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Modern Police Practices: Arizona v. Gant's Illusory Restriction of Vehicle Searches Incident to Arrest

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INTRODUCTION

IN 2009, law enforcement officers conducted more than 13.5 million searches without a warrant, consent, or exigent circumstances.[1] Those searches were "incident to arrest," one of the most commonly exercised exceptions[2] to the Fourth Amendment's warrant requirement.[3] To conduct such a search, the arresting officer need only make a legal arrest. The fact of arrest itself justifies the search—the officer need not have any additional suspicion that the arrestee is hiding a weapon, a means of escape, or evidence of a crime.[4] The scope of a search

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[1] U.S. Dep't of Justice, Federal Bureau of Investigation, Crime in the United States 2009, Table 29: Estimated Number of Arrests (2010), http://www2.fbi.gov/ucr/cius2009/data/table_29.html (assuming at least one search incident to arrest was conducted for arrests for every offense except those categorized under "Runaway" and "Suspicion").

[2] Consensual searches are the only warrantless search more common than searches incident to arrest. 3 Wayne R. LaFave, Search and Seizure § 5.2(b), at 68–69 (3d ed. 1996 & Supp. 2000); John M. MacDonald et al., Search and Seizure, *in* Criminal Investigation of Drug Offenses 276 (1983); David E. Aaronson & Rangeley Wallace, A Reconsideration of the Fourth Amendment's Doctrine of Search Incident to Arrest, 64 Geo. L.J. 53, 54 (1975) (stating that more than ninety percent of all searches receiving court consideration were incident to an arrest).

[3] U.S. Const. amend. IV ("[N]o 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.").

[4] See Chimel v. California, 395 U.S. 752, 764 (1969) (justifying searches incident to arrest by the need to "seize weapons and other things which might be used to assault an officer or effect an escape, [and] prevent the destruction of evidence" without any discussion or requirement of officer knowledge or suspicion about the presence of such items).

incident to arrest extends to the person of an arrestee,[5] the immediate area where the arrest occurred[6] and, until recently, the passenger compartment of a vehicle recently occupied by the arrestee.[7] Modern courts, including the Supreme Court, have adopted an almost mechanical recitation of the justifications for the search incident to arrest doctrine that has led commentators to note that courts view the doctrine as a "categorical entitlement."[8]

Critics of vehicle searches incident to arrest have expressed concern over the way the doctrine incentivizes pretextual stops and arrests.[9] Even before the Supreme Court granted certiorari

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[5] United States v. Robinson, 414 U.S. 218, 235 (1973) ("[A] full search of the [arrestee] is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.").

[6] *Chimel*, 395 U.S. at 763 (1969) ("[T]he area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by" a rule that allows officers to search for such items).

[7] Thornton v. United States, 541 U.S. 615, 622 (2004) (making explicit that search incident to arrest doctrine included arrests of recent vehicle occupants); New York v. Belton, 453 U.S. 454, 460 (1981) (extending searches incident to arrest to the passenger compartment of an arrestee's vehicle), overruled by Arizona v. Gant, 129 S. Ct. 1710, 1726 (2009) (Alito, J., dissenting) ("Although the Court refuses to acknowledge that it is overruling *Belton* . . . there can be no doubt that it does so."). A vehicle's passenger compartment is the contiguous space accessible to passengers in the vehicle from the dashboard to the rear window. It includes the front and back seats (and middle rows, if applicable), the glove box, and the rear storage area of SUVs. Engine compartments and trunks that passengers cannot access while riding in the vehicle are not considered "passenger compartments."

[8] Wayne A. Logan, An Exception Swallows a Rule: Police Authority to Search Incident to Arrest, 19 Yale L. & Pol'y Rev. 381, 385 (2001); see also *Robinson*, 414 U.S. at 235 (holding that searches incident to lawful arrest "require[] no additional justification").

[9] Scholars often cite the potential for abuse arising from the combination of *Whren v. United States*, 517 U.S. 806, 811–13 (1996) (permitting pretextual vehicle stops), *Atwater v. City of Lago Vista*, 532 U.S. 318, 338–40 (2001) (permitting arrest upon probable cause of any criminal violation, including traffic infractions, even when state law does not authorize an arrest for the criminal violation), and *Belton*, 453 U.S. at 460–61 (permitting vehicle searches incident to the arrest of an occupant). Under this line of cases, an officer who arrested any vehicle occupant for any offense—even a pretextual arrest—was authorized to search the vehicle incident to arrest. See, e.g., David A. Harris, Car Wars: The Fourth Amendment's Death on the Highway, 66 Geo. Wash. L. Rev. 556, 567–68 (1998) (pre-dating *Atwater*, but expressing concern for the potential for abuse).

to *Arizona v. Gant*, scholars,[10] legal activists,[11] and the defense bar[12] hoped the case would remove the incentive for pretextual arrests by overruling *New York v. Belton*, which allowed officers to search the passenger compartment of a vehicle incident to the arrest of anyone in that vehicle.[13] The *Gant* decision was widely viewed as vindicating those concerns,[14] although academics have not been alone in recognizing that the availability of alternative justifications for post-arrest vehicle searches—such as inventory and consent searches, vehicle "frisks," and searches justified under the "automobile exception"—undermines *Gant*'s impact on law enforcement/citizen interactions.[15]

This Note has two principal purposes: one predictive, the other descriptive. A number of commentators have suggested that *Gant* will not constrain police because there are so many *other* search justifications. In contrast, this Note predicts that *Gant* will not meaningfully constrain police because the rule after *Gant* is broader than scholars have yet realized. Existing academic commentary erroneously assumes that *Gant* will limit vehicle searches incident to arrest, but the two justifications that authorize vehicle searches incident to arrest after *Gant*—evidence preservation and officer safety—are both far more permissive than commentators appreciate. For example, officers will continue to search vehicles incident to arrest for many common offenses—particularly possession crimes and driving under the influence—because the very fact of arrest gives officers reason to believe the vehicle contains evi-

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[10] See, e.g., Carson Emmons, *Arizona v. Gant*: An Argument for Tossing *Belton* and All Its Bastard Kin, 36 Ariz. St. L.J. 1067, 1069 (2004).

[11] See, e.g., Brief for the American Civil Liberties Union and the National Association of Criminal Defense Lawyers as Amici Curiae in Support of Respondent at 3–6, Arizona v. Gant, 162 P.3d 640 (Ariz. 2007) (No. 02-1019).

[12] See, e.g., Scott H. Greenfield, Car Searches: Supremes Take on Arizona v. Gant, Simple Justice: A New York Criminal Defense Blog (Feb. 26, 2008, 7:24 AM), http://blog.simplejustice.us/2008/02/26/car-searches-supremes-take-on-arizona-v-grant.aspx.

[13] 453 U.S. at 460.

[14] See, e.g., Scott Morgan, Supreme Court Upholds 4th Amendment in Arizona v. Gant, Scott Morgan's Blog (Apr. 21, 2009), http://flexyourrights.org/gant_ruling.

[15] Barbara Armacost, *Arizona v. Gant*: Does it Matter?, 2009 Sup. Ct. Rev. 275, 300–01 (2010); Mark M. Neil, The Impact of *Arizona v. Gant*: Limiting the Scope of Automobile Searches?, 18 Between the Lines 1, 2 (2009), available at http://www.ndaa.org/pdf/btl_vol_18_no_1_2009.pdf ("In short, the holding in *Arizona v. Gant* is not an overly burdensome one on law enforcement.").

dence, thereby triggering *Gant*'s evidence preservation exception. Indeed, *Gant* may only meaningfully constrain police when they arrest a vehicle occupant on an outstanding warrant, and then only if the arresting officer does not find any contraband on the arrestee during a search of his person incident to arrest.

As a descriptive matter, mistaken assumptions about *Gant*'s effects are not surprising given the dearth of information about law enforcement practices in legal circles. When judges and academics focus on whether a search is justified[16] or the scope of a permissible search,[17] they do so in a vacuum, lacking critical information about law enforcement arrest and search procedures. An arrest is *more* than the means to initiate the criminal justice process. The ability to search *incident to* an arrest has made it an evidence gathering mechanism as well. Commentators cannot establish a cogent definition of arrest or address infringements on the liberty and privacy interests at stake without understanding the context in which police officers use that mechanism. This Note facilitates more thorough academic discussion by providing detailed information about law enforcement practices.

This Note proceeds in three Parts. Part I reviews the evolution of the search incident to arrest doctrine and its application to vehicles in *Belton*, which authorized law enforcement officers to search vehicle passenger compartments after the arrest of a vehicle occupant. It then discusses the facts and holding of *Gant*, which purported to restrict vehicle searches incident to arrest. Part II identifies and resolves the ambiguity regarding the quantum of proof needed to allow officers to search a vehicle incident to arrest after *Gant*. It then predicts that *Gant* will do very little to constrain vehicle searches incident to arrest in most cases. Part III seeks to address *why* the Court's efforts to curtail vehicle searches incident to arrest will fall flat, arguing that the overestimation of *Gant*'s limiting influence results primarily from a lack of information about what law enforcement officers actually *do*. By describing common law enforcement arrest and search procedures, Part III both illustrates *Gant*'s limited effect and begins to address the surprising

[16] See, e.g., Arizona v. Gant, 129 S. Ct. 1710 (2009); Logan, supra note 8, at 414–38.

