The *Robinson* opinion quoted this passage from *Chimel*. *United States v. Robinson*, 414 U.S. 218, 226.

77. *Horton v. California*, 496 U.S. 128, 136 (1990). Only one of the cases discussed in *Chimel* involved the seizure of evidence unrelated to the offense of arrest where it was “immediately apparent” to the agents that the defendant's possession of the draft board documents was illegal. *Harris v. United States*, 331 U.S. 145, 149 (1947).

78. The police searched for and found in *Chimel*'s bedroom, far removed from where he was arrested, coins that had been stolen in a burglary, which was the offense of arrest. *Chimel*, 395 U.S. at 753–54. In this regard, *Chimel* is fully consistent with the existence of an evidence of the offense of arrest limitation. In all of the cases discussed in *Chimel*, the authorities were also searching for evidence of the offense of arrest. *See Rabinowitz*, 339 U.S. at 56; *Trupiano*, 334 U.S. at 699; *Harris*, 331 U.S. at 145; *Lefkowitz*, 285 U.S. at 452; *Go-Bart*

to limit.<sup>79</sup>

It is my position that the portion of the *Robinson* holding that extends searches incident to arrest beyond evidence of the offense of arrest was contrary to the common law rule and inconsistent with the Court's prior decisions. *Robinson*, nonetheless, has been the law for nearly forty-six years.<sup>80</sup> As commentators have opined since *Robinson* was decided, it substantially enlarged police power to conduct full-blown searches of individuals who are guilty of no more than a traffic violation.<sup>81</sup> In the years since *Robinson*, two of the Court's decisions have enhanced the police power to arrest and search even further.

### III. *WHREN* AND *ATWATER*: EXPANDING POLICE POWER TO ARREST FOR MINOR OFFENSES

In *Whren v. United States*,<sup>82</sup> the Court held that so long as there is probable cause to arrest, the subjective intentions of the officer for making the arrest are irrelevant.<sup>83</sup> Thus, the motives of the officers in *Whren* (plainclothes vice officers in an unmarked car in a "high drug area") did not make the stop for a minor traffic violation unlawful because the officers had witnessed the offense (making a right turn without signaling

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*Importing Co.*, 282 U.S. at 344; *Marron*, 275 U.S. at 192; *Agnello*, 269 U.S. at 20; *Carroll*, 267 U.S. at 132; *Weeks*, 232 U.S. at 383. Moreover, Justice White's dissenting opinion, arguing that warrantless searches of the type carried out in *Chimel* are almost always justified by exigent circumstances, is predicated on "probable cause to believe that seizable items are on the premises." *Chimel*, 395 U.S. at 773.

79. *Chimel*, 395 U.S. at 763 ("There is no . . . justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself.").

80. Salken, *supra* note 1, at 244 n.156 (1989) (noting that by 1989, thirty-four states admitted evidence seized incident to an arrest for a traffic violation).

81. See, e.g., *id.* at 222 (observing that "a layman would doubtless be surprised to learn that police officers in most states may arrest and search virtually every adult almost at whim") and sources cited *infra* note 127.

82. 517 U.S. 806 (1996).

83. *Id.* at 813.

and proceeding at an “unreasonable” speed).<sup>84</sup> Fortuitously, after pulling over Whren’s vehicle, one of the officers saw two large plastic bags of crack cocaine in his hands.<sup>85</sup> Contributing to the smell of pretext in *Whren* was the fact that Washington D.C. police regulations permitted plainclothes officers driving unmarked vehicles to make traffic arrests only when the violation posed an immediate safety threat.<sup>86</sup>

In *Atwater v. City of Lago Vista*,<sup>87</sup> the Court sanctioned a full custodial arrest for an offense punishable by only a \$50 fine because Texas law gave the officer the discretion to arrest for violations of a seatbelt law.<sup>88</sup> There was also a whiff of pretext, or at least abusive police conduct, in *Atwater*<sup>89</sup> where the complaint alleged that the arresting officer “approached [Atwater’s] truck and ‘yell[ed]’ something to the effect of ‘[w]e’ve met before’ and ‘[y]ou’re going to jail.’”<sup>90</sup> True to his word, the officer handcuffed Atwater, placed her in the squad car, and transported her to the police station where she was booked. She had to remove her shoes, jewelry, eyeglasses and empty her pockets. She was photographed and held in a jail cell for an hour before she was released on a \$310 bond.<sup>91</sup>

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84. *Id.* at 808.

