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# Stepping out of the Vehicle: The Potential of Arizona v. Gant to End Automatic Searches Incident to Arrest beyond the Vehicular Context

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STEPPING OUT OF THE VEHICLE:  
THE POTENTIAL OF *ARIZONA V. GANT*  
TO END AUTOMATIC SEARCHES  
INCIDENT TO ARREST BEYOND  
THE VEHICULAR CONTEXT

ANGAD SINGH\*

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## INTRODUCTION

“Because the law says we can do it” was the response that Officer Griffith offered when asked why officers searched Rodney Gant’s car when he was arrested for driving with a suspended license.<sup>1</sup> Officer Griffith’s honest answer exemplifies the effect of prior Supreme Court decisions on search incident to arrest power in the vehicle context: that a search of a vehicle incident to arrest is a police entitlement divorced from any rationale whatsoever.<sup>2</sup> The legal justifications that permit warrantless searches incident to arrest generally, concerns for officer safety and preservation of evidence,<sup>3</sup> had been utterly abandoned by the Court in the automobile context.<sup>4</sup> This police entitlement led to invasions of privacy against persons guilty of no more than mere traffic violations as searches were conducted simply because they were legally permissible.<sup>5</sup> However, the Supreme Court in *Arizona v. Gant*<sup>6</sup> shifted course and strengthened Fourth Amendment protections by terminating the entitlement that permitted vehicle searches incident to arrest as a matter of right.<sup>7</sup>

The tumultuous jurisprudence of the search incident to arrest doctrine under the Fourth Amendment<sup>8</sup> has often produced inconsistent and varied

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

2. *See id.* at 1721 (recognizing that prior cases created a bright-line rule allowing a vehicle search incident to arrest regardless of any reason); *see also* *Thornton v. United States*, 541 U.S. 615, 624 (2004) (O’Connor, J., concurring) (lamenting lower court decisions that deem a search of a vehicle incident to arrest as a right of the police rather than as an exception to the warrant requirement that is justified only by a threat of harm to the officers or destruction of evidence); 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, 1436 (2007) (arguing that a bright-line rule for searches incident to arrest was meant to extend to all vehicular arrests).

3. *See* *Chimel v. California*, 395 U.S. 752, 767–68 (1969) (disallowing a search of an entire house incident to arrest as it was not justified by a need to reduce a risk of officer safety or destruction of evidence by the arrestee).

4. *See* *New York v. Belton*, 453 U.S. 454, 460 (1981) (establishing a bright-line rule permitting searches of vehicles incident to arrest in all circumstances, yet claiming fidelity to *Chimel*); *see also* *Thornton*, 541 U.S. at 628 (Scalia, J., concurring) (noting that, due to *Belton*, many lower courts have upheld vehicle searches incident to arrest when the arrestee was handcuffed and secured in a police car); Edwin J. Butterfoss, *Bright Line Breaking Point: Embracing Justice Scalia’s Call for the Supreme Court to Abandon an Unreasonable Approach to Fourth Amendment Search and Seizure Law*, 82 TUL. L. REV. 77, 80 (2007) [hereinafter *Bright Line*] (asserting that *Belton* created a bright-line rule permitting vehicle searches incident to arrest regardless of the crime for which the vehicle’s occupant was arrested, and irrespective of the likelihood that the arrestee could access the car to reach a weapon or destructible evidence).

5. *See* *Gant*, 129 S. Ct. at 1722–23 (deploring invasions of privacy against those who were arrested for committing minor traffic offenses); *cf.* Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 407 (2004) (asserting that the “worst feature” of the *Belton* decision was the incentive it created for police to arrest in order to execute their “broad search power”).

6. 129 S. Ct. 1710 (2009).

7. *See infra* Part IV (arguing that *Gant* overrules the bright-line automatic search rule).

8. U.S. CONST. amend. IV. The text of the Amendment reads:

results.<sup>9</sup> In keeping with this tradition, the Supreme Court in *Gant* revised nearly thirty years of search incident to arrest law in the automobile context.<sup>10</sup> Unlike *Gant*'s predecessors, *Gant* generally enhanced Fourth Amendment protections against unreasonable searches<sup>11</sup> by holding that automatic vehicle searches incident to arrest are unconstitutional.<sup>12</sup> On the other hand, *Gant*'s second holding created a new warrant exception to govern searches of automobiles incident to arrest by allowing officers to search a vehicle, even when the justifications of officer safety and preservation of evidence are nonexistent.<sup>13</sup>

This Comment argues that *Gant* not only enhances Fourth Amendment protections overall by limiting authority to search an automobile upon arrest, but that its first holding also undermines other cases permitting automatic searches incident to arrest in nonvehicular situations.<sup>14</sup> *Gant*'s affirmation of two specific rationales that permit a search incident to

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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.

9. See Tomkovicz, *supra* note 2, at 1421–27 (tracing the history of search incident to arrest law and outlining the Court's rapid expansions and retractions of search incident to arrest power); see also *Gant*, 129 S. Ct. at 1723 (describing the "checkered history" of search incident to arrest law).

10. See *Gant*, 129 S. Ct. at 1726 (Alito, J., dissenting) (asserting that the majority opinion overruled twenty-eight year old precedent).

11. See *Bright Line*, *supra* note 4, at 103 (arguing that Justice Scalia's approach, later adopted in *Gant*, would abandon automatic searches and thereby reduce the incentive for pretextual arrests motivated by a desire to search). But see, e.g., David S. Rudstein, Belton Redux: Reevaluating Belton's Per Se Rule Governing the Search of an Automobile Incident to an Arrest, 40 WAKE FOREST L. REV. 1287, 1345–46 (2005) (dismissing Justice Scalia's approach, later adopted in *Gant*, as insufficiently protective of Fourth Amendment rights). *Gant* furthers Fourth Amendment privacy protections vis-à-vis the automatic vehicle search rule. See *Gant*, 129 S. Ct. at 1721 (refusing to construe prior case law broadly in order to enhance Fourth Amendment privacy protections).

12. See *Gant*, 129 S. Ct. at 1721 (stating that automatic vehicle searches incident to arrest are police entitlements that are "anathema" to the Fourth Amendment).

13. See *id.* at 1719 (holding that a search of a vehicle incident to arrest is permissible when it is reasonable to believe that evidence of the crime of arrest would be found in the vehicle); Jason Hermele, Comment, Arizona v. Gant: Rethinking the Evidence-Gathering Justification for the Search Incident to Arrest Exception, and Testing a New Approach, 87 DENV. U. L. REV. 175, 195 (2009) (noting that *Gant* reigns in expansive search incident to arrest power, but adopts a new evidence gathering rationale that is not governed by probable cause).

14. E.g., *Maryland v. Buie*, 494 U.S. 325, 334 (1990) (allowing law enforcement to automatically search closets and areas adjoining the place of arrest); *United States v. Robinson*, 414 U.S. 218, 235 (1973) (formalizing the power to automatically search a person and containers on the person incident to arrest by reasoning that a lawful arrest itself creates search authority); *United States v. Turner*, 926 F.2d 883, 888 (9th Cir. 1991) (utilizing a test that always permits a search of the place of arrest in the home context); see *infra* Part IV (arguing that *Gant* undermines the authority to automatically search containers on the person incident to arrest); *infra* Part V (arguing that *Gant* abrogates automatic searches incident to arrest in the home).

arrest,<sup>15</sup> officer safety and the preservation of evidence, directly conflicts with nonvehicular cases allowing automatic searches irrespective of these rationales.<sup>16</sup> Since *Gant* undermines such cases by reconnecting the search incident to arrest exception with its justifications, applying *Gant* to cases that permit automatic searches of containers on the person,<sup>17</sup> and certain automatic home searches incident to arrest, serves to enhance privacy protections against these nonvehicular searches that have become police entitlements.<sup>18</sup>

Part I outlines the judicial origin of search incident to arrest law and its schizophrenic history. This Part will also expose the fundamental conflict between the cases and discuss the legal rules and reasoning of *Gant*. Part II argues that the standard governing *Gant*'s second holding is vague, and is concerned with whether the crime of arrest involves tangible evidence rather than a quantum of proof analysis prevalent in standards such as probable cause and reasonable suspicion. Part III analyzes the effect of applying *Gant*'s first holding to an automatic search of containers on the person incident to arrest, while Part IV applies *Gant* to certain automatic home searches incident to arrest. Part IV also addresses some counterarguments and potential pitfalls. This Comment concludes that *Gant*'s retraction of the search incident to arrest power may serve to end, or at the least severely undermine, automatic searches of containers on the person and homes incident to arrest.

## I. INTRODUCING THE SEARCH INCIDENT TO ARREST EXCEPTION AND *GANT*

In numerous opinions, the Supreme Court has interpreted the Fourth Amendment to require a warrant for a search.<sup>19</sup> Nevertheless, the general

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15. *Gant*, 129 S. Ct. at 1719 (rejecting a rule permitting automatic vehicle searches because such a rule cannot be justified by the twin rationales of officer safety and preservation of evidence as established by *Chimel v. California*, 395 U.S. 752 (1969)).

16. See cases cited *supra* note 14 (providing examples of nonvehicular cases in which courts have allowed automatic searches).

17. For purposes of this Comment, containers on the person include containers found in a search of an arrestee's clothing, such as a cigarette pack. *Robinson*, 414 U.S. at 236. Containers on the person also include purses, backpacks, and other containers "immediately associated," or somehow connected to, the individual. *United States v. Chadwick*, 433 U.S. 1, 15 (1977). Courts have used *Robinson* and *Belton* to support automatic searches of personal bags and briefcases. See, e.g., *United States v. Morales*, 923 F.2d 621 (8th Cir. 1991) (bags); *United States v. Herrera*, 810 F.2d 989 (10th Cir. 1987) (briefcase).

18. See *United States v. Taylor*, 656 F. Supp. 2d 998, 1003 (E.D. Mo. 2009) (suppressing evidence from a home search by applying *Gant*); *United States v. Perdona*, No. 8:08cr00460, 2009 WL 1490595, at \*2 (D. Neb. May 22, 2009) (applying *Gant* to a search of a nonvehicular arrestee's bag).

19. See, e.g., *Chimel*, 395 U.S. at 761 (stating that the Fourth Amendment requires a magistrate to assess the legal justification of a search before it takes place); *Katz v. United States*, 389 U.S. 347, 357 (1967) (holding that warrantless searches are unreasonable per se and are "subject only to a few specifically established and well-delineated exceptions");

rule that a warrantless search is unconstitutional has been significantly weakened by a plethora of exceptions that have greatly expanded the power of police to conduct warrantless searches.<sup>20</sup> One such exception is a search incident to arrest.<sup>21</sup> The history of search incident to arrest law is often contradictory as the Supreme Court has variously expanded and retracted police authority to conduct such a search.<sup>22</sup>

#### A. *Origins of the Search Incident to Arrest Exception*

The Court first recognized search incident to arrest power in dictum in *Weeks v. United States*<sup>23</sup> and subsequent cases drew from *Weeks* to further establish this law enforcement “right” to search.<sup>24</sup> After rapid expansion and contraction of the search incident to arrest authority,<sup>25</sup> the Court settled on an expansive search power in *United States v. Rabinowitz*.<sup>26</sup>

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*Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (quoting *Katz*, 389 U.S. at 357) (holding that it is a “cardinal principle” that warrantless searches are “per se unreasonable under the Fourth Amendment”). See generally Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 762–63 (1994) (discussing the warrant requirement and its variants).

20. E.g., *Minnesota v. Olsen*, 495 U.S. 91, 100 (1990) (listing certain emergencies, such as hot pursuit of a felon, that would allow a warrantless entry of a home); *Chimel*, 395 U.S. at 755–60 (tracing the history of the search incident to arrest exception); *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (permitting a limited warrantless pat-down search for reasons of officer safety); *Schmerber v. California*, 384 U.S. 757, 770–71 (1966) (permitting a warrantless search based on the exigency of the destruction of evidence); *Carroll v. United States*, 267 U.S. 132, 161 (1925) (creating the automobile exception and upholding a warrantless automobile search supported by probable cause); see also Edwin Butterfoss, *As Time Goes By: The Elimination of Contemporaneity and Brevity as Factors in Search and Seizure Cases*, 21 HARV. C.R.-C.L. L. REV. 603, 604 (1986) [hereinafter *As Time Goes By*] (arguing that expansions of various exceptions to the warrant requirement have diminished the protection of the Fourth Amendment).

21. See *Thornton v. United States*, 541 U.S. 615, 627 (2004) (Scalia, J., concurring) (emphasizing that a search incident to arrest is not the government’s right, but an exception that is only justified by certain necessities).

22. See Tomkovicz, *supra* note 2, at 1419 (analogizing the shrinking and expanding of search incident authority to a pendulum swinging back and forth).

23. See 232 U.S. 383, 392 (1914) (recognizing the “right on the part of the government . . . to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime”).

24. See *United States v. Rabinowitz*, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting) (acknowledging the flaws of relying on *Weeks* to establish search incident to arrest authority by stating that such power was “loosely turned into dictum and finally elevated to a decision”). See generally Tomkovicz, *supra* note 2, at 1421–26 (discussing the origins of the exception).