[17] See, e.g., Chimel v. California, 395 U.S. 752, 763 (1969); Emmons, supra note 10, at 1089–92.

dearth of scholarly work that discussed actual law enforcement practices in more than a cursory or conceptual fashion.[18]

I. EVOLUTION OF THE SEARCH INCIDENT TO ARREST DOCTRINE

A. The Origins of the Search Incident to Arrest Doctrine

Officers have been taught to search arrestees for weapons for over two hundred years,[19] but it was not until 1848, while rendering an opinion in an otherwise unremarkable trover case, that the Supreme Court of Vermont ushered the search incident to arrest doctrine from police[20] procedure texts to American legal reporters. The court justified the ability of an officer to search an arrestee by holding that an individual who violated the law surrendered his right to be protected from an otherwise illegal search.[21] Within two decades, other courts had embraced the doctrine but not the justification for it. In holding a police officer not liable for civil trespass, the Supreme Court of New Hampshire abandoned Vermont's variant of the "clean hands" doctrine[22] and immunized the officer from liability when his search was based on his good faith "regard [for] his own or the public safety, or the security of his prisoner."[23]

The United States Supreme Court first voiced its approval of the doctrine in *Weeks v. United States*, a 1914 Fourth Amendment case that noted in dicta the government's right, "always recognized un-

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[18] For an exception to this general rule, see Myron Moskovitz, A Rule in Search of a Reason: An Empirical Reexamination of *Chimel* and *Belton*, 2002 Wis. L. Rev. 657, 663–68, in which Professor Moskovitz discusses the limited responses to his requests for information about policies and procedures governing arrests and searches, which he sent to over one hundred local, state, and federal law enforcement agencies.

[19] Logan, supra note 8, at 386 n.29 (citing Conductor Generalis 109, 117 (James Parker ed., New York 1788)).

[20] This Note uses "police" as shorthand for the far broader term "law enforcement."

[21] Spalding v. Preston, 21 Vt. 9, 15–16 (1848) ("One who sets himself deliberately at work to contravene the fundamental laws of civil governments, that is, the security of life, liberty, or property, forfeits his own right to protection, in those respects, wherein he was studying to infringe the rights of others.").

[22] See Black's Law Dictionary 268 (8th ed. 2004).

[23] Closson v. Morrison, 47 N.H. 482, 484–85 (1867) (finding that an officer would be justified in taking from a prisoner any deadly weapon, money, or articles of value by which a prisoner might "procure his escape, or obtain tools, or implements, or weapons with which to effect his escape," regardless of the crime for which the person was arrested or whether the prisoner made any threats of violence toward the arresting officer).

der English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime."[24] Eleven years later, in a case that had, at best, a tangential relationship to the search incident to arrest doctrine, the Supreme Court again endorsed the doctrine and its evidence-gathering justification, stating, "When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution."[25] Although originally limited in both the Supreme Court and lower courts to evidence material to the charge for which the defendant was arrested,[26] Prohibition-era courts expanded the doctrine to allow for the introduction into evidence of liquor seized during searches incident to non-alcohol related arrests.[27] The Supreme Court continued to expand the doctrine even after Prohibition, holding in *Harris v. United States*[28] and *United States v. Rabinowitz*[29] that the government's right to search incident to arrest extended to all "premises . . . under the control of the person arrested and where the crime was being committed."[30] In both cases, the Court cited its earlier precedent holding that the search incident to arrest doctrine was justified by the need to locate "things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody."[31]

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[24] 232 U.S. 383, 392 (1914).

[25] Carroll v. United States, 267 U.S. 132, 158 (1925); accord Agnello v. United States, 269 U.S. 20, 30 (1925).

[26] See, e.g., 32 A.L.R. 680, 687 (1924) (citing a number of state, federal, and English cases for, inter alia, "[t]he proposition that an officer who lawfully arrests an offender without a warrant may search for, and seize, and take into custody, the subject of the crime, or the thing or instrument by which it was committed, or which might aid the prisoner in escaping, but has no authority to search for and take from the prisoner any other property").

[27] See Logan, supra note 8, at 390 n.49.

[28] 331 U.S. 145, 151–52 (1947).

[29] 339 U.S. 56, 61 (1950).

[30] Id. at 61. But see id. at 64 (noting that the room "was small and under the immediate and complete control of [the defendant]" and "the search did not extend beyond the room used for unlawful purposes").

[31] Id. at 77 (quoting Agnello v. United States, 269 U.S. 20, 30 (1925)); *Harris*, 331 U.S. at 151 (same).

The Supreme Court cut back on the scope of searches incident to arrest in *Chimel v. California*.[32] In *Chimel*, officers arrested an individual at his house and, after the arrestee refused to consent to a search of his home, searched "the entire three-bedroom house, including the attic, the garage, and a small workshop" incident to the arrest.[33] When it held that the search violated the Fourth Amendment, the Court recited the foundational principle of warrantless search doctrine: the justification of a warrantless search determines its scope.[34] A search incident to arrest, held the Court, was justified under the dual rationales of officer safety and evidence gathering: it was reasonable for officers to remove any weapons with which the arrestee could "resist arrest or effect his escape," as well as seize any evidence to prevent its concealment or destruction.[35] These rationales made it reasonable for officers to conduct "a search [incident to arrest] of the arrestee's person and the area within his immediate control."[36] However, the Court held that there was no similar justification for searching rooms other than where the arrest was conducted, or even for searching the "desk drawers or other closed or concealed areas in that room itself."[37]

After *Chimel*, searches incident to arrest were governed by a maddening amalgam of a bright-line rule and an ill-defined standard based on the facts of each case. Courts were given clear instructions that the very fact of a valid arrest justified a search of the arrestee and the area in the arrestee's immediate control, but at the same time courts were told that determining the scope of the search incident to arrest required defining the exact size of the searchable area on a case-by-case basis, a definition that could vary dramatically based on the circumstances.[38]

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[32] 395 U.S. 752, 753–55, 768 (1969).
[33] Id. at 754.
[34] Id. at 762–65.
[35] Id. at 762–63.
[36] Id. at 763 (internal quotation marks omitted).
[37] Id.
[38] Id. at 762–64.

B. Vehicle Searches Incident to Arrest and New York v. Belton

As lower courts wrestled to determine what constituted the area of immediate control in the context of vehicle searches incident to arrest, they inevitably came to inconsistent conclusions. The U.S. Courts of Appeals for the Fifth, Eighth, and Ninth Circuits upheld not only the search of vehicle passenger compartments, but also the search of containers in a vehicle searched incident to the arrest of a vehicle occupant.[39] The Fifth Circuit permitted officers to search an attaché case that had been sitting in the back seat of the suspect's car when he was arrested "at his car."[40] The court cited *Chimel* for the proposition that a search incident to arrest extended to the area within the arrestee's immediate control and found that both the vehicle and the attaché case had been within the arrestee's immediate control.[41] Both the Eighth and Ninth Circuits admitted into evidence heroin that officers found inside opaque packages in vehicles searched incident to arrest.[42]

Yet the Fifth and Eighth Circuits both contradicted themselves, holding in other cases that evidence seized pursuant to searches of opaque containers located in vehicles searched incident to arrest were impermissible in the absence of a search warrant.[43] In *United States v. Rigales*, an officer stopped a vehicle for illegally crossing a dirt median.[44] During the stop, the officer arrested one of the passengers on outstanding warrants and, during a search of the vehicle incident to arrest, found a firearm inside a zippered leather case.[45] The Fifth Circuit overruled the trial court and held that the search and seizure was unconstitutional without discussing existing circuit precedent to the contrary.[46]

New York v. Belton was the Supreme Court's attempt to confront the inconsistency in the scope of vehicle searches incident to

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[39] United States v. Frick, 490 F.2d 666, 668–70 (5th Cir. 1973); United States v. Sanders, 631 F.2d 1309, 1312–13 (8th Cir. 1980); United States v. Dixon, 558 F.2d 919, 922 (9th Cir. 1977).

[40] *Frick*, 490 F.2d at 668.

[41] Id. at 669.

[42] *Sanders*, 631 F.2d at 1313; *Dixon*, 558 F.2d at 922.

[43] United States v. Rigales, 630 F.2d 364, 366 (5th Cir. 1980); United States v. Benson, 631 F.2d 1336, 1337–38 (8th Cir. 1980).

[44] *Rigales*, 630 F.2d at 366.

[45] Id.