85. *Id.* 808–09.

86. *Id.* at 815. The Court went one step further in *Virginia v. Moore*, 553 U.S. 164, 164 (2008) when it held that because there was probable cause, a search incident to a custodial arrest unauthorized by state law did not violate the Fourth Amendment.

87. 532 U.S. 318 (2001).

88. *Id.* at 323.

89. *Id.* at 346–47 (observing that “the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment”).

90. *Id.* at 324.

91. *Id.* The officer even denied Atwater’s request to take her children to a friend’s house. Fortunately, a friend of Atwater’s arrived on the scene to take charge of her three- and five-year-old children. *Id.* Who knows what might have happened to the children otherwise.

Atwater argued for a limitation on in-custody arrests to “jailable,” as opposed to “fine-only” offenses.<sup>92</sup> The Court rejected her proposal because “[t]he trouble with this distinction, of course, is that an officer on the street might not be able to tell.”<sup>93</sup> Justice O’Connor dissented and was joined by Justices Stevens, Ginsburg and Breyer. She argued that this case did not comport with the Court’s constitutional “reasonableness” requirement, pointing out that “[a] custodial arrest exacts an obvious toll on an individual’s liberty and privacy, even when the period of custody is relatively brief.”<sup>94</sup>

*Whren* and *Atwater* significantly broaden the authority of the police to make arrests for extremely minor offenses so long as they have probable cause. They also foreclose two of the proposed limitations on *Robinson’s* unqualified, automatic right to search incident to arrest—suppression of evidence seized during pretextual searches and restriction of the power to make a custodial arrest for a minor offense.<sup>95</sup> But at least they both insisted that the arrest had to be

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92. *Id.* at 348. The Court conceded that “If we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail.” *Id.* at 346.

93. *Id.* at 348.

94. *Id.* at 364. Justice O’Connor went on to detail the indignities accompanying a full custodial arrest:

The arrestee is subject to a full search of her person and confiscation of her possessions. If the arrestee is the occupant of a car, the entire passenger compartment of the car, including packages therein, is subject to search as well. [After the Court’s decision in *Arizona v. Gant*, 555 U.S. 332 (2009), the right to search the passenger compartment incident to arrest is no longer automatic. *See, infra* pp. 21–23.] The arrestee may be detained for up to 48 hours without having a magistrate determine whether there in fact was probable cause for the arrest. Because people arrested for all types of violent and nonviolent offenses may be housed together awaiting such review, this detention period is potentially dangerous. And once the period of custody is over, the fact of the arrest is a permanent part of the public record.

*Id.* at 364–65 (citations omitted).

95. *See, e.g.*, Salken, *supra* note 1, at 236, 248.

supported by probable cause. In two more recent cases, the Court has eroded this bedrock principle and thus further expanded the search incident to arrest exception in minor offense cases.

#### IV. *HERRING* AND *STRIEFF*: SEARCHES INCIDENT TO

*Herring* and *Strieff* are exclusionary rule, not search incident to arrest, cases. Nevertheless, by refusing to apply the exclusionary rule in circumstances where the arrests were otherwise illegal, they provide a further incentive for police to search for evidence other than that of the offense of arrest.

In *Herring v. United States*,<sup>96</sup> the charges against the petitioner stemmed from his possession of drugs and a firearm seized from him incident to arrest.<sup>97</sup> The arresting officer found out that Herring had driven to the Coffee County Sheriff's Office to retrieve something from his impounded truck. While there were no outstanding warrants for Herring's arrest in Coffee County, the warrant clerk told the officer there was a warrant for failure to appear in neighboring Dale County.<sup>98</sup> Based on that information, Officer Anderson arrested Herring. It is obvious that no evidence of the charged offense (failure to appear) could be found by a search incident to arrest. The search incident to arrest did, however, reveal methamphetamine in Herring's pocket and a pistol in his truck (possession of the pistol was illegal because Herring was a previously convicted felon). Ten to fifteen minutes after the search, Officer Anderson learned that the warrant had been recalled but that the recall did not appear in the database.<sup>99</sup> Thus, there was no probable cause for Herring's arrest.

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96. 555 U.S. 135 (2009).

97. *Id.* at 137–38.

98. *Id.* at 137.

99. *Id.* at 138.

