

A CASE OF DOUBTFUL CERTAINTY: THE COURT RELAPSES INTO SEARCH INCIDENT TO ARREST CONFUSION IN *ARIZONA V. GANT*

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INTRODUCTION

The Supreme Court has long recognized the need to craft clear rules to guide police in their daily work because the Fourth Amendment cannot control officers who do not understand it.¹ In *New York v. Belton*, a case in which the Court enabled police to search as incident to arrest the passenger compartment of an arrestee's vehicle,² the Court expressed wariness of a "highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions" because such laws "may be 'literally impossible of application by the officer in the field.'"³ *Belton*'s practical concern in forming a workable rule led the Court to a generalized rule that all passenger compartments fell within search incident to arrest.⁴

Despite such an effort at clarity, search incident to arrest—at least in the vehicle context—became a doctrine divorced from its reasonable moorings. Nearly a quarter century after *Belton*, in *Thornton v. United States*, the Court upheld a search incident to arrest of a vehicle even though its driver had been "handcuffed and secured in the back of a squad car" at the time of the search.⁵ *Thornton*'s arrestee, fettered and in police custody, hardly appeared to be in a position to retrieve a weapon or evidence, the concern originally addressed by the Court's search incident to arrest precedent.⁶ *Thornton* mystified Justice Scalia, who believed the Court's holding envisioned an arrestee "possessed of the skill of Houdini and the strength of Hercules."⁷

Four years after *Thornton* strained search incident to arrest to near breaking, the Court heard *Arizona v. Gant*.⁸ The *Gant* Court, wishing to return to "the

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1. See *New York v. Belton*, 453 U.S. 454, 458 (1981). The Fourth Amendment provides: 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.

U.S. CONST. amend. IV.

2. *Belton*, 453 U.S. at 462-63.

3. *Id.* at 458 (citation omitted).

4. *Id.* at 460.

5. *Thornton v. United States*, 541 U.S. 615, 625 (2004) (Scalia, J., concurring).

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

7. *Thornton*, 541 U.S. at 626 (Scalia, J., concurring) (quoting *United States v. Frick*, 490 F.2d 666, 673 (5th Cir. 1973)).

8. 129 S. Ct. 1710 (2009).

safety and evidentiary justifications” underlying search incident to arrest’s scope, held that “*Belton* does not authorize a vehicle search incident to a recent occupant’s arrest after the arrestee has been secured and cannot access the interior of the vehicle.”⁹ *Gant* instead offered a new rule for search incident to arrest of vehicles, holding that police could “search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”¹⁰ To obtain the five votes needed to support this rule, however, the Court apparently had to do some horse trading. To persuade Justice Scalia to join the majority, the Court added a second and entirely novel police right to search incident to arrest: “we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’”¹¹ Thus, in an attempt to meaningfully limit search incident to arrest in the vehicle context, *Gant* created a new two-part rule.¹²

The *Gant* rule, however, may lead to further confusion in this troubled area of Fourth Amendment litigation. After a review of the historical background of search incident to arrest in Part I and a consideration of *Gant*’s facts and the Court’s ruling in Part II, this Article critically examines the concerns raised by the Court’s new rule. Those problems could be significant. By failing to adequately define its “reaching distance” limit,¹³ *Gant* could create misunderstandings of Fourth Amendment protections, causing officers to improperly execute its new standard. Further, *Gant*’s allowance of a search upon a “reason to believe” a vehicle contains “offense-related evidence”¹⁴ could expand search incident to arrest beyond its original justifications to become coterminous with the automobile exception. Finally, by failing to specify the “unique” circumstances the Court found in the automobile context,¹⁵ *Gant* might enable future cases to spread its contagion of confusion to search incident to arrest cases outside the vehicle setting.

9. *Id.* at 1714.

10. *Id.* at 1719.

11. *Id.* (quoting *Thornton*, 541 U.S. at 626) (Scalia, J., concurring)).

12. *Id.* at 1726 (Alito, J., dissenting) (“a police officer who arrests a vehicle occupant or recent occupant may search the passenger compartment if (1) the arrestee is within reaching distance of the vehicle at the time of the search or (2) the officer has reason to believe that the vehicle contains evidence of the offense”).

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

14. *Id.* at 1719.

15. *Id.* at 1714.

I. HISTORICAL BACKGROUND OF SEARCH INCIDENT TO ARREST

A. *A Hint Became a Suggestion, Was Loosely Turned into Dictum, and Was Finally Elevated to a Decision*

The search incident to arrest exception to the Court's warrant requirement has earned a secure position as a solid law enforcement right in Court precedent.¹⁶ The Court has exalted the police right to search incident to arrest as "always recognized under English and American law"¹⁷ and as a rule "not to be doubted."¹⁸ Such an unquestioned authority, however, has a curiously dubious origin.¹⁹ Justice Frankfurter once criticized a particular application of search incident to arrest as proof of "how a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision."²⁰ The whole of the search incident to arrest rule itself, with its "sketchy" history,²¹ has followed a similar trajectory.²² Indeed, one commentator has charitably described search incident to arrest's "historical provenance" as "not so clear."²³

Justice Cardozo traced the search right "back beyond doubt to the days of the hue and cry, when there was short shrift for the thief who was caught 'with the mainour,' still 'in seisin of his crime.'"²⁴ This theory placed the creation of search incident to arrest "in early Anglo-Saxon law,"²⁵ making it part of "a loud outcry with which felons . . . were anciently pursued, and which all who heard it were bound to take up, and join the pursuit, until the malefactor was taken."²⁶ Thus, search incident to arrest presumably began as a right of angry villagers,

16. See *United States v. Robinson*, 414 U.S. 218, 226 (1973).

17. *Weeks v. United States*, 332 U.S. 383, 392 (1914), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

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

19. For an illuminating and cogent discussion of the history of search incident to arrest, see James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417, 1421-45.

20. *United States v. Rabinowitz*, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting), *overruled in part by* *Chimel v. California*, 395 U.S. 752 (1969).

21. *Robinson*, 414 U.S. at 232.

22. The Court has noted, "As Mr. Justice Frankfurter commented in dissent . . . the 'hint' contained in *Weeks* was, without persuasive justification, 'loosely turned into dictum and finally elevated to a decision.'" *Chimel*, 395 U.S. at 760 (citation omitted).

23. Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 385 (2001). This article provides an interesting overview of the early history of search incident to arrest. See *id.* at 385-90.

24. *People v. Chiagles*, 142 N.E. 583, 584 (1923) (citing 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 577, 578 (1927)). "[T]he thief caught [with stolen goods in his possession is said to be taken] with the mainour[.]" meaning the property *in manu*—"in his hands." BLACK'S LAW DICTIONARY 859 (5th ed. 1979).

25. *Rabinowitz*, 339 U.S. at 72 (Frankfurter, J., dissenting).

26. BLACK'S LAW DICTIONARY, *supra* note 24, at 667.

who, upon capturing a fleeing thief, were empowered to recover stolen property from his person.

Search incident to arrest was quite different by the time of the Framers. Since this search right was asserted by government officials rather than villagers, it was constrained within the “limited powers enjoyed by eighteenth century authorities to execute arrests, especially without a warrant.”²⁷ The Framers were reluctant to “extend discretionary authority” to officials at the scene²⁸ because magistrates were viewed as “more capable than ordinary officers of making sound decisions as to whether a search was justified.”²⁹ This, interestingly, might have been due in part to class bias.³⁰ Framing era commentators “sometimes expressed outright disdain for the character and judgment of ordinary officers,”³¹ believing

[i]t was disagreeable enough for an elite or middle-class householder to have to open his house to a search in response to a command from a high status magistrate acting under a judicial commission; it was a gross insult to the householder’s status as a “freeman” to be bossed about by an ordinary officer who was likely drawn from an inferior class.³²

Therefore, officials performing warrantless arrests for even the most serious offenses—felonies—were protected from civil suit only if the arrestee was actually convicted.³³ Warrantless arrests and searches incident to them were not the norm.³⁴ Thus, search incident to arrest, as used in the era of the Framers, provided today’s law enforcement scant guidance.

At first, even less direction was provided by Supreme Court precedent. The Court first acknowledged search incident to arrest in *Weeks v. United States*, where it openly conceded that such a doctrine was not relevant to the case.³⁵

27. Logan, *supra* note 23, at 385.

28. *Id.*

29. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 577 (1999).

30. *See id.* Davies quotes Blackstone’s declaration that “considering what manner of men are for the most part put upon these offices, it is perhaps very well that they are generally kept in ignorance [of the full extent of the authority of their office].” *Id.* at 577 n.69 (alteration in original) (citation omitted).

31. *Id.* at 578.

32. *Id.* at 577-78.

33. *See* Logan, *supra* note 23, at 385-86.

34. *Id.* (“Thus, as a practical matter, authorities had relatively little occasion to arrest persons in the absence of a warrant, and as a result had only limited recourse to conduct searches incident to arrest . . .”).