25. See Tomkovicz, *supra* note 2, at 1423–26 (describing the rapid and unpredictable expansions and contractions of the search incident to arrest exception); see also *Rabinowitz*, 339 U.S. at 67 (Black, J., dissenting) (lamenting the uncertainty regarding the scope of the search incident to arrest power in preceding years). For example, the Court in *Harris v. United States*, 331 U.S. 145 (1947), articulated a broad authority by upholding a search of an entire apartment incident to arrest, whereas the Court reversed course the next year in *Trupiano v. United States*, 334 U.S. 699 (1948), by insisting that the search incident to arrest power must be strictly limited. Almost twenty years later, the Court returned to *Harris* only to limit the search incident power in *Chimel*. The Court proceeded to expand this power after *Chimel* only to rein it back in *Gant*. See Tomkovicz, *supra* note 2, at 1427 n.66 (noting

The *Rabinowitz* Court upheld the search of a home based on law enforcement's interest in discovering evidence of the crime of arrest,<sup>27</sup> in this case, stamp forgery, and determined that Fourth Amendment adjudication should not be governed by a general warrant requirement, but on a case-by-case basis to determine whether the search was reasonable.<sup>28</sup> *Rabinowitz* remained good law for nineteen years until the Court took a dramatic turn and rejected *Rabinowitz*'s broad search authority, which was premised on law enforcement's need to discover evidence.

In *Chimel v. California*,<sup>29</sup> the defendant was arrested in his home, pursuant to an arrest warrant, for burglarizing a coin shop.<sup>30</sup> Subsequently, the officers searched the entire house over the objection of arrestee Chimel, and ordered his wife to open drawers located in the master bedroom.<sup>31</sup> The Court held that this search violated the Fourth Amendment and established a new rule to govern searches incident to arrest.<sup>32</sup> Overruling *Rabinowitz*,<sup>33</sup> the Court stated that a search incident to arrest may only extend to the area within the arrestee's immediate control, or reaching distance, from where she might obtain a weapon or destructible evidence.<sup>34</sup> These twin rationales, officer safety and preservation of evidence, underpin the authority to search within the arrestee's reaching area.<sup>35</sup>

The Court reasoned that warrantless searches, like in *Rabinowitz*, generally contradict the original purpose of the Fourth Amendment: to guard against warrantless searches and general warrant searches, like the British conducted of the colonists' homes.<sup>36</sup> The *Chimel* Court emphasized

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that the more than thirty-five years since *Chimel* was decided had been marked by an expansion of search incident to arrest authority).

26. 339 U.S. 56 (1950).

27. *See id.* at 65 (permitting a warrantless home search for the purpose of discovering evidence, as opposed to another rationale such as officer safety); *see also* Thornton v. United States, 541 U.S. 615, 629 (2004) (Scalia, J., concurring) (stating that the *Rabinowitz* Court relied on the interest in gathering evidence to uphold a warrantless search of a home).

28. *Rabinowitz*, 339 U.S. at 66 ("The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case.").

29. 395 U.S. 752 (1969).

30. *Id.* at 753.

31. *Id.* at 754.

32. *Id.* at 768.

33. *See id.* (overruling *Rabinowitz* to the extent that it is inconsistent with the *Chimel* rule).

34. *Id.* at 763. The area of immediate control is also known as the "lunge area." Leslie A. Lunney, *The (Inevitably Arbitrary) Placement of Bright Lines: Belton and Its Progeny*, 79 TUL. L. REV. 365, 396 (2004). Furthermore, the rationales underpinning the search, officer safety and the preservation of evidence, are often referred to as *Chimel*'s twin rationales. *E.g.*, Tomkovicz, *supra* note 2, at 1417.

35. *Chimel*, 395 U.S. at 763; *see also* *As Time Goes By*, *supra* note 20, at 604 (citing cases requiring warrant exceptions to be "narrowly tailored to the circumstances that justify their creation"); Tomkovicz, *supra* note 2, at 1428 (stating that the majority's belief in the warrant requirement lead it to limit warrant exceptions to specific rationales).

36. *Chimel*, 395 U.S. at 760–61.

the importance of obtaining a warrant before a search and therefore restricted the search incident to arrest exception to the warrant requirement to the reaching area, justified by the twin rationales of officer safety and preservation of evidence.<sup>37</sup>

A possible explanation for the difference in outcomes between *Rabinowitz* and *Chimel* is that the cases fundamentally differ on whether the Fourth Amendment presumes a warrantless search to be impermissible.<sup>38</sup> The *Chimel* Court believed that the Fourth Amendment generally required a warrant for a search,<sup>39</sup> and that any exception would have to be narrow in scope and strictly tied to the rationales that justify the exception.<sup>40</sup> On the other hand, the *Rabinowitz* Court did not believe in the warrant presumption, and was guided by the reasonableness clause of the Fourth Amendment where the permissibility of searches must be determined by a general reasonableness standard.<sup>41</sup>

### B. *The Emergence of Bright-Line Rules*

While *Chimel* firmly established the rationales for the search incident to arrest exception, the Court four years later permitted an automatic search of the person and containers on the person incident to arrest in *United States v. Robinson*.<sup>42</sup> In *Robinson*, the defendant was lawfully arrested for driving with a revoked license.<sup>43</sup> Upon patting down Robinson, the officer felt a crumpled cigarette pack in his coat pocket and removed it.<sup>44</sup> The officer felt that its contents were not cigarettes, and opened it to discover fourteen

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37. See *id.* at 763 (stating that no justification comparable to the twin rationales exists to support a warrantless search of a home incident to arrest). Note that the preservation of evidence rationale seeks to prevent the arrestee from obtaining and destroying evidence upon arrest whereas the discovery of evidence rationale, as upheld in *Rabinowitz*, relates to searches for evidence of crime even when the arrestee cannot reach destructible evidence.

38. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 224–25 (3d ed. 2002) (noting that the holdings in both *Chimel* and *Robinson* result from differing Fourth Amendment analyses since the *Chimel* Court was concerned about the scope of a warrant exception whereas the *Robinson* Court de-emphasized the warrant requirement). Compare *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950) (rejecting a per se warrant requirement and supporting a general reasonableness approach to Fourth Amendment adjudication), with *Chimel*, 395 U.S. at 764–65 (asserting that a general reasonableness standard is devoid of meaning and the reasonableness argument is founded on a “subjective view regarding the acceptability of certain sorts of police conduct”).

39. See *Chimel*, 395 U.S. at 761 (“In the scheme of the Amendment, therefore, the requirement that ‘no Warrants shall issue, but upon probable cause,’ plays a crucial part.” (quoting U.S. CONST. amend. IV)).

40. *Chimel*, 395 U.S. at 761–62; see also *As Time Goes By*, *supra* note 20, at 604 (arguing that warrant exceptions must be strictly confined to the rationales that justify their existence).

41. *Rabinowitz*, 339 U.S. at 65–66; see also Tomkovicz, *supra* note 2, at 1425 (discussing *Rabinowitz*’s rejection of a rule requiring warrants whenever practicable).

42. 414 U.S. 218, 236 (1973).

43. *Id.* at 220.

44. *Id.* at 222–23.

heroin capsules.<sup>45</sup> The Court stated that the search of Robinson's person and the cigarette pack were constitutional based on reasons of officer safety and discovery of evidence.<sup>46</sup> Despite these reasons, Justice Rehnquist, writing for the majority, held that a lawful arrest provides the authority to search and that a search of a person incident to a lawful arrest needs no further justification.<sup>47</sup> The Court also stated that a "more fundamental" reason for upholding the search is that precedent does not support a case-by-case adjudication of the lawfulness of the search of a person incident to arrest.<sup>48</sup> In other words, the Court created the power of an automatic search by virtue of an arrest, irrespective of whether the arrestee could possibly reach into the container to grab a weapon to harm the officer or destroy evidence.<sup>49</sup>

Not only did the Court establish a bright-line rule permitting automatic searches of a person and containers on a person incident to arrest, but later also upheld automatic searches in the home context. For example, the Court in *Maryland v. Buie*<sup>50</sup> held that upon arrest, police may search closets and other areas "immediately adjoining the place of arrest" from where a person may attack.<sup>51</sup> The basis for this so-called protective sweep is officer safety; however, the Court held that no rationale is needed to conduct the automatic sweep, not even an officer's subjective belief that there may be a hiding person who presents a danger to officer safety.<sup>52</sup>

Another case that created an automatic search power incident to arrest in the home is *United States v. Turner*.<sup>53</sup> In *Turner*, police obtained an arrest warrant for Turner for distributing crack cocaine and possessing a firearm while committing a drug crime.<sup>54</sup> The officers forced their way into the apartment and discovered Turner in bed with a woman and a revolver by his side.<sup>55</sup> Turner was handcuffed and taken into the other room for officer

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45. *Id.* at 223.

46. *Id.* at 235.

47. *Id.*

48. *Id.*; see also Tomkovicz, *supra* note 2, at 1432 (arguing that a *Robinson* search of a person incident to arrest does not require a danger that the arrestee might harm the officer or obtain destructible evidence).

49. See *Robinson*, 414 U.S. at 235 (holding that it is the fact of a lawful arrest that provides the authority to search); see also Kelly A. Deters, Note, *The "Evaporation Point": State v. Sykes and the Erosion of the Fourth Amendment Through the Search-Incident-to-Arrest Exception*, 92 IOWA L. REV. 1901, 1913 (2007) (arguing that *Robinson* permits a search irrespective of the twin rationales and therefore violates privacy protections as it allows a warrantless search when there is no exigency to justify it).

50. 494 U.S. 325 (1990).

51. *Id.* at 334.

52. See *id.* (allowing a search of closets and spaces immediately adjoining arrest without requiring probable cause or reasonable suspicion).

53. 926 F.2d 883 (9th Cir. 1991).

54. *Id.* at 885.

55. *Id.* at 886.

safety.<sup>56</sup> With Turner detained in the adjacent room, the officers searched the room of arrest and found firearms and crack cocaine.<sup>57</sup> The Ninth Circuit upheld the search, determining that the contraband was within Turner's immediate control when he was arrested, and asserting that it was of no consequence that he was not within reaching distance at the time of the search.<sup>58</sup> While claiming consistency with *Chimel*, the court in *Turner* did not apply *Chimel's* essential logic because the arrestee in *Turner* was handcuffed, under the control of the police, and not in reaching distance of the searched area at the time of the search was conducted.<sup>59</sup>

Consistent with its historical vacillations on the scope of searches incident to arrest, the Supreme Court sharply broke from *Chimel* in *New York v. Belton*.<sup>60</sup> In *Belton*, an officer stopped a car for speeding and upon smelling marijuana and observing an envelope marked "Supergold," which he associated with the drug, ordered the occupants to exit the vehicle.<sup>61</sup> The officer then arrested the car's occupants for possession of marijuana and searched the car incident to the arrest, finding marijuana in the envelope and cocaine in Belton's jacket, which was inside the car.<sup>62</sup> The Court announced that *Chimel* was difficult to apply to automobiles because lower courts were confused on whether *Chimel* permitted a search of the vehicle after its occupants were no longer inside it.<sup>63</sup> Stressing the importance of providing law enforcement with a clear, bright-line rule, the Court held 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."<sup>64</sup> The Court looked favorably upon the bright-line rule *Robinson* created, providing

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56. *Id.* at 888.

57. *Id.* at 886.

58. *See id.* at 887–88 (adopting the Seventh Circuit approach by asking whether the evidence or weapons were within the immediate control of the arrestee at the time of arrest, and whether any events between the arrest and search made the search unreasonable).

59. *Compare* *Chimel v. California*, 395 U.S. 752, 763 (1969) (holding that officers may search, incident to arrest, the area where an arrestee might gain access to weapons or destructible evidence), *with Turner*, 926 F.2d at 888 (upholding a search of a room when the arrestee was not in reaching distance by analyzing whether the arrestee was in reach of weapons or destructible evidence at the time of arrest, as opposed to the time of the search).

60. 453 U.S. 454 (1981).

61. *Id.* at 455–56.

62. *Id.*

63. *Id.* at 459; *see also* *Arizona v. Gant*, 129 S. Ct. 1710, 1724 (2009) (Scalia, J., concurring) (arguing that *Chimel's* rule is difficult for officers to apply in the field).

64. *Belton*, 453 U.S. at 460. Courts have required, at least in theory, that the search must be contemporaneous, or at least substantially contemporaneous, to an arrest in order for it to be incident to that arrest. The contemporaneity requirement is essential if the search is to qualify as incident to arrest. *See United States v. Chadwick*, 433 U.S. 1, 15 (1977) (holding that a search of a footlocker more than an hour after an arrest was not contemporaneous and thus not a search incident to arrest); *Preston v. United States*, 376 U.S. 364, 367 (1964) (holding that a search conducted after an arrest and in a location beyond that of the arrest cannot fall under search incident to arrest doctrine).

officers the authority to search a person, and his containers, incident to arrest as a matter of right, and lamented that such a clear rule had not emerged in the vehicular context.<sup>65</sup>

In his *Belton* dissent, Justice Brennan pointed out that the majority created a bright-line rule authorizing automatic searches that disregarded *Chimel's* twin rationales.<sup>66</sup> In order to maintain the illusion that it was applying *Chimel* to the present facts, the Court created a legal fiction which presumes that arrestees are generally within reaching distance of the passenger compartment of the vehicle, thereby automatically triggering *Chimel's* twin rationales to justify a search.<sup>67</sup>

The Court revisited *Belton* in *Thornton v. United States*,<sup>68</sup> where it upheld a search of a recent occupant of a vehicle who had alighted from the vehicle just before arrest.<sup>69</sup> The majority upheld the search even though Thornton was handcuffed and placed in the squad car before the search, thereby affirming *Belton's* bright-line rule.<sup>70</sup>

Justice Scalia concurred in the judgment but wrote separately to present his differing approach to searches of vehicles incident to arrest.<sup>71</sup> He rejected *Belton's* legal fiction and asserted that the risk of Thornton escaping from the squad car, in handcuffs, to retrieve a weapon or evidence from his car was “remote in the extreme.”<sup>72</sup> In asserting that such warrantless searches are exceptions to a warrant requirement, rather than police entitlements,<sup>73</sup> Justice Scalia's concurrence affirmed *Chimel* and

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65. See *Belton*, 453 U.S. at 459 (noting that *Robinson* rejected the argument that searches of persons incident to arrest must be adjudicated on a case-by-case basis and that lower courts have had difficulty in individual adjudication of searches of automobiles incident to arrest).