[46] Id. at 366–68.

arrest.[47] Writing for the majority, Justice Stewart acknowledged "[t]he difficulty courts have had . . . decid[ing] whether, in the course of a search incident to the lawful custodial arrest of the occupants of an automobile, police may search inside the automobile after the arrestees are no longer in it."[48]

The basic facts leading to the vehicle search incident to arrest in *Belton* were not in any sense unusual. A New York State Trooper stopped a vehicle for speeding.[49] After smelling "burnt marihuana" and observing an envelope he identified as drug paraphernalia on the floor of the car,[50] the trooper directed the four male occupants to exit the vehicle and arrested them.[51] The officer "patted down each of the men and split them up into four separate areas of the [road] . . . so they would not be in physical touching area of each other."[52] The Supreme Court opinion does not mention whether the trooper handcuffed any of the arrestees, but the dissent noted that the trooper did *not* secure any of the men in his patrol car.[53] The trooper then retrieved the envelope from the car and found that it contained marijuana.[54] The trooper provided the arrestees with *Miranda* warnings, searched them, and searched the vehicle's passenger compartment.[55] When he found cocaine in a zippered pocket of a leather jacket on the back seat of the car, the trooper secured the jacket, put all four arrestees in his vehicle and drove them to a police station for booking.[56]

A majority of the New York Court of Appeals held that neither of the dual rationales justifying a search incident to arrest—officer

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[47] 453 U.S. 454, 455–57 (1981).

[48] Id. at 459.

[49] Id. at 455–56.

[50] Id. (noting that the officer recognized that the word written on the envelope, "Supergold," referred to cannabis).

[51] Id. at 456. There is some dispute in the opinion about exactly when the custodial arrest occurred. The dissent states that the custodial arrest did not occur until after the trooper removed the men from the vehicle, patted them down, and separated them. Id. at 466 (Brennan, J., dissenting).

[52] Id. at 456 (majority opinion).

[53] Id. at 468 ("Under the approach taken today, the result would presumably be the same even if Officer Nicot had handcuffed Belton and his companions in the patrol car . . . .") (Brennan, J., dissenting).

[54] Id. at 456 (majority opinion).

[55] Id.

[56] Id.

safety and evidence preservation—applies "where there is no longer any danger that the arrestee or a confederate might gain access to the article."[57] The dissent agreed with the majority about the justifications for searches incident to arrest[58] but argued that, under the circumstances, there *was* a danger that one of the arrestees could have gotten hold of the jacket and the destructible evidence therein, rendering the search permissible for evidence preservation reasons.[59]

The Supreme Court granted certiorari because "courts have discovered the [justifications for searches incident to arrest are] difficult to apply in specific cases."[60] The Court thought a bright-line rule appropriate because "[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts . . . may be 'literally impossible [to apply] by the officer in the field.'"[61] The Supreme Court was confident that citizens need to know the extent of their constitutional protections and that police officers need to know the constitutional scope of their authority.[62] The Court then fashioned a clear rule allowing police to search a vehicle incident to the arrest of an occupant based on an irrebuttable presumption—and legal fiction—that the passenger compartment of a vehicle is *always* within an arrestee's grabbing range,[63] holding:

> [A]rticles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within "the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]." In order to establish the workable rule this category of cases requires, we read

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[57] People v. Belton, 407 N.E.2d 420, 421 (N.Y. 1981).

[58] Id. at 423.

[59] Id. at 424 (Gabrielli, J., dissenting) ("The situation was still fluid, and neither the suspects themselves nor their property had as yet been reduced to the exclusive and certain control of the police.").

[60] *Belton*, 453 U.S. at 458.

[61] Id. (quoting Wayne R. LaFave, "Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 Sup. Ct. Rev. 127, 141).

[62] Id. at 459–60.

[63] Id. The Supreme Court later expanded the *Belton* doctrine to allow for vehicle searches incident to arrest even when the arresting officer does not make contact with the arrestee until *after* the arrestee has exited his vehicle. Thornton v. United States, 541 U.S. 615, 617 (2004).

> *Chimel*'s definition of the limits of the area that may be searched in light of that generalization.[64]

Writing in dissent, Justice Brennan criticized the majority for deliberately ignoring *Chimel*'s "temporal and . . . spatial limitation on searches incident to arrest."[65] Justice Brennan wrote, "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."[66] To maintain the limits *Chimel* envisioned, Justice Brennan advocated for case-by-case determinations in which courts would review various factors to determine whether a particular area was within the arrestee's immediate control.[67]

C. Arizona v. Gant

Like those in *Belton*, the facts leading to the arrest of Rodney Gant are not uncommon for law enforcement officers. When two officers responding to an anonymous tip about drug trafficking at a residence knocked on the front door, Gant answered even though he was not a resident there.[68] Once they left the residence, the officers "conducted a records check" and learned that there was an outstanding warrant for Gant's arrest, and that Gant's driver's license was still suspended.[69] The officers returned to the house later that evening and, after arresting two people for unrelated crimes, observed Gant as he drove his car into the driveway.[70] As Gant exited his vehicle, an officer "called to" and approached him, meeting

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[64] *Belton*, 453 U.S. at 460 (second alteration in original) (citation omitted) (quoting Chimel v. California, 395 U.S. 752, 763 (1969).

[65] Id. at 465 (Brennan, J., dissenting).

[66] Id. at 465–66.

[67] Id. at 471 (including "the relative number of police officers and arrestees, the manner of restraint placed on the arrestee, and the ability of the arrestee to gain access to a particular area or container").

[68] Arizona v. Gant, 129 S. Ct. 1710, 1714–15 (2009).

[69] Id. at 1715. Police officers routinely conduct records checks on anyone they interact with, including witnesses and crime victims.

[70] Id. The opinion states that the officers "recognized [Gant's] car," although there is no mention of whether they observed his car during their previous visit or whether they were familiar with his car from checking his vehicle registrations during the earlier records check.

Gant ten to twelve feet from Gant's car where he "immediately arrested Gant and handcuffed him."[71] Because their vehicles were occupied by the other arrestees, the officers called for assistance and waited until two other officers arrived, then secured Gant in the backseat of one of the newly arrived officers' vehicles.[72] Two officers then searched Gant's car.[73] One found a firearm, while the other found "a bag of cocaine in the pocket of a jacket on the backseat."[74]

Gant moved to suppress the firearm and cocaine on Fourth Amendment grounds.[75] The trial court denied Gant's motion to suppress, but the state appellate court reversed.[76] The Arizona Supreme Court ultimately affirmed, holding *Belton* inapplicable.[77] *Belton*, in the view of the Arizona Supreme Court, addressed the *scope* of a search but not the threshold question of whether a search was authorized.[78] Because neither of *Chimel*'s dual rationales was satisfied, officers were not allowed to search Gant's vehicle.[79]

The Supreme Court granted certiorari, intoning that "courts, scholars, and Members of this Court" had all questioned *Belton*'s "clarity and its fidelity to Fourth Amendment principles."[80] The Court first rejected the narrow reading of *Belton*, noting 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."[81] The Supreme Court went on to repudiate *Belton*'s adoption of such a broad rule, criticizing it for detaching vehicle searches incident to arrest from the justifications described in *Chimel*.[82] The *Belton* rule

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[71] Id. The Arizona Supreme Court opinion has a slightly different description of the facts, reciting that Gant was arrested and handcuffed "eight to twelve feet" from his car. State v. Gant, 162 P.3d 640, 641 (Ariz. 2007).

[72] *Gant*, 129 S. Ct. at 1715.

[73] Id.

[74] Id.

[75] State v. Gant, 162 P.3d 640, 641, 642 n.1 (Ariz. 2007).

[76] State v. Gant, 43 P.3d 188, 194 (Ariz. Ct. App. 2002).

[77] *Gant*, 162 P.3d at 643.

[78] Id.

[79] Id.

[80] *Gant*, 129 S. Ct. at 1716.

[81] Id. at 1718.

[82] Id. at 1719.

was, the Court stated, "clearly incompatible" with the "statement in *Belton* that it 'in no way alter[ed] the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.'"[83] Nor was such a broad rule required to "protect law enforcement safety and evidentiary interests" because existing exceptions to the warrant requirement ensure officers' ability to "search a vehicle when genuine safety or evidentiary concerns . . . justify a [warrantless] search."[84] The Supreme Court overturned *Belton*, describing its generalization that the passenger compartment of a vehicle is frequently within reaching distance of an arrestee as "unfounded" and "faulty."[85] "Blind adherence to *Belton*[]," the Court wrote, "would authorize myriad unconstitutional searches."[86]

The Supreme Court, however, did not totally eliminate the authority of law enforcement officers to conduct vehicle searches incident to arrest. Instead, the *Gant* decision permitted vehicle searches incident to the arrest of a recent occupant in two contexts: first, when the arrestee is "unsecured and within reaching distance of the passenger compartment at the time of the search," and second, "when . . . it is reasonable to believe the vehicle contains evidence of the offense of arrest."[87] Regrettably, the Court did not provide any direction to law enforcement officers on how they should define "reasonable belief,"[88] "unsecured," or "reaching distance."[89]

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[83] Id. (quoting *Belton*, 453 U.S. 454, 460 n.3 (1981)).