Despite this lack of probable cause, the Court held the exclusionary rule should not be applied to exclude the evidence seized from Herring because the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case did not rise to that level.<sup>100</sup> It was significant that “[t]he Coffee County officers did nothing improper.”<sup>101</sup> Rather, “the error was the result of *isolated negligence attenuated from the arrest.*”<sup>102</sup>

Given the Supreme Court’s frequent incursions into the exclusionary rule, paring it back to its core purpose, which is to deter police misconduct,<sup>103</sup> the decision in *Herring* is unsurprising. In prior cases the Court had consistently declined to extend the exclusionary rule to actors in the criminal justice system other than the police.<sup>104</sup> *Herring* is the first case where the rule was not applied to a police mistake, albeit a mistake “attenuated” from the conduct of the arresting officer, because the exclusionary rule is ordinarily reserved for cases of “flagrant” police misconduct.<sup>105</sup>

In *Utah v. Strieff*,<sup>106</sup> the arresting officer intentionally detained the petitioner to gather evidence without reasonable suspicion that he had committed an offense. The state conceded that the *Terry* stop was unlawful.<sup>107</sup> The officer demanded the defendant’s identification and then

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100. *Id.* at 144.

101. *Id.* at 140.

102. *Id.* at 137 (emphasis added).

103. *United States v. Leon*, 468 U.S. 897, 916 (1984) (holding that “the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates”).

104. *See, e.g., Arizona v. Evans*, 514 U.S. 1, 1 (1995) (court clerks); *Illinois v. Krull*, 480 U.S. 340, 340 (1987) (legislatures); *Massachusetts v. Sheppard*, 468 U.S. 981, 981 (1984) (judges).

105. *Herring*, 555 U.S. at 143–45.

106. 136 S. Ct. 2056 (2016).

107. *Id.* at 2060.

used that information to check for outstanding warrants.<sup>108</sup> He learned there was a warrant for an unpaid parking ticket,<sup>109</sup> arrested Strieff for that violation and searched him incident to arrest, finding methamphetamine and drug paraphernalia.<sup>110</sup> Again, it was obvious that no evidence of the unpaid parking ticket could be found during the search of Strieff's person incident to his arrest.

The Supreme Court reversed the Utah Supreme Court, finding that discovery of the warrant sufficiently attenuated the arrest and search incident to it from the illegal *Terry* stop.<sup>111</sup> In a tortured opinion, Justice Thomas applied the attenuation exception to the exclusionary rule to the facts of this case.<sup>112</sup> He identified the three *Brown*<sup>113</sup> factors—temporal proximity between the discovery of the evidence and the unconstitutional act, the presence of intervening circumstances, and the purpose and flagrancy of the official

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108. *Id.*

109. *Id.* at 2060 (Sotomayor, J., dissenting).

110. *Id.* at 2060.

111. *Id.* at 2064.

112. *Strieff* is not an attenuation case and Justice Thomas was unable to cite any authority for the proposition that an unknown, pre-existing warrant breaks the chain of causation between the illegal act and the discovery of the evidence. The case he did cite, *Segura v. United States*, 468 U.S. 796 (1984), as he conceded, is an “independent source” case. *Strieff*, 136 S. Ct. at 2062. The Court applies the independent source doctrine when a warrant is obtained after and independently of the unconstitutional act. *Id.* at 2061. Justice Thomas could not, however, rely upon the independent source doctrine because it is inapplicable when the decision to seek a warrant is prompted by the illegal conduct. *Murray v. United States*, 487 U.S. 533, 542 (1988). Of course, that is precisely what happened in *Strieff*. The officer discovered the warrant as a direct result of his illegal demand for and use of Strieff's identification.

113. *Brown v. Illinois*, 422 U.S. 590 (1975). *Brown*, like the other attenuation cases, involved a confession following an illegal arrest where the issue is whether the confession is “sufficiently an act of free will” to purge the taint of the illegal arrest. *Id.* at 602 (quoting *Wong Sun v. United States*, 371 U.S. 471, 486 (1963)). The Utah Supreme Court reversed Strieff's conviction because it concluded that the attenuation doctrine was applicable only in situations involving an independent act of the defendant's free will and that that circumstance was not present. Strieff did not defend that position in the Supreme Court. *Strieff*, 136 S. Ct. at 2061.