66. See *id.* at 464–65 (Brennan, J., dissenting) (asserting that the majority had created an arbitrary bright-line rule that disregarded the policy reasons underlying *Chimel's* holding).

67. See *id.* at 460 (majority opinion) (creating “the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within” the immediate control of the arrestee); see also Myron Moskowitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 WIS. L. REV. 657, 674 (2002) [hereinafter *An Empirical Reexamination*] (arguing that *Belton's* legal fiction is wrong in light of routine police procedures that secure and remove the arrestee from the car); Tomkovicz, *supra* note 2, at 1434 (stating that *Belton* created a legal fiction that a recent occupant who is no longer in the vehicle can gain access to weapons or destructible evidence within the vehicle).

68. 541 U.S. 615 (2004).

69. *Id.* at 623–24.

70. *Id.* at 623.

71. See *id.* at 625–32 (Scalia, J., concurring) (delineating his opposing view on search incident to arrest doctrine).

72. *Id.* at 625. Justice Scalia recognized that, by creating a rule where an arrestee is presumed to always be able to access the vehicle, *Belton* created a “mythical arrestee ‘possessed of the skill of Houdini and the strength of Hercules.’” *Id.* (quoting *United States v. Frick*, 490 F.2d 666, 673 (5th Cir. 1973)).

73. See *id.* at 627 (“[C]onducting a *Chimel* search is not the Government's right; it is an exception—justified by necessity—to a rule that would otherwise render the search unlawful.”).

expressed concern that pretextual arrests allowed officers to rummage through an individual's personal property.<sup>74</sup> However, Justice Scalia continued that even when the arrestee is not within reaching distance of the passenger compartment of the vehicle, he would nevertheless permit a search if it were "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."<sup>75</sup>

Justice Scalia based this rule upon the evidence-gathering rationale from cases such as *Rabinowitz*,<sup>76</sup> but did not acknowledge that *Chimel* overruled *Rabinowitz*.<sup>77</sup> He also justified his rule by reasoning that permitting such a vehicular search is not rummaging, presumably because an officer would be searching for evidence of the crime of arrest as opposed to conducting a general automobile search in order to discover some other criminal evidence.<sup>78</sup>

### C. *Gant's Retraction of Search Incident to Arrest Power*

Justice Scalia's approach became law in *Arizona v. Gant*.<sup>79</sup> In *Gant*, Tucson police officers discovered an arrest warrant for Rodney Gant, for driving with a suspended license, during a drug trafficking investigation.<sup>80</sup> The officers arrested, handcuffed, and placed Gant in a squad car before conducting a *Belton* search of his vehicle, whereupon they uncovered a gun and cocaine.<sup>81</sup> Without expressly overruling *Belton*, the Court rejected what it deemed to be a broad reading of that case, which granted automatic search power, by reasoning that such an interpretation contradicts *Chimel's* twin rationales of officer safety and preservation of evidence.<sup>82</sup>

The Court affirmed *Chimel's* rule by asserting that it only allows a search of the passenger compartment of a car when the arrestee is "unsecured and within reaching distance of the passenger compartment at the time of the search."<sup>83</sup> The Court found that *Belton* violated *Chimel's*

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74. *See id.* at 627–29 (arguing that searches cannot merely be exploratory; police officers must have an objective or reason for the search).

75. *Id.* at 632.

76. *See id.* at 630 ("There is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested.").

77. *Id.* at 629.

78. *See id.* at 630 (stating that searching for a evidence of a specific crime incident to arrest is not "general rummaging").

79. 129 S. Ct. 1710, 1714 (2009). The Court stated:

Consistent with the holding in *Thornton v. United States* . . . and following the suggestion in Justice Scalia's opinion concurring in the judgment in that case . . . we also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle. *Id.*

80. *Id.* at 1714–15.

81. *Id.* at 1715.

82. *Id.* at 1719.

83. *Id.*

core principles, including *Chimel*'s holding that a warrantless search exception to the warrant requirement must be strictly linked to its rationales.<sup>84</sup> Because Rodney Gant was handcuffed and inside the police cruiser, his ability to retrieve a weapon or evidence from his car was nonexistent.<sup>85</sup> Therefore, the Court held that the search violated the Fourth Amendment because the rationales underlying the search incident to arrest exception were lacking.<sup>86</sup>

In *Gant*, the Court affirmed *Chimel*, but also adopted Justice Scalia's novel approach from *Thornton* that when the arrestee is not within reaching distance of the vehicle, a search is still permissible if it is reasonable to believe that evidence of the crime of arrest might be found in the automobile.<sup>87</sup> The Court expressly limited this second holding to the automobile context by stating that "circumstances unique" to this context justify a search for evidence of the crime of arrest.<sup>88</sup>

As in Justice Scalia's *Thornton* concurrence, the Court was concerned about the power of police to rummage among an individual's private property<sup>89</sup> and declared that an interpretation of *Belton* that gave police the right to automatically search is "anathema to the Fourth Amendment."<sup>90</sup> Furthermore, the fact that *Belton* and *Thornton* permitted automatic searches of an arrestee's car, even for those arrested for mere traffic violations, deeply concerned the Court.<sup>91</sup>

Notably, Justice Scalia concurred with the majority, rather than joining its opinion, even though the Court essentially adopted his *Thornton* concurrence.<sup>92</sup> In his *Gant* concurrence, Justice Scalia expressed a dissatisfaction with *Chimel* that he did not express in *Thornton*: that *Chimel* fails to give appropriate guidelines to arresting officers given the ambiguity in what constitutes an arrestee's reaching distance.<sup>93</sup> He argued that *Chimel* "leaves much room for manipulation, inviting officers to leave the scene unsecured (at least where dangerous suspects are not involved) in

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84. *See id.* at 1716 ("[*Chimel*'s] limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy.").

85. *See id.* at 1719 (acknowledging that Gant "was not within reaching distance of his car at the time of the search").

86. *See id.* at 1716 (declaring the search unreasonable because Gant was not within reaching distance of his car, and no evidence of the crime of arrest, driving with a suspended license, could logically exist).

87. *Id.*

88. *Id.*; *see also* United States v. Taylor, 656 F. Supp. 2d 998, 1002 (E.D. Mo. 2009) (holding that *Gant*'s evidentiary holding is limited to the vehicular context).

89. *Gant*, 129 S. Ct. at 1720.

90. *Id.* at 1721.

91. *See id.* at 1722–23 (noting that these cases resulted in numerous constitutional right violations of those who were guilty of mere traffic violations).

92. *Id.* at 1724–25 (Scalia, J., concurring).

93. *Id.* at 1724.

order to conduct a vehicle search.”<sup>94</sup> Interestingly, Justice Scalia dismissed this perverse incentive argument in *Thornton* by arguing that if officers do not follow safe procedures by failing to secure or remove an arrestee from the scene of the arrest, then the search would automatically be unconstitutional.<sup>95</sup> Justice Scalia’s latest position, reflected in his *Gant* concurrence, is that a search incident to arrest is reasonable under the Fourth Amendment “only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred.”<sup>96</sup> Justice Scalia reasoned that since Rodney Gant was arrested for driving with a suspended license, a nonevidentiary crime where a search incident to arrest could not possibly discover evidence of the crime, and since no probable cause of another crime existed, the search was unreasonable.<sup>97</sup>

While the Court clearly abolished *Belton*’s legal fiction by affirming *Chimel*’s twin rationales, it left unclear what exactly the “reasonable to believe” standard entails.<sup>98</sup>

## II. *GANT*’S REASONABLE TO BELIEVE STANDARD PERTAINS TO THE EVIDENTIARY NATURE OF THE CRIME

By adopting Justice Scalia’s approach from *Thornton*, the Court opted for a reasonable to believe standard that varies from the familiar standards of reasonable suspicion and probable cause.<sup>99</sup> However, the Court was not explicit about what such a standard entails and failed to define it.<sup>100</sup> A

94. *Id.* at 1724–25.

95. See *Thornton v. United States*, 541 U.S. 615, 627 (2004). Justice Scalia asserted that “if an officer leaves a suspect unrestrained nearby just to manufacture authority to search, one could argue that the search is unreasonable *precisely because* the dangerous conditions justifying it existed only by virtue of the officer’s failure to follow sensible procedures.” *Id.* (emphasis in original).

96. *Gant*, 129 S. Ct. at 1725.

97. *Id.*

98. *Id.* at 1723–24 (holding that a search incident to arrest is unconstitutional where *Chimel*’s twin rationales are absent, or where it is not reasonable to believe that evidence of the crime of arrest could be found in the vehicle).

99. See 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.1(d), at 109 (4th ed. Supp. 2009) (noting that the adoption of this standard was a “dramatic change in the law”); Rudstein, *supra* note 11, at 1345 (arguing that reasonable to believe is not probable cause); Tomkovicz, *supra* note 2, at 1464 (same); Orin Kerr, *When Is It “Reasonable to Believe” That Evidence Relevant to An Offense is In A Car? Does that Require Probable Cause, Reasonable Suspicion, or Something Else?*, THE VOLOKH CONSPIRACY, Apr. 22, 2009, [http://volokh.com/archives/archive\\_2009\\_04\\_19-2009\\_04\\_25.shtml#1240453456](http://volokh.com/archives/archive_2009_04_19-2009_04_25.shtml#1240453456) (recognizing the uncertainty associated with a reasonable to believe standard); see also Dripps, *supra* note 5, at 404 (contending that reasonable to believe is a vague standard less than probable cause, and that the Court might eventually equate it with reasonable suspicion).

100. See *Gant*, 129 S. Ct. at 1729 (Alito, J., dissenting) (arguing that it is unclear when the reasonable to believe standard will permit a search); see also LAFAVE, *supra* note 99, § 7.1(d), at 111 (observing that *Gant* provided only an “adumbrated treatment” of the

logical place to seek guidance about this standard's meaning is Justice Scalia's concurrence in *Thornton* because the Court in *Gant* expressly adopted the standard from this concurrence.<sup>101</sup> Unfortunately, Justice Scalia's *Thornton* concurrence does not provide a definition of the standard either, leaving lower courts, police officers, and commentators to guess at its precise meaning.<sup>102</sup>

Other cases have articulated a standard such as reasonable to believe, or reason to believe, but they too provide little guidance.<sup>103</sup> Adding to the confusion, various cases have equated the reasonable to believe, or reasonable belief, standard with either reasonable suspicion<sup>104</sup> or probable cause.<sup>105</sup> Nevertheless, this standard is not equivalent to probable cause because the automobile exception already provides for warrantless vehicle searches based solely on probable cause.<sup>106</sup> The automobile exception pertains to car searches before<sup>107</sup> or after an arrest,<sup>108</sup> rather than a

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standard).

101. See *Gant*, 129 S. Ct. at 1719 (adopting the reasonable to believe standard by directly quoting Justice Scalia's concurrence in *Thornton*).

102. See *id.* at 1726 (Alito, J., dissenting) (stating that the new standard will confuse police officers and judges); Kerr, *supra* note 99 (determining that Justice Scalia's *Thornton* concurrence, and other cases, provide little guidance regarding the meaning of "reasonable to believe," leaving the author unsure of the standard's definition); see also Kit Kinports, *Diminishing Probable Cause and Minimalist Searches*, 6 OHIO ST. J. CRIM. L. 649, 657 (2009) (arguing that undefined standards such as reasonable to believe should be adopted, if at all, with transparency and better guidance).

103. E.g., *Brigham City v. Stuart*, 547 U.S. 398, 400 (2006) (allowing a warrantless home entry if there is an "objectively reasonable basis" that a house occupant is severely injured, without elaborating on the standard); *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring) (articulating a reasonable to believe standard without elaborating on its contours); *Payton v. New York*, 445 U.S. 573, 602 (1980) (upholding entrance into a home with an arrest warrant where "there is reason to believe the suspect is within"); see also Kinports, *supra* note 102, at 649 (stating that the Court has used language such as "reason[able] to believe" without definition or explanation of its relationship to reasonable suspicion or probable cause).

104. E.g., *Maryland v. Buie*, 494 U.S. 325, 327 (1990) (upholding protective house sweeps based on reasonable suspicion and requiring that the police have "a reasonable belief" that an attacker is hiding in the area swept); *Terry v. Ohio*, 392 U.S. 1, 21, 27 (1968) (stating that an officer may frisk a suspect if he has a reasonable, articulable suspicion, or a "reason to believe" the suspect is armed and dangerous).

105. E.g., *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (proclaiming that the substance of probable cause is a "reasonable ground for belief of guilt") (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)) (internal quotation marks omitted); *Illinois v. Gates*, 462 U.S. 213, 233 n.7 (1983) (describing probable cause to arrest as a "reasonable belief" that the arrestee had committed a crime).

106. Kinports, *supra* note 102, at 651; LAFAVE, *supra* note 99, § 7.1(d), at 110–11. See generally *Carroll v. United States*, 267 U.S. 132, 155–56 (1925) (holding that a warrantless automobile search supported by probable cause of a crime is lawful).

107. See *Carroll*, 267 U.S. at 155–56 (upholding the search and seizure of contraband liquor upon probable cause, which then led to arrest); see also *California v. Carney*, 471 U.S. 386, 395 (1985) (upholding a warrantless search of a mobile home before arrest based on the automobile exception).