[84] Id. at 1721 (citing Michigan v. Long, 463 U.S. 1032, 1049 (1983) (permitting an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual on scene is dangerous and might access the vehicle to gain immediate control of a weapon), and United States v. Ross, 456 U.S. 798, 820–21 (1982) (permitting a warrantless search of any part of a vehicle, including containers within the vehicle, if officers have probable cause to believe evidence might be located there)).

[85] Id. at 1723. Ironically, the Supreme Court made factual assumptions in both *Belton* and *Gant*—whether the passenger compartment of a vehicle is within an arrestee's grabbing distance—without citation or support. See id.; *Belton*, 453 U.S. at 459–60.

[86] *Gant*, 129 S. Ct. at 1723.

[87] Id. at 1719, 1721. Oddly, despite the majority's reliance on the *Chimel* rationales to overturn *Belton*, the Supreme Court describes its second holding as "not follow[ing] from *Chimel*." Id. at 1719.

[88] See infra Section II.A.

[89] See infra Subsection II.B.3.

Justice Scalia joined the majority with emphatic reluctance.[90] In a concurring opinion, he stated that the majority opinion "fail[ed] to provide the needed guidance to arresting officers" and incentivized law enforcement to leave the scene unsecured.[91] He thought the majority's rationale would induce officers to artificially create dangerous situations by not handcuffing arrestees or securing them in the back of a police car so as to justify a vehicle search incident to arrest under *Gant*'s officer safety rationale. Justice Scalia advocated abandoning what he described as the "charade of officer safety" and replacing it with a rule permitting vehicle searches incident to arrest "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."[92] However, Justice Scalia recognized that he was the lone voice for that position, and he joined the majority because he felt it would have been "unacceptable . . . for the Court to come forth with a 4–to–1–to–4 opinion that [left] the governing rule uncertain."[93]

II. *GANT*'S EFFECT ON LAW ENFORCEMENT PRACTICES

The Supreme Court's holding in *Gant* authorizes vehicle searches incident to arrest when it is "reasonable to believe that evidence of the offense of arrest might be found in the vehicle" and when the vehicle is "within an [unsecured] arrestee's immediate control, meaning the area from which he might gain possession of a weapon or destructible evidence."[94] This Part addresses two unresolved questions about *Gant*: First, what quantum of proof is required to satisfy the "reasonable [belief]" standard? Second, to what extent will *Gant* restrict vehicle searches incident to arrest?

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[90] *Gant*, 129 S. Ct. at 1725 (Scalia, J., concurring) (describing his joining the majority as the lesser of two evils).

[91] Id. at 1724.

[92] Id. at 1725.

[93] Id.

[94] Id. at 1714 (majority opinion) (internal quotation marks omitted).

A. Identifying the Quantum of Proof for Evidentiary Searches after Gant

Commentators have criticized *Gant*'s "reasonable belief" standard for not conforming clearly to the two traditional Fourth Amendment quanta of proof—reasonable suspicion and probable cause[95]—and lower courts have exhibited some confusion about this portion of the *Gant* holding.[96] This Section argues that "reasonable belief" should be interpreted as "reasonable suspicion" for two reasons. First, courts and scholars have consistently read "reasonable belief" to mean "reasonable suspicion" since *Terry v. Ohio*. Second, interpreting the *Gant* standard as "probable cause" would render a large portion of the *Gant* holding superfluous in light of the existing "automobile exception." This Section expands on each argument in turn.

1. "Reasonable Belief" is Reasonable Suspicion

Courts and commentators have historically understood "reasonable belief" as synonymous with "reasonable suspicion," and *Gant* should be read to adopt, not challenge, that well-established reading. The reasonable suspicion standard originated more than forty years ago in *Terry v. Ohio*, which continues to stand for the dual propositions that a law enforcement officer may temporarily stop an individual whom he *reasonably suspects* of being involved in criminal activity (a *Terry* stop), and that he may conduct a protective pat-down search if he *reasonably suspects* that the individual may be armed (a *Terry* frisk).[97] But the "reasonable suspicion"

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[95] Armacost, supra note 15, at 280–81; Angad Singh, Comment, Stepping Out of the Vehicle: The Potential of *Arizona v. Gant* to End Automatic Searches Incident to Arrest Beyond the Vehicular Context, 59 Am. U. L. Rev. 1759, 1773 (2010).

[96] Compare United States v. Howard, 621 F.3d. 433, 455 (6th Cir. 2010) (citing *Gant* for the proposition that an automobile search is sustainable "[i]f there is probable cause to believe a vehicle contains evidence of criminal activity"), with United States v. Vinton, 594 F.3d 14, 25 (D.C. Cir. 2010) (stating that "the 'reasonable to believe' standard probably is akin to the 'reasonable suspicion' standard required to justify a *Terry* search").

[97] 392 U.S. 1, 30–31 (1968). For an example of how lower courts have interpreted this standard, see, for example, *Vinton*, which refers to the "reasonable suspicion standard required to justify a *Terry* search." 594 F.3d at 25 (internal citations and quotation marks omitted).

standard read into *Terry*[98] does not appear in the plain language of the opinion; throughout his decision, Chief Justice Warren articulated the standard as a "reason to believe."[99] The words "suspicion," "suspicious," and "suspect" are used to describe the circumstances and the defendant's behavior, not as referents to the quantum of proof officers need to justify a stop or frisk.[100] The Court explicitly noted that reasonable belief is something less than probable cause, holding it is reasonable for an officer to frisk someone he "has reason to believe [is] . . . armed and dangerous . . . *regardless* of whether he has probable cause to arrest the individual for a crime."[101]

When the Court extended the *Terry* frisk to vehicles in *Michigan v. Long*,[102] lower courts understood that officers could "frisk" a vehicle only if they had reasonable suspicion that the vehicle contained a weapon.[103] Yet in *Long*, as in *Terry*, the standard actually articulated by the Court was "reasonable belief."[104] Writing for the Court, Justice O'Connor merged the terms by rooting *Long* in "the principles articulated in *Terry*," under which officers may search for weapons when they have "an *articulable suspicion* that an individual is armed and dangerous."[105] Similarly, Justice Brennan re-

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[98] See Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cnty., 542 U.S. 177, 185 (2004) ("Beginning with *Terry v. Ohio*, the Court has recognized . . . reasonable suspicion" as the quantum of proof that justifies an investigatory detention) (internal citations omitted); Michigan v. Long, 463 U.S. 1032, 1055 (1983) (Brennan, J., dissenting) ("*Terry*, and the cases that followed it, permit only brief investigative stops and extremely limited searches based on reasonable suspicion." (internal quotation marks omitted); United States v. Place, 462 U.S. 696, 700 (1983) (discussing the *Terry* standard as "reasonable suspicion")); Angela Davis, Race, Cops, and Traffic Stops, 51 U. Miami L. Rev. 425, 428 (1997); David A. Harris, Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 Ind. L.J. 659, 659–60 (1994). But see Stephen A. Saltzburg, *Terry v. Ohio*: A Practically Perfect Doctrine, 72 St. John's L. Rev. 911, 926 (1998) ("Notwithstanding the fact that *Terry* is widely known today as a reasonable suspicion case and as establishing a reasonable suspicion standard, one can find nothing in Chief Justice Warren's opinion to support the claim that he thought that was the standard the Court was adopting.").

[99] *Terry*, 392 U.S. at 24.

[100] Id. at 8, 24–28. They are, however, used to refer to the quantum of proof in the portion of the opinion where the Court summarizes the State's argument. Id. at 10–11.

[101] Id. at 27 (emphasis added).

[102] 463 U.S. 1032 (1983).

[103] See, e.g., United States v. Goodwin-Bey, 584 F.3d 1117, 1120 (8th Cir. 2009).

[104] 463 U.S. at 1049–50.

[105] Id. at 1034–35 (emphasis added).

ferred to the majority's "reasonable belief" standard as "reasonable suspicion" throughout his dissent.[106]

The Court again applied the "reasonable belief" standard in the Fourth Amendment context in *Maryland v. Buie*.[107] In *Buie*, officers serving an arrest warrant for robbery called the defendant out of his basement, arrested him, then searched the basement "in case there was someone else down there" and discovered evidence used to win a conviction.[108] In denying the defendant's attempt to suppress the evidence, the Court held that officers may search areas that are outside the scope of a *Chimel* search if they have a "*reasonable belief* based on specific and articulable facts" that the other rooms contain "an individual posing a danger to those on the arrest scene."[109] But it was so clear that the "reasonable belief" standard in *Buie* equated to "reasonable suspicion" that Justice Stevens opened his concurrence by writing, "Today the Court holds that *reasonable suspicion*, rather than probable cause, is necessary to support a protective sweep while an arrest is in progress."[110]

One contention that reasonable belief and reasonable suspicion should not be read synonymously is the proposition that the Supreme Court has established a "general rule that reasonable suspicion can *only* support limited searches for officer safety."[111] Under this argument, the phrase "reasonable belief" has two definitions. When a search is motivated by officer safety concerns, "reasonable belief" is synonymous with reasonable suspicion. In other contexts, however, such as evidentiary searches, "reasonable belief" takes on a different meaning with a higher quantum of proof.