misconduct—which he applied to the facts in *Strieff*.<sup>114</sup> He refused to apply the exclusionary rule because he found that two of the three *Brown* factors—intervening circumstances and purpose and flagrancy—favored the state.<sup>115</sup> The intervening circumstance was the discovery of the pre-existing arrest warrant, which was the direct result of the conceded illegal *Terry* stop.<sup>116</sup> As for the purpose and flagrancy of the official misconduct, Justice Thomas characterized the officer’s conduct as “at most negligent,”<sup>117</sup> despite the fact that the officer “acknowledged” that “[h]is sole reason for stopping Strieff . . . was investigative—he wanted to discover whether drug activity was going on in the house Strieff had just exited.”<sup>118</sup> In other words, the officer discovered the warrant through the exploitation of his illegal conduct, which is precisely what is condemned in the attenuation cases.<sup>119</sup>

Justice Thomas concluded that “once Officer Fackrell was authorized to arrest Strieff, it was undisputedly lawful to search Strieff as an incident of his arrest to protect Officer Fackrell’s safety,”<sup>120</sup> even though the officer admitted that his purpose was to find evidence of drug activity and that he “did not fear Strieff.”<sup>121</sup> This was a search for evidence unrelated to the unpaid traffic ticket offense for which Strieff was arrested.<sup>122</sup> It is curious then that Justice Thomas cited *Arizona v. Gant* and noted that it explains “the permissible

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114. *Strieff*, 136 S.Ct. at 2061–62.

115. Only the temporal proximity factor went in Strieff’s favor since the search occurred only minutes after the illegal *Terry* stop. *Id.* at 2062–63. Arguably, the time factor alone should have negated any finding that the search was attenuated.

116. *See id.* at 2066 (Sotomayor, J., dissenting).

117. *Id.* at 2063.

118. *Id.* at 2066

119. *See id.*

120. *Id.* at 2063.

121. *Id.* at 2066–67

122. *See id.* at 2065

scope of searches incident to arrest.”<sup>123</sup> As will be discussed in the next section, *Gant* allows searches of the passenger compartment of an automobile incident to arrest only when there is reason to believe evidence of the offense of arrest will be discovered, obviously an impossibility in *Strieff*.<sup>124</sup>

Post-*Herring* and -*Strieff*, searches incident to arrest are lawful when the police mistakes which led to them can be characterized as only “negligent.”<sup>125</sup> The resulting fruits of the searches, including evidence unrelated to the crime of arrest, will be admissible even though there was either no probable cause to arrest because a warrant had been vacated or when the grounds for arrest became known to the officer only as a result of an illegal *Terry* stop. The upshot, as Justice Kagan put it in her dissenting opinion in *Strieff*, is to “practically invite[]” officers to take the risk of stopping a suspect in the hope of finding evidence of a serious offense, given the chances the evidence will be suppressed are slim to none.<sup>126</sup> And, as Justice Sotomayor so forcefully demonstrates in her powerful dissenting opinion in *Strieff*, the odds this will happen are high.<sup>127</sup> Indeed, the “epidemic”

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123. *Id.* at 2063.

124. *See infra* pp. 24, 26.

125. An issue that was not addressed in either *Herring* or *Strieff* is how to square their negligence standards with the Fourth Amendment’s prohibition of “unreasonable” searches and seizures, since negligent conduct is by definition unreasonable conduct. *See* BLACK’S LAW DICTIONARY 1245 (11th ed. 2019) (“Negligence: The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation . . .”).

126. *See Strieff*, 136 S. Ct. at 2073–74 (Kagan, J., dissenting).

127. *Id.* at 2068–69 (Sotomayor, J., dissenting). Not surprisingly, *Strieff* has generated scholarly criticism. *See, e.g.*, Julian A. Cook III, *The Wrong Decision at the Wrong Time: Utah v. Strieff in the Era of Aggressive Policing*, 70 SMU L. REV. 293 (2017); George M. Derry III, *Allowing “Lawless Police Conduct” in Order to Forbid “Lawless Civilian Conduct”: The Court Further Erodes the Exclusionary Rule in Utah v. Strieff*, 44 HASTINGS CONST. L. Q. 393 (2017); Katherine A. Macfarlane, *Predicting Utah v. Strieff’s Civil Rights Impact*, 126 YALE L. J. F. 139 (2016); Guy Padula, *Utah v. Strieff: Lemonade Stands and Dagnet Policing*, 120 W. VA. L. REV. 469 (2017); Josephine Ross, *Warning: Stop-and-Frisk May Be Hazardous to Your Health*, 25 WM. & MARY BILL RTS. J. 689 (2016); Emily J. Sack, *Illegal Stops and the Exclusionary Rule: The Consequences of Utah v. Strieff*, 22

of arrests for minor offenses which the *Atwater* Court was unable to foresee in 2001 has arrived.<sup>128</sup>