108. E.g., *United States v. Johns*, 469 U.S. 478, 487–88 (1985) (holding that a car search conducted three days after the arrest of a driver and seizure of his car was reasonable); *Chambers v. Maroney*, 399 U.S. 42, 47 (1970) (permitting a car search based on the

substantially contemporaneous search incident to arrest, so that the two doctrines of search incident to arrest and the automobile exception would blend into each other if probable cause were equated with *Gant*'s reasonable to believe standard. Since equating reasonable to believe with probable cause would be redundant in light of the preexisting automobile exception, it is unlikely that the Court intended to equate the two standards.<sup>109</sup>

Furthermore, it is also unlikely that the Court intended to equate this standard with reasonable suspicion. In abolishing the bright-line *Belton* rule, the Court found that ample authority exists to search a car for reasons of officer safety.<sup>110</sup> Justice Stevens acknowledged that *Michigan v. Long*<sup>111</sup> permits a search of a vehicle if there is reasonable suspicion that an occupant is dangerous and might grab a weapon,<sup>112</sup> and noted that the Court similarly permitted a protective sweep of a house in *Buie* based on reasonable suspicion.<sup>113</sup> These cases reflect the general rule that reasonable suspicion can only support limited searches for officer safety.<sup>114</sup> By discussing such cases, the Court in *Gant* impliedly acknowledged that reasonable suspicion is limited to searches based on officer safety and that an evidentiary search cannot be based on that standard.<sup>115</sup> It is also unlikely that reasonable to believe is a standard lower than reasonable suspicion since the latter standard is already extremely low.<sup>116</sup> If

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automobile exception after the car and the arrestee had been taken to the police station).

109. LAFAVE, *supra* note 99, at § 7.1(d); *Bright Line*, *supra* note 4, at 98 n.139.

110. *See Arizona v. Gant*, 129 S. Ct. 1710, 1721 (2009) (discussing the established authority to search, not incident to arrest, but for officer safety).

111. 463 U.S. 1032 (1983).

112. *See Gant*, 129 S. Ct. at 1721 (2009) (rejecting a broad reading of *Belton* because, *inter alia*, officer safety is already addressed in settled case law).

113. *Id.*

114. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that an officer may conduct a pat-down search only when there is reasonable, articulable suspicion that the suspect is armed and dangerous).

115. *See Gant*, 129 S. Ct. at 1721 (analyzing cases permitting searches based on reasonable suspicion for officer safety reasons, but not for evidentiary reasons). *But see* Myron Moskowitz, *The Road to Reason: Arizona v. Gant and the Search Incident to Arrest Doctrine*, 79 Miss. L.J. 181, 193–94 (2009) [hereinafter *The Road to Reason*] (predicting that courts will equate reasonable to believe with reasonable suspicion).

116. *See Alabama v. White*, 496 U.S. 325, 330 (1990) (stating that reasonable suspicion is “considerably” lower than preponderance of the evidence and is less demanding than probable cause); *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (discussing reasonable suspicion as a standard that requires only “some minimal level of objective justification,” *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (internal quotation marks omitted), supported by facts rather than an “inchoate and unparticularized suspicion,” *INS v. Delgado*, 466 U.S. 210, 217 (1984) (internal quotation marks omitted)). It can be argued that the reasonable to believe standard is no different from the reasonable suspicion standard because both share the requirement of reasonability. *See Kinports*, *supra* note 102, at 651 (observing that phrases such as reasonable to believe are linguistically similar to reasonable suspicion). However, as discussed in the text, the *Gant* Court probably did not intend to equate the two standards since it did not analyze reasonable suspicion cases in light of the reasonable to believe standard, which is used for searches due to officer safety alone, rather than an evidentiary

reasonable to believe is a standard lower than probable cause, but not lower than reasonable suspicion, it might be an intermediate standard, albeit one whose contours are unknown.<sup>117</sup>

More likely still is that the standard asks whether the crime of arrest was an evidentiary crime, rather than entailing a quantum of proof, as do reasonable suspicion and probable cause.<sup>118</sup> Because the crime of arrest in *Gant* was not evidentiary—no further evidence of driving without a license could exist beyond the warrant for *Gant*'s arrest—a search of the car would be unreasonable under *Gant*'s second holding.<sup>119</sup> On the other hand, if the warrant listed distribution of illegal drugs as the crime, the evidentiary nature of the crime would likely justify the search. This “nature of the offense” test finds support in the *Gant* opinion as the Court claimed that, “[i]n 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.”<sup>120</sup> The Court stated that in other cases, such as *Belton* and *Thornton*, where the arrestees were arrested for possession of illegal drugs, it would be reasonable to search the car incident to arrest.<sup>121</sup>

Nevertheless, it is uncertain what exactly the Court intended the standard to entail, and its definition will likely be heavily litigated.<sup>122</sup> Such obfuscation on behalf of the Supreme Court bodes ill for lower courts that are left with little guidance in applying the standard.<sup>123</sup>

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rationale.

117. See Kinports, *supra* note 102, at 660 (arguing that phrases akin to reasonable to believe may lead to a sliding scale of standards, as opposed to the current reasonable suspicion/probable cause dichotomy). *But see* Kerr, *supra* note 99 (“My best guess is that ‘reasonable to believe’ is the sort of undefined reasonableness used by most lower courts in the *Payton* setting.”) (quoting *United States v. Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005)).

118. See LAFAVE, *supra* note 99, § 7.1(d), at 111–12 (stating that the author’s “hunch” is that the standard is a “nature-of-the-offense test”); *see also* *United States v. Chavez*, No. 2:09-cr-0033 FCD, 2009 WL 4282111, at \*5 (E.D. Cal. Nov 24, 2009) (disallowing a search incident to arrest under *Gant*'s second holding because it is not reasonable to believe that evidence of a battery would be found within the car); *People v. Osborne*, 96 Cal. Rptr. 3d 696, 705 (Cal. Ct. App. 2009) (permitting a search under *Gant*'s second holding because gun possession was an evidentiary crime akin to possession of illicit drugs); Hermele, *supra* note 13, at 186 (stating that *Gant*'s second holding pertains to evidentiary crimes).

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

120. *Id.*

121. *Id.*

122. Dale Anderson & Dave Cole, *Search and Seizure After Arizona v. Gant*, 46 ARIZ. ATT'Y 14, 16 (2009) (stating that the definition of reasonable to believe is “anybody’s guess” and will require lower courts to define it); Timothy H. Everett, *Arizona v. Gant: The End of the Belton Rule as we Knew It*, 33 CHAMPION 58, 58–59 (Aug. 2009) (noting that the Court did not articulate the standard’s relation to reasonable suspicion or probable cause and that this issue will be heavily litigated before reappearing at the Supreme Court).

123. See *Gant*, 129 S. Ct. at 1726 (Alito, J., dissenting) (stating that the new standard will confuse police officers and judges); *cf.* Kinports, *supra* note 102, at 650–53 (discussing the confusion arising from phrases resembling reasonable to believe).

### III. *GANT*'S POTENTIAL TO END AUTOMATIC SEARCHES OF CONTAINERS ON THE PERSON INCIDENT TO ARREST

*Gant*'s immediate effect is to terminate automatic searches incident to arrest in the vehicular context.<sup>124</sup> The police no longer have the power, as a matter of right granted in *Belton* and extended in *Thornton*, to automatically search a vehicle based solely on an arrest.<sup>125</sup> Nevertheless, automatic searches incident to arrest in nonvehicular contexts continue to persist.<sup>126</sup> *Gant* abrogated cases such as *Robinson*, *Turner*, and *Buie* by terminating automatic searches incident to arrest in the vehicle context.<sup>127</sup> The Court severely undermined the concept that the police may search incident to arrest as a matter of right.<sup>128</sup>

#### A. *Strengthening Chimel Beyond the Vehicular Context*

*Gant* abrogated such a police entitlement by re-anchoring the search incident to arrest exception to the twin rationales of *Chimel*.<sup>129</sup> Moreover, the *Gant* Court strengthened *Chimel* by stating that not only must the arrestee be within reaching distance to justify a search, but that he also must be unsecured.<sup>130</sup> *Chimel* did not analyze whether the arrestee must be unsecured for police to justifiably search the arrestee's alleged reaching distance, and the opinion omitted the important detail of whether petitioner *Chimel* was handcuffed or otherwise secured when the police searched his home.<sup>131</sup>

Nevertheless, under *Chimel*'s logic, it seems that if an arrestee is secured in handcuffs, his ability to retrieve a weapon or destructible evidence from his surrounding area is virtually nonexistent.<sup>132</sup> While the text of *Chimel* is not immediately clear whether a search is permissible when an arrestee is handcuffed, the logic driving the opinion would likely deny a search in

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124. See *Gant*, 129 S. Ct. at 1724 (Scalia, J., concurring) ("It must be borne in mind that we are speaking here only of a rule automatically permitting a search when the driver or an occupant is arrested."); Everett, *supra* note 122, at 58–59; see also Anderson & Cole, *supra* note 122, at 14 (noting that *Gant* ends "free" searches of cars incident to arrest).

125. See *Gant*, 129 S. Ct. at 1719 (rejecting a broad reading of *Belton* that would violate *Chimel*).

126. See *supra* note 14 (listing cases in the personal container and home context where automatic searches incident to arrest persist).

127. See *Gant*, 129 S. Ct. at 1720 (asserting that automatic *Belton* searches are a serious threat to privacy).

128. See *id.* at 1721 (stating that allowing automatic warrantless searches as a police entitlement is "anathema to the Fourth Amendment").

129. *Id.* at 1719.

130. See *id.* (holding that a search of the passenger compartment of a car is constitutional under *Chimel* when the arrestee is both unsecured *and* within reaching distance).

131. See *Chimel v. California*, 395 U.S. 752, 753 (1969) (stating only that officers arrested *Chimel* by handing him an arrest warrant).

132. See *id.* at 762–63 (explaining that a search is reasonable upon arrest if the suspect is able to grab a weapon or destructible evidence).

such circumstances since the area surrounding the arrestee would not be in his immediate control.<sup>133</sup> It seems unlikely that a handcuffed arrestee could grab a gun from a cabinet, or drugs from a closed container.<sup>134</sup> If the area around the arrestee is not within his immediate control, then the twin rationales are not present, as the arrestee cannot reach a weapon with which to harm officers or grab evidence to destroy.<sup>135</sup>

By holding that a vehicle search is permissible under *Chimel* only if the arrestee is within reaching distance *and* unsecured, the Court in *Gant* recognizes that a handcuffed, or otherwise secured arrestee, has little opportunity to obtain weapons or destructible evidence.<sup>136</sup> This acknowledgement is evident when the Court claims, “[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.”<sup>137</sup> *Gant*’s first holding does not imply that the only situation where an arrestee cannot reach into an area officers desire to search is when the arrestee is far removed from that area.<sup>138</sup>

This holding, then, must include situations where the arrestee is adequately secured, so as to render his ability to reach the area the police seek to search a virtual impossibility.<sup>139</sup> For example, an unhandcuffed arrestee who is surrounded by multiple officers may be adequately secured.<sup>140</sup>

In sum, *Gant*’s first holding permits officers to search an area incident to arrest, other than the person himself, when the arrestee may realistically access that area.<sup>141</sup> This possibility of access is only present when the arrestee is not secured and within reaching distance of the space officers

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133. *See id.* at 763 (allowing a search of the area within an arrestee’s immediate control by providing the example of the comparable danger of a gun on a table versus one in a drawer); *An Empirical Reexamination*, *supra* note 67, at 662 (2002) (arguing that *Chimel*’s rule allows a search under an assumption that the arrestee is unrestrained).

134. *Cf. Gant*, 129 S. Ct. at 1719 (acknowledging that an arrestee cannot access his vehicle when restrained). *But see* *United States v. Lucas*, 898 F.2d 606, 609 (8th Cir. 1990) (upholding a search of a cabinet after handcuffing arrestee); *United States v. Silva*, 745 F.2d 840, 847 (4th Cir. 1984) (holding a search valid after arrestees were handcuffed and monitored by agents).

135. *Gant*, 129 S. Ct. at 1719; *Chimel*, 395 U.S. at 763.

136. *See Gant*, 129 S. Ct. at 1719 (elaborating on *Chimel*’s rule to bar a vehicle search when the arrestee is secured).

137. *Id.* at 1716.

138. *See supra* note 132 and accompanying text (noting that if the arrestee is in handcuffs, the possibility that he will be able to retrieve a weapon or destroy evidence is extremely low).

139. *See* LAFAYE, *supra* note 99, § 7.1(c) at 104 (“The connector ‘and’ is especially significant here, for it tells us that the fact the arrestee is ‘unsecured’ is not good enough if he is not also ‘within reaching distance,’ just as being that close is not good enough if that arrestee has been secured.”).

140. *Id.*

141. *Id.* § 5.5(a), at 43.

seek to search.<sup>142</sup> The Court not only affirmed *Chimel*, but has also reinvigorated its rule by using *Chimel*'s internal logic to hold that a secured arrestee cannot reach the surrounding area for weapons or evidence.<sup>143</sup>

Notably, the Court did not limit its elaboration of *Chimel* to the vehicular context. When it discussed *Chimel*, the Court in *Gant* did not qualify its language with phrases such as “in the vehicle context” or use other words that would confine its *Chimel* analysis to the automobile sphere.<sup>144</sup> To the contrary, the language used to discuss *Chimel* is broad. The *Gant* Court's use of broad language in its discussion of *Chimel* leads to the inference that the Court did not intend to limit its *Chimel* analysis to the automobile context.<sup>145</sup>

In contrast, the Court expressly limited its second holding to the vehicular context, allowing a search of a vehicle incident to arrest when it is reasonable to believe that evidence of the crime of arrest could be discovered.<sup>146</sup> The Court failed to articulate what circumstances are unique to the car context that warrant the adoption of this new evidentiary exception, though rationales underpinning the automobile exception to the warrant requirement are likely the unique circumstances that justify the Court's evidentiary holding.<sup>147</sup>

In *Carroll v. United States*,<sup>148</sup> the Court allowed a search of a car, before arrest, upon probable cause that contraband would be found inside.<sup>149</sup> This

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142. *Id.* § 6.3(c), at 60.