35. *Weeks v. United States*, 232 U.S. 383, 392 (1914), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961). Justice Day, writing for the Court, declared,

What, then, is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the government always recognized under English and American law, to

Thus, the first mention of search incident to arrest in a Court opinion was mere dictum. Further, the scope of the search right *Weeks* articulated was quite narrow. The Court made no mention of the right to search for weapons, referring only to the recovery of “fruits or evidences of crime.”³⁶ Further, *Weeks* made no reference to any area beyond the arrestee’s body, articulating only the right to “search the person of the accused.”³⁷

As Justice Frankfurter alluded,³⁸ the Court then “elevated [*Weeks*] to a decision” in *Carroll v. United States* by intoning, “When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution.”³⁹ By mentioning an area “in his [the arrestee’s] control,”⁴⁰ *Carroll* outstripped *Weeks* by extending the scope of search incident to arrest beyond the arrestee’s person. Furthermore, *Carroll* performed this legerdemain in yet more dictum, for the Court explained that, in its case, “[t]he right to search and the validity of the seizure are not dependent on the right to arrest.”⁴¹

The dicta in *Weeks* and *Carroll* emboldened the Court in *Agnello v. United States* to broaden search incident to arrest from an arrestee’s “control” to include “the place where the arrest is made”⁴² or “one’s house.”⁴³ *Agnello* gave no further precision because the Court, noting that the relevant search was of a house “several blocks distant” from the arrest, simply ruled that search incident to arrest “[did] not extend to other places.”⁴⁴ *Agnello* also made a change regarding the object of search incident to arrest; the Court expanded the list of items officers could search for to include “weapons and other things to effect an escape from custody.”⁴⁵ As in the prior cases, the Court failed to make its expansion of items subject to search part of its holding, for the search of *Agnello*’s home was found to be outside the scope of the rule.⁴⁶

The Court maintained an expansive view of search incident to arrest in its

search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime.

Id.

36. *Id.*

37. *Id.*

38. *United States v. Rabinowitz*, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting), overruled in part by *Chimel v. California*, 395 U.S. 752 (1969).

39. *Carroll v. United States*, 267 U.S. 132, 158 (1925) (citations omitted).

40. *Id.*

41. *Id.* Instead, the *Carroll* Court based the lawfulness of the search on the automobile exception, a rule it created. *See id.* at 158-59, 162.

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

43. *See id.* at 32.

44. *Id.* at 30-31.

45. *Id.* at 30.

46. *Agnello* ruled that the search of *Agnello*’s home “[could not] be sustained as an incident of the arrests.” *Id.* at 31.

next case, *Marron v. United States*.⁴⁷ In *Marron*, federal prohibition agents arrested Birdsall—a co-conspirator of Marron's—because he was operating a speakeasy, and thus recovered some utility bills and a ledger listing inventories of liquor.⁴⁸ The Court determined that the officers had a right to search “the place” of arrest and that such right “extended to all parts of the premises used for the unlawful purpose,”⁴⁹ even though the premises were large enough to have “six or seven rooms.”⁵⁰ Yet the *Marron* Court, as with previous search incident to arrest case law, failed to link its broad language with the facts of the case. While expansively describing search incident to arrest's scope, it justified the search that actually occurred in the case by noting the nearness of the items to the arrestee.⁵¹ The ledger was in the arrestee Birdsall's “immediate possession and control.”⁵²

Thus, a rule confidently and repeatedly announced in Court dicta did indeed ripen into a decision. This evolution, however, was not without cost. The rule's scope was not closely tied to the facts of the cases in which it was declared. Search incident to arrest's actual boundaries were not supported by a fully explained or understood rationale and therefore were vulnerable to alteration and even retrenchment.

B. Constant Inconsistency

Less than five years after *Marron*, the Court began a dramatic contraction of search incident to arrest in *Go-Bart Importing Co. v. United States*.⁵³ Although *Go-Bart*, like *Marron*, was a prohibition case, it presented quite different police behavior.⁵⁴ The agents falsely claimed to have a search warrant, took the arrestee's keys, and “by threat of force compelled him to open a desk and safe.”⁵⁵ The *Go-Bart* Court found the search unreasonable, condemning the officers' actions as making a “general and apparently unlimited search, ransacking the desk, safe, filing cases and other parts of the office.”⁵⁶ Further, the Court deemed the search of an office to be “a general exploratory search in the hope that evidence of crime might be found.”⁵⁷ Condemning the search of a single office seemed inconsistent with *Marron*'s generous rule. Rather than question the boundaries previously allowed by *Marron*, the *Go-Bart* Court merely

47. 275 U.S. 192 (1927).

48. *Id.* at 194.

49. *Id.* at 199.

50. *Id.* at 193-94.

51. *See id.* at 199.

52. *Id.*

53. 282 U.S. 344 (1931).

54. *See id.* at 349-50.

55. *Id.* at 349.

56. *Id.* at 358.

57. *Id.* (citation omitted).

distinguished its facts.⁵⁸ *Marron* simply lacked the reprehensible behavior of the *Go-Bart* agents, for the officers in *Marron* executed a valid warrant without threatening force or rummaging the place in a general search.⁵⁹ Further, *Go-Bart* noted that *Marron*'s officers collected items that "were visible and accessible and in the offender's immediate custody."⁶⁰

The Court continued its contraction of search incident to arrest in *United States v. Lefkowitz*,⁶¹ still another prohibition case. *Lefkowitz* determined that the search of a "ten feet wide and twenty feet long"⁶² room violated the Fourth Amendment.⁶³ As did *Go-Bart*, *Lefkowitz* distinguished *Marron* as a case where the evidence was seized "in plain view" and thus collected without a search being performed.⁶⁴ Such reasoning seemed forced. However much *Lefkowitz* attempted to distinguish *Marron* rather than simply overturn it, the fact remained that in the space of five years, search incident to arrest had shrunk from supporting a search of an entire home to failing to justify the search of one room.⁶⁵

Lefkowitz's severe restriction of search incident to arrest's scope was followed by yet another expansion of the rule in *Harris v. United States*.⁶⁶ Whereas *Lefkowitz* deemed the search of "room 604"⁶⁷ to be "unrestrained,"⁶⁸ *Harris* found a "careful and thorough"⁶⁹ five-hour search of an entire apartment to be "basically reasonable."⁷⁰ The search in *Harris* was so intrusive that it included lifting carpets, stripping bed linen, turning over a mattress, and opening a sealed envelope in a bureau drawer.⁷¹ The Court reasoned that since *Harris* "was in exclusive possession of a four room apartment," the arrestee's control "extended quite as much to the bedroom in which the . . . [evidence was] found as to the living room in which he was arrested."⁷² The dissent in *Harris* recognized the glaring incongruity between the Court's ruling and recent precedent, declaring that finding the search lawful in *Harris* was tantamount to throwing *Go-Bart* and *Lefkowitz* "to the winds."⁷³

58. *Id.* ("Plainly the case before us is essentially different from *Marron v. United States*.").

59. *Id.*

60. *Id.*

61. 285 U.S. 452 (1932).

62. *Id.* at 458.

63. *Id.* at 467.

64. *Id.* at 465.

65. The Court's delicacy in refusing to openly overturn *Marron* was somewhat ironic in light of the fact that this precedent had its origin in dictum in *Weeks* and *Carroll*.

66. 331 U.S. 145 (1947), *overruled in part by* *Chimel v. California*, 395 U.S. 752 (1969).

67. *Lefkowitz*, 285 U.S. at 458.

68. *Id.* at 464.

69. *Harris*, 331 U.S. at 149.

70. *See id.* at 155.

71. *Id.* at 169 (Frankfurter, J., dissenting).

72. *Id.* at 152 (majority opinion).

73. *Id.* at 167 (Frankfurter, J., dissenting).

One year after *Harris*, the Court abruptly reversed course in *Trupiano v. United States*.⁷⁴ In *Trupiano*, agents raided a farm and seized an illegal still without troubling themselves to obtain a search warrant.⁷⁵ The Court found the seizure improper,⁷⁶ denying officers the use of search incident to arrest because “[t]he mere fact that there is a valid arrest does not ipso facto legalize a search or seizure without a warrant.”⁷⁷ The Court deemed search incident to arrest such a “strictly limited right” that it “[grew] out of the inherent necessities of the situation.”⁷⁸ Yet what those “necessities” were was far from clear. The Court groped to explain by offering that “there must be something more in the way of necessity than merely a lawful arrest” and that “there must be some other factor in the situation that would make it unreasonable or impracticable to require the arresting officer to equip himself with a search warrant.”⁷⁹ The facts in the case presented no such necessities, and the Court gave no examples to clarify its ruling.

Outside of a half-hearted attempt to distinguish *Harris* as involving the unexpected discovery of evidence for which officials could not have thought to seek a warrant before the arrest (while *Trupiano*’s officials, by comparison, had plenty of forewarning of the need for a warrant), *Trupiano* did not even pretend to reconcile its ruling with *Harris*.⁸⁰ Indeed, *Trupiano* admitted, “These factual differences may or may not be of significance so far as general principles are concerned.”⁸¹ The *Trupiano* Court flatly declared, “We do not take occasion here to reexamine the situation involved in [*Harris*].”⁸²

The Court lurched back to broadening search incident to arrest only two years later in *United States v. Rabinowitz*, a case involving an hour and a half search of a one-room office.⁸³ The Court in *Rabinowitz* found the search to be “incident to a lawful arrest . . . and therefore valid.”⁸⁴ Although refusing to bind itself to any “ready litmus paper test,” the Court did specify five factors which pointed toward reasonableness.⁸⁵ Some elements were hardly novel, such as the fact that the search and seizure were based on a valid arrest and that possession of the recovered evidence (forged stamps) was a crime.⁸⁶ Two factors—that “the

74. 334 U.S. 699 (1948), *overruled in part by* *United States v. Rabinowitz*, 339 U.S. 56 (1950).