This dual-meaning theory rests on a faulty premise; the "reasonable suspicion" standard has not been limited to searches motivated by officer safety concerns. In *Terry v. Ohio*, the Supreme Court held it reasonable for law enforcement officers to detain—not search—an individual to promote the "general interest . . . of effective crime prevention and detection" without implicating offi-

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[106] Id. at 1054–65 (Brennan, J., dissenting).
[107] 494 U.S. 325 (1990).
[108] Id. at 328 (internal quotation marks omitted).
[109] Id. at 334, 337 (emphasis added).
[110] Id. at 337 (Stevens, J., concurring) (emphasis added).
[111] See Singh, supra note 95, at 1774 (emphasis added).

cer safety.[112] Officers may detain individuals when they have a reasonable suspicion "criminal activity may be afoot," [113] but the suspected criminal activity need not be violent or dangerous. Courts permit *Terry* stops for traffic infractions,[114] drug investigations,[115] and even when an officer can articulate suspicious circumstances without a specific crime in mind.[116]

2. "Reasonable Belief" is not Probable Cause

There are additional and independent reasons to reject reading *Gant*'s "reasonable belief" standard to mean "probable cause." However desirable such an interpretation may be as a normative matter, existing precedent would render it superfluous. The "automobile exception" permits police officers to search vehicles if they have probable cause to believe there is evidence of a crime in the vehicle regardless of whether they arrest a vehicle occupant.[117] As the D.C. Circuit held, "[T]he 'reasonable to believe' standard requires less than probable cause, because otherwise *Gant*'s evidentiary rationale would merely duplicate the 'automobile exception,' which the Court specifically identified as a distinct exception to the warrant requirement."[118] Because of the inherent exigency with which the Court believes vehicles must be treated, law enforcement officers with probable cause to believe that a vehicle contains evidence of a crime have been allowed to conduct warrantless vehicle searches since 1925, regardless of whether they have arrested a recent occupant of the vehicle.[119] The *Gant* decision neither disrupted that precedent nor limited vehicle searches to situations in which the officers had probable cause.[120] Instead, the Court discussed the "reasonable belief" standard as existing *in ad-*

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[112] 392 U.S. 1, 22 (1968).
[113] Id. at 30.
[114] See, e.g., Arizona v. Johnson, 129 S. Ct. 781, 784 (2009).
[115] See, e.g., Minnesota v. Dickerson, 508 U.S. 366, 368–69 (1993).
[116] See, e.g., New York v. Earl, 431 U.S. 943, 943–44 (1977).
[117] Carroll v. United States, 267 U.S. 132 (1925).
[118] United States v. Vinton, 594 F.3d 14, 25 (D.C. Cir. 2010) (citations omitted).
[119] See California v. Acevedo, 500 U.S. 565 (1991); Carroll v. United States, 267 U.S. 132 (1925).
[120] 129 S. Ct. 1710, 1721 (2009) (discussing and reaffirming the precedent set by *Carroll*).

dition to other vehicle search doctrines.[121] Rather than merely echo established precedent, the *Gant* Court intended to supplement that precedent by reducing the quantum of proof necessary to search a vehicle for evidence when that search is incident to arrest.[122]

B. Gant*'s Illusory Effect on Vehicle Searches Incident to Arrest*

The expectation among commentators has been that *Gant* would not change what police do—search vehicles—but it would change *how* police justified those searches by significantly constraining vehicle searches incident to arrest, and it would reduce the incentive for officers to make arrests for traffic offenses by eliminating vehicle searches incident to those arrests. This Part argues that such an expectation is misplaced: *Gant* will not significantly constrain vehicle searches incident to arrest, and therefore its effect on police behavior is largely illusory. *Gant* will not substantially decrease the number of pretextual arrests for traffic violations for the simple reason that relatively few such arrests occurred even before *Gant*. Further, *Gant*'s dual justifications for vehicle searches incident to arrest—evidence preservation and officer safety—are far more permissive than they first appear, based on both the nature of the offenses for which most vehicle occupants are arrested—possession crimes and DUI—and the circumstances surrounding common arrest scenarios. Officers do not need to change how they justify vehicle searches because *Gant* left their authority to search incident to arrest largely intact.

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[121] Id. at 1723–24.

[122] Compare *Gant*, 129 S. Ct. at 1723–24 ("Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies."), with *Acevedo*, 500 U.S. at 579 ("[T]he police may search [a vehicle] without a warrant if their search is supported by probable cause.").

1. Arrests for Traffic Infractions

Under the precedent established by *Whren v. United States*,[123] *Atwater v. City of Lago Vista*,[124] and *New York v. Belton*,[125] an officer who lacked a legal justification for searching a car needed only follow his target until he observed the driver commit a traffic offense. The officer could then pull the vehicle over (*Whren*), arrest the driver for the traffic infraction (*Atwater*), and get a "free" search of the vehicle incident to the driver's arrest (*Belton*).[126] In this context, *Gant*'s preclusion of vehicle searches was widely expected to be a significant limitation on law enforcement.[127] While any reduction of the potential for abuse of the *Whren/Atwater/Belton* precedent is well warranted,[128] empirical analysis suggests that arrests for traffic infractions were uncommon even before *Gant*. *Gant*'s effect, then, is blunted; while it will preclude searches incident to arrests for traffic violations, there have simply never been many such arrests.

As a preliminary matter, jurisdictions categorize traffic offenses differently. Some states categorize traffic offenses as civil infractions rather than criminal violations,[129] so officers *cannot* make arrests for traffic infractions even after *Atwater*. Other states classify traffic offenses as criminal infractions.[130] Even where officers *can* make arrests for traffic violations, however, statistics suggest they do not often do so. According to the most recent research survey by the Bureau of Justice Statistics ("BJS"), law enforcement officers conducted about 17.4 million traffic stops in 2005.[131] Police re-

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[123] 517 U.S. 806 (1996).

[124] 532 U.S. 318 (2001).

[125] 453 U.S. 454 (1981).

[126] Id.

[127] See supra note 9; see also Craig M. Bradley, Two and a Half Cheers for the Court, Trial, Aug. 2009, at 38, available at http://ssrn.com/abstract=1431562.

[128] See, e.g., David A. Harris, The Stories, the Statistics, and the Law: Why "Driving While Black" Matters, 84 Minn. L. Rev. 265, 277–88 (2000).

[129] See. e.g., Fla. Stat. § 318.12 (2010) (generally decriminalizing traffic violations and rendering them civil infractions); see also Ariz. Rev. Stat. § 28-121 (2004) (identifying traffic violations in certain chapters as misdemeanors, while treating traffic violations in other chapters as civil infractions).

[130] See, e.g., Ga. Code Ann. § 40-6-1(a) (2007) (LexisNexis) (identifying traffic violations generally as misdemeanors).

[131] Matthew R. Durose et al., U.S. Dep't of Justice, Contacts between Police and the Public, 2005, at 5 (2007), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/cpp05.pdf

solved only 2.4% of those stops by arresting the driver of the stopped vehicle, reflecting approximately 418,600 arrests. Of *those* arrests, more than a third resulted from a DUI roadblock or non-traffic offense, as depicted in the table.

Traffic-Related Arrests, Based on 17,444,000 Traffic Stops[132]

	Traffic Stops		Resolved by Arrest	
	Percent	Approximate Number	Percent	Approximate Number
Traffic Infractions				
Speeding	53.3%	9,297,652	1.1%	102,274
Vehicle Defect	9.6%	1,674,624	3.5%	58,612
Record Check	10.7%	1,866,508	1.9%*	35,464
Seatbelt	4.7%	819,868	<0.5%	<4,099
Illegal Turn or Lane Change	5.7%	994,308	1.9%*	18,892
Stop Sign/Light Violation	7.2%	1,255,968	2.0%*	25,119
Other Traffic Offense	2.6%	453,544	7.3%*	33,109
Sub-Total	**93.8%**	**16,362,472**		**~277,569**
Other***	3.9%	680,316	7.1%*	48,302
Roadside Drunk Driving Check	2.2%	383,768	16.4%	62,938
Total**	**100.00%**	**17,444,000**		**~418,656**

*Estimate based on 10 or fewer samples.

**Details may not add up to total because of rounding.

***"Other" is not defined but appears to exclude traffic offenses.

(excluding approximately 356,000 traffic stops, or 2% of the total 17.8 million, in which the driver reported the officer did not give a reason for the stop).

