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THE ROAD TO REASON: *ARIZONA V. GANT* AND THE SEARCH INCIDENT TO ARREST DOCTRINE

*Myron Moskowitz**

Officer Copp arrests Dan in his bedroom, handcuffs Dan, takes him out of the room, and locks him in a patrol car. Then Copp returns to the bedroom and searches the room. The officer has no search warrant, no probable cause to believe there is evidence in the room, and no reason to believe that some confederate might dispose of evidence in the room. Is the search valid?

Change the facts slightly. Dan is in the driver's seat of a car when arrested, then cuffed and locked in the patrol car. May Copp now return to Dan's car and search it—with no warrant, no probable cause to believe the car contains evidence of a crime, and no danger that the car will be driven off?

Until recently, many courts have answered “yes” to both questions—solely because the search occurred soon after an arrest and near the place of arrest.¹ Several commentators (including this one) have objected to these results, with little effect.

Now, however, *Arizona v. Gant* offers some hope that reason will replace dogma as the basis of the search-incident-to-arrest doctrine, and put some sensible limits on its scope.²

I. IN THE BEGINNING: *CHIMEL*

The trouble started with a landmark case, *Chimel v. California*,³ which is generally known for its careful reasoning.⁴

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¹ See, e.g., *Arizona v. Gant*, 129 S. Ct. 1710, 1719 n.3 (2009).

² *Gant*, 129 S. Ct. 1710.

³ *Chimel v. California*, 395 U.S. 752 (1969).

⁴ I summarized *Chimel* more thoroughly in Myron Moskowitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 WIS. L. REV. 657, 658-62 (2002).

Chimel held that an arrest justifies a warrantless search because the arrest might cause the arrestee to attack the arresting officer or dispose of evidence.⁵ These two justifications limit the scope of the search to areas in which the arrestee might reach for a weapon or evidence. These justifications permit the officer to search the clothing worn by the arrestee, but not the area beyond where he might reach or lunge. So far, so good—this limitation on scope fits perfectly with the Court’s justifications for this exception to the search warrant “requirement.” But the Court also indicated that the justifications allow the police to search *within* the lunge area.⁶ Therein lies the problem.

The Court assumed that the police arrest Dan while he is standing on a certain spot, then calculate the area into which he might reach, and—while Dan stands on that spot—search that area (including the insides of any drawers or other containers within that area). It never occurred to the Court that—in the real world—Dan will be nowhere near the spot of arrest when *the search* occurs. Immediately after arresting Dan, the police will usually handcuff him, remove him from the spot, and lock him in their patrol car. But then—relying on *Chimel’s* dictum—might return to the spot and search the lunge area.⁷

Since *Chimel*, most lower courts *have not cared* that Dan is no longer at the spot of arrest when the police search the lunge area—the search of that area is fine even if Dan is long gone. The Supreme Court has spoken, and that’s good enough for them. If pressed, some courts would concoct a new rationale for this strange stretch of the *Chimel* rationale. For example, the police were justified in removing Dan from the spot for their own safety, so they should not forfeit their “right” to search the area without a warrant.⁸

None of this made any sense to me, but my job nevertheless compelled me to explain it to a pack of wide-eyed, innocent law students year after year. I found myself embarrassed by the judicial system I was urging my pupils to respect. What to do?

⁵ *Chimel*, 395 U.S. at 762-63.

⁶ *Id.* at 763.

⁷ *Id.*

⁸ *See, e.g., United States v. Turner*, 926 F.2d 883 (9th Cir. 1991).

Maybe I could shake up the courts by *proving* to them that *Chimel's* premise was simply wrong: cops do *not* let Dan stand there while they search the area.

So I did a study. I asked police departments around the country what they tell their officers to do with the suspect after an arrest. The response was pretty much unanimous: "Cuff him and get him out of there." I reported my findings in a law review article.⁹ Unlike most articles, this one seemed to have some effect on the Supreme Court. The mental meanderings of law professors only occasionally influence the Court, but the Justices pay more attention to *facts* shown by empirical research.

More on that later. First, let's review the effect of *Chimel's* mistake on *car searches*.

II. CAR SEARCHES—*BELTON & THORNTON*

In *New York v. Belton*, the arrestee was outside his car when he was arrested, along with his three passengers.¹⁰ The officer then searched the car, finding cocaine in the pocket of a black leather jacket on the back seat.¹¹

The situation was unusual. The single officer was outnumbered by the four detainees, and he might not have had room for all of them in his patrol car. So he left them where they were when they were arrested, and probably called for back-up to help take them in. Applying *Chimel's* logic, the Court should have *allowed* the officer to search the lunge area, which may—or may not—have included the back seat of the car and the jacket pocket.