75. *Id.* at 701-03.

76. *Id.* at 710.

77. *Id.* at 708.

78. *Id.*

79. *Id.*

80. *Id.* at 708-09.

81. *Id.* at 709.

82. *Id.* at 708.

83. *United States v. Rabinowitz*, 339 U.S. 56, 58-59, 63-64 (1950), *overruled in part by* *Chimel v. California*, 395 U.S. 752 (1969).

84. *Id.* at 63.

85. *Id.* at 63-64.

86. *Id.* at 64.

room was small and under the immediate and complete control of [the arrestee]” and that “the search did not extend beyond the room used for unlawful purposes”⁸⁷—appeared to be reformulations of norms stated in prior cases. One factor—that “the place of the search was a business room to which the public, including the officers, was invited”⁸⁸—seemed to be a new creation crafted for the case at hand. *Rabinowitz* did not explain the origins of the factors. Nor did the Court seem to place much reliance on them, for it declared that “[w]hat is a reasonable search is not to be determined by any fixed formula.”⁸⁹

In dissent, Justice Frankfurter vehemently disagreed with the ruling, essentially branding the majority’s reasoning a “distortion”⁹⁰ and a “farce.”⁹¹ He emphasized that the “basic roots” of search incident to arrest “lie in necessity.”⁹² The two necessities were: “first, in order to protect the arresting officer and to deprive the prisoner of potential means of escape, and secondly, to avoid destruction of evidence by the arrested person.”⁹³ These two imperatives, though not appreciated at the time, would become guideposts for future search incident to arrest case law.

C. An Attempt to Establish a Rational and Lasting Rule

The Court itself knew of the uncertainty plaguing search incident to arrest.⁹⁴ In *Chimel v. California*, Justice Stewart, who wrote the Court’s opinion, compared the precedent of this doctrine to a swinging pendulum⁹⁵ that was “hardly founded on an unimpeachable line of authority.”⁹⁶ *Chimel* therefore endeavored to bring consistency to this area of law by anchoring it to specifics, averring:

As Mr. Justice Frankfurter put it: “To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an ‘unreasonable search’ is forbidden—that the search must be reasonable. What is the test of reason which makes a search unreasonable?”⁹⁷

In this regard, Justice Stewart wondered if it were reasonable to search a person’s

87. *Id.*

88. *Id.*

89. *Id.* at 63.

90. *Id.* at 71 (Frankfurter, J., dissenting).

91. *Id.* at 72.

92. *Id.*

93. *Id.* (internal citation omitted).

94. *See Chimel v. California*, 395 U.S. 752, 755 (1969) (“The decisions of this Court bearing upon that question [search incident to arrest] have been far from consistent, as even the most cursory review makes evident.”).

95. *Id.* at 758.

96. *Id.* at 760.

97. *Id.* at 765 (quoting *Rabinowitz*, 399 U.S. at 83 (Frankfurter, J., dissenting)).

home simply because he or she was arrested in it, what made the same search unreasonable when the arrest occurred out on the front lawn or just down the street?⁹⁸ “Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point.”⁹⁹

Chimel therefore set out to craft a rule that was grounded in the practicalities of arrests. One such concrete concern involved officer safety, for “[w]hen 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.”¹⁰⁰ Equally valid was the interest in protecting the case. *Chimel* explained, “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.”¹⁰¹ The actual necessities of the arrest setting thus helped identify the objects for which officers could reasonably search.

Practical consequences of arrests also informed the *Chimel* Court in its determination of search incident to arrest’s scope. Justice Stewart reasoned:

[T]he 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. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested.¹⁰²

There was thus “ample justification . . . [to allow] a search of the arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.”¹⁰³

Chimel made clear that permitting officers to move beyond these common sense boundaries would destroy any effort at meaningfully limiting searches incident to arrest. Justice Stewart warned, “No consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items.”¹⁰⁴

98. *Id.* at 764-65.

99. *Id.* at 765.

100. *Id.* at 762-63. Justice Stewart explained, “Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated.” *Id.* at 763.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 766. In this regard, Justice Stewart quoted from Justice Jackson’s dissent in *Harris*:

The difficulty with this problem for me is that once the search is allowed to go beyond the person arrested and the objects upon him or in his immediate physical control, I see no practical limit short of that set in the opinion of the Court—and that means to me no limit at all.

Id. at 766 n.11 (citation omitted).

D. Insinuation of Per Se Search Rights into Chimel's Scope Rule

In defending its newly formed rules, *Chimel* explicitly rejected the dissent's contention that "so long as there is probable cause to search the place where an arrest occurs, a search of that place should be permitted even though no search warrant has been obtained," because such an argument would create a per se right to search the room of arrest.¹⁰⁵ Justice Stewart responded, "[W]e can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require."¹⁰⁶

Despite such an effort, absolute search rights seeped into search incident to arrest case law. One of the most significant examples occurred in *United States v. Robinson*,¹⁰⁷ a case involving an arrest for driving on a revoked license. When the arresting officer patted down Robinson's breast pocket, he felt something, but he "couldn't tell what it was."¹⁰⁸ The officer then recovered a "crumpled up cigarette package," finding heroin inside.¹⁰⁹

Justice Rehnquist, the author of the Court's opinion in *Robinson*, took a categorical approach to search incident to arrest. He perceived arrests, as a kind of seizure, to present peril to police, for it was "scarcely open to doubt that the . . . extended exposure which follows the taking of a suspect into custody" created "far greater" danger than simple street encounters.¹¹⁰ He thus refused to tailor the intrusiveness of the search on the basis of the severity of the crime committed, instead choosing to treat "all custodial arrests alike for purposes of search justification."¹¹¹

The same one-size-fits-all analysis was applied to measuring the scope of the search permitted by an arrest:

A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken

105. *Id.* at 766 n.12.

106. *Id.*

107. 414 U.S. 218 (1973).

108. *Id.* at 223.

109. *Id.*

110. *Id.* at 234-35.

111. *See id.* at 235. Justice Rehnquist declared,

Nor are [we] inclined, on the basis of what seems to us to be a rather speculative judgment, to qualify the breadth of the general authority to search incident to a lawful custodial arrest on an assumption that persons arrested for the offense of driving while their licenses have been revoked are less likely to possess dangerous weapons than are those arrested for other crimes.

Id. at 234.

down in each instance into an analysis of each step of the search.¹¹²

Even though the purposes of search incident to arrest were the officer's "need to disarm and to discover evidence," the right to search in the individual case did not depend on what a judge might "later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect."¹¹³ In fact, the officer's failure in this case to have any fear of Robinson or to suspect he was armed was simply "of no moment."¹¹⁴ Thus, the mere existence of a lawful arrest enabled an officer in every case to search for both weapons and evidence.¹¹⁵ Further, *Robinson* promoted this absolute version of search incident to arrest as not merely an exception to the warrant requirement, but as an "affirmative authority to search" meeting the Fourth Amendment's reasonableness requirement.¹¹⁶ *Robinson's* laissez-faire attitude toward police marked a dramatic retreat from *Chimel's* insistence that a warrantless search be based on "the inherent necessities of the situation"¹¹⁷ and that the warrant requirement "is not lightly to be dispensed with, and 'the burden is on those seeking (an) exemption (from the requirement) to show the need for it.'"¹¹⁸

Another case that crafted an absolute search right for officers performing arrests was actually ambivalent about creating a per se rule.¹¹⁹ In *Maryland v. Buie*, police lawfully entered Buie's home to arrest him for armed robbery.¹²⁰ When an officer called down into the basement, Buie emerged with his hands up and was arrested.¹²¹ Afterward, a detective went down into the basement "in case there was someone else down there" and noticed a red running suit worn by the robber in plain view.¹²² Buie's motion to suppress the running suit was denied.¹²³

In considering whether the detective's entry into the basement after the defendant's exit and arrest was reasonable, the Court, in an opinion written by

112. *Id.* at 235.

113. *Id.*

114. *Id.* at 236.

115. *See id.* at 235-36.

116. *Id.* at 226, 235.

117. *Chimel v. California*, 395 U.S. 752, 759 (1969) (quoting *Trupiano v. United States*, 344 U.S. 699, 708 (1948)). *Chimel* declared that a warrant could be excused only with a "showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." *Id.* at 761 (quoting *McDonald v. United States*, 335 U.S. 451, 455-56 (1948)).

118. *Id.* at 762 (alteration in original) (quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951)).

119. *Maryland v. Buie*, 494 U.S. 325, 336-37 (1990).

120. *Id.* at 328.

121. *Id.*

122. *Id.* (internal citation omitted).