143. *See id.* (noting the relevance of *Gant*'s specification that “possibility of access” is only necessary when the arrestee is unsecured and is within reaching distance).

144. *Id.*; *see also* LAFAVE, *supra* note 99, § 5.5(a), at 43 (discussing the two holdings in *Gant* when a search is permissible and noting only the second is limited to the vehicle context, and not the first “where there is ‘possibility of access’”).

145. *See* United States v. Taylor, 656 F. Supp. 2d 998, 1001–02 (E.D. Mo. 2009) (applying *Gant* to a home search); United States v. Perdoma, No. 8:08CR460, 2009 WL 1490595, at \*2 (D. Neb. May 22, 2009) (applying *Gant* to search of a personal container); LAFAVE, *supra* note 99, § 5.5(a), at 43–44 (mentioning that *Gant*'s first holding may apply to container and premises searches); Anderson & Cole, *supra* note 122, at 16, at 16 (predicting that courts will apply *Gant* to the home context); Craig M. Bradley, *Two and a Half Cheers for the Court*, 45 TRIAL 48, 49 (Aug. 2009) (“Alito was correct when he observed that *Gant* will lead to a reexamination of searches incident to arrest in the home and will force courts to recognize that searches of areas near arrestees also may not be justified once a suspect has been handcuffed or taken away.”) (emphasis added).

146. *Gant*, 129 S. Ct. at 1719 (“Although it does not follow from *Chimel*, we also conclude that *circumstances unique to the vehicle context* justify a search incident to a lawful arrest when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’”) (emphasis added) (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004)); *see also* Taylor, 656 F. Supp. 2d at 1002 (holding that *Gant*'s evidentiary holding is confined to the vehicular context); LAFAVE, *supra* note 99, § 5.5(a), at 43 (suggesting that *Gant*'s second holding is inapplicable beyond the vehicular context).

147. *See* California v. Carney, 471 U.S. 386, 391 (1985) (justifying the automobile exception on a lower expectation of privacy within the automobile); *Carroll v. United States*, 267 U.S. 132, 153 (1925) (holding that a warrantless automobile search supported by probable cause of a crime is lawful due to the mobility inherent in an automobile).

148. 267 U.S. 132 (1925).

149. *Id.* at 155.

exception is distinct from the search incident to arrest exception, and the Court justified this distinction based on the fact that cars are mobile and can easily drive away if the police delay a search in an attempt to obtain a search warrant.<sup>150</sup> Another unique characteristic of vehicles to which *Gant* is likely referring is the supposed lower expectation of privacy for automobiles, which the Court also has used to justify the automobile exception.<sup>151</sup> Nowhere in the opinion, besides in relation to its second holding, does the Court in *Gant* limit its *Chimel* analysis to the vehicular context.<sup>152</sup> Therefore, *Gant*'s robust affirmation of *Chimel* is applicable in other contexts, such as searches of containers on the person as in *Robinson*.<sup>153</sup> Furthermore, the Court's concern about automatic searches as unjustified police entitlements supports the argument that *Gant*'s first holding should be applied in other automatic, nonvehicular search incident to arrest situations.<sup>154</sup> In his *Gant* dissent, Justice Alito recognized that *Gant*'s refinement of *Chimel* can apply to other instances, stating that "there is no logical reason why the same rule should not apply to all arrestees."<sup>155</sup>

The Court's powerful rhetoric against automatic searches as police entitlements reflects a broader concern about the erosion of individual privacy resulting from an overly broad search incident to arrest power.<sup>156</sup> Since the Court felt that the *Belton* rule contravenes the primary purpose of the Fourth Amendment—to prevent unfettered discretion to search within

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150. *Id.* at 153. See generally *As Time Goes By*, *supra* note 20, at 606–11 (recognizing *Carroll* as the origin of the automobile exception, and explaining the *Carroll* Court's concern with the impracticality of securing a warrant for an automobile search because of an automobile's mobility).

151. See *Carney*, 471 U.S. at 391 (justifying the automobile exception by claiming that one has a lower expectation of privacy in an automobile due to pervasive governmental regulation).

152. See *United States v. Taylor*, 656 F. Supp. 2d 998, 1001–02 (E.D. Mo. 2009) (explaining that, except for its second holding, the *Gant* decision is not strictly limited to the automobile context).

153. See *United States v. Perdoma*, No. 8:08CR460, 2009 WL 1490595, at \*2 (D. Neb. May 22, 2009) (applying *Gant* to search of a personal container); LAFAYE, *supra* note 99, § 5.5(a), at 43–44 (arguing that *Gant*'s requirement of possibility of access, that is when the arrestee is unsecured and within reaching distance, must be applied in all instances where containers are searched incident to arrest).

154. See *Arizona v. Gant*, 129 S. Ct. 1710, 1721 (2009) (stating that allowing automatic warrantless searches as a police entitlement is "anathema to the Fourth Amendment").

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

156. See *id.* at 1720 (majority opinion) (expressing concern that the police power to search incident to arrest for a crime where evidence cannot exist "creates a serious and recurring threat to the privacy of countless individuals" and that this threat "implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects"); see also *Thornton v. United States*, 541 U.S. 615, 624 (2004) (O'Connor, J., concurring) (claiming that the search incident exception has become a police entitlement right rather than a warrant requirement exception justified only by the rationales that justify its existence); Everett, *supra* note 122, at 58 (asserting that the search incident to arrest exception since *Belton* had become a police entitlement).

the individual's private sphere—then *Gant* calls into question other cases, such as *Robinson*, where courts have upheld automatic searches as a matter of right.<sup>157</sup>

*B. Applying Gant to Robinson Prevents a Search of the Cigarette Pack*

In *Robinson*, the defendant was arrested for the nonevidentiary offense of driving with a revoked license,<sup>158</sup> the same offense for which *Gant* was arrested.<sup>159</sup> Despite the nonevidentiary nature of the crime, the Court upheld the search in *Robinson* for differing reasons, but essentially determined that the power to search a person and containers on the person incident to arrest is a matter of right and flows automatically from the arrest itself.<sup>160</sup> *Robinson* permits automatic searches of a person, and containers on the person,<sup>161</sup> incident to arrest and thereby stands in stark tension with *Chimel* and the elaboration of its rule in *Gant*.<sup>162</sup>

*Gant*'s potential to end automatic searches of persons is less promising than its potential to end automatic searches of containers on the person due to courts' emphasis on officer safety.<sup>163</sup> Since a search of the arrestee's person could easily be justified under *Chimel*, given that an arrestee is within reaching distance of a possible weapon or evidence upon his own person, *Chimel*'s twin rationales would allow the search of a person incident to arrest.<sup>164</sup> Presumably, a search of the person would still be lawful even if the arrest were for a nonevidentiary crime, since *Chimel*'s officer safety rationale would still exist even absent the evidence preservation rationale.<sup>165</sup> The search of a person may also be permissible under *Gant*'s affirmation of *Chimel* since a handcuffed arrestee might

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157. See *Bright Line*, *supra* note 4, at 97–98 (arguing that Justice Scalia's *Thornton* approach abrogates cases upholding automatic searches incident to arrest in nonvehicular contexts).

158. *United States v. Robinson*, 414 U.S. 218, 220 (1973).

159. *Gant*, 129 S. Ct. at 1714.

160. See *Robinson*, 414 U.S. at 235 (holding that “[i]t is the fact of the lawful arrest which establishes the authority to search”).

161. See *supra* note 17.

162. See DRESSLER, *supra* note 38, at 224–25 (noting that the holdings in both *Chimel* and *Robinson* result from differing Fourth Amendment analyses since the *Chimel* Court was concerned about the scope of a warrant exception whereas the *Robinson* Court de-emphasized the warrant requirement).

163. See, e.g., *Maryland v. Buie*, 494 U.S. 325, 333–34 (1990) (permitting officers to search closets and spaces adjoining arrest to look for dangerous persons, without any level of suspicion whatsoever); *Chimel v. California*, 395 U.S. 752, 762–63 (1969) (permitting a search incident to arrest based on, inter alia, concerns for officers' safety).

164. See *Chimel*, 395 U.S. at 762–63 (concluding that the search of a person is reasonable based on rationales of officer safety and preservation of evidence); see also *Robinson*, 414 U.S. at 234–35 (relying on, inter alia, officer safety and evidence preservation to justify a search of an arrestee's person incident to arrest).

165. See *Chimel*, 395 U.S. at 768 (holding that a search of an area beyond that within which the arrestee can obtain weapons or something that could be used against him or her as evidence is unreasonable).

arguably be able to obtain a small weapon, such as a razor blade, or destructible evidence from his pockets.

Nevertheless, *Chimel* does not discuss containers on the person, but unlike *Robinson*, presumably does not allow automatic searches of containers that are in the possession of the police.<sup>166</sup> The Court in *United States v. Chadwick*<sup>167</sup> articulated this point in holding that a search of arrestee's property that is in the exclusive dominion and control of the police is impermissible since the arrestee cannot access the property to retrieve a weapon or evidence.<sup>168</sup>

In upholding the search of the cigarette pack in *Robinson*, the Court did not discuss why the Fourth Amendment permits the police to automatically search any container found on the person incident to arrest.<sup>169</sup> This gap in *Robinson*'s reasoning is where *Gant* could end automatic searches of containers on the person incident to arrest. If the search of *Robinson*'s person is permissible under *Chimel*, the search of the cigarette pack is impermissible under the logic of *Gant*.<sup>170</sup> When the officer searched the cigarette pack, it was in the exclusive control of the officer, making it very unlikely that *Robinson* could grab it to obtain a weapon or destroy evidence inside the pack.<sup>171</sup> Nevertheless, it is unclear from the text of the case whether *Robinson* was handcuffed, and he arguably had the potential to grab the pack from the officer if he was not secured.<sup>172</sup> The question of whether the arrestee was secured, however, does not impact the outcome in *Robinson*.

Since *Robinson* held that the authority to search a person incident to arrest, in addition to containers on the person, flows from the arrest itself, whether the arrestee was handcuffed was irrelevant to the outcome in *Robinson*.<sup>173</sup> Assuming that *Robinson* was handcuffed, the result would have been the same: the search of the cigarette pack would have been permitted. However, under *Gant*, the search would be impermissible since

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166. Compare *id.* at 762–63 (holding that a search of an arrestee is based on the twin rationales), with *Robinson*, 414 U.S. at 235–36 (upholding a search of the person and a container in which evidence of the crime cannot exist).

167. 433 U.S. 1 (1977).

168. *Id.* at 15.

169. See DRESSLER, *supra* note 38, at 224 (noting that the “*Robinson* Court gave short shrift to the search of [the defendant’s] cigarette package after it was removed from his pocket”).

170. See *Arizona v. Gant*, 129 S. Ct. 1710, 1719 (2009) (holding that where the twin rationales are absent, and it is not reasonable to believe that evidence of the crime of arrest would be found in a vehicle, a search is impermissible).

171. See *Robinson*, 414 U.S. at 222–23 (1973) (stating that the officer possessed the cigarette pack after removing it from the arrestee’s pocket).

172. See *id.* at 234–35 (finding a danger of officer safety in all arrest situations); *cf.* *Gant*, 129 S. Ct. at 1724 (Scalia, J., concurring) (stating that a risk that an unrestrained driver will attack an officer is present whenever there is a traffic stop).

173. See *Robinson*, 414 U.S. at 235 (holding that a search incident to arrest of a person and containers on the person needs no greater justification than the arrest itself).

a handcuffed arrestee in all likelihood could not grab the pack from the officer who had complete custody of it.<sup>174</sup> Like Rodney Gant, who was secured and unable to reach his car,<sup>175</sup> a secured Robinson would not be able to reach into the cigarette pack, even if he were close to the officer who possessed it. Therefore, an automatic search of a personal container incident to arrest is unconstitutional in light of *Gant*.

*C. Perdoma's Faulty Application of Gant to a Search of a Bag*

At least one case has applied *Gant* to the search of a personal container in the nonvehicular context. In *United States v. Perdoma*,<sup>176</sup> an officer confronted Perdoma at a bus station and asked him for identification upon detecting the scent of marijuana.<sup>177</sup> Perdoma claimed he did not have any identification, despite the officer's knowledge that he produced identification to buy a bus ticket.<sup>178</sup> Perdoma then fled upon the officer's demand to see his wallet.<sup>179</sup> After his arrest for obstructing a police officer, the officers placed "restraints" on Perdoma, searched his pockets, discovered marijuana, contemporaneously searched his bag, and found methamphetamine.<sup>180</sup>

In its ruling on Perdoma's motion to suppress the methamphetamine,<sup>181</sup> the District Court for Nebraska found that the magistrate judge's recommendation to deny the motion was erroneous in light of *Gant*.<sup>182</sup> The court reasoned that *Gant* affirmed *Chimel*'s twin rationales and therefore a search incident to arrest was unconstitutional absent those rationales, unless *Gant*'s second holding applied.<sup>183</sup> The court upheld the search by determining that it was reasonable to believe that the bag contained evidence of a drug offense since the officer had smelled marijuana, and that its discovery provided "additional support" for the reasonable belief that more evidence of the drug crime would be found in the bag.<sup>184</sup>

The court's application of *Gant*'s first holding demonstrates that its affirmation and elaboration of *Chimel* must be applied to the nonvehicular context since the search incident to arrest exception is now re-attached to

174. See *supra* note 134 and accompanying text.

175. *Gant*, 129 S. Ct. at 1715.