But—held the Court—why bother with all this work, when a single "bright line" rule will do the trick: arrest a "recent occupant" of a car, and you can *automatically* search the entire passenger compartment and all containers that happen to be there. Why? Largely because "articles inside the relatively narrow compass of the passenger compartment of an automobile

⁹ Moskowitz, *supra* note 4, at 663-70.

¹⁰ *New York v. Belton*, 453 U.S. 454 (1981).

¹¹ *Id.* at 456.

are in fact generally, even if not inevitably, within ‘the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].’¹²

My study showed that this premise was pretty far off the mark. Articles in the passenger compartment are *not* generally within the area an arrestee might grab, because when the search occurs, the arrestee is almost always firmly sequestered in the back of the patrol car.¹³

Dissenting in *Belton*, Justice Brennan protested that this “single familiar standard” was at odds with *Chimel’s* case-by-case approach.¹⁴ A plethora of professors agreed with Brennan, to no avail.¹⁵

In *Thornton v. United States*, the Court reaffirmed *Belton’s* broad rule.¹⁶ While driving an unmarked police car, Officer Nichols learned that Thornton was driving a car whose tags did not match the car to which the tags had been issued. Thornton parked and left the car. Nichols “accosted” Thornton, who consented to a search of his person, which revealed marijuana and cocaine.¹⁷ Nichols arrested Thornton, handcuffed him, and placed him in the patrol car. The officer then searched Thornton’s car, finding a handgun.¹⁸

Chief Justice Rehnquist’s plurality opinion held that the search of the car was incident to the arrest and therefore valid.¹⁹ Thornton had argued that because the officer in *Belton* had “initiated contact” with the suspects while they were *in* the car, the police may search the car incident to arrest of a recent occupant only where this fact is present.²⁰ But in *Thornton*, Rehnquist’s opinion held that this fact played no role in the *Belton* opinion.²¹

¹² *Id.* at 460 (citation omitted).

¹³ Moskowitz, *supra* note 4, at 675-76.

¹⁴ “When the arrest has been consummated and the arrestee safely taken into custody, the justifications underlying *Chimel’s* limited exception to the warrant requirement cease to apply: at that point there is no possibility that the arrestee could reach weapons or contraband.” *Id.* at 465-66 (Brennan, J., dissenting).

¹⁵ See *Gant*, 129 S. Ct. at 1716.

¹⁶ *Thornton v. United States*, 541 U.S. 615 (2004).

¹⁷ *Id.* at 617-18.

¹⁸ *Id.*

¹⁹ *Id.* at 619.

²⁰ *Id.* at 620-21.

²¹ *Id.*

Therefore, "*Belton* governs even when an officer does not make contact until the person arrested has left the vehicle."²² Why? "The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated."²³

Thus, *Thornton* confirms the *Belton* rule: A police officer may search the car of a "recent occupant" incident to arrest even if the suspect is nowhere near the car when the search takes place—for "officer safety" and to prevent destruction of evidence. This, I believe, is ridiculous. Neither of these dangers is in fact present if the suspect is nowhere near the car when the *search* occurs.

Justice Scalia concurred. He rejected three arguments that tried to squeeze the search into *Chimel's* justifications.²⁴

First, in this case, could *Thornton* himself—at the time of the search—have reached into the car for a weapon or evidence? No. Unless *Thornton* was "possessed of the skill of Houdini and the strength of Hercules,"²⁵ the likelihood was minimal that he could have wriggled out of his handcuffs, leapt out of the squad car, and reached into his own car for a weapon or evidence—all before Officer Nichols could stop him. If such a danger was substantial, then there was an equal likelihood that *Chimel* could have escaped his captors and run upstairs to grab a weapon or evidence—but the Court in *Chimel* refused to allow a search of the upstairs incident to the downstairs arrest.²⁶

Second, should there be a *general rule* "entitling" the police to search a car incident to a valid arrest? No, the Fourth Amendment is not a game where the police "win" the right to search. Warrantless searches must be justified by some identified need.

Third, is *Belton's* general rule justified by dangers *generally* occurring in the real world, so a general rule permitting such

²² *Thornton*, 541 U.S. at 617.

²³ *Id.* at 622-23.

²⁴ *Id.* at 625-29 (Scalia, J., concurring).

²⁵ *Id.* at 626 (quoting *United States v. Frick*, 490 F.2d 666, 673 (5th Cir. 1973)).