V. *GANT* AND *RILEY*: REINING IN SEARCHES INCIDENT TO ARREST

In *Arizona v. Gant*,<sup>129</sup> the Court rejected the categorical approach to the search of passenger compartments of automobiles that it had adopted in *New York v. Belton*.<sup>130</sup> *Belton* was the adaptation of *Chimel's* “grabbing distance” rule to automobiles.<sup>131</sup> *Belton* held that because items in the passenger compartment are “inevitably” within the grabbing distance of an arrestee, “when an officer lawfully arrests ‘the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile’ and any containers therein.”<sup>132</sup> *Gant* overturned this portion of *Belton* and limited the search incident to arrest of the passenger compartment to those instances “when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’”<sup>133</sup> As the *Gant* Court straightforwardly acknowledged, “when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence.”<sup>134</sup>

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ROGER WILLIAMS U. L. REV. 263 (2017); Nirej Sekhon, *Dangerous Warrants*, 93 WASH. L. REV. 967 (2018).

128. *Atwater v. City of Lago Vista*, 532 U.S. 318, 353 (2001). For the supporting statistics, see *infra* note 150.

129. 556 U.S. 332 (2009).

130. *Id.* at 335 (citing *New York v. Belton*, 453 U.S. 454 (1981)).

131. *Id.*

132. *Id.* at 340–41 (quoting *Belton*). Although the four defendants in *Belton* had been arrested, they were not handcuffed but had been separated from one another and the car in which they had been traveling. *Id.* at 339.

133. *Id.* at 343 (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in the judgment)). *Belton* still applies “when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” *Id.*

134. *Id.* at 343–44 (citing as examples, *Atwater*, 532 U.S. at 324 and *Knowles*,

The road to *Gant* started in Justice Scalia's concurring opinion in *Thornton v. United States*.<sup>135</sup> While he eviscerated the rationales for *Belton*,<sup>136</sup> Justice Scalia concurred in the judgment in *Thornton*, even though its "effort to apply our current doctrine to this search stretches it beyond its breaking point . . ." <sup>137</sup> After reviewing the authorities, Justice Scalia concluded that the Court had followed two different approaches to searches incident to arrest—*Robinson*, where the fact of arrest alone justifies the search, and *Rabinowitz*, where there was a reasonable belief that evidence of the offense of arrest would be found.<sup>138</sup> He went on to state:

The two different rules make sense: When officer safety or imminent evidence concealment or destruction is at issue, officers should not have to make fine judgments in the heat of the moment. But in the context of a general evidence-gathering search, the state interests that might justify any overbreadth are far less compelling. A motorist may be arrested for a wide variety of offenses; in many cases, there is no reasonable basis to believe relevant evidence might be found in the car. [citations omitted] *I would therefore limit Belton searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.*<sup>139</sup>

Justice Scalia's analysis applies equally to the search of one's person when the arrest is supported only by a warrant charging a traffic offense.

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525 U.S. at 118).

135. See 541 U.S. 615, 625 (2004) (Scalia, J., concurring in the judgment).

136. See *id.* at 625–29.

137. *Id.* at 625. The police wanted to stop Thornton's car because the license plates belonged to another vehicle. Before they could reach him, Thornton had gotten out of the car and was standing nearby. The officer asked Thornton for permission to pat him down and felt a bulge. When he was asked whether he had any narcotics, Thornton removed bags from his pocket containing marijuana and crack cocaine. He was arrested, handcuffed and placed in the patrol car. His car was searched and a nine-millimeter handgun was discovered. *Id.* at 618. *Belton* was applied because the arrestee was a "recent occupant" of the vehicle. *Id.* at 623–24.

138. *Id.* at 631–32.

139. *Id.* at 632 (emphasis added).