176. No. 8:08CR460, 2009 WL 1490595, at \*1 (D. Neb. May 22, 2009).

177. *Id.* at \*1.

178. *Id.*

179. *Id.*

180. *Id.*

181. See *Weeks v. United*, 232 U.S. 383, 393 (holding that evidence recovered in violation of the 4th amendment is inadmissible in federal court).

182. *Id.* at \*2.

183. *Id.*

184. *Id.*

its twin justifications.<sup>185</sup> The *Perdoma* court did not apply *Robinson*, which would have upheld the search irrespective of *Chimel*'s twin rationales.<sup>186</sup> The court expressly rejected the state's argument that *Gant* only applies to the search of automobiles incident to arrest,<sup>187</sup> thereby rejecting the automatic searches of containers on the person allowed in *Robinson*.<sup>188</sup> The *Perdoma* opinion recognizes that officers may not lawfully search when the arrestee is handcuffed<sup>189</sup> and the personal container is in the custody of police,<sup>190</sup> making it a near impossibility for the arrestee to gain access to it. By reconnecting the twin rationales to a *Chimel* search, and realizing that a secured, handcuffed arrestee is extremely unlikely to access the area to be searched, *Gant* supports *Perdoma*'s holding that the twin rationales of officer safety and preservation of evidence are inapplicable due to the restraint of the arrestee.

While the *Perdoma* court correctly applied *Gant*'s first holding, it incorrectly applied the second holding.<sup>191</sup> *Perdoma* failed to consider *Gant*'s express limitation that "circumstances unique to the vehicle context" justify a search absent *Chimel* rationales when it is reasonable to believe that evidence of the crime of arrest would be found in the car.<sup>192</sup> Those unique characteristics, mobility and lower expectation of privacy, are entirely missing when the police seek to search containers, such as the backpack in *Perdoma*.

Though technically mobile, a bag is not amenable to being whisked away as is a car, and it is not susceptible to being moved by the arrestee when it is in the control of the police.<sup>193</sup> Furthermore, the Supreme Court has recognized that privacy interests in luggage and other containers on the person are substantially higher than automobiles since the former is not

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185. See Everett, *supra* note 122, at 59 (stating that *Gant* re-tethers the search incident to arrest exception to its justifications, thereby affirming it as an exception to the warrant requirement rather than the rule).

186. See *supra* note 160–62 and accompanying text (describing the application of *Robinson* to support the automatic search of containers on the person).

187. *Perdoma*, 2009 WL 1490595, at \*2.

188. *United States v. Robinson*, 414 U.S. 218, 235–36 (1973).

189. See *Arizona v. Gant*, 129 S. Ct. 1710, 1714 (2009) (holding that a search is impermissible, under *Chimel*, when the arrestee is secured).

190. See *supra* notes 166–168 and accompanying text (discussing the application of *Chimel* to searches of containers in police custody).

191. See *Gant*, 129 S. Ct. at 1719 (holding that unique circumstances of the vehicular context justify a search incident to a lawful arrest, absent the twin rationales); see also *United States v. Taylor*, 656 F. Supp. 2d 998, 1002 (E.D. Mo. 2009) (explaining that *Gant*'s second holding is limited to the vehicular context).

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

193. See, e.g., *United States v. Chadwick*, 433 U.S. 1, 15 (1977), *abrogated by California v. Acevedo*, 500 U.S. 565 (1982) (holding that a search of arrestee's property in control of the police is impermissible since the arrestee cannot access that property to obtain a weapon or destructible evidence).

subject to the public's view, nor subject to pervasive regulations that diminish privacy.<sup>194</sup>

Not only did *Perdoma* apply *Gant*'s second holding when it should not have, but it also misapplied it. The *Perdoma* court misapplied the second holding because it permitted a search for evidence of the crime of arrest where evidence of obstructing a peace officer did not exist beyond the actual act of flight.<sup>195</sup> The court's reasoning, that the aroma of marijuana made it reasonable to believe that *Perdoma*'s bag may contain evidence of a drug crime, disregards the fact that *Perdoma* was not arrested for a drug offense.<sup>196</sup> If *Gant* were properly applied to the *Perdoma* case, it would not permit a search of the bag because the twin rationales of *Chimel* would not exist where the arrestee was secured and the bag was in the officers' control.<sup>197</sup> Furthermore, a correct application of *Gant* would render its second holding irrelevant outside the vehicle context.

The question that naturally follows is, if *Gant* would not allow a search incident to arrest here, would it require the police to obtain a warrant in order to search the bag? The *Gant* Court found that absent the *Chimel* rationales, and a situation that would activate *Gant*'s second holding, the police would have to get a warrant unless another exception to the warrant requirement applied.<sup>198</sup> In *Perdoma*, the police would likely have had to get a warrant to search the bag since another exception, such as consent or exigent circumstances, did not exist.

A hypothetical analogous to the *Perdoma* case reflects this outcome. Imagine that police officers witness a person wearing a backpack punch another person in the face, and then arrest and handcuff him for assault. If they confiscate his backpack, *Gant* would not permit a search incident to arrest, whereas *Robinson* presumably would. Applying *Gant* to these facts would not allow the search since the handcuffed arrestee cannot physically

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194. See *id.* at 13 (recognizing that “[l]uggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis”). The Court further noted that, “[u]nlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects.” *Id.* The Court therefore asserted that a person has a “substantially greater” expectation of privacy in personal luggage than in an automobile. *Id.*

195. Cf. *Gant*, 129 S. Ct. at 1719 (holding that the evidence gathering rationale is inapplicable to nonevidentiary offenses such as driving with a suspended license).

196. Compare *United States v. Perdoma*, No. 8:08CR460, 2009 WL 1490595, at \*1–2 (D. Neb. May 22, 2009) (concluding that a search of the defendant's bag was reasonable as a search incident to arrest under *Gant*'s second holding, despite the fact that the defendant was arrested for “obstructing, along with resisting” arrest), with *Gant*, 129 S. Ct. at 1719 (permitting searches incident to arrest of vehicles where it is reasonable to believe that evidence of the crime of arrest could be found therein).

197. Even if the bag were within reaching distance, *Chimel* may not permit its search if it was in police custody since the bag would not be in the area over which the arrestee had control. See *Chimel v. California*, 395 U.S. 752, 763 (1969) (holding that officers may search incident to arrest the area “within [the arrestee's] immediate control”).

198. *Gant*, 129 S. Ct. at 1723–24.

access the bag that is in the police's dominion and control.<sup>199</sup> Here, like in *Perdoma*, a proper application of *Gant*'s first holding would restrict officers from searching containers on the person when the person is secured so that access to the containers is extremely unlikely.

Despite its flaws, *Perdoma* reflects the potential of *Gant* to limit automatic searches of containers on the person, thereby curtailing a police entitlement that the *Gant* Court found repugnant to the Fourth Amendment.

#### IV. *GANT* UNDERMINES AUTOMATIC SEARCHES OF HOMES INCIDENT TO ARREST

Despite *Chimel*, many courts have disregarded the twin rationales and upheld searches of homes when the arrestee was secured and not in reaching distance at the time of the search.<sup>200</sup> Courts have justified these searches on the grounds that the arrestee was within reaching distance at the time of the arrest, as opposed to the time of the search.<sup>201</sup> In effect, these cases permit automatic searches of the place of arrest in the home as they assume that *Chimel* rationales are always present, even when the arrestee has been secured and removed.<sup>202</sup> *Gant* abrogates these cases because a search of the place of arrest within a home is not justified when the arrestee is secured or removed.<sup>203</sup> A recent case applying *Gant* to the home context is illustrative.

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199. See *Gant*, 129 S. Ct. at 1719 (disallowing a search if the arrestee is secured); *United States v. Chadwick*, 433 U.S. 1, 15 (1977), *abrogated by California v. Acevedo*, 500 U.S. 565 (1982) (holding that a search of arrestee's property in control of the police is impermissible).

200. See, e.g., *United States v. Turner*, 926 F.2d 883, 886, 888 (9th Cir. 1991) (upholding a home search where the arrestee was cuffed and removed from the room of arrest); *United States v. Lucas*, 898 F.2d 606, 607–08, 610 (8th Cir. 1990) (upholding a search of a cabinet after officers handcuffed the arrestee); *United States v. Silva*, 745 F.2d 840, 847 (4th Cir. 1984) (upholding a search after arrestees were handcuffed and secured by federal agents).

201. E.g., *Turner*, 926 F.2d at 888 (“First, we consider whether the baggies of cocaine base were within Turner’s immediate control when he was *arrested*.”) (emphasis added); *United States v. Fleming*, 677 F.2d 602, 607 (7th Cir. 1982) (explaining that the reasonableness of a search is tied to the circumstances known to police at the time of arrest).

202. See *As Time Goes By*, *supra* note 20, at 625 (arguing that courts’ focus on the arrestee’s position at the time of arrest eliminates the requirement that a search incident to arrest must be substantially contemporaneous to the arrest, thereby allowing a search despite the twin rationales).

203. See *United States v. Taylor*, 656 F. Supp. 2d 998, 1001–03 (E.D. Mo. 2009) (utilizing *Gant* to suppress evidence found in a home when the arrestee was secured in a squad car); *LAFAVE*, *supra* note 99, § 7.1(c), at 104. (emphasizing that *Gant* stands for the proposition that the arrestee must be both “unsecured” and “within reaching distance” for the “possibility of access” to exist).

A. *Taylor's Application of Gant in the Home Context*

In *United States v. Taylor*,<sup>204</sup> officers arrived at Michael Taylor's house with arrest warrants for unlawful use of a weapon and tampering with a witness.<sup>205</sup> The officers found Taylor hiding in the attic, whereupon they brought him downstairs, handcuffed him, and placed him in the police cruiser.<sup>206</sup> An officer then searched the attic and found a handgun allegedly lying in an area that was within easy reach of Taylor at the time of his arrest.<sup>207</sup>

The District Court for the Eastern District of Missouri suppressed the gun and found that *Gant's* first holding, which strengthened *Chimel*, does apply in contexts other than a vehicular one.<sup>208</sup> Since Taylor was secured in the police cruiser without the possibility of accessing the gun in the attic, the twin rationales of officer safety and preservation of evidence were not present to justify the search. The court also noted that *Gant's* second holding did not apply since the unique circumstances surrounding a vehicular search confine an evidentiary search based on a reasonable belief to the vehicular context.<sup>209</sup> *Taylor's* application of *Gant* shows its applicability to home searches incident to arrest, and undermines cases where courts have allowed searches in defiance of *Chimel* justifications,<sup>210</sup> such as *United States v. Turner*.<sup>211</sup>

In *Turner*, the Ninth Circuit upheld a search that violated *Chimel* since the arrestee was handcuffed and removed to an adjacent room before the search of the room of arrest.<sup>212</sup> Because officers detained Turner in an area where he could not possibly obtain weapons or evidence, and was detained there precisely to remove him from the place of arrest,<sup>213</sup> the search of the room of arrest could not be justified by the twin rationales.<sup>214</sup> While

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204. 656 F. Supp. 2d 998 (E.D. Mo. 2009).

205. *Id.* at 1000.

206. *Id.* at 1000–01.

207. *Id.* at 1001.

208. *Id.* at 1002.

209. *Id.*

210. *See id.* (stating that cases outside the car context that relied on *Belton* must be reexamined due to *Gant*).

211. 926 F.2d 883 (9th Cir. 1991).

212. *Compare id.* at 888 (upholding a search where the arrestee was not within reaching distance of the searched area), *with Chimel v. California*, 395 U.S. 752, 763 (1969) (holding that the search incident exception must be confined to the twin rationales, preservation of evidence and officer safety, and is permissible when the area searched is within the arrestee's immediate control).

213. *Turner*, 926 F.2d at 888.

214. *See New York v. Belton*, 453 U.S. 454, 465–66 (1981) (Brennan, J., dissenting) (stating that after an arrestee is within police custody, the twin rationales do not apply and that it is impossible for the arrestee to grab a weapon or evidence); *see also An Empirical Reexamination*, *supra* note 67, at 683 (implying that *Turner* treats the *Chimel* doctrine as a game to justify a search by overlooking the fact that Turner was secured and removed from the room).

proclaiming fidelity to *Chimel*, the court nonetheless used a test from a Seventh Circuit case, *United States v. Fleming*,<sup>215</sup> which distorted *Chimel*'s reasoning. In using the test, which considered whether the evidence was in the defendant's immediate control at the time of arrest as opposed to time of search,<sup>216</sup> both circuit courts essentially disregarded the twin rationales since the defendant at the time of the search was secured and not within reaching distance of the evidence.<sup>217</sup> This test, sometimes known as the "now or earlier test," requires that the arrestee be in reaching distance at the time of arrest, and permits the search even after the arrestee has been removed from the area.<sup>218</sup>

Implicit in decisions such as *Turner* and *Fleming* is the courts' concern about restricting police authority to search for evidence upon arrest.<sup>219</sup> However, this policy preference giving police a right to search absent legal justification was robustly rejected in *Gant*.<sup>220</sup> The now or earlier rationale can no longer be used to uphold searches since *Gant* explicitly held that a search incident to arrest is permissible "only when the arrestee is unsecured and within reaching distance . . . at the time of the search."<sup>221</sup> Since *Turner* was secured in another room, not within reaching distance of the room of arrest, *Gant* would prohibit this search.