²⁶ *Chimel*, 395 U.S. at 768.

searches should apply even in a small minority of cases where those dangers are *not* present? No, in the real world there is usually *no* danger, because police are trained to get the arrestee away from the car before searching. Justice Scalia cited my study to support this last point.²⁷

According to Scalia, *Belton's* rationale is wrong, but not its *rule*—at least in part.²⁸ Apparently impelled somewhat by *stare decisis*, Scalia would not overrule *Belton* but would instead “re-cast” the case with a *new* rationale (never mentioned in *Belton* itself): “the car might contain evidence relevant to the crime for which he was arrested.”²⁹ Why? Scalia harks back to a couple of pre-*Chimel* cases³⁰ that justified area searches incident to arrest by “a more general interest in gathering evidence relevant to the crime for which the suspect has been arrested.”³¹ Scalia re-justifies this basis:

There is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested. The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of his crime from general rummaging. Moreover, it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.³²

But so what? If there is no danger that the arrestee (or someone else) might remove this evidence before the officer can obtain a search warrant, why not require the officer to go through the usual procedure of presenting his justification to a magistrate first? Scalia might have (but did not) invoked the reasoning of cases endorsing the “automobile exception” to the warrant requirement. In *United States v. Chadwick*, for exam-

²⁷ *Thornton*, 541 U.S. at 628 (citing *Moskovitz*, *supra* note 4, at 665-66).

²⁸ *Id.* at 629.

²⁹ *Id.*

³⁰ *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Harris v. United States*, 331 U.S. 145 (1947).

³¹ *Thornton*, 541 U.S. at 629.

³² *Id.* at 630.

ple, the Court held that because of the low (but not non-existent) expectation of privacy in a car, if the officer has probable cause to believe there is evidence of a crime in parts of a car, the officer may search those parts.³³ He needs no search warrant and no exigent circumstances preventing him from getting a warrant before the evidence might be removed or destroyed.³⁴ This low expectation of privacy also supports Scalia's new rule, arguably—at least insofar as it applies to car searches incident to arrest.

Has Scalia's new rule added anything to the automobile exception? That is, are there circumstances where the automobile exception would not apply but Scalia's "recasted" Belton rule would authorize the search? It seems so. Scalia would permit a search of an arrestee's car "where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."³⁵ If Scalia intended to add something to the auto exception (even though he failed to discuss that exception), then it must be this: "reasonable to believe" means something less than probable cause. Scalia must have intended this, because he never uses the familiar term probable cause in his concurrence.

How much less? We get some hint from Scalia's application of his new rule to the facts of *Thornton*. Because Thornton was arrested for a drug offense, "It was reasonable for Officer Nichols to believe that further contraband or similar evidence relevant to the crime for which he had been arrested might be found in the vehicle from which he had just alighted and which was still within his vicinity at the time of arrest."³⁶

Was there *probable cause* to believe there were drugs in the car? Well, Officer Nichols had found three bags of marijuana and "a large amount" of cocaine in Thornton's pockets when he arrested Thornton, and Thornton had just been driving the car.³⁷ So Thornton might well be a drug dealer, and he *might* have been storing more drugs in the car. But maybe he kept them all

³³ United States v. Chadwick, 433 U.S. 1 (1977).

³⁴ *Id.* at 22.

³⁵ *Thornton*, 541 U.S. at 632.

³⁶ *Id.*

³⁷ *Id.* at 618 (plurality opinion).

in his pockets. Probable cause? Tough question, but Scalia did not even bother to address it. Pretty strong evidence that Justice Scalia did *not* mean to equate “reasonable to believe” with probable cause.

I suspect that he meant “reason to believe” to mean something like the reasonable suspicion needed to justify a *Terry*-stop—more than a mere hunch, but less than probable cause.³⁸ If probable cause means something like a 51% chance that X is true, then reasonable suspicion means something like a 25% chance. That is probably what Scalia meant, and that is probably what future cases will hold.

Could the “reason to believe” flow from facts *other than* the nature of the crime for which the suspect was arrested? (Scalia does not address this.) I cannot see why not.

So why am I bothering to spend so much time on a concurrence? Well, *this* concurrence seemed very likely to command a majority of the Court, eventually, because Justice Ginsburg (from the left) signed on to Scalia’s concurrence, and Justice O’Connor (from the center) wrote her own concurring opinion pretty much endorsing Scalia’s.³⁹

And that is just what happened in *Gant*: the majority adopted the rule proposed by Scalia in *Thornton*.

III. ARIZONA V. GANT

Officers knew that a warrant had been issued to arrest Gant for driving with a suspended license.⁴⁰ They saw Gant drive into a driveway, then get out of his car.⁴¹ Officer Griffith was thirty feet from Gant when he called to Gant.⁴² They approached each other, meeting ten to twelve feet from Gant’s car.⁴³ Griffith arrested Gant, handcuffed him, and locked him in the backseat of a patrol car.⁴⁴ Then they searched Gant’s car,

³⁸ *Terry v. Ohio*, 392 U.S. 1 (1968).

³⁹ *Thornton*, 541 U.S. at 624-25 (O’Connor, J., concurring in part).