In *Riley v. California*,<sup>140</sup> the Court placed limitations on *Robinson*'s unqualified, automatic right to search cell phones seized incident to arrest. Observing that *Robinson* is “the only decision from this Court applying *Chimel* to a search of the contents of an item found on an arrestee’s person,”<sup>141</sup> the Court rejected *Robinson*'s central premise that the mere fact of custody justifies any search, citing *Chimel* as an example.<sup>142</sup> The Court also refused to apply *Gant* to permit warrantless searches of cell phones because, while “*Gant* restricts broad searches resulting from minor crimes such as traffic violations,” “[i]t would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone.”<sup>143</sup> Chief Justice Roberts also accepted the fact that the Court’s decision might result in the loss of some “valuable incriminating information about dangerous criminals” but that is because “[p]rivacy comes at a cost.”<sup>144</sup> Thus, absent some other “case specific” exception to the warrant requirement, “[o]ur answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.”<sup>145</sup>

*Gant* and *Riley* represent clear inroads into *Robinson*'s unqualified, automatic authority to search incident to arrest. That authority is no longer automatic and no longer unqualified.

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140. 573 U.S. 373 (2014).

141. *Id.* at 392.

142. *See id.* The *Riley* Court did reaffirm *Robinson*'s categorical rule when it comes to the search of physical objects. *See id.* at 386.

143. *Id.* at 399.

144. *Id.* at 401.

145. *Id.* at 403. The “case specific” exceptions require an evidentiary justification and thus are not “automatic.” *See id.* at 402.

## VI. CONCLUSION

There are several reasons that searches incident to arrest should be limited to the offense of arrest.

First, the evidence of offense of arrest limitation reflects the common law rule and the understanding of the right to search incident to arrest at the time the Fourth Amendment was adopted.<sup>146</sup> As the analysis of the cases cited in *Robinson* and other cases not mentioned by the *Robinson* Court demonstrated, there was clear authority, which *Robinson* ignored, that the common law understanding of the authority to search incident to arrest included the offense of arrest limitation.<sup>147</sup> Accordingly, the conclusion of the *Robinson* Court that the authorities supported an unqualified right to search incident to arrest was unfounded.

Furthermore, searches incident to arrest other than for evidence of the offense of arrest rest on dubious theoretical grounds. The Supreme Court does not permit *Terry* searches for evidence because the justification for the *Terry* pat down is the officer's reasonable suspicion "criminal activity may be afoot," and that the suspect is armed and dangerous.<sup>148</sup> The officer does not have reasonable suspicion to believe that evidence of a crime will be found because no crime has yet been committed. When, however, there is probable cause to believe a crime has been committed, it is reasonable for the officer to believe that evidence of the offense will be found on,

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146.

In reading the Amendment, we are guided by "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing," since "[a]n examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable."

*Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001) (first quoting *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); and then quoting *Payton v. New York*, 445 U.S. 573, 591 (1980)).

147. *See, e.g., supra* notes 69, 70 & 72.

148. *Terry v. Ohio*, 392 U.S. at 30–31.

or in the near vicinity of, the offender.<sup>149</sup> Searches incident to arrest for evidence unrelated to the offense of arrest should be prohibited because, like *Terry* searches for evidence, there is no reason to believe such evidence will be found.

Next, *Robinson* and the post-*Robinson* cases, *Whren*, *Atwater*, *Herring* and *Strieff*, provide powerful incentives for the police to stop individuals who have committed only a minor offense in order to search, hoping to find evidence of a more serious crime.<sup>150</sup> In combination, these cases represent a “get-out-of-jail-free-card” for the police who can stop and search for any offense, no matter how minor, and their motives for doing so cannot be questioned. Even where there is no basis for the stop, if they find incriminating evidence during a search, it will not be suppressed so long as there is a warrant somewhere, even one that is invalid. If they find nothing or there is no warrant, they pat the citizen on the back and send him on his way, secure in the belief that there will be no adverse consequences.

Unfortunately, a large number of these police-citizen encounters have racial overtones and disproportionately impact minority communities.<sup>151</sup> While, obviously, this is a

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149. See *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in the judgment); Marks, *supra* note 64, at 213 n.16 (noting that probable cause is “almost always provided by the circumstances of the arrest itself”).