123. *Id.*

Justice White, delineated two kinds of “protective sweep[s].”¹²⁴ *Buie* specified that for “closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched,” officers were permitted to look “as a precautionary matter and without probable cause or reasonable suspicion.”¹²⁵ In contrast, for officers to venture beyond this area, *Buie* held that “there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.”¹²⁶ Since these searches are meant to protect arresting officers, the sweeps must amount to a “ cursory inspection of those spaces where a person may be found,”¹²⁷ lasting “no longer than is necessary to dispel reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.”¹²⁸

In requiring some level of objective justification for the second kind of sweep (covering the entire home), *Buie* avoided a per se search right in favor of a rule providing power “no more than necessary to protect the officer from harm.”¹²⁹ For support, Justice White noted the Court’s earlier refusal in *Terry v. Ohio* to create a bright-line rule when crafting a right to frisk a person on the street.¹³⁰ *Buie* recognized that

despite the danger that inheres in on-the-street encounters and the need for police to act quickly for their own safety, the Court in *Terry* did not adopt a bright-line rule authorizing frisks for weapons in all confrontational encounters. Even in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted. That approach is applied to the protective sweep of a house.¹³¹

This explicit adherence to an individualized suspicion requirement for protective sweeps of homes might have obscured the fact that *Buie* created an absolute right for officers to search “spaces immediately adjoining the place of arrest.”¹³² Unlike the protective sweep of the home, *Buie* extended search incident to arrest authority to include looking for persons in these areas without any additional

124. *Id.* at 327, 334-35. In this regard, the Court posed the issue as requiring that it “decide what level of justification is required . . . before police officers, while effecting the arrest of a suspect in his home pursuant to an arrest warrant, may conduct a warrantless protective sweep of all or part of the premises.” *Id.* at 327 (emphasis added).

125. *Id.* at 334.

126. *Id.*

127. *Id.* at 335.

128. *Id.* at 335-36 (citation omitted).

129. *Id.* at 334.

130. *Id.* at 334 n.2 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

131. *Id.*

132. *Id.* at 334.

justification.¹³³

The *Buie* Court determined that protective sweeps were not constrained by *Chimel*'s prohibition against extending the search beyond an arrestee's person or area of immediate control because the two cases were simply different.¹³⁴ *Chimel* concerned the prospect of extending search incident to arrest to the entire house, while *Buie* merely involved a more limited protective sweep of the home.¹³⁵ Moreover, *Chimel*'s focus of danger was the arrestee; in *Buie*, the peril came from "unseen third parties."¹³⁶ *Buie*, therefore, established an absolute right to search in all search incident to arrest precedent without viewing its extension as undermining the integrity of *Chimel*'s limitations.

E. Search Incident to Arrest and Vehicles

Perhaps the most dramatic expansion of search incident to arrest occurred in *New York v. Belton*,¹³⁷ where the Court devised a bright-line boundary for police searches of vehicles. In *Belton*, a police officer, upon pulling over four men in a speeding car, smelled marijuana and observed an item of marijuana paraphernalia on the floor of the vehicle.¹³⁸ After patting down the occupants and splitting them up from each other on the road "so they would not be in physical touching area of each other," the officer searched the passenger compartment of the car.¹³⁹ As a result, he unzipped a pocket of a black leather jacket on the back seat and found cocaine.¹⁴⁰

Belton was written by Justice Stewart, the same author who had taken such care in crafting a reasoned basis for the scope of search incident to arrest in *Chimel*.¹⁴¹ In *Belton*, Justice Stewart's concern was the workability of *Chimel*'s rule when applied to cars.¹⁴² The *Belton* Court worried that Fourth Amendment protections could "only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."¹⁴³ Justice Stewart noted that the Fourth Amendment was "primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily

133. *See id.*

134. *See id.* at 336 (citing *Chimel v. California*, 395 U.S. 752 (1969)).

135. *Id.*; *Chimel*, 395 U.S. at 754.

136. *Buie*, 494 U.S. at 336; *Chimel*, 395 U.S. at 766-67.

137. 453 U.S. 454 (1981).

138. *Id.* at 455-56. The officer observed a "Supergold" wrapper, which he associated with marijuana, on the car's floor. *Id.*

139. *Id.* at 456.

140. *Id.*

141. *Id.* at 454-55.

142. *See id.* at 458-59.

143. *Id.* at 458 (citation omitted).

engaged.”¹⁴⁴ If search incident to arrest presented too complex a rule, neither citizens nor police would be able to know the scope of their protection against unreasonable search and seizure.¹⁴⁵

Belton found that lower courts lacked a “workable definition” of *Chimel*’s “area within the immediate control of the arrestee” when police arrested motorists.¹⁴⁶ The Court therefore attempted to draw a simple bright line by 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.”¹⁴⁷ Thus, anything inside the passenger compartment—including containers—could be searched under *Belton*, even if such containers “could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested.”¹⁴⁸

Even though *Belton* now enabled police to search areas “not inevitably” within an arrestee’s control, and in containers that could not hold a weapon or evidence, Justice Stewart did not view this creation of a per se search right as an expansion of *Chimel*’s carefully considered boundaries.¹⁴⁹ He stated, perhaps more out of hope than of conviction, that “[o]ur holding today does no more than determine the meaning of *Chimel*’s principles in this particular and problematic context. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.”¹⁵⁰

This pretense became harder to maintain in the Court’s next case, *Thornton v. United States*,¹⁵¹ in which a driver stopped and exited his vehicle before the police officer following him had a chance to pull him over. Chief Justice Rehnquist, who wrote the Court’s opinion, asserted that “[i]n all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle.”¹⁵² The Court found the stress of the arrest “no less merely because the arrestee exited his car before the officer initiated contact” and further

144. *Id.* (citation omitted). The Court continued as follows:

A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be “literally impossible of application by the officer in the field.”

Id. (citation omitted).

145. *Id.* at 459-60. *Belton* declared that “[w]hen a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.” *Id.*

146. *Id.* at 460. The *Belton* Court specifically noted the confusion when the area at issue “arguably include[d] the interior of an automobile and the arrestee is its recent occupant.” *Id.*

147. *Id.* (internal footnote omitted).

148. *Id.* at 461.

149. *Id.* at 460 n.3.

150. *Id.*; see generally *Chimel v. California*, 395 U.S. 752 (1969).

151. 541 U.S. 615 (2004).

152. *Id.* at 621.

concluded that the arrestee was “[no] less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle.”¹⁵³ *Thornton* therefore extended *Belton* to include those encounters “when an officer does not make contact until the person arrested has left the vehicle.”¹⁵⁴

To support this expansion, Chief Justice Rehnquist emphasized the “need for a clear rule” to avoid the “ad hoc determinations on the part of officers in the field and reviewing courts.”¹⁵⁵ *Thornton* therefore sought to preserve its bright-line analysis despite the fact that “not all contraband in the passenger compartment is likely to be readily accessible to a ‘recent occupant.’”¹⁵⁶ Such an improbability, in fact, existed in *Thornton* itself because “[i]t . . . [was] unlikely in this case that . . . [Thornton] could have reached under the driver’s seat for his gun once he was outside of his automobile.”¹⁵⁷ Thus, the *Thornton* Court, in explaining its concern about forcing officials to apply a case-by-case test to determine the legality of a particular search, readily applied such an ad hoc analysis in its own case.

In the wake of *Chimel*’s effort to establish a reasoned basis for the boundaries of search incident to arrest, the Court increasingly lost faith that officers in the field or judges in the courtroom would be able to accurately and consistently apply its rule. To resolve this doubt, *Thornton* created ever-broadening bright-line rules meant to enable even the dimmest officials to reach the proper conclusion about where to search incident to arrest. The per se search rights, however, tended to undermine the very reasoning *Chimel* had established in the first place in order to prevent pendulum swings in this area of the law. Thus, on the threshold of *Arizona v. Gant*, the Court’s search incident to arrest doctrine for vehicles had two incompatible aims—to adhere to a rule strictly limited to “the inherent necessities of the situation,”¹⁵⁸ while at the same time offering a “sort of generalization” for ready understanding by officers in the field.¹⁵⁹

II. ARIZONA V. GANT

A. The Facts

On August 25, 1999, Tucson police officers Griffith and Reed visited a home at 2524 North Walnut Avenue to check out an anonymous tip that the house was being used to sell drugs.¹⁶⁰ When Rodney Gant answered the door, the officers

153. *Id.*

154. *Id.* at 617.

155. *Id.* at 623.

156. *Id.* at 622.

157. *Id.*

158. *Chimel v. California*, 395 U.S. 752, 759 (1969).

159. *Thornton*, 541 U.S. at 623.

160. *Arizona v. Gant*, 129 S. Ct. 1710, 1714 (2009).

asked to speak to the owner of the house.¹⁶¹ Gant identified himself and told the officers that the owner was not at home but would return later that afternoon.¹⁶² The officers later conducted a records check on Gant, learning that he had an outstanding arrest warrant for driving with a suspended license.¹⁶³ That evening, the officers returned to the home and found “a man near the back of the house and a woman in a car parked in front of it.”¹⁶⁴ Upon arrival of a third officer, the police arrested the man “for providing a false name and the woman for possessing drug paraphernalia.”¹⁶⁵ After the two arrestees were handcuffed and placed separately in the two patrol cars, Gant pulled into the driveway.¹⁶⁶ The officers recognized his vehicle, shining a flashlight into the car to confirm his identity.¹⁶⁷ After Gant parked his car at the end of the driveway, exited, and shut his door, Officer Griffith—who was about thirty feet away—called to him.¹⁶⁸ Approaching each other, the two met ten to twelve feet from Gant’s car, where Griffith immediately arrested and handcuffed Gant.¹⁶⁹ Griffith then called for backup, and when two more officers arrived, the police locked Gant in the back of the newly available vehicle.¹⁷⁰ Within minutes of the arrest, the officers searched Gant’s car and found a gun and a bag of cocaine in the pocket of a jacket on the backseat.¹⁷¹ Gant later moved to suppress the evidence found in his car as obtained in violation of the Fourth Amendment.¹⁷²

B. *The Court’s Opinion*

The *Gant* Court, in an opinion written by Justice Stevens, established a new two-part rule for search of an automobile incident to arrest.¹⁷³ *Gant* first held that police could “search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time.”¹⁷⁴ The Court next concluded that “circumstances unique to the vehicle context justify a search incident to arrest when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in

161. *Id.*

162. *Id.* at 1714-15.