⁴⁰ *Arizona v. Gant*, 129 S. Ct. 1710, 1715 (2009).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

finding a gun and cocaine in the pocket of a jacket on the back seat.⁴⁵

Was the search of the car valid? It depends whether *Belton* is still good law, or Scalia's new rule has now become the law. *Belton's* general rule would clearly authorize the search, as *Gant* was a recent occupant⁴⁶ of the car and the arrest was valid.⁴⁷ Rehnquist's plurality opinion in *Thornton* would also authorize the search, as that opinion held that *Belton* applies whether or not the officer first initiated contact with the arrestee while he was in the car.⁴⁸ But Scalia's concurrence in *Thornton* would *not* authorize the search, because (1) *Gant* was out of reach of the car when the search occurred,⁴⁹ and (2) there was no "reason to believe" there was evidence of the crime for which *Gant* was arrested (driving with a suspended license) in the car.⁵⁰ So *Gant* presented the Court with a pretty clear choice: *Belton/Thornton* or Scalia? They chose Scalia—sort of.

Justice Stevens wrote the majority opinion. He conceded that *Belton* "has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search"—blaming Brennan's concurrence for this view of *Belton*.⁵¹ But that reading was wrong, says Stevens: "[W]e reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."⁵² This new rule comports with part of Scalia's concurrence in *Thornton*—and Stevens then adopts the rest of Scalia's concurrence, stating: "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

⁴⁵ *Id.*

⁴⁶ See *New York v. Belton*, 453 U.S. 454, 460 (1981).

⁴⁷ See *id.* at 457.

⁴⁸ See *Thornton v. U.S.*, 541 U.S. 615, 622 (2004).

⁴⁹ See *id.* at 625-27 (Scalia, J., concurring in part).

⁵⁰ See *id.* at 632.

⁵¹ *Gant*, 129 S. Ct. at 1718.

⁵² *Id.* at 1719.

is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’⁵³ Stevens goes on to distinguish *Belton* on its facts, noting that *Belton* involved a single outnumbered officer while here the arresting officers outnumbered Gant, and *Belton* was arrested for a drug offense (so there might be evidence of that offense in the car) while Gant was arrested only for driving with a suspended license.⁵⁴

If *Belton* did not establish a “bright line rule” permitting automatic searches of cars incident to the driver’s arrest, should the Court now adopt such a rule? No, says Stevens, because the threat to privacy is too great. While one has a *diminished* expectation of privacy in a car, it is not a *zero* expectation. And *Belton* permits police to search other, *more* private containers found *in* the car—such as purses and briefcases.⁵⁵ No general rule is needed because the majority’s revamped reading of *Belton* protects against the arrestee’s use of weapons and destruction of evidence, and other doctrines permit car searches in related situations: where a passenger poses a danger, and where there is probable cause to believe there is evidence in the car.⁵⁶

Once again, Justice Scalia concurred. Since the majority opinion adopts pretty much his entire position in his *Thornton* concurrence, he is pretty satisfied with it—except for its revisionist view of *Belton*.⁵⁷ Scalia says *Belton* cannot be distinguished on its facts, because *Belton* did not care about the facts—the case applied a general rule. That general rule is wrong, so *Belton* (and *Thornton*) should simply be overruled.⁵⁸

Justice Alito dissented, joined by Roberts, Kennedy, and (in part) Breyer. Alito claims that the majority *did* in fact overrule *Belton* and *Thornton* because—as Scalia also said—those cases applied a general rule, not dependent on the specific facts of the case, and application of that general rule to the facts of *Gant*

⁵³ *Id.* at 1719 (quoting *Thornton*, 514 U.S. at 632 (Scalia, J., concurring)).

⁵⁴ *Gant*, 129 S. Ct. at 1719.

⁵⁵ *Id.* at 1720.

⁵⁶ *Id.* at 1721.

⁵⁷ *Gant*, 129 S. Ct. at 1724-25 (Scalia, J., concurring).

⁵⁸ *Id.*

would compel a result opposite to the one reached by the majority.⁵⁹ So far, I agree.

Alito then argues that *Belton's* general rule should be retained, because of *stare decisis*.⁶⁰ There is no "special justification" for refusing to follow a decided case, for several reasons.⁶¹ First, the police *relied* on the *Belton* rule, because that rule has been taught to the police in their training programs.⁶² (Not too persuasive, in my view. Just change the training regimen, at the cost of a few bucks to update the materials—which are updated anyway, to reflect new cases.) Second, no circumstances have changed since *Belton* was decided, because "surely it was well known in 1981 that a person who is taken from a vehicle, handcuffed, and placed in the back of a patrol car is unlikely to make it back into his own car to retrieve a weapon or destroy evidence."⁶³ If the *Belton* majority considered these circumstances in adopting the general rule, then all the *more* reason they were dead wrong. Third, Alito says that the *Belton* rule is not unworkable as, apart from determining whether the occupant was recent, the rule is relatively easy for the police to apply in most situations. However, it would be even more workable to have a rule that allows the police to search wherever they like if they first say "Mother may I," so long as one has no concern for the privacy interests protected by the Fourth Amendment. The *Belton* rule is not much better than this formulation. Fourth, *Belton* has not been undermined by subsequent cases.⁶⁴ (This time he's right—look at *Thornton*.) Finally, Alito defends *Belton's* reasoning: it represents "only a modest—and quite defensible—extension of *Chimel*."⁶⁵ Here's where things get interesting.