150. Logan, *supra* note 4, at 402–03 (“[T]he synergy of *Knowles* and *Whren*, combined with expansive police authority to arrest for minor offenses, is now manifesting itself on the nation’s streets.”). Professor Logan made this observation before the Court’s decisions in *Herring* and *Strieff*. If anything, the situation is now far worse as the statistics cited in Justice Sotomayor’s dissenting opinion in *Strieff* prove—180,000 misdemeanor warrants in Utah’s database. *Utah v. Strieff*, 136 S. Ct. 2056, 2066 (2016). There are also 7.8 million outstanding warrants in the United States “the vast majority of which appear to be for minor offenses.” *Id.* at 2068. There are 16,000 outstanding warrants out of a population of 21,000 in Ferguson, Missouri. *Id.* There are 20,000 arrests in New Orleans in one year on “outstanding traffic or misdemeanor warrants.” *Id.* There are also 52,235 pedestrians stopped in Newark in a four-year period resulting in 39,308 warrant checks. *Id.*

151. See *supra* note 127. During the writing of this article, another of these

complex problem and limiting the right to search incident to arrest will not solve it completely, it is a step toward reducing the incentives for police overzealousness. The fact that some evidence of crime may go undiscovered is simply a post-*hoc* rationalization for a bad rule. We do not tolerate searches for evidence in *Terry* cases and we should not tolerate them here.

Third, the proposed limit on searches incident to arrest is a categorical rule, like those fashioned by the Court in *Robinson* and *Belton*.<sup>152</sup> The officer may not search for evidence incident to arrest if it is impossible that she will find evidence of the offense of arrest. This is identical to the approach taken in *Gant* and it is as easy to follow, particularly when the officer is relying on a warrant for a minor offense.<sup>153</sup> Of course the officer may still search for weapons incident to arrest and if in the process, she finds evidence in plain view or plain touch, *i.e.* whose evidentiary value is “immediately apparent,”<sup>154</sup> she may seize it even if it is unrelated to the offense of arrest.

Finally, since the Supreme Court’s decision in *Terry*, there has been an inexorable trend in its cases to expand the power of the police at the expense of individual privacy. In so doing, the Court has consistently valued the law enforcement interests over an individual’s liberty and privacy interests. It has adopted “categorical” rules in cases like *Robinson*, *Belton* and *Atwater* that do not factor in the circumstances of any

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incidents was reported in the press. Mihir Zaveri & Sandra E. Garcia, *Phoenix Mayor Apologizes After Police Draw Guns on Family Over Report of Stolen Doll*, N.Y. TIMES (June 16, 2019), available at <https://www.nytimes.com/2019/06/16/us/phoenix-police-brutality-lawsuit.html>.

152. As the *Gant* Court noted, the clarity of categorical rules like *Belton*’s, which “generated a great deal of uncertainty,” has been overstated. *Arizona v. Gant*, 556 U.S. 332, 346 (2009).

153. Compare *Robinson* (fraudulent driver’s license), *Gant* (traffic offense), *Herring* (failure to appear) and *Strieff* (unpaid parking ticket) with *Belton* and *Thornton* (narcotics). In the former there is no authority to search. In the latter there is.

154. *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993).



individual case. It is time for the adoption of a categorical rule that limits the authority of the police to search incident to arrest.<sup>155</sup> In the “no evidence of the offense of arrest” case, the law enforcement interest might be characterized as “taking a shot” that some evidence will be found at the expense of a significant intrusion on a person’s liberty and privacy.<sup>156</sup> It is time for the pendulum to swing in the other direction.<sup>157</sup>

As our recent history has made clear, the consequences of police interaction with the citizenry, especially in minority communities, sometimes has deadly consequences. Surely the off-chance the police will find evidence of serious crimes by arresting for minor offenses and searching for evidence unrelated to the minor offense is not worth even a single life.

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155. See *Chimel v. California*, 395 U.S. 752, 761 (1969) (observing that the Fourth Amendment was adopted because “[t]he right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals”).

156. As the *Gant* Court put it:

It is particularly significant that *Belton* searches authorize police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space. 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, creates a serious and recurring threat to the privacy of countless individuals.

*Gant*, 556 U.S. at 345.

157. There is some indication in cases like *Riley* that, especially in the digital age, the Court is becoming more sensitive to individual privacy concerns. See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206 (extending Fourth Amendment protection to data held by a third party); *United States v. Jones*, 565 U.S. 400 (2012) (five members of the Court agreeing that extensive GPS monitoring of a suspect’s movements in public would violate societal privacy expectations).