The now or earlier test analyzes the permissibility of a search by asking the wrong question. Under *Gant*, the question courts must ask is if the *Chimel* rationales are present when the search was conducted, not whether they were present at the time of arrest, thereby justifying a search when the arrestee has been secured and disabled.<sup>222</sup> Therefore, *Gant* abrogates all

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215. 677 F.2d 602 (7th Cir. 1982).

216. *Turner*, 926 F.2d at 887; *Fleming*, 677 F.2d at 607.

217. See *supra* note 199 and accompanying text (discussing how *Gant* would not allow a search when the arrestee is secured or removed).

218. See, e.g., *Turner*, 926 F.2d at 887–88 (upholding a search of a room after the arrestee was moved elsewhere since the area searched was within the arrestee's immediate control at the time of arrest); see also *Fleming*, 677 F.2d at 607–08 (using the now or earlier test to uphold a search). See generally *Bright Line*, *supra* note 4, at 97–98 (arguing that Justice Scalia's *Thornton* concurrence could undermine the now or earlier rationale).

219. See *Thornton v. United States*, 541 U.S. 615, 627 (2004) (Scalia, J., concurring) (maintaining that cases such as *Fleming* that defy the twin rationales by declining to adopt a test that would be "at odds with safe and sensible police procedures" assume that the government has a right to search, rather than an exception based on a necessity to search); *Fleming*, 677 F.2d at 607 (declining to adopt a rule requiring a search contemporaneous with arrest as it would conflict with "safe and sensible police procedures" of restraining the arrestee and removing him from the area of arrest); see also *An Empirical Reexamination*, *supra* note 67, at 682–83 (stating that the court in *Turner* assumed that the police had "won the right" to search by the mere fact of arrest).

220. See *Arizona v. Gant*, 129 S. Ct. 1710, 1719 (2009) (rejecting *Belton*'s rule which allowed broad search incident to arrest power as a matter of right).

221. *Id.* (emphasis added); see also LAFAYE, *supra* note 99, § 7.1(c), at 103–04 (arguing that it is significant that *Gant*'s rule applies to the time of the search since general police practice is to handcuff and remove the arrestee from the immediate vicinity).

222. See *New York v. Belton*, 453 U.S. 454, 465–66 (1981) (Brennan, J., dissenting) (stating that after an arrestee is within police custody, the twin rationales do not apply and

cases that have used the now or earlier test to permit a search despite the absence of the twin rationales.

### B. *Gant* Undermines an Automatic *Buie* Search

In addition to undermining *Turner* and like cases, *Gant* may also weaken one of the holdings of *Maryland v. Buie*, which allows automatic searches of closets and rooms adjacent to the place of arrest.<sup>223</sup> While *Buie*'s second holding required reasonable suspicion to conduct a protective sweep of the house generally to discover potentially dangerous persons,<sup>224</sup> its first holding allowed a search of closets and other adjacent spaces to discover such persons without any evidentiary showing whatsoever.<sup>225</sup> This automatic search power was presumably based on officer safety reasons: to protect officers from attack by an arrestee's hidden compatriot rather than the arrestee himself.<sup>226</sup>

*Buie*'s second holding is akin to a *Terry* frisk, but the thing "frisked" is a house rather than a person.<sup>227</sup> The *Buie* Court directly analogized to *Terry* in borrowing its reasonable suspicion standard and its sole rationale of officer safety for a limited search.<sup>228</sup> Since a *Terry* frisk occurs before an arrest, in order to eliminate a reasonably perceived risk of harm,<sup>229</sup> *Buie*'s reasonable suspicion sweep is tied closely with *Terry* rather than *Chimel*.<sup>230</sup>

On the other hand, an automatic *Buie* sweep is more akin to a search incident to arrest since it modifies *Chimel* to include a search not only of the grabbing area of the arrestee, but also of adjoining spaces and closets.<sup>231</sup> The majority in *Buie* stated that *Chimel* was not at issue and attempted to

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that it is impossible for the arrestee to grab a weapon or evidence).

223. 494 U.S. 325, 334 (1990).

224. *Id.*

225. *See id.* (holding that officers may search adjoining spaces of arrest and closets without any probable cause or reasonable suspicion).

226. *Id.* While the Court did not elaborate on its automatic sweep holding, it is rooted in reasons of officer safety since the Court labeled such a sweep a "precautionary matter." *Id.*

227. Edward J. Loya, Jr., *Sweeping Away the Fourth Amendment*, 1 STAN. J. C.R. & C.L. 457, 465 (2005); *see Buie*, 494 U.S. at 332–33 (analogizing officer safety interests in *Terry* with the present case).

228. *See Buie*, 494 U.S. at 332–33.

229. *See Terry v. Ohio*, 392 U.S. 1, 25–26 (1968) (holding that frisking a suspect before the existence of probable cause to arrest must be limited in scope to discover weapons).

230. *See Loya*, *supra* note 227, at 465 (stating that since a sweep based on reasonable suspicion is analogous to a *Terry* frisk, *Terry* is instructive regarding the sweep doctrine's contours).

231. *Buie*, 494 U.S. at 342 n.6 (Brennan, J., dissenting); *see also* *United States v. Williamson*, 250 F. App'x 532, 533 (4th Cir. 2007) (describing an automatic *Buie* sweep as a search incident to arrest); Tomkovicz, *supra* note 2, at 1438 (noting that an automatic *Buie* sweep is closely aligned with a *Chimel* search since both require only a lawful arrest); Peter W. Fenton & Michael B. Shapiro, *Chimel v. California 40 Years Later*, CHAMPION, July 2009, at 50 ("*Buie*] extend[ed] *Chimel*'s application to evidence found in plain view during a protective sweep of the premises.").

distinguish that case.<sup>232</sup> It reasoned that *Chimel*'s purpose was to retract the expansive search incident to arrest power in *Rabinowitz* that allowed a top to bottom search of a house.<sup>233</sup> The Court also asserted that *Chimel* was concerned about the risk to officer safety arising from the arrestee as opposed to a dangerous hidden ally.<sup>234</sup>

However, these arguments fail to adequately explain how an automatic *Buie* sweep is not an expansion of *Chimel*. In his *Buie* dissent, Justice Brennan argued that an automatic sweep of closets and spaces adjacent to arrest is an expansion of the search incident to arrest exception because of the similarity in the type of presumptions present in *Chimel* and the majority in *Buie*.<sup>235</sup> In *Chimel*, a search of the grabbing area of an arrestee is permitted due to a presumption that an arrestee may try to obtain weapons or destructible evidence from that area.<sup>236</sup> Similarly, Justice Brennan posited that the *Buie* majority presumed that "arrestees are likely to sprinkle hidden allies throughout the rooms in which they might be arrested," an assumption that Justice Brennan found "much less plausible" than the one relied upon in *Chimel*.<sup>237</sup> Therefore, while *Chimel* was concerned about expansive house searches incident to arrest, it also at least partly founded its rule on the officer safety rationale.<sup>238</sup>

Furthermore, the *Buie* majority's conclusion that *Chimel* was not at issue because *Chimel* focused on the threat from the arrestee as opposed to third parties is flawed. The majority analogized a protective sweep to a *Terry* frisk and relied heavily on this analogy to justify a protective sweep based on reasonable suspicion.<sup>239</sup> Since *Terry* was concerned about danger to officers arising out of the person to be frisked, rather than dangerous third parties,<sup>240</sup> the majority's attempt to distinguish *Chimel* is inconsistent with the majority's own logic in establishing the legal justification for a protective sweep.

However, *Buie*'s expansion of the search incident to arrest power violates the bounds of the exception.<sup>241</sup> *Chimel* and *Gant* do not permit an

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232. *Buie*, 494 U.S. at 336.

233. *Id.*

234. *Id.*

235. *See id.* at 342 n.6 (Brennan, J., dissenting) (arguing that the majority's assumption that arrestees will keep dangerous confederates in a house is "much less plausible" than the *Chimel* presumption that an arrestee might reach for destructible evidence or a weapon).

236. *Id.*

237. *Id.*

238. *See Chimel v. California*, 395 U.S. 752, 763 (1969) (retracting the search incident to arrest power to prevent expansive searches and crafting a rule addressing officer safety and preservation of evidence.)

239. *Buie*, 494 U.S. at 332-33.

240. *See Terry v. Ohio*, 392 U.S. 1, 27 (1968) (establishing the permissibility of a frisk for weapons to protect officers).

241. *See Buie*, 494 U.S. at 342 n.6 (Brennan, J., dissenting) (arguing that *Buie*'s expansion of the search incident to arrest power is impermissible since the threat to officer

automatic search incident to arrest to look for hidden attackers, but only to protect officers from the arrestee and to prevent destruction of evidence by the arrestee.<sup>242</sup> Moreover, *Gant* realigned the search incident to arrest exception as a whole with the underlying twin rationales established in *Chimel*.<sup>243</sup> In reestablishing the proper scope of the search incident to arrest exception, *Gant* undermines *Buie*'s expansion of the exception to encompass automatic sweeps insofar as the twin rationales underpinning the exception need not exist under *Buie*'s automatic sweep rule.<sup>244</sup>

A common defense of expanded search power generally, and one articulated by the *Buie* Court, is that of officer safety.<sup>245</sup> The *Buie* majority stated that a home arrest presents dangers to officers on par with, or greater than, those experienced during street encounters.<sup>246</sup> The *Buie* Court maintained that officers are more vulnerable in an arrestee's home than in other spaces with which they are more familiar, such as a public street or highway.<sup>247</sup>

While such language may have superficial appeal, this argument assumes that house ambushes are common enough to warrant an automatic sweep.<sup>248</sup> It is not clear that the danger of a hidden third party inside a home is as great or greater than the multitude of other precarious situations that are routine in policing.<sup>249</sup> As noted, Justice Brennan was skeptical that

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safety in situations like *Buie* is less believable than that in *Chimel*.

242. See *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009) (affirming *Chimel*'s twin rationales of the risk of harm to officers and destruction of evidence by the arrestee); *Chimel*, 395 U.S. at 763 (creating the twin rationales in light of risks created by the arrestee).

243. See *Gant*, 129 S. Ct. at 1716 (stating that *Chimel*'s restriction of the search to the grabbing area "ensures that the scope of a search incident to arrest is commensurate with" the twin rationales).

244. See *id.* (reaffirming *Chimel* by stating that there can be no search incident to arrest when the twin rationales are absent); cf. *Terry*, 392 U.S. at 19 ("The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible.") (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

245. See *Buie*, 494 U.S. at 333 (assuming that officer safety is imperiled in home arrests to the same or greater degree as roadside encounters); see also *Leaf v. Shelnut*, 400 F.3d 1070, 1087 (7th Cir. 2005) (asserting that the underlying rationale for a protective sweep is officer safety); Sarah E. Rosenberg, Comment, *Buie Signals: Has an Arrest Warrant Become a License to Fish in Private Waters?*, 41 EMORY L.J. 321, 359 (1992) (observing that the Court, as in *Buie*, will sacrifice individual privacy in light of substantial governmental interests such as officer safety).

246. *Buie*, 494 U.S. at 333.

247. *Id.*

248. See *id.* at 342 n.6 (Brennan, J., dissenting) (noting the implausibility that an arrestee would likely "sprinkle hidden allies throughout the rooms in which they might be arrested").

249. *Id.* at 340; see also Leslie A. O'Brien, Note, *Finding a Reasonable Approach to the Extension of the Protective Sweep Doctrine in Non-Arrest Situations*, 82 N.Y.U. L. REV. 1139, 1164-65 (2007) (arguing that the government's interest in a search generally does not justify the sacrifice of personal privacy). Federal Bureau of Investigation statistics indicate that 19.1 percent of law enforcement officers who were feloniously killed between 1999-2008 died during a traffic stop or pursuit, whereas 20 percent were feloniously killed as a result of an ambush and 23 percent in arrest situations. FEDERAL BUREAU OF

the existence of an arrestee's dangerous compatriots would be so prevalent to justify an automatic sweep, whereas the *Chimel* assumption that arrestees would try to destroy evidence or harm officers was much more plausible.<sup>250</sup>

Even more problematic is that an officer need not even have a subjective belief of an ambush since an automatic *Buie* sweep is permissible as a matter of right.<sup>251</sup> An automatic *Buie* sweep, while ostensibly premised on officer safety, is little more than a police entitlement if it permits an automatic search when there is no subjective fear of physical violence. Justice Stevens rightly underscored that the searching officer in *Buie* testified that he did not fear an attack from a third party.<sup>252</sup>

It is precisely this unjustified, automatic search power that the *Gant* majority found abhorrent. Insofar as the Court in *Gant* rejected such an authority, *Gant* gravely undermines automatic *Buie* searches.

#### V. OVERCOMING PERVERSE INCENTIVES

One defense of *Belton* and cases like *Turner* that use the now or earlier test is that without this automatic search power, the police would have a perverse incentive to leave a suspect unsecured and within reaching distance of the area the officers seek to search.<sup>253</sup> Consequently, the

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INVESTIGATION, LAW ENFORCEMENT OFFICERS FELONIOUSLY KILLED AND ASSAULTED, 2008, available at [http://www.fbi.gov/ucr/killed/2008/data/figure\\_04.html](http://www.fbi.gov/ucr/killed/2008/data/figure_04.html) (last visited Jan. 8, 2009). However, note that these statistics do not relate what percentage of officers were feloniously killed by a third party during an in-home arrest.

250. *Buie*, 494 U.S. at 342 n.6.