163. *Id.* at 1715.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *See id.* at 1714.

174. *Id.* at 1719. *Gant* offered the converse of the same rule, holding that “*Belton* does not authorize a vehicle search incident to a recent occupant’s arrest after the arrestee has been secured and cannot access the interior of the vehicle.” *Id.* at 1714.

the vehicle.”¹⁷⁵ These two rules are potentially in conflict: the first restricts search incident to arrest to its original necessities (searching an area only because the arrestee might reach into it for a weapon or evidence), while the second expands the rule, providing police with an entirely new and independent basis (reason to believe evidence of the offense exists) for searching a vehicle incident to arrest.¹⁷⁶

The incompatibility of *Gant*'s “reaching distance” limit with its “reason to believe” or “offense-related evidence” expansion can be gleaned by the differing treatment each rule was given in the opinion. The rationale justifying the reaching distance limit required most of the opinion, while the support for “offense-related evidence” fit within a single paragraph.¹⁷⁷ The very structure of the opinion, therefore, hinted that Justice Stevens's primary aim in *Gant* was to place a limit on the recent expansions of search incident to arrest's scope. The “offense-related evidence” rule seemed grafted on in an attempt to gain the needed fifth vote of Justice Scalia. In the one paragraph devoted to explaining the “offense-related evidence” expansion, the *Gant* Court mentioned Justice Scalia's concurring opinion in *Thornton*, urging its implementation.¹⁷⁸ Further, Justice Scalia himself made no secret of his need to hold his nose in order to concur with the majority, explaining:

It seems to me unacceptable for the Court to come forth with a 4-to-1-to-4 opinion that leaves the governing rule uncertain. I am therefore confronted with the choice of either leaving the current understanding of *Belton* and *Thornton* in effect, or acceding to what seems to me the artificial narrowing of those cases adopted by Justice Stevens. The latter, as I have said, does not provide the degree of certainty I think desirable in this field; but the former opens the field to what I think are plainly unconstitutional searches—which is the greater evil. I therefore join the opinion of the Court.¹⁷⁹

For its primary goal—the “reaching distance” limit on *Belton*—*Gant* took great care in laying a proper foundation, returning to the original understanding of search incident to arrest as merely a “well-delineated” exception to the warrant requirement.¹⁸⁰ This characterization was important, for it represented a significant break with the bolder claim of the early bright line case of *Robinson*, which saw search incident to arrest as reasonable in its own right.¹⁸¹ Since search

175. *Id.* at 1719 (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004)).

176. *See id.* at 1714.

177. *See id.* at 1719.

178. *See id.* at 1718.

179. *Id.* at 1725 (Scalia, J., concurring).

180. *Id.* at 1716 (majority opinion).

181. *See United States v. Robinson*, 414 U.S. 218, 226 (1973). In *Robinson*, the Court gave search incident to arrest an independent basis of legitimacy, averring, “Since the statements in the cases speak not simply in terms of an exception to the warrant requirement, but in terms of an affirmative authority to search, they clearly imply that such searches also meet the Fourth

incident to arrest was an exception to a general rule, deviating from the norm of procuring a warrant rested on the interests of “officer safety and evidence preservation.”¹⁸² These very interests, in turn, created a limit which ensured that “the scope of a search incident to arrest . . . [was] commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense that an arrestee might conceal or destroy.”¹⁸³ If search incident to arrest were concerned with the arrestee’s access to weapons or evidence, then the only area of worry would be the area from which he “might gain possession.”¹⁸⁴ Thus, “[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.”¹⁸⁵

Gant then considered the weapons and evidence interests involved in *Belton*.¹⁸⁶ Interestingly, in analyzing a case that established a bright-line rule, *Gant* deemed *Belton*’s specific facts to be quite relevant. *Belton* had applied *Chimel* in a context involving a “lone police officer” confronting four arrestees, none of whom were handcuffed.¹⁸⁷ By framing *Belton* within these facts, *Gant* attempted to limit *Belton* to the items in a passenger compartment that are generally within the arrestee’s reaching distance.¹⁸⁸ Justice Stevens then lamented that the Court’s opinion “has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search.”¹⁸⁹ *Gant* blamed this misunderstanding on Justice Brennan’s dissent in *Belton*, which warned that *Belton*’s ruling would mean that “the interior of a car is *always* within the immediate control of the arrestee who has recently been in the car.”¹⁹⁰ Scapegoating Justice Brennan enabled the *Gant* Court to conveniently forget its own support for a broad interpretation of *Belton* in *Thornton*, where the Court upheld the search even though the officer had “handcuffed . . . [Thornton], informed him that he was under arrest, and placed him in the back seat of the patrol car” before searching the vehicle.¹⁹¹

Gant then applied its “reaching distance” rule, determining that there was no

Amendment’s requirement of reasonableness.” *Id.*

182. *Gant*, 129 S. Ct. at 1716 (citation omitted).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 1716-17.

187. *Id.* *Gant* noted that “[t]he officer [in *Belton*] was unable to handcuff the occupants because he had only one set of handcuffs.” *Id.* at 1717 n.1.

188. *Gant* noted that *Belton*’s “holding was based in large part on our assumption ‘that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within the area into which an arrestee might reach.’” *Id.* at 1717 (quoting *New York v. Belton*, 453 U.S. 454, 460 (1981)).

189. *Id.* at 1718.

190. *Id.* (emphasis in original) (quoting *Belton*, 453 U.S. at 466 (Brennan, J., dissenting)).

191. *Thornton v. United States*, 541 U.S. 615, 618 (2004).

“possibility of access” in the case.¹⁹² Unlike *Belton*, where a single officer faced the threat of four unsecured arrestees, *Gant*’s five officers outnumbered its three arrestees, “all of whom had been handcuffed and secured in separate patrol cars” before the time of the search.¹⁹³ The police in *Gant* therefore “could not reasonably have believed . . . that *Gant* could have accessed his car at the time of the search.”¹⁹⁴

After presenting its “reaching distance” rule, *Gant* turned, with less enthusiasm, to its second innovation: the declaration that “circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’”¹⁹⁵ The Court’s lukewarm feelings for the “offense-related evidence” rule¹⁹⁶ were palpable. *Gant* did not bother to explain exactly what circumstances made this rule appropriate for the vehicle context, and it further conceded that the rule “[did] not follow from *Chimel*.”¹⁹⁷ The Court even tried to minimize the rule’s impact by predicting that “in many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence.”¹⁹⁸ The *Gant* Court then proceeded to quickly apply the “offense-related evidence” rule¹⁹⁹ to the facts. Justice Stevens determined that “[a]n evidentiary basis for the search” was lacking because “*Gant* was arrested for driving with a suspended license—an offense for which police could not expect to find evidence in the passenger compartment of *Gant*’s car.”²⁰⁰ The search in the case was therefore unreasonable.²⁰¹ Neither of *Gant*’s two new rules—those involving “reaching distance” and “offense-related evidence”—could therefore save the search in the case from violating the Fourth Amendment.²⁰²

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

193. *Id.* *Gant* somehow failed to note the similarities between its arrestees “handcuffed and secured” in patrol cars and the arrestee handcuffed and seated in a patrol vehicle in *Thornton*, a drug case decided only five years previously. *See id.* *Gant* did distinguish *Thornton* on the fact that there was reason to believe that evidence of the offense would be found in the car. *Id.* at 1719, 1722. This second rationale, though, was not recognized by the Court at the time *Thornton* upheld its search incident to arrest, leaving Justice Scalia to advocate such a rule in his concurrence. *See Thornton*, 541 U.S. at 632 (Scalia, J., concurring). Therefore, *Thornton* must have upheld the search based on the belief that police could search vehicles despite having the arrestee safely handcuffed and secured in a patrol car, since this was the only basis at the time to support the search incident to arrest.

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

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

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 1723-24.

III. IMPLICATIONS OF *GANT*A. *Gant's* New "Reaching Distance" Limitation on *Belton* Will Create Uncertainty Both in Its Meaning and Its Impact on Police Behavior

When *Gant* created the rule that an officer may search a vehicle incident to arrest "only if the arrestee is within reaching distance of the passenger compartment at the time of the search,"²⁰³ the Court never precisely defined "reaching distance." Instead, Justice Stevens spent much ink explaining what it was not.²⁰⁴ The facts of the case indicated that "reaching distance" did not extend to an officer meeting the suspect ten to twelve feet from his car, arresting him, handcuffing him, and placing him in the back of a police cruiser.²⁰⁵ The Court also indicated, without elaboration, that "reaching distance" did not occur "in most cases."²⁰⁶ The closest *Gant* came to identifying reaching distance was in dismissing an extreme case: "There was no suggestion . . . that *Chimel* authorizes a vehicle search incident to arrest when there is no realistic possibility that an arrestee could access his vehicle."²⁰⁷

Gant did make some factual determinations about the failure of the case to fulfill reaching distance, but the Court's contentions here created more questions than answers. Justice Stevens distinguished *Belton*, where reaching distance existed, from *Gant's* own facts (where it did not) by noting that "[u]nlike in *Belton*, which involved a single officer confronted with four unsecured arrestees, the five officers in this case outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched *Gant's* car."²⁰⁸ The Court thus deemed relevant three factors: (1) number of officers versus arrestees; (2) handcuffing the arrestee; and (3) placing the arrestee in a patrol vehicle. Yet the Court did not explicitly place the factors in a multi-part test, nor did it explain how many of the factors needed to be satisfied for "reaching distance" to occur.