[132] Id. at 4–5 (with extrapolated calculations). The precise usage of the term "arrest" is unclear, as the drivers self-reported that description. It may include a number of false positives, such as detention in handcuffs without a search incident to arrest and "paper arrests," in which a driver is issued a citation for a criminal infraction and must appear in court even without being physically arrested and searched. It may also contain false negatives, as when an officer arrests and then "unarrests" an individual and the individual does not report that interaction as an arrest.

Not only are arrests for traffic violations uncommon when compared to the number of traffic stops and arrests every year, they are also rare compared to the number of law enforcement officers. If all 777,885 full- and part-time state and local police officers employed as of September 2004[133] divided the traffic stops and arrests for traffic offenses equally between themselves, each officer would make about 23 traffic stops. Only one officer in three would make an arrest for a traffic violation over the course of the year. To the extent that the abuse of *Whren* and *Atwater* was more limited than scholars realized, *Gant* will have a minimal effect on changing police conduct.

Further, police who *do* arrest a vehicle occupant for a traffic infraction (or for any other offense, for that matter) retain the authority to conduct a search of the arrestee's person incident to arrest. This is a particularly thorough search, intended to find evidence and anything that may present a threat.[134] If they locate incriminating evidence on the arrestee, officers can then use that evidence to justify a vehicle search incident to arrest under *Gant*'s evidence preservation rationale, as the next Section demonstrates.

2. Evidentiary Searches Incident to Arrest

Gant was criticized for its lack of clarity about whether law enforcement officers will always need to identify facts beyond the arrest itself to articulate reasonable suspicion or whether the *nature* of the crime for which the arrest was made can, without more, give an officer reasonable suspicion to conduct an evidentiary vehicle search incident to arrest.[135] This Note argues that many—if not most—vehicle occupants are arrested for crimes for which the fact of arrest itself establishes reasonable suspicion. Moreover, for other crimes, officers will often develop reasonable suspicion based on factual circumstances that commonly accompany the arrest of a vehicle occupant.

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[133] Brian A. Reaves, U.S. Dep't of Justice, Census of State and Local Law Enforcement Agencies, 2004, at 2 (2007), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/csllea04.pdf (reflecting 731,903 full-time and 45,982 part-time law enforcement officers nationwide).

[134] See infra Section III.B.

[135] See Armacost, supra note 15, at 306–07.

In *Gant*, the Supreme Court explicitly identified two categories of offenses and implicitly recognized a third. The first category consists of crimes for which "there will be no reasonable basis to believe the vehicle contains relevant evidence" of the crime of arrest, such as "traffic violation[s]."[136] The nature of the offenses in this category effectively precludes the application of *Gant*'s evidence preservation rationale because there simply cannot be any evidence in the vehicle. Relatively few vehicle occupants are arrested for crimes that fall into the first category, particularly traffic offenses.[137]

The second category includes crimes for which "the offense of arrest *will* supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein."[138] The fact that a vehicle occupant was arrested for an offense in this category inevitably satisfies *Gant*'s evidence preservation rationale, paralleling the way that vehicle searches incident to arrest were automatic under *Belton*. Although precise statistics are unavailable, this Note argues that the majority of arrests of vehicle occupants are for crimes within this category.

The third category, which fills the gap between the first two, consists of offenses for which an arrest is irrelevant. For these offenses, circumstances other than the fact of arrest dictate whether the officer who makes the arrest will be able to articulate reasonable suspicion. Common factual situations surrounding the arrest of vehicle occupants will often, but not inevitably, provide officers with reasonable suspicion that there is evidence of the crime of arrest in the vehicle.

a. Offenses for Which an Arrest Establishes Reasonable Suspicion

The *Gant* opinion provides that arrests for some offenses will automatically justify a search incident to arrest because "the offense of arrest . . . suppl[ies the] basis for searching" the vehicle.[139] To illustrate this principle, the Supreme Court referred to the facts of two cases: *Belton* and *Thornton*.[140] The context of the Supreme

[136] 129 S. Ct. 1710, 1719 (2009).
[137] See supra Subsection II.B.1.
[138] *Gant*, 129 S. Ct. at 1719. (emphasis added).
[139] Id.
[140] Id.

Court's illustration makes clear that it is the offense itself that matters: Roger Belton and Marcus Thornton were both arrested for drug crimes.[141] In distinguishing *Gant* from the two prior cases, the Supreme Court wrote, "An evidentiary basis for the search was also lacking in [*Gant*]. Whereas Belton and Thornton were arrested for drug offenses, Gant was arrested for driving with a suspended license—an offense for which police could not expect to find evidence in the passenger compartment of Gant's car."[142] Law enforcement officers who make an arrest for a drug offense, then, can "expect" to find evidence in the passenger compartment of a vehicle. That expectation satisfies the low reasonable suspicion threshold, which triggers *Gant*'s evidence preservation rationale.

The citations to *Belton* and *Thornton* are instructive. In both cases, the initial interaction between the law enforcement officer and the arrestee was premised on a traffic stop—for speeding in *Belton* and for displaying the wrong license plate in *Thornton*—while the ultimate arrest was for a drug offense.[143] The majority's use of *Thornton* as an example of a search justified by the *Gant* rationales is persuasive evidence of *Gant*'s limited effect. In *Thornton*, a municipal officer's suspicions were aroused when Thornton slowed down to avoid driving next to the unmarked police car.[144] The officer conducted a records check and discovered that the license plate displayed on Thornton's vehicle was not assigned to that vehicle.[145] Thornton drove into a parking lot, parked, and exited his vehicle before the officer had an opportunity to initiate a traffic stop.[146] The officer followed, "parked the patrol car, accosted [Thornton], and asked him for his driver's license" and whether he had any weapons or narcotics "on him or in his vehicle," which Thornton denied.[147] During the course of their interaction, the officer became "[c]oncerned for his safety" and "asked [Thornton] if he could pat him down, to which [Thornton] agreed."[148] After feel-

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[141] Id.
[142] Id.
[143] New York v. Belton, 453 U.S. 454, 455–456 (1981); Thornton v. United States, 541 U.S. 615, 618 (2004).
[144] 541 U.S. at 617.
[145] Id. at 618.
[146] Id.
[147] Id.
[148] Id.

ing a "bulge" in Thornton's left front pocket, the officer again asked Thornton if he had any illegal narcotics on him, and this time Thornton confessed that he did, reaching into his pockets and handing the officer three bags of marijuana and a "large amount of crack cocaine."[149] After physically arresting Thornton and securing him in his patrol car, the officer conducted a search incident to arrest of Thornton's vehicle and discovered a firearm.

In short, *Thornton* demonstrates all of the characteristics that make commentators cringe. The traffic stop was pretextual. The interaction between the officer and the arrestee began away from the vehicle. To the extent the frisk was based on Thornton's consent, that consent was questionable.[150] Thornton was compliant throughout the interaction and, after being asked twice, not only admitted to drug possession but also voluntarily produced the drugs and handed them to the officer. Yet the *Gant* majority cited *Thornton* as an example of the proposition that, for some offenses, the very fact of arrest will justify a vehicle search incident to arrest.

That lower courts have adopted this interpretation of *Gant*[151] blunts any constraining effect that *Gant* might have had on vehicle searches incident to arrest. Drug arrests are the single largest category tracked by the Federal Bureau of Investigation's Uniform Crime Reports, constituting 12.2% of all arrests.[152] Although empirical data regarding the nature of arrests from vehicles do not exist, it is reasonable to expect that vehicle occupants are arrested for drug crimes far more frequently than for other crimes, largely because it is simply easier for officers to develop probable cause for drug crimes in a vehicle than in other situations; officers benefit

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[149] Id.

[150] The Supreme Court did not identify whether this "pat down" was a limited consent search or a *Terry* frisk, but to the extent that the search was consensual, there is no discussion regarding the validity of Thornton's consent.

[151] See, e.g., United States v. Shakur, 394 F. App'x 974, 976 (4th Cir. 2010) (holding that a vehicle search incident to arrest for a drug offense was justified under *Gant*); United States v. Hayden, 389 F. App'x 544, 549 (7th Cir. 2010) (citing *Gant* and holding that an "arrest for possession of the marijuana supported a search of the car for evidence relevant to that offense").

[152] U.S. Dep't. of Justice, supra note 1. Numerically, there were more arrests for "All other offenses" and "Property crimes" than for "Drug abuse violations," but both of the former are compilations of several different crimes, not independent offenses. Id. at n.2.

from being able to approach the car and examine the vehicle and its occupants at close range.[153]

In the context of drug offenses, *Gant* not only does nothing to restrict vehicle searches incident to arrest, but it also does very little to reduce the incentives for traffic-related arrests. *Gant*'s evidentiary rationale holds regardless of how the arresting officer developed probable cause to make an arrest; if an officer arrests a vehicle occupant for *any* reason and discovers drugs during a search of the person incident to arrest, the officer may charge the arrestee with the drug offense *in addition to* (or instead of) the charge for the original offense. At this point, *Gant* explicitly authorizes the officer to conduct a vehicle search incident to the drug arrest.