Alito says that while *Chimel* limited searches-incident-to-arrest to the arrestee's grab area, the opinion failed to specify whether this area is to be measured at the time of the arrest or

⁵⁹ *Id.* at 1726-27.

⁶⁰ *Id.* at 1727-31 (Alito, J., dissenting).

⁶¹ *Id.* at 1728.

⁶² *See id.*

⁶³ *Gant*, 129 S. Ct. at 1729.

⁶⁴ *Id.*

⁶⁵ *Id.*

the time of the search—“but unless the *Chimel* rule was meant to be a specialty rule, applicable to only a few unusual cases, the Court must have intended for this area to be measured at the time of arrest.”⁶⁶ Why? Because usually the cop immediately handcuffs the arrestee and gets him away from the area of arrest for officer safety.⁶⁷ For support, Alito cites my study!⁶⁸

Normally, I am happy as a clam when a judge cites one of my articles. But this Justice uses my piece to support a conclusion *opposite* to the one I reached! Alito says that because “[h]andcuffs were in use in 1969” when *Chimel* was decided, the *Chimel* Court must have *known* that cops usually secure the arrestee before searching.⁶⁹ Therefore, when the Court said the police may search the “grab area”, the Court *must* have intended to authorize the police to search that area *even after the arrestee is secured*.⁷⁰

My conclusion was quite different.⁷¹ I said that *Chimel's* scribbling about a search of the grab area was only a dictum because the *issue* before the Court in *Chimel* was the admissibility of evidence found *well outside* the grab area.⁷² A dictum is worth less than a holding because the facts of the case do not force the court to think carefully about what they are saying, and therefore they make mistakes. That is exactly what happened in *Chimel*. The *Chimel* Court simply missed the boat on grab area because its attention was focused on overruling prior cases that had permitted the police to search *the entire house*. The mistake in *Chimel* led to the mistakes in *Belton* and *Thornton*, which the *Gant* majority finally corrected.

And that leads to the most interesting question: will *Gant* lead to correction of the *Chimel* mistake? Alito saw the problem. *Belton* was based on the *Chimel* dictum, which Alito assumes was right and I believe was wrong.⁷³ Because *Gant* effec-

⁶⁶ *Id.* at 1730.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Gant*, 129 S. Ct. at 1730.

⁷⁰ *Id.*

⁷¹ Moskowitz, *supra* note 4, at 660.

⁷² *Id.*

⁷³ *Gant*, 129 S. Ct. at 1730.

tively overrules *Belton*, Alito says “if we are going to reexamine *Belton*, we should also reexamine the reasoning in *Chimel* on which *Belton* rests.”⁷⁴ I agree. Alito also says, “there is no logical reason why the same rule should not apply to all arrestees.”⁷⁵ Again, I agree. Let’s do it right in all cases, not just cases involving car searches. But I disagree with Alito’s conclusion. All arrestees should *not* have their homes and cars searched incident-to-arrest when there is no danger they could reach those places.

IV. THE FUTURE: CAR SEARCHES

The majority opinion in *Gant* authorizes the police to search the arrestee’s car “incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”⁷⁶ That standard should be pretty easy to apply, as courts have had a lot of experience dealing with the arrestee’s reaching distance, or “grabbable area,” at the time of *arrest*.⁷⁷ Courts need only apply those same criteria to where the arrestee was at the time of the *search*. As the Court indicates, the issue will rarely arise because the police will almost always secure the guy and get him away from his car before they search it.⁷⁸

The majority in *Gant* also allows the police to search the arrestee’s car when it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”⁷⁹ This is a new rule, and it needs elaboration. What does “reasonable to believe” mean? We’ve seen probable cause, and we’ve seen reasonable suspicion. Is “reasonable to believe” something new, different from these two familiar standards? I doubt it. I expect courts to equate “reasonable to believe” with the reasonable

⁷⁴ *Id.* at 1731.

⁷⁵ *Id.*

⁷⁶ *Id.* at 1719.

⁷⁷ *See, e.g., State v. Robalewski*, 418 A.2d 817 (R.I. 1980).

⁷⁸ *Gant*, 129 S. Ct. at 1719.