Interestingly, none of these three factors measures the actual distance an arrestee must be to the vehicle in order to fall within "reaching distance." *Gant's* discussion of *Belton* lacks any specifics regarding the distance of the arrestees from the vehicle other than a brief mention that the State in *Belton* vaguely referred to the arrestees' "proximity to the vehicle."²⁰⁹ *Gant*—and *Belton*, for

203. *Id.* at 1723.

204. In fact, the first time *Gant* provided its holding, it did so in the negative: "Accordingly, we hold that *Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle." *Id.* at 1714.

205. *See id.* at 1715.

206. *Id.* at 1719. Specifically, the Court noted that "in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search." *Id.*

207. *Id.* at 1717.

208. *Id.* at 1719.

209. *Id.* at 1717.

that matter—mentioned the distance of *Belton*'s arrestees in only one other particular: the space between the individuals themselves.²¹⁰ The Court in each case noted that "the officer 'split . . . [the arrestees] up into four separate areas of the Thruway . . . so they would not be in physical touching area of each other.'"²¹¹ The failure to measure the arrestee's distance from the vehicle not only undermined this factor's credibility as an actual element of *Gant*'s "reaching distance" test, but also called into question the importance *Belton* placed on this unspecified variable in the first place. *Gant*'s three-factor rule tests not the distance of the arrestee from the car, but his or her potential danger to the arresting officer in general. Each factor—the number of suspects in relation to the number of officers, the limitation of an arrestee's movement, whether constrained by handcuffs or locked in a police vehicle—speaks to danger facing police regardless of nearness to a vehicle or the existence of weapons. Instead of "reaching distance," perhaps *Gant*'s first rule should have been labeled "amount of officer control over arrestee" or "potential danger suspect posed to officer."

The confusion created by *Gant*'s "reaching distance" rule is more than just semantics. The Court either created a "distance" test without any guidance or a "control/danger" test without acknowledgment. Either option creates uncertainty, which could cause either officer hesitation or exploitation. Hesitation from uncertainty was one of the primary concerns voiced in *Belton*, which recognized that police can only adhere to Fourth Amendment limits if they can understand them.²¹² *Belton* feared that a confusing rule ran the risk of hindering officers in performing their "day-to-day activities."²¹³ In its vagueness, *Gant*'s "reaching distance" rule might be akin to rules "qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions."²¹⁴ Officers in the field, groping to figure out the boundaries of "reaching distance," might be hamstrung in performing their duties.

The uncertainty that might confuse one officer could embolden another to take improper risks. In the wake of *Gant*'s ruling, officers who are intent upon searching a vehicle might attempt to fulfill "reaching distance" by placing the arrestee next to the vehicle. Moreover, *Gant*'s three "reaching distance" factors might create a perverse incentive for police to delay handcuffing an arrestee or placing him in a patrol car. *Gant* may thus result in placing an unrestrained suspect nearer to weapons in a vehicle. Its reasoning, at the very least, promotes proximity between officer and suspect that would trigger the exposure warned about in *Robinson*.²¹⁵ Police and citizen safety might therefore be threatened.

210. *See id.* (citing *New York v. Belton*, 453 U.S. 454, 456 (1981)).

211. *Id.* (quoting *Belton*, 453 U.S. at 456).

212. *See Belton*, 453 U.S. at 458.

213. *See id.*

214. *Id.* (citation omitted).

215. *See United States v. Robinson*, 414 U.S. 218, 234, 234-35 (1973). The *Robinson* Court noted,

It is scarcely open to doubt that the danger to an officer is far greater in the case of the

Finally, the “reaching distance” rule created a curious incongruity between the reasoning officers apply when they are outside a vehicle and the thinking they perform when they are inside a vehicle. As previously noted, *Gant* rejected a bright-line rule enabling officers to search every vehicle after arresting its occupant, instead requiring an officer to assess in each individual case whether the arrestee is near enough to the car to trigger the “reaching distance” requirement to search.²¹⁶ Yet once an arrestee is within “reaching distance” of the vehicle, *Gant* then has the officer shift to *Belton*’s bright-line rule enabling a search of the entire passenger compartment, regardless of the arrestee’s ability to actually reach every area within that passenger compartment.²¹⁷ The *Gant* Court has thus grafted together a case-by-case test with a bright-line rule, reaping the worst of both worlds. Officers will have to toil through all the interpretive factual issues of a case-by-case analysis to determine whether they can even employ the *Belton* rule. Then, should they find they can indeed search the car, police can look in places beyond the arrestee’s reach, thus losing the precision usually offered in a case-by-case rule.

B. Gant’s New “Reasonable to Believe the Vehicle Contains Evidence of the Offense” Standard Expands Police Search Power Beyond Chimel’s Reasoned Basis

In introducing its entirely new basis for police to search a vehicle incident to arrest (the “likelihood of discovering offense-related evidence”), the *Gant* Court somewhat sheepishly noted that its innovation “[did] not follow from *Chimel*.”²¹⁸ This was an understatement, for *Gant*’s “offense-related evidence” rule threatened to undo much of *Chimel*’s hard work in anchoring search incident to arrest to “the inherent necessities” of the arrest situation.²¹⁹ The “offense-related evidence” rule stands wholly independent of the “reaching distance” rule and is therefore not subject to its limitations.²²⁰ In his initial pitch for this rule in his *Thornton* concurrence, Justice Scalia made this plain.²²¹ There, he declared, “If *Belton* searches are justifiable, it is not because the arrestee might grab a weapon or evidentiary item from his car, but simply because the car might contain evidence relevant to the crime for which he was arrested.”²²² Instead, the right to search was based on “a more general interest in gathering evidence relevant

extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop.

Id.

216. See *Gant*, 129 S. Ct. at 1723.

217. See *id.* at 1719-20.

218. *Id.* at 1719.

219. *Chimel v. California*, 395 U.S. 752, 759 (1969).

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

221. *Thornton v. United States*, 541 U.S. 615, 629 (2004) (Scalia, J., concurring).

222. *Id.*

to the crime for which the suspect had been arrested.”²²³ Thus, when *Gant* adopted Justice Scalia’s expansion of search incident to arrest,²²⁴ it presumably did so based on the rationale advanced by Justice Scalia. These reasons were, by Justice Scalia’s own admission, a general interest in gathering evidence, not a “more specific interest in preventing its concealment or destruction.”²²⁵ Since this rule therefore does not concern itself with the arrestee’s reaching distance, it might not only outstrip *Chimel*’s restrictions, but also *Belton*’s. *Belton* crafted the “passenger compartment” limit because “articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within ‘the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].’”²²⁶ Now that *Gant*’s “offense-related evidence” rule is not dependent on the arrestee’s reach, police search of the vehicle could presumably move beyond the passenger compartment to include the entire vehicle. Suddenly, motorists would have no basis to complain about police looking into a trunk, under the hood, or behind a door panel. Searches would be limited only by the size of the stopped vehicle, some of which could be large SUVs, motor homes, or tractor-trailers.

Furthermore, *Gant*’s trigger for the offense-related evidence search—“reasonable to believe”²²⁷—is itself problematic. Insertion of the “reasonable to believe” standard into an area of law which has routinely specified the needed level of certainty²²⁸ could create a vacuum, tending to confuse officers, citizens, and judges. Historically, the Court has employed the “reasonable to believe” standard inconsistently—sometimes suggesting probable cause, other times reasonable suspicion, and still other times using the phrase as a shortcut to express the notion that certain crimes might by their nature have evidence of their commission near the arrestee. The *Gant* Court seemed to employ “reasonable to believe” in this later sense; in the passage that the Court quoted from Justice Scalia’s concurrence,²²⁹ Justice Scalia offered, “I would . . . limit *Belton* searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”²³⁰ Justice Scalia then

223. *Id.*

224. *Gant*, 129 S. Ct. at 1719, 1721.

225. *Thornton*, 541 U.S. at 629 (Scalia, J., concurring).

226. *New York v. Belton*, 453 U.S. 454, 460 (1981) (alteration in original) (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)).

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

228. For instance, the Court has specified the need to establish probable cause in a variety of contexts, such as the automobile exception in *Carroll v. United States*, 267 U.S. 132, 149 (1925); search incident to arrest in *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980); and serving arrest warrants on a home in *Payton v. New York*, 445 U.S. 573, 603 (1980). Likewise, the Court has pinpointed reasonable suspicion as the standard for both *Terry* stops and frisks in *Terry v. Ohio*, 392 U.S. 1, 20-21, 28 (1968); frisks of vehicles in *Michigan v. Long*, 463 U.S. 1032, 1047 (1983); and protective sweeps of homes in *Maryland v. Buie*, 494 U.S. 325, 334 (1990).