251. See *id.* at 334 (creating the authority to search closets and spaces adjacent to arrest as a matter of right); Tomkovicz, *supra* note 2, at 1438 (denouncing the *Buie* majority's willingness to sanction "causeless" automatic sweeps in the home). Because *Buie* allows automatic sweeps, the original reason for the search, to look for attackers, need not exist. Case-by-case adjudication of whether an attacker was likely present, or even if the police feared an attacker, is the antithesis of a bright-line rule allowing police to search automatically. See also *Whren v. United States*, 517 U.S. 806, 813 (1996) (declining to consider the subjective motivations of police actions as long as they are legally justified).

252. *Buie*, 494 U.S. at 337 (Stevens, J. concurring). The officer in *Buie* obtained arrest warrants for *Buie* and his alleged accomplice for an armed robbery, but the illogic of the Court's automatic sweep holding is even more palpable for arrests of nonviolent crimes. Whether the crime of arrest is failure to pay child support, skipping a court date, or tax fraud, *Buie* gives law enforcement the power to search a closet and adjacent rooms as a matter of right despite the unlikelihood of an assailant lying in wait.

253. See *Thornton*, 541 U.S. at 627 (Scalia, J., concurring) (listing cases that allow a search after, not incident to arrest, based on a desire to eliminate a perverse incentive for officers); see also *United States v. Turner*, 926 F.2d 883, 887-88 (9th Cir. 1991) (adopting the now or earlier test to prevent creating an incentive for police to leave a potentially dangerous arrestee in the area to be searched); *United States v. Fleming*, 677 F.2d 602, 607 (7th Cir. 1982) (arguing that the now or earlier test, which justifies a search after an arrest, is superior to a contemporaneity requirement because "it does not make sense to prescribe a constitutional test that is entirely at odds with safe and sensible police procedures"). See generally *As Time Goes By*, *supra* note 20, at 620-35 (discussing how the now or earlier test eliminates the contemporaneity requirement, thereby effectively allowing a warrantless

argument goes, officers would be placed in harm's way due to an unrestrained arrestee. Since *Gant*'s first holding logically extends to nonvehicular contexts, one could argue that there are more situations than just roadside arrests where officers would have a perverse incentive to manufacture a search by leaving an arrestee unsecured and within reaching distance.

Justice Scalia explained the perverse incentive argument in his *Thornton* concurrence:

The second defense of the search in this case is that, since the officer could have conducted the search at the time of arrest (when the suspect was still near the car), he should not be penalized for having taken the sensible precaution of securing the suspect in the squad car first.<sup>254</sup>

In other words, the disadvantage of following safe procedures of securing the arrestee is that the twin rationales of *Chimel* would not allow a search. A recurring refrain from cases using such logic is that "it does not make sense to prescribe a constitutional test that is entirely at odds with safe and sensible police procedures."<sup>255</sup>

The constitutional test—or more appropriately, the requirement—the courts are referring to is that a search incident to arrest must be substantially contemporaneous with the arrest.<sup>256</sup> This contemporaneity requirement is a logical requisite since the very words "incident to arrest" connote that the search must occur substantially contemporaneously with the arrest.<sup>257</sup> Otherwise, the search is made after an arrest and is not within the purview of the search incident to arrest exception to the warrant requirement. The other requirement, related to contemporaneity, to which the courts are likely referring is one included in *Gant*: that the arrestee must be within reaching distance at the time of the search.<sup>258</sup> The now or earlier test, on the other hand, forsakes the contemporaneity and reaching distance requirements.<sup>259</sup>

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search when the reasons for the warrant exception are no longer existent).

254. *Thornton*, 541 U.S. at 627; see also *United States v. Abdul-Saboor*, 85 F.3d 664, 669 (D.C. Cir. 1996) (asserting that a court's exclusive focus on the moment of the search "might create a perverse incentive for an arresting officer" to keep an arrestee in an area from which he could pose a threat for a longer period of time).

255. See, e.g., *United States v. Mitchell*, 82 F.3d 146, 152 (7th Cir. 1996) (quoting *United States v. Karlin*, 852 F.2d 968, 971 (7th Cir. 1988)) (internal quotation marks omitted); *Turner*, 926 F.2d at 888; *Fleming*, 677 F.2d at 607.

256. *Preston v. United States*, 376 U.S. 364, 367 (1964) ("Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.").

257. *Dressler*, *supra* note 38, at 215; see also *United States v. Chadwick*, 433 U.S. 1, 15 (1977) (holding that a search of a footlocker that occurred an hour after law enforcement had exclusive control cannot be incident to arrest); *Preston*, 376 U.S. at 368 (holding that a search of an automobile after it has been towed and after the arrest of the driver is not a search incident to arrest).

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

259. See *supra* note 218 and accompanying text (stating that the now or earlier rationale

The argument for *Belton* and the now or earlier test is rife with unsound assumptions. It assumes that without automatic search incident to arrest power, police will engage in the unsafe practice of leaving the arrestee within the area to be searched to create search authority under *Chimel* and *Gant*, because the arrestee would be within reaching distance of the space to be searched.<sup>260</sup> However, studies show that police procedures direct officers to always secure the arrestee in handcuffs, usually behind the back, and to remove the arrestee from the scene as quickly as possible.<sup>261</sup> These procedures indicate that law enforcement value safety and would rather restrain and remove an arrestee than leave him unsecured in order to manufacture authority to search.<sup>262</sup>

Nevertheless, officers may still have an incentive to not secure and remove an arrestee when the officer believes that the arrestee is of no danger to him.<sup>263</sup> Despite routine police procedure of handcuffing and removing the arrestee, it is plausible that an officer would act due to some improper motive.<sup>264</sup> Due to such a motive, and a belief in the peacefulness of the arrestee, an officer might purposefully leave an arrestee unsecured near a vehicle, or other space, so that he may conduct a search.<sup>265</sup> Though *Gant* does not explicitly claim that a search conducted based on a

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justifies a search of the area within the arrestee's immediate control at the time of arrest rather than at the time of the search).

260. See *Thornton v. United States*, 541 U.S. 615, 627 (Scalia, J., concurring) (discussing the perverse incentive of leaving suspects unrestrained to "manufacture authority to search"). Another flaw in the now or earlier, perverse incentive argument, as Justice Scalia noted in his *Thornton* concurrence, is that it "assumes that, one way or another, the search must take place." *Id.* The implicit assumption here is that the police must be able to search the area of arrest, even absent the *Chimel* rationales, thereby creating a police entitlement. According to Justice Scalia's *Thornton* concurrence, if safe procedure demands restraint and removal of an arrestee, then officers should do so and then not search. *Id.*

261. *An Empirical Reexamination*, *supra* note 67, at 665; see also *Gant*, 129 S. Ct. at 1724 (Scalia, J., concurring) (stating that the police almost always conduct a vehicular arrest by ordering the arrestee out of the vehicle, handcuffing him, and placing him in the squad car).

262. See *An Empirical Reexamination*, *supra* note 67, at 665–66 (analyzing various police department procedures and concluding that officers are almost always directed to effectuate a safe arrest).

263. *Gant*, 129 S. Ct. at 1724–25 (Scalia, J., concurring), see also *Anderson & Cole*, *supra* note 122, at 17 (arguing that *Gant* creates a perverse incentive that will result in police murders if officers are careless and decide to value a search higher than their safety); *Bradley*, *supra* note 145, at 49 (stating that the *Gant* Court invites officers to not follow safe arrest procedures).

264. An officer may seek to manufacture a search based on racially prejudicial grounds, or other improper motives such as a desire to assert authority. Nevertheless, the Court is generally unconcerned about the actual motivations of an officer if his actions are supported by the appropriate legal justification. See *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that the constitutionality of a traffic stop is not dependent on the "actual motivations of the individual officers involved" and that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis").

265. See *Gant*, 129 S. Ct. at 1724–25 (Scalia, J., concurring).

manufactured risk of officer safety or destruction of evidence is inherently unconstitutional, a footnote in the opinion implies this conclusion.<sup>266</sup>

In footnote four, the Court asserted that it would be the rare case where an officer “is unable to fully effectuate an arrest so that a real possibility of access to the arrestee’s vehicle remains.”<sup>267</sup> The Court maintained that in a situation where such a safe arrest is not possible, a search of the vehicle is permissible due to the twin rationales.<sup>268</sup> Arguably, *Gant* renders a search unconstitutional if the officer manufactures authority to search since the officer would have been able to safely secure the arrestee, but chose not to do so.<sup>269</sup> The operative word in footnote four is “unable,” which connotes impossibility. An inability, or impossibility, to effectuate a safe arrest is the antithesis of an officer intentionally leaving an arrestee unrestrained in order to justify a search incident to arrest.<sup>270</sup> As Justice Scalia articulated in his *Thornton* concurrence, a search incident to arrest cannot be justified when officers create the very exigencies—the risk of harm to officers and destruction of evidence—that underpin the search incident to arrest exception to the warrant requirement.<sup>271</sup>

The fear that *Gant* creates perverse incentives for officers that will endanger their safety assumes that officers value a search more than eliminating the risk of physical harm.<sup>272</sup> This assumption is faulty as it presumes irrationality amongst police officers.<sup>273</sup> To the contrary, as studies have shown, officers in the field secure and generally remove arrestees from the scene to disable them by virtue of the fact that policing is

266. See *id.* at 1719 n.4 (majority opinion) (“Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee’s vehicle remains.”); LAFAVE, *supra* note 99, § 7.1(c), at 106–07 (viewing the interpretation of the majority’s suggestion in *Gant* “that the question to be decided . . . is whether the officers were able to eliminate the ‘possibility of access’” is consistent with allowing a search based on “genuine safety or evidentiary concerns”) (emphasis in original).

267. *Gant*, 129 S. Ct. at 1719 n.4.

268. See *id.* (stating that a search will not be unreasonable if the officer cannot make an arrest so that an arrestee may access the car).

269. See *id.* (noting that officers have numerous means to ensure a safe arrest, thereby making it unlikely that officers will be “unable to fully effectuate an arrest so that a real possibility of access to the arrestee’s vehicle remains”).

270. See LAFAVE, *supra* note 99, § 7.1(c), at 107 (arguing that after *Gant*, lower courts must consider whether officers had the ability to eliminate the arrestee’s possibility of access to the area to be searched).

271. *Thornton v. United States*, 541 U.S. 615, 627 (2004) (Scalia, J., concurring); see also *An Empirical Reexamination*, *supra* note 67, at 688 (claiming that it is illogical to permit police to conduct a bad-faith search when they do not subjectively fear that the arrestee is dangerous).

272. See *supra* note 235.

273. See Anderson & Cole, *supra* note 122, at 17 (acknowledging that *Gant* only increases risk to officers if they indulge in careless, bad-faith searches); see also LAFAVE *supra* note 99, § 5.5(a), at 44 (“*Gant* should be construed as requiring police to take available steps to ensure against such a possibility of access. . . .”).

an inherently dangerous profession.<sup>274</sup> Police are unlikely to risk their safety simply to manufacture the authority to conduct a search incident to arrest. Therefore, *Gant* does not endanger officers in either roadside arrests or other nonvehicular situations.

#### CONCLUSION

The Court in *Gant* not only affirmed *Chimel*, but strengthened it by recognizing that a handcuffed, or adequately secured arrestee is not able to reach into the area to be searched.<sup>275</sup> If the arrestee cannot grab a weapon to harm officers or obtain destructible evidence, a search would be unconstitutional because the rationales underpinning the search incident to arrest exception would not be present.

While *Gant* introduced an evidence gathering rationale that permits a search even when the twin *Chimel* rationales are absent, this authority only lies in the vehicular context.<sup>276</sup> On the other hand, *Gant*'s affirmation and elaboration of *Chimel* extends to other contexts, such as searches of containers on the person and homes incident to arrest, because the *Chimel* rationales define the scope of this exception to the warrant requirement irrespective of what is searched.<sup>277</sup>

In these nonvehicular contexts, *Gant*'s logic abrogates cases that have permitted automatic searches incident to arrest, and therefore curtails a police entitlement that is founded on little more than a desire to provide the government with an expansive search power. Nevertheless, *Gant* arguably creates a perverse incentive for officers to not follow safe arrest procedures in an effort to manufacture authority to search and bypass *Gant*.<sup>278</sup> However, such instances are likely to be rare, and *Gant* itself likely renders such bad-faith searches unconstitutional.<sup>279</sup>

The right to individual privacy embodied in the Fourth Amendment reflects not only the appropriate respect to be afforded the individual, but also a check on the government's power to unreasonably intrude upon this privacy. Expansive search power is especially pernicious when the law permits the government to pry into an individual's affairs as a matter of right.<sup>280</sup> *Gant* rightly curtails this power. *Gant*'s immediate effect is the

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274. *Supra* notes 259–261 and accompanying text.

275. *Supra* Part IV.

276. *Supra* notes 138–139 and accompanying text.

277. *See* United States v. Taylor, 656 F. Supp. 2d 998, 1001–03 (E.D. Mo. 2009) (suppressing evidence from a home search by applying *Gant*); United States v. Perdoma, No. 8:08CR460, 2009 WL 1490595, at \*2 (D. Neb. May 22, 2009) (applying *Gant* to a search of a nonvehicular arrestee's personal bag).

278. *Supra* Part VI.

279. *Supra* notes 240–246 and accompanying text.

280. *See* Arizona v. Gant, 129 S. Ct. 1710, 1720 (2009) (asserting that expansive search incident to arrest power “implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects”).

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## STEPPING OUT OF THE VEHICLE

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prohibition of automatic searches incident to arrest in the vehicular context, but perhaps its legacy will be the cessation of automatic searches in nonvehicular situations that are still conducted merely “[b]ecause the law says [the police] can do it.”<sup>281</sup>

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281. *Supra* notes 1–2 and accompanying text.