⁷⁹ *Id.* (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).

suspicion standard applied regularly to *Terry* stops.⁸⁰ It is hard enough to make a non-lawyer police officer tell the difference between probable cause and reasonable suspicion. It is not fair to saddle the officer with the burden of understanding a *third* standard, knowing where it fits with the other two, and then requiring the officer to *apply* that new standard to a new, unique set of facts with only a few seconds of thought and no legal opinion from some deputy DA or magistrate to guide him. And, since he has no search warrant, his good faith effort to apply this new standard will not protect him from suppression of the evidence if he gets it wrong.⁸¹ It's just too much, and I doubt that the courts will impose such a burden on him.

I expect courts to apply the "reasonable to believe" standard on a case-by-case basis, just as they do when assessing the validity of a *Terry*-stop. It is possible, however, that courts might decide that certain *categories* of "offenses of arrest" *always* justify a search of the car. For example, a person arrested for selling narcotics will often have drugs nearby in his car, so why not make it easy on the police by establishing a *general rule* permitting a search of the car without further facts indicating that there is evidence of sales in the car? Or does this hark back to *Belton's* now-disapproved general rule? We will see.

Justice Alito raises another issue: "[W]hy is this type of search restricted to evidence of the offense of arrest?"⁸² Good question. I can't see why it should be so restricted. The only justification for reducing the cause needed to search the car below probable cause is the reduced expectation of privacy one has in a car. If the officer has reasonable suspicion from *any* source for believing there is evidence of a crime in the car, the *Gant* majority's logic should allow him to search the car.

Alito also asks "why an evidence-gathering search incident to arrest should be restricted to the passenger compartment."⁸³

⁸⁰ See, e.g., *Hibel v. 6th Jud. Dist. Ct. of Nev. Humboldt County*, 542 U.S. 177 (2004); *United States v. Sharpe*, 470 U.S. 675 (1985).

⁸¹ See *United States v. Leon*, 468 U.S. 897 (1984).

⁸² *Id.* at 1731.

⁸³ *Id.*

Another good question. That restriction is an artifact of *Belton*, which seemed to “reason” as follows:

(1) *Chimel* allowed a search of the area around Dan at the time of arrest;

(2) *If* Dan were in the car when arrested, he could then reach into any place or container in the passenger compartment, but not into the trunk;

(3) We now extend *Chimel* to the arrest of a “recent occupant”, so we will hypothetically put him *back* into the car and assume he was arrested there; and so (4) *Voila*, the officer can search the passenger compartment but not the trunk. Very strange “logic.”

As *Gant* changes the rule and the rationale, the scope of the allowable search should change too. Under the auto exception, the Court assumes that the lowered expectation of privacy in a car applies to the entire car, so if the officer has probable cause to believe there is evidence in the trunk, he may search the trunk without a warrant.⁸⁴ (I do not necessarily agree with this, as people tend to store private things in a trunk more often than they store them in the passenger compartment. But the Court has spoken.) As I said above, I think *Gant* allows a search of a car if the officer has reasonable suspicion to believe there is evidence of a crime in the car—because of that same lowered expectation of privacy in a car. If that lowered expectation permits a search of the trunk under the auto exception, it should permit a search of the trunk under the *Gant* exception too.

Will *Gant* lead to a change in the auto exception? Maybe. The auto exception is one strange animal. It started, I believe, simply as an application of the “probable cause + exigent circumstances” exception to the search warrant requirement. The Fourth Amendment generally requires probable cause, and the Court generally requires the officer to seek out a magistrate to issue a search warrant—unless exigent circumstances prevent the officer from getting a warrant before the evidence is destroyed, hidden, or carried away. The auto exception evolved into a separate category because usually the fact that the evi-

⁸⁴ See *United States v. Ross*, 456 U.S. 798 (1982).

dence is in a car means that it can be driven away by someone before the officer can obtain a warrant; thus the car provides the exigent circumstances. But not always. Sometimes the car is disabled or there is no one to drive it away. Even in these cases, however, the Supreme Court upheld the search.⁸⁵ The Court finally explained these anomalies by finding a *different basis* for the exception. In *United States v. Chadwick*,⁸⁶ the Court said that the auto exception is based not on the car's inherent mobility, but on the lowered (but not non-existent) expectation of privacy in a car.

Fine, but what test *should* be applied to car searches? Why probable cause, and not mere reasonable suspicion? Probable cause is required for an arrest. A *Terry*-stop intrudes on an expectation of liberty *lower* than an arrest, so we don't require probable cause for a *Terry*-stop—only reasonable suspicion is required. By like reasoning, only reasonable suspicion should be required for a car search, where a lower expectation of privacy also attaches. Justice O'Connor made a similar proposal in her dissenting opinion in *Arizona v. Hicks*.⁸⁷ The majority held that the police could look under a stereo in a home only if they had probable cause to believe there was evidence beneath the stereo. O'Connor assumed that this intrusion on privacy was enough to constitute a "search," but felt the intrusion was so low that reasonable suspicion (the *Terry* standard) should be enough to justify "a cursory examination of an item in plain view."⁸⁸ She noted that the intrusion in *Terry* (a forcible stop) was much more intrusive on privacy than moving the stereo a few inches. The same reasoning would seem to apply to the search of a car, given the Court's "low expectation of privacy" rationale for the auto exception.