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

230. *Thornton*, 541 U.S. at 632 (Scalia, J., concurring). Justice Scalia based his “reasonable

promptly applied his “reasonable to believe” standard to the facts in *Thornton* by noting,

In this case, as in *Belton*, petitioner [Thornton] was lawfully arrested for a drug offense. It was reasonable for . . . [the arresting officer] to believe that further contraband or similar evidence relevant to the crime for which he had been arrested might be found in the vehicle from which he had just alighted and which was still within his vicinity at the time of arrest.²³¹

Justice Scalia’s use of “reasonable to believe” language was meant to focus attention on identifying “the nature of the charge”²³² because certain crimes tend to have evidence of their commission nearby, such as contraband in a drug case or stolen property in a theft case. Thus, Justice Scalia’s “reasonable to believe” did not offer a standard as to level of certainty officers should have before launching into the search.²³³

“Reasonable to believe” has also surfaced in the context of reasonable suspicion.²³⁴ In his dissenting opinion in *Safford v. Redding*, a case involving a strip search of a student, Justice Thomas declared searches of students to be “permissible in scope under *T.L.O.* so long as it is objectively reasonable to believe that the area searched could conceal the contraband.”²³⁵ *New Jersey v. T.L.O.* was itself a school search case which based a school administrator’s

to believe” test in part on use of a similar phrase: “reason to believe.” *Id.* at 630. Earlier in his concurring opinion, Justice Scalia cited Bishop’s *Criminal Procedure*, employing the “reason to believe” language as follows:

The officer who arrests a man on a criminal charge should consider the nature of the charge; and, if he finds about the prisoner’s person, or otherwise in his possession, either goods or moneys which there is *reason to believe* are connected with the supposed crime as its fruits, or as the instruments with which it was committed, or as directly furnishing evidence relating to the transaction, he may take the same, and hold them to be disposed of as the court may direct.

Id. (emphasis added) (citation omitted).

231. *Id.* at 632.

232. *Id.* at 630 (citation omitted).

233. *Robinson* used “reasonable to believe” in a similar fashion, noting that the court of appeals in the case concluded that “there could be no evidence or fruits in the case of an offense such as that with which . . . [Robinson] was charged” since he was arrested for driving on a suspended license. *United States v. Robinson*, 414 U.S. 218, 233 (1973). The court of appeals in *Robinson* would have allowed a search only “[w]here the arrest is made for a crime for which it is reasonable to believe that evidence exists” rather than where the arrest is for driving on a suspended license, where it would not be reasonable to believe that any such evidence would be found. *Id.* at 233 n.4.

234. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2650 (2009) (Thomas, J., concurring and dissenting).

235. *Id.*

search of a purse upon reasonable suspicion.²³⁶ In his *Safford* opinion, Justice Thomas referred to reasonable suspicion in this context explicitly, noting that the Court had just acknowledged that “school officials had reasonable suspicion to look in Redding’s backpack.”²³⁷ He further declared that such “reasonable suspicion” later “did not dissipate simply because . . . Redding was secreting the pills in a place she thought no one would look.”²³⁸

The Court, however, has more frequently mentioned “reasonable to believe” in the context of probable cause. As early as 1948, the Court mentioned “reasonable to believe”²³⁹ in *Johnson v. United States*, a case in which officers approached a room emitting the “distinctive and unmistakable” odor of burning opium.²⁴⁰ The *Johnson* Court declared that the police, entering what they thought was an “opium smoking den” being used by possibly “one or several persons,” only obtained probable cause to believe that Johnson herself was in possession of opium after they had intruded and found her to be the only person present.²⁴¹ Prior to their entry, officers had no “reasonable basis for believing” Johnson was in possession and thus lacked probable cause for arrest.²⁴² Similarly, in *United States v. Leon*, famous for establishing the good faith exception to the exclusionary rule,²⁴³ the Court spoke of officers properly executing a warrant and searching only “those places and for those objects that it was reasonable to believe were covered by the warrant.”²⁴⁴ Because probable cause is the basis of a search pursuant to a warrant, the “reasonable to believe”²⁴⁵ standard as used in *Leon* apparently rose to the level of certainty required in probable cause. The Court also employed the “reasonable to believe” standard in *Michigan v. Fisher*, a case decided in 2009.²⁴⁶ In *Fisher*, police entered a home after finding “a household in considerable chaos: a pickup truck in the driveway with its front smashed, damaged fenceposts along the side of the property, and three broken house windows, the glass still on the ground outside.”²⁴⁷ Officers noticed blood on the truck and on one of the doors to the home.²⁴⁸ Through a window, police could see Fisher “screaming and throwing things.”²⁴⁹ The Court deemed it “objectively reasonable to believe that Fisher’s projectiles might have a human target (perhaps a spouse or a child), or that Fisher would hurt himself in the

236. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

237. *Safford*, 129 S. Ct. at 2650 (Thomas, J., concurring and dissenting).

238. *Id.*

239. *Johnson v. United States*, 333 U.S. 10, 16 (1948).

240. *Id.* at 12.

241. *Id.* at 16.

242. *Id.*

243. *United States v. Leon*, 468 U.S. 897, 922 (1984).

244. *Id.* at 918 n.19.

245. *Id.*

246. *Michigan v. Fisher*, 130 S. Ct. 546, 549 (2009) (per curiam).

247. *Id.* at 547.

248. *Id.*

249. *Id.*

course of his rage” and thus upheld the police entry under “the emergency aid exception.”²⁵⁰ Although the Court refrained from mentioning probable cause, the officers’ direct observations of all relevant details supported such a level of certainty.

The Court’s choice of “reasonable to believe” language is problematic. The phrase has been applied inconsistently in Court precedent, sometimes meaning reasonable suspicion and other times meaning probable cause. Furthermore, “reasonable to believe,” in comparison to the traditional measures of reasonable suspicion and probable cause, has rarely been used by the Court in a Fourth Amendment context. The phrase therefore lacks the clarity that comes with the repeated testing of a rule that is applied to various factual situations. Thus, the “reasonable to believe” language further muddles an already confusing rule.

C. *Gant’s New “Reasonable to Believe the Vehicle Contains Evidence of the Offense” Rule Risks Equating Search Incident to Arrest with the Automobile Exception*

Even if “reasonable to believe” is interpreted in its narrowest sense as requiring probable cause,²⁵¹ the Court’s new rule, allowing searches for offense-related evidence, still raises troubling questions. If *Gant* intended to enable police to search “the passenger compartment of an arrestee’s vehicle and any containers”²⁵² based on a reasonable belief amounting to probable cause, then the Court essentially grafted a lesser version of the automobile exception onto vehicle searches incident to arrest. The automobile exception, created in *Carroll v. United States*, enables police to search a vehicle without a warrant if probable cause exists to believe it contains “contraband goods in the course of transportation and subject to forfeiture or destruction.”²⁵³

The Court created the automobile exception, a right independent of search incident to arrest, for reasons different from those justifying search incident to arrest.²⁵⁴ The automobile exception was intended to enable officers to cope with

250. *Id.* at 549.

251. Such an interpretation could fit within the holding of *Carroll v. United States*, where the Court declared that

the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.

Carroll v. United States, 267 U.S. 132, 149 (1925).

252. *Arizona v. Gant*, 129 S. Ct. 1710, 1719 (2009).

253. *Carroll*, 267 U.S. at 149. However, the Court later expanded the class of objects to be searched to include instrumentalities and “fruits of the crime.” *Chambers v. Maroney*, 399 U.S. 42, 47 (1970).

254. *Chambers*, 399 U.S. at 49 (explaining, “The Court also noted that the search of an auto on probable cause proceeds on a theory wholly different from that justifying the search incident to an arrest.”).

the exigencies created by the car's mobility as a mode of transportation.²⁵⁵ Later, the Court adopted a second rationale to justify the automobile exception—that cars possess a lessened expectation of privacy due to their use and exposure to official regulation.²⁵⁶ In contrast, the Court, as previously noted, allowed police to search incident to arrest in order to protect their own safety and the evidence of the case.²⁵⁷ Due to different justifications, the two warrant requirement exceptions have differing search rights, both as to time and space.

Although *Chimel* limited the spatial scope of a search to the arrestee's person and area of immediate control,²⁵⁸ and *Belton* interpreted *Chimel* to enable the search of the passenger compartment of a vehicle,²⁵⁹ the Court placed no such limits on the automobile exception. In *Carroll*, the Court simply spoke in terms of searching an automobile.²⁶⁰ Later, in *United States v. Ross*, the Court specified that the probable cause triggering an automobile exception search justified "the search of every part of the vehicle and its contents that may conceal the object of the search," including containers.²⁶¹ The Court has deemed the scope of the automobile exception to be "broad,"²⁶² even allowing officers to tear open the upholstery cushions in a vehicle search.²⁶³ Because *Gant*'s new right to search might be based on probable cause to believe that a vehicle contains offense-related evidence, the Court might expand the scope of search incident to arrest to the broader search permitted under the other search right for vehicles based on

255. See *Carroll*, 267 U.S. at 146 (stating, "It is impossible to get a warrant to stop an automobile. Before a warrant could be secured the automobile would be beyond reach of the officer with its load of illegal liquor disposed of."); see also *Chambers*, 399 U.S. at 50 (stating, "[T]he mobility of a car may make the search of a car without a warrant reasonable 'although the result might be the opposite in a search of a home, a store, or other fixed piece of property'" (quoting *Preston v. United States*, 376 U.S. 364, 366-67 (1964))).