Drug crimes are not the only offenses for which an arrest establishes reasonable suspicion that the vehicle contains additional evidence. Courts may hold that *any* possession crime[154] satisfies the reasonable suspicion standard. Consider *United States v. Vinton*, in which an officer pulled a vehicle over for speeding and for having excessively dark window tint.[155] During the stop, the officer observed a sheathed knife laying on the backseat.[156] The officer searched the vehicle for weapons pursuant to *Michigan v. Long* and discovered a locked briefcase on the backseat and several other weapons, including a butterfly knife under the front passenger-side floor mat.[157] The officer arrested the driver for possession of the butterfly knife (a prohibited weapon) and, during a vehicle

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[153] Both the author's experience as a law enforcement officer and conversations with current officers suggest a rough estimate of thirty to forty percent, with the caveat that this will vary by jurisdiction, agency, and individual officer. All of the officers believed that more than twelve percent of their arrests of vehicle occupants include charges for drug offenses.

[154] See, e.g., Va. Code Ann. § 18.2-94 (2001) (criminalizing possession of burglary tools); Va. Code Ann. § 18.2-105.2 (2001) (criminalizing possession of devices intended to defeat electronic shoplifting detection devices); Va. Code Ann. § 18.2-308.2 (2001) (criminalizing possession of firearms by convicted felons); Va. Code Ann. § 18.2-308.8 (2001) (criminalizing possession of a certain type of shotgun); Va. Code Ann. § 18.2-371.2 (2001) (criminalizing underage possession of tobacco products); Va. Code Ann. § 29.1-550(iii) (2001) (criminalizing possession of wild bird, animal, or fish in excess of the daily bag or creel limit).

[155] 594 F.3d 14, 18 (D.C. Cir. 2010).

[156] Id.

[157] Id. at 19.

search incident to arrest, "pried open the locked briefcase" and discovered drugs and additional weapons, including a firearm.[158]

In upholding the constitutionality of the search of the locked briefcase, the D.C. Circuit compared the nature of the arrest in *Vinton* to the nature of the arrest in both *Belton* and *Thornton*, finding that unlawful possession of a weapon "resembles narcotics-possession offenses far more closely than it resembles a traffic violation."[159] The court was unable to "imagine a principled basis for distinguishing the possession of narcotics from the possession of an unlawful weapon," noting that the officer testified that "generally if one weapon is there . . . there's the chance that other weapons could be there."[160] Although the D.C. Circuit held that the *facts* of the case established that it was reasonable for the officer to "expect[]" the presence of additional weapons in the vehicle,[161] it would have been more accurate to write that, after *Gant*, the *nature* of the offense—a possession crime—established reasonable suspicion that additional evidence of the crime of arrest would be located in the vehicle.

Similarly, in *United States v. Bunton*, an officer stopped and arrested Gary Bunton for driving on a suspended license and, while searching him incident to arrest, discovered an empty holster and two bullets.[162] Although the court claimed that the subsequent vehicle search was based on probable cause, the court's language is pertinent:

> [The search of the arrestee's person incident to arrest], as already discussed, revealed an empty holster and 2 rounds of ammunition. The ammunition in his pocket constituted a felony violation of federal and state law. Additionally, it was reasonable to believe that the empty holster once contained a handgun, and that the handgun more likely than not was somewhere in the passenger compartment of the vehicle.[163]

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[158] Id.
[159] Id. at 25–26.
[160] Id. at 26. For a discussion of the "plus one" rule, see infra text accompanying note 221.
[161] 594 F.3d at 26 (emphasis added).
[162] No. 2:09-CR-106, 2010 WL 2081961, at *2 (E.D. Tenn. Mar. 4, 2010).
[163] Id. at *3 (emphasis added).

Whether the proposition that the presence of one weapon is indicative of the presence of a second is empirically sound remains an open question, but, as Part III discusses at more length, law enforcement officers are trained to ensure their safety to the greatest extent possible by assuming such is the case.[164] Police officers also assume an arrestee's vehicle contains paraphernalia inculpatory of the possession charge (beyond that found on the arrestee's person) until they have assured themselves otherwise with a thorough search. Judicial deference to law enforcement "training and experience" suggests that, like the D.C. Circuit,[165] courts will treat that assumption as the functional equivalent of reasonable suspicion.

Like drug offenses and possession crimes, arrests for driving under the influence ("DUI") also support reasonable suspicion without facts beyond the nature of the offense. In 2009, arrests for DUI made up the second largest category of arrests (after drug offenses), with DUI arrests making up more than one out of every ten arrests,[166] and it is safe to assume that the vast majority of individuals arrested for DUI were in a vehicle immediately before their arrest.[167] While DUI laws do not criminalize the *possession* of alcoholic beverages or drugs in a vehicle,[168] the presence of alcoholic beverage containers or drug paraphernalia is inculpatory. Substance-impaired drivers may have consumed alcoholic beverages or used drugs in or around their vehicles before they were ar-

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[164] See infra text accompanying note 221.

[165] *Vinton*, 594 F.3d at 26 (quoting the officer as saying during a suppression hearing, "generally if one weapon is there . . . there's the chance that other weapons could be there").

[166] U.S. Dep't of Justice, supra note 1 (reporting arrests under the category of "Driving under the influence" made up 1,440,409 of a total 13,591,832 arrests, or 10.6%, excluding arrests for "Runaways" and "Suspicion").

[167] Although possible, arresting individuals other than recent vehicle occupants for DUI often presents evidentiary challenges; officers may be unable to develop probable cause for DUI if the individual had an opportunity to consume alcohol after exiting the vehicle.

[168] See, e.g., Va. Code Ann. § 18.2-266 (2005). This Note includes both driving under the influence of alcohol and driving under the influence of drugs under the generic category of DUI.

rested,[169] and that evidence of their consumption is relevant to the DUI charge.

In short, individuals arrested for drug offenses, possession crimes, and DUI should expect *Gant* to permit, not restrict, vehicle searches incident to arrest because these common arrests automatically trigger *Gant*'s evidentiary justification.[170]

b. Factual Scenarios Supporting the Reasonable Suspicion Presumption

The offenses presented in the preceding section—those for which the fact of arrest establishes reasonable suspicion that evidence of the crime of arrest can be found within the vehicle—are largely *incidental* to a traffic stop. In other words, law enforcement officers develop probable cause to make an arrest by interacting with the driver only after initiating the traffic stop. However, law enforcement officers also initiate traffic stops *because* they have probable cause to arrest a vehicle occupant or reasonable suspicion that justifies an investigatory detention (which then leads to arrest) for something other than a traffic offense.

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[169] Although empirical evidence is elusive, the author's experience as a police officer suggests that consumption of alcohol while tailgating at a sporting event is common, as is drinking or using drugs in the parking lot of a nightclub or bar before entering or after leaving the establishment.

[170] Notably, *Gant* may result in more protection for white arrestees than minority arrestees since minorities are arrested at a disproportionately high rate for the offenses that automatically satisfy *Gant*. Census estimates for 2009 indicate that 12.86% of individuals in the United States are classified as at least partially "Black," but arrest statistics from 2009 reflect that 41% of all persons arrested for weapons offenses—a possession crime—and 33.6% of all persons arrested for drug offenses were categorized as "Black." U.S. Census Bureau, Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States: April 1, 2000 to July 1, 2009 (2010), http://www.census.gov/popest/national/asrh/NC-EST2009-srh.html; U.S. Census Bureau, Table DP-1: Profile of General Demographic Characteristics: 2000 (2001), http://censtats.census.gov/data/US/01000.pdf; U.S. Dep't of Justice, Fed. Bureau of Investigation, Crime in the United States 2009, Table 43: Arrests by Race (2010), http://www2.fbi.gov/ucr/cius2009/data/table_43.html. Although individuals arrested for DUI are disproportionately white (making up 86.3% of DUI arrestees compared to an estimated 81.1% of the population), white individuals are not nearly as overrepresented in DUI arrests as black individuals are in weapons and drug arrests. Id. Thus, *Gant* restricts vehicle searches incident to arrest for crimes for which whites are more likely to be arrested (except DUI) but permits such searches for crimes for which minorities are more likely to be arrested.

Officers can initiate traffic stops when they reasonably suspect that a vehicle was involved in a crime, particularly a recently committed crime. If the officer arrests a vehicle occupant for that crime, the fact that the arrest occurred shortly after the crime was committed establishes reasonable suspicion that there is evidence of the crime of arrest in the vehicle. Similarly, the commission of a crime *in* a vehicle will establish at least reasonable suspicion, even if it is not a crime for which the arrest itself would justify reasonable suspicion. In other words, it is not the *nature* of the crime of arrest that justifies an officer's reasonable suspicion but rather the circumstances surrounding the arrest.[171]

Officers develop probable cause for some number of traffic stops—there are no data available on precisely how many—based on information contained in Be on the Lookout ("BOLO") notices or All-Points Bulletins ("APBs"). In a typical scenario, a BOLO or APB serves to alert officers that a vehicle of a certain description was involved in a crime or traffic offense. Supreme Court precedent allows law enforcement officers to conduct an investigatory stop based solely on a notice issued "on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense."[172] If an officer then arrests a vehicle occupant for a recently committed crime, the temporal proximity of the crime to the arrest supports at least reasonable suspicion, if not probable cause, that evidence of the crime of arrest is located within the vehicle.