But no. The Court in *Chadwick* stuck to the old test for the auto exception: probable cause. Why? Probably from some sense of deference to *stare decisis*. The Court wanted to clarify

⁸⁵ See, e.g., *Cady v. Dombrowski*, 413 U.S. 433, 436 (1973) (car disabled as result of an accident); *Chambers v. Maroney*, 399 U.S. 42, 52 (1970) (search conducted while car at police station and occupants in custody).

⁸⁶ *United States v. Chadwick*, 433 U.S. 1, 12-13 (1977).

⁸⁷ *Arizona v. Hicks*, 480 U.S. 321, 333 (1987) (O'Connor, J., dissenting).

⁸⁸ *Id.* at 334.

the *basis* for the rule, but preferred not to tinker with the rule itself.

But *Gant* has changed the picture. Car searches now are *permitted* on mere reasonable suspicion—at least right after an arrest and where the reasonable suspicion is connected to “the offense of arrest.”⁸⁹ But why these limitations? How does the fact of arrest affect the driver’s or owner’s lowered expectation of privacy in the car? Not much. One is just as troubled (or not troubled) by an officer’s search of one’s car whether one has been arrested or not. Scalia, however, believes that the arrest *does* matter, as it “distinguishes the arrestee from society at large,” and “it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.”⁹⁰ Well, it will be “illogical” in some situations, and the “reasonable to believe” test should be adequate to distinguish the logical from the illogical.

The upshot of all this: if the Court gets around to deleting these restrictions, it might as well use its resulting new rule to replace (or redefine) the auto exception with a revamped *Gant* exception. The *Gant* majority characterized its new rule as a revised *Belton* rule. *Belton* placed its rule under the search-incident-to-arrest exception. The *Gant* majority opinion approved of *Belton*, so it looks like a revised *Belton* rule, belonging under the search-incident-to-arrest doctrine. But it really *does not* belong under that exception because only rarely will *Chimel’s justifications underlying* the search-incident-to-arrest exception apply to searches of a car incident to an arrest (because the arrestee will almost never be able to reach the car for weapons or evidence when the officer searches the car).

Instead, the guts of *Gant* are its *new* rule permitting the officer to search the car when it is “reasonable to believe” there is in the car evidence of the “offense of arrest.” So the focus is now on the likelihood that there is evidence of a crime in the car—which is exactly the focus of the auto exception. There is not much need for both, so I predict (speculate, actually) that when

⁸⁹ *Gant*, 129 S. Ct. at 1719.

⁹⁰ *Thornton*, 541 U.S. at 630.

the Supreme Court gets around to deleting or modifying the restrictions that Justice Alito criticized, the new “updated” *Gant* rule will displace the old auto exception.

V. CAR SEARCHES—SOME HYPOTHETICALS

Let’s play with a few hypos.

1. Officer Copp stops Dan for speeding. Copp runs a warrant check, which brings up a warrant to arrest Dan for selling cocaine. The warrant says nothing about the date, place, or circumstances of the alleged cocaine sale. Copp handcuffs Dan and locks him in the patrol car. Does *Gant* allow Copp to search Dan’s car for cocaine? I don’t think so. Without more, what Copp knows does not make it “reasonable to believe” (in my view, this means reasonable suspicion) that Dan was selling cocaine out of his car or transporting it in his car.

2. Same facts, but when Copp searches Dan’s clothes incident to the valid arrest on the warrant, Copp finds a pound of cocaine and \$10,000 in Dan’s pockets. Now may Copp search Dan’s car? Clearly he could do so under *Gant*, as Copp has plenty of reasonable suspicion to believe Dan might be transporting in the car “evidence of the crime of arrest” (sale of cocaine).

But Copp probably *doesn’t need Gant* to justify the search. The sum of all these facts seems to add up to *probable cause* to believe there is evidence of cocaine sales in the car, so the *auto exception* authorizes the search.

3. Same facts as #1, but Copp finds only a small baggie of cocaine in Dan’s pockets. May he search the car? Now the sum of the facts does *not* seem to add up to probable cause to believe there is evidence in the car, so the auto exception would not appear to work. But I think *Gant* would authorize the search, because the warrant for selling cocaine plus the discovery of the baggie of cocaine shows that Dan is regularly involved with cocaine and so there is at least a 25% chance (?) that there are more drugs, sales money, paraphernalia, etc., in the car.