256. In *United States v. Chadwick*, the Court explained that "[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects It travels public thoroughfares where both its occupants and its contents are in plain view." *United States v. Chadwick*, 433 U.S. 1, 12 (1977) (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974)), *abrogated by California v. Acevedo*, 500 U.S. 565 (1991). *Chadwick* also noted:

Other factors reduce automobile privacy. "All states require vehicles to be registered and operators to be licensed. States and localities have enacted extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways." Automobiles periodically undergo official inspection, and they are often taken into police custody in the interests of public safety.

Id. at 12-13 (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)).

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

258. *Id.*

259. *New York v. Belton*, 453 U.S. 454, 460 (1981).

260. See *Carroll*, 267 U.S. at 162.

261. *United States v. Ross*, 456 U.S. 798, 825 (1982).

262. *California v. Acevedo*, 500 U.S. 565, 572 (1991).

263. *E.g.*, *Ross*, 456 U.S. at 805.

probable cause—the automobile exception. There would seem to be no logical hurdle to making such a leap. If one search based on probable cause for the existence of evidence allows a search of the entire car, why not the other?

Gant also threatens to disturb the temporal scope of search incident to arrest by confusing this search right with the automobile exception. Just as the spatial boundaries of search incident to arrest and the automobile exception differ, so too do the time limits of these searches. The Court has mandated that a search incident to arrest be “contemporaneous” with the arrest because the justifications for officer safety and preservation of evidence “are absent where a search is remote in time or place from the arrest.”²⁶⁴ The automobile exception is not limited by the same time constraints because officers who have obtained the right to use the automobile exception in the field can choose to exercise it later—that is, when the car is safely secured at the police station.²⁶⁵ The Court has even upheld, on one occasion, the right to perform an automobile exception three days after seizure.²⁶⁶ *Gant*’s new adoption of the offense-related evidence rule could easily expand the temporal scope of search incident to arrest of vehicles to match that of the automobile exception. This is due to the Court’s reliance on unspecified “circumstances unique to the vehicle context”²⁶⁷ to support its new search right. Because the Court never elaborated on what circumstances make vehicles unique, the Court will be free in the future to adopt those identified in the automobile exception context—mobility and lessened privacy expectations. After all, the Court has previously altered the automobile exception itself from a rule based on the exigency of a moving vehicle to one that covers cars immobilized at police stations. Its reasoning has been that the justification to perform an automobile exception search does “not vanish once the car has been immobilized,” for “there is no requirement of exigent circumstances to justify such a warrantless search.”²⁶⁸ A similar evolution of the justification for search incident to arrest would presumably result in similar time boundaries. Thus, *Gant* has conceivably opened the door to expanding search incident to arrest of vehicles to searches days later at police stations.

Perhaps the *Gant* Court, in adding a kind of automobile exception appendage to its search incident to arrest rule, merely assumed it was buying Justice Scalia’s fifth vote on the cheap. After all, the right to search the vehicle would be limited to the passenger compartment, an area already open to officers’ reach by *Belton*. Furthermore, it would apply only in those arrests—such as drug possession or theft—where it would be reasonable to believe evidence of the crime was in the car, information that would trigger the automobile exception anyway. Yet, as shown by the histories of both search incident to arrest and the automobile exception, the limits on these searches hardly remain static. The rationales advanced by *Gant* could make search incident to arrest vulnerable to dramatic

264. *Preston v. United States*, 376 U.S. 364, 367 (1964).

265. *See Chambers v. Maroney*, 399 U.S. 42, 52 (1970).

266. *See, e.g., United States v. Johns*, 469 U.S. 478, 487 (1985).

267. *Arizona v. Gant*, 129 S. Ct. 1710, 1719 (2009).

268. *Johns*, 469 U.S. at 484 (citations omitted).

expansions already suffered by the automobile exception. The purchase of Justice Scalia's fifth vote might have been made at a steep price.

D. The Logic of Gant's Rule for Searching Vehicles Might Alter All Searches Incident to Arrest

Although *Gant* explicitly limited its "reasonable to believe" rule to "circumstances unique to the vehicle context,"²⁶⁹ the reasoning *Gant* employed could alter the scope of all searches incident to arrest. *Gant*'s impact on the scope of search incident to arrest is particularly troubling when the case is viewed in relation to *Robinson*. *Robinson* involved an officer searching a "crumpled up cigarette package"²⁷⁰ of a driver arrested for operating a motor vehicle after revocation of his operator's permit.²⁷¹ The Court in *Robinson* explicitly rejected the contention that the likelihood of finding a weapon or evidence was relevant to the right to search incident to arrest, asserting,

The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.²⁷²

In contrast, *Gant* not only considered such probabilities relevant, but also included them in its "reasonable to believe" in the existence of offense-related evidence rule.²⁷³ *Gant*, involving an arrest on essentially the same charges as those in *Robinson*,²⁷⁴ starkly declared that when an officer made an arrest for a traffic offense (like the officers in *Gant* and *Robinson*), officers could not search because "there will be no reasonable basis to believe the vehicle contains relevant evidence."²⁷⁵ *Gant* thus directly contradicted *Robinson*.

Admittedly, *Robinson* and *Gant* addressed distinct search issues; *Robinson* involved the search of the arrestee's person,²⁷⁶ whereas *Gant* focused on the search of the arrestee's vehicle.²⁷⁷ Yet this difference fails to explain the reason for the creation of a bright-line search right in *Robinson* and a factual analysis in *Gant*.²⁷⁸ Did *Gant* mean to retain *Robinson*'s absolute right to search an

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

270. *United States v. Robinson*, 414 U.S. 218, 223 (1973).

271. *Id.* at 220-21.

272. *Id.* at 235.

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

274. *Id.* at 1714-15 (arresting defendant for driving with a suspended license); *Robinson*, 414 U.S. at 220 (arresting defendant for operating a motor vehicle after revocation of his operating permit).

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

276. *See Robinson*, 414 U.S. at 224.

277. *See Gant*, 129 S. Ct. at 1714-15.

278. *See id.* at 1719 (making the Court's failure to spell out the "circumstances unique to the

arrestee's person—regardless of the possibility of finding weapons or evidence—while at the same time create a “reasonable to believe” rule for searches of passenger compartments of vehicles? *Gant* fails to mention this distinction, let alone justify it. Without a reasoned distinction, *Gant* potentially calls into question police searches of arrestees for evidence if it is not “reasonable to believe evidence relevant to the crime of arrest might be found.”²⁷⁹ The force of *Gant*'s logic could, at worst, undermine officers' abilities to make quick ad hoc judgments as necessary in arrest situations and, at least, sow confusion.

CONCLUSION

Belton warned, “When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.”²⁸⁰ *Gant* should have heeded this advice. The *Gant* Court's attempt to limit search incident to arrest of vehicles to only those cases where an arrestee would have access to weapons or evidence was admirable, yet clumsy. When considering facts deemed relevant in assessing reaching distance, *Gant* offered little guidance in terms of proximity, instead listing factors of control: handcuffing, ratio of officers to arrestees, and placing the arrestee in the police car.²⁸¹ *Gant*'s lack of attention to actual distance might confuse some officers, while its focus on control might induce more reckless officers to take dangerous chances—such as forgoing the use of handcuffs and placing arrestees next to vehicles—in order to justify intrusion into automobiles. Therefore, the practical effect of *Gant* might undermine the very safety rationales supporting the warrant exception in the first place.

If *Gant*'s reaching distance test is unclear, its second rule—enabling officers to search a vehicle based on a reason to believe the automobile contains offense-related evidence—is not only unnecessary, but potentially corrosive to the boundaries of the search incident to arrest rule. Since *Gant* created the offense-related evidence rule as an entirely new basis to search an arrestee's vehicle,²⁸² there seems to be no reason for believing that this new search right is limited by *Belton*'s passenger compartment boundary. Thus, while the reaching distance rule might limit officers to the passenger compartment of the vehicle, the offense-related evidence rule might not. Further, *Gant* has failed to specify the level of certainty required to establish the reason to believe that offense-related evidence might be in the car. Therefore, the offense-related evidence rule, lacking specific limits, could potentially be used to expand search incident to arrest to the scope of the automobile exception. Finally, *Gant*'s reticence in identifying what

vehicle context” all the more troubling).

279. *Id.* (citation omitted).

280. *New York v. Belton*, 453 U.S. 454, 459-60 (1981).

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

282. *See id.*

“circumstances” were indeed “unique to the vehicle context”²⁸³ could cause future courts to determine that perhaps vehicles are really not “unique,” thus enabling them to apply the offense-related evidence search rule to situations occurring outside the vehicle context.

Justice Scalia, who originally championed a search based on a reason to believe that a vehicle contained offense-related evidence,²⁸⁴ might himself come to regret the ramifications of *Gant*. He declared in the context of a police frisk, a search arguably less intrusive than a search incident to arrest, that he frankly doubted “whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves” to undergo such an indignity as the Court envisioned.²⁸⁵ Similarly, one wonders whether the Founders, who often doubted the judgment of officials at the scene,²⁸⁶ would welcome an officer searching their carriages based on their own determination that it was “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”²⁸⁷ Perhaps fiercely proud citizens today should be equally concerned about *Gant*, a case of doubtful certainty.

283. *Id.*

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

285. *Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993) (Scalia, J., concurring).

286. Logan, *supra* note 23, at 385.

287. *Gant*, 129 S. Ct. at 1719 (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring)).