May Copp search the *trunk*, or just the *passenger compartment*? Because the *Gant* majority did not overrule *Belton*, it seems that *Gant* authorizes Copp to search only the passenger compartment of Dan’s car. Justice Alito has problems with this,

and so do I. As I indicated above, if *Gant*'s reasonable suspicion standard is justified by the lowered expectation of privacy one has in a car, that should justify a search of the trunk too.⁹¹

4. Copp stops Dan for speeding, and the warrant check shows a warrant for driving with a suspended license. Copp's search of Dan's clothing turns up a small baggie of cocaine and \$5,000. This is a tough one. I don't think this adds up to probable cause to believe there are more drugs or related items in the car (so the auto exception would not apply), but this might be enough for reasonable suspicion.

But this search would not be for "evidence of the crime of arrest,"⁹² so the *Gant* majority opinion would not seem to permit it. Justice Alito questioned this, and so do I, as indicated above.⁹³ It seems that this limitation on car searches incident to arrest was only dicta in *Gant*, so maybe the Court will reconsider it when the right facts come before it.

VI. THE FUTURE: HOME SEARCHES

As I said above,⁹⁴ I think the Court should reexamine the *Chimel* dictum allowing the police to search the "grabbable area" around the arrestee at the time of arrest—even though he is nowhere near that area at the time of the search. As my earlier study shows, police officers are instructed to get the guy secured and out of that area immediately after arrest—and that is what they usually do. There is no danger of any reach for weapons or evidence in that area, so no search should be allowed under the search-incident-to-arrest doctrine.

The logic of *Gant*'s majority opinion (and certainly Justice Scalia's concurrence) supports this analysis, and I predict that this is exactly what the Court will do when it accepts a case presenting these facts in a home search. That case will probably

⁹¹ The Court has extended the auto exception to include *containers found in* the car. *California v. Acevedo*, 500 U.S. 565 (1991). This goes too far, in my view, because your expectation of privacy in your suitcase found in your trunk is much higher than, say, a jacket found on your back seat.

⁹² *Gant*, 129 S. Ct. at 1719.

⁹³ See *supra* note 72 and accompanying text.

⁹⁴ See *supra* notes 6-8 and accompanying text.

resemble *United States v. Turner*,⁹⁵ where the police arrested Turner in a room and saw a gun next to him. They handcuffed him and took him out of the room. Then they returned and searched the room where the arrest took place, finding a rifle, ammunition, and cocaine.⁹⁶

The Court of Appeals upheld this search—even though Turner could not reach that room when the search occurred—because (1) the area searched was within Turner's reach when he was arrested, and (2) the decision to remove Turner from the room was justified by the officers' concern for their safety, as they had already found a gun near Turner when he was arrested.⁹⁷

In his *Thornton* concurrence, Justice Scalia rejected this sort of reasoning, stating:

[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. If “sensible police procedures” require that suspects be handcuffed and put in squad cars, then police should handcuff suspects, put them in squad cars, and not conduct the search.⁹⁸

Scalia will find it pretty hard not to apply the same analysis to a home search. Indeed, the argument for limiting searches-incident-to-arrest in the home is *even stronger* than in a car, because the Court (including Justice Scalia) seems to go out of its way to protect the sanctity of the home.⁹⁹

Scalia convinced a majority in *Gant*, and I think he will do so again when a case like *Turner* hits the Court. Will the Court include the new wrinkle Scalia added in *Thornton* and adopted by the majority in *Gant*—allowing the police to search the grabbable area when it is “reasonable to believe” that the area contains “evidence of the crime of arrest”? I don't think so. While the recent justices have not enforced the Fourth Amendment nearly as much as earlier justices (e.g., on the Warren Court),

⁹⁵ 926 F.2d 883 (9th Cir. 1990)

⁹⁶ *Turner*, 926 F.2d at 885-86.

⁹⁷ *Id.*

⁹⁸ *Thornton*, 541 U.S. at 627 (Scalia, J., concurring).

⁹⁹ See, e.g., *Kyllo v. United States*, 533 U.S. 27 (2001); *Arizona v. Hicks*, 480 U.S. 321 (1987). Justice Scalia wrote the majority opinion in both of these cases.

they have been quite protective when it comes to home searches.¹⁰⁰ Permitting the police to search the home (the *entire* home?) on mere reasonable suspicion—without a warrant or exigent circumstances—merely because there was an arrest in the home goes much too far. The lower expectation of privacy in cars might justify this new *Gant* exception, but it would not seem to justify an intrusion on the privacy of the home. And, for good measure, we don't want to encourage the police to arrange home arrests in order to take advantage of a *Gant*-like exception.

CONCLUSION

We've come a long way. *Belton* (and *Thornton*) undermined the Fourth Amendment's protection of privacy by setting out a general rule that bore no resemblance to what the police usually do in the real world. *Gant* brought the Court back on the track of rationality and realism. There are still several kinks in the opinion that need straightening, but now that the Court is back on the road to reason, that shouldn't be too hard.

¹⁰⁰ See *supra* note 99 and accompanying text.