In *United States v. Walker*, a radioed BOLO notice alerted officers of a recent bank robbery and provided the description of the armed bank robber and the getaway vehicle.[173] About thirty minutes after the robbery, an officer encountered the vehicle parked at a body shop. Walker, who matched the radioed description of the suspect, was outside of the vehicle carrying a duffel bag.[174] After calling for backup, the officer approached Walker and, in the course of their interaction and without Walker's consent, searched

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[171] The notable exceptions, of course, are offenses of a nature that preclude the assertion of reasonable suspicion, such as traffic infractions.

[172] United States v. Hensley, 469 U.S. 221, 232 (1985).

[173] 615 F.3d 728, 730 (6th Cir. 2010).

[174] Id.

the duffel bag and found evidence of the robbery.[175] In upholding the legality of the search of the duffel bag, the U.S. Court of Appeals for the Sixth Circuit held that,

> [b]ased on the description of the robbery in the BOLO, including the warning that the thief was armed, Walker's statement that he was driving the car that matched the license plate of the robber's car and his response to the request for identification, the officers had a "perfectly reasonable apprehension" that Walker had a weapon in the duffel bag that he was carrying.[176]

Although the arrestee in *Walker* was not a recent vehicle occupant, the Sixth Circuit's logic extends to such situations. If the arresting officer had observed a vehicle matching the description, initiated a traffic stop, and arrested the driver, the court seems inevitably positioned to hold that the officer had a "perfectly reasonable apprehension" that evidence of the robbery would be in the vehicle.

In *Lavender v. City of Blue Ash*, a Section 1983 action for violations of the Fourth and Fourteenth Amendments related to a warrantless vehicle search, the Sixth Circuit upheld the district court's grant of summary judgment for defendant officers who had stopped a vehicle that matched the APB description of a getaway car used in an armed robbery that occurred about forty-five minutes before the stop.[177] The getaway vehicle was described as a "boxy, older police cruiser type vehicle, color white [sic] with an unusual driver's side spotlight common to police cars and . . . contain[ing] two occupants."[178] The officers detained the driver, an African-American woman, and her two daughters, aged ten and sixteen, and conducted a search of the vehicle for the bank robber, described as a white male in his thirties.[179] The Sixth Circuit affirmed the trial court's dismissal of the suit, holding:

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[175] Id.

[176] Id. at 731–32. Officers later obtained a warrant to search the rest of the duffel bag and located additional evidence of the robbery, including dark clothing, money from the bank, and a firearm. Id. at 730–31.

[177] 162 F. App'x 548, 548–49 (6th Cir. 2006).

[178] Id. (internal quotation marks omitted).

[179] Id. at 549. The APB did not describe the driver of the getaway vehicle.

> [T]here was no constitutional violation because the initial stop, viewed in light of all the circumstances, was supported by . . . reasonable suspicion . . . and because the officers who detained the plaintiff had a reasonable belief that an armed robber might have been in the car, thereby justifying both the level of force used by the officers to secure the scene and the thoroughness of their search.[180]

Modifying the facts only slightly, one is faced with the almost inevitable conclusion that, in a similar situation, *Gant* would not restrict an officer's ability to conduct a vehicle search incident to arrest because the facts of the situation—the matching descriptions and the relatively short period of time that passed between the commission of the crime and the arrest—establish reasonable suspicion that evidence of the crime of arrest is located in the vehicle. Consider what would have occurred if the officers had arrested the driver of the vehicle for the robbery. The court would likely have found that the officers possessed at least reasonable suspicion that the vehicle contained evidence of the robbery, which would have justified the vehicle search incident to arrest under *Gant*. Thus, in a number of common factual scenarios, *Gant* functions identically to *Belton* by permitting law enforcement officers to conduct vehicle searches incident to arrest.

Courts may also be expected to permit vehicle searches incident to arrest in accordance with *Gant* when the vehicle plays some independent role in the offense. In other words, courts will hold that officers have *at least* reasonable suspicion that evidence of the crime of arrest is located within a vehicle when a vehicle itself is a crime scene,[181] when the vehicle was an instrumentality of the crime and so is itself evidence,[182] or when the vehicle was used in conjunction with the crime.[183]

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[180] Id. (internal citation omitted).

[181] Here, as before, *Gant* will have no effect. If an officer has reasonable suspicion, which this Note argues is inevitable in these situations, *Gant* will permit a vehicle search incident to arrest. If an officer has probable cause, *Gant* is inapplicable because the search is no longer incident to arrest.

[182] Consider an assault in which the vehicle is used as the weapon and evidence of the driver's identity may be located within.

[183] An example would be when officers believe the vehicle to be a getaway vehicle that contains evidence of the underlying crime.

For example, consider *United States v. Avery*, in which the Western District of Tennessee held that officers had reasonable suspicion to justify an evidentiary search incident to arrest of a vehicle that was the "common link" between a series of robberies and a murder that had occurred four days before.[184] The court wrote, "The principal element linking the multiple crimes was the older model, green Mercury Villager van. Because the van was the common link to all of the crimes, it was reasonable for the officers to conclude that the van was likely to contain evidence related to the robberies."[185] While *Avery* dealt with a single vehicle implicated in multiple crimes, such logic strongly suggests that *Gant*'s reasonable suspicion threshold is satisfied when a vehicle is used in conjunction with a crime.

3. Officer Safety Searches Incident to Arrest

In addition to evidentiary vehicle searches incident to arrest, *Gant* permits vehicle searches incident to arrest when the arrestee "is unsecured and within reaching distance of the passenger compartment at the time of the search."[186] Regrettably, the question of *how* to determine whether an arrestee is unsecured or within reaching distance of the passenger compartment of his vehicle at the time of the search was not before the Supreme Court. In *Gant*, the arrestee was not only handcuffed, but secured in the back of a police car before officers began to search the arrestee's vehicle.[187] Further, there were a total of five officers at the scene at the time, with three arrestees each handcuffed and secured in separate police cars.[188] Yet we do not know which factors, if any, were determinative in *Gant*, or even whether the Supreme Court would favor a bright-line rule or a totality-of-the-circumstances standard in future cases.

Courts need not limit "secured" arrestees to those who have been handcuffed. Instead, courts may interpret "secured" in a way

[184] No. 07-20040, 2010 WL 419946, at *2, *6 (W.D. Tenn. Jan. 28, 2010). The court further held the search was reasonable under the rationale that the officers had probable cause to search the vehicle independent of the arrest. Id. at *4–5.

[185] Id. at *6 (internal citation omitted).

[186] 129 S. Ct. 1710, 1719 (2009).

[187] Id. at 1715.

[188] Id.

that blunts *Gant*'s effect by defining it as "placed in a police vehicle or locked room." The Eighth Circuit suggested just such a definition in *United States v. Perdoma*, in which two law enforcement officers arrested an individual in a bus terminal, put him in handcuffs, and escorted him to the rear of the terminal before they searched his bag incident to arrest and found 454 grams of methamphetamine.[189] The defendant argued for an extension of *Gant*, claiming that he was "secured" and not within reaching distance of his bag when it was searched.[190] While holding that the defendant had waived his right to challenge the legality of the search of his bag, the Eighth Circuit noted that *Gant* does not hold that "an arrestee who is restrained in some fashion by law enforcement necessarily is secured."[191] The Eighth Circuit opinion in *Perdoma* sets the stage for permitting vehicle searches incident to arrest when the arrestee is handcuffed, so long as the arrestee is not "secured" for purposes of *Gant*. If a handcuffed arrestee is not considered secured for the purposes of *Gant* until he is placed in the backseat of a police car, *Gant*'s officer safety exception becomes far broader than it first appears. District courts have already evidenced the manifold ways an arrest may be defined as "secured" vel non.[192]

While this Note takes the position that law enforcement officers will not risk their safety by intentionally leaving an arrestee unsecured so as to justify a search incident to arrest,[193] it is not uncommon for officers to delay before putting a handcuffed arrestee into a police car. Further, whether or not the arrestee is "secured" in a police car may depend on the size of the police department. As of September 2004, forty-nine percent of all officers in the United

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[189] 621 F.3d. 745, 747–48 (8th Cir. 2010).

[190] Id. at 751.

[191] Id. at 752.

[192] See David S. Chase, Who is Secure?: A Framework for Arizona v. Gant, 78 Fordham L. Rev. 2577, 2603–07 (2010) (discussing the different ways district courts have determined whether an arrestee is "secured").

[193] See *Gant*, 129 S. Ct. at 1724–25 (Scalia, J., concurring) (suggesting officers may manipulate the *Gant* holding by leaving suspects unsecured in order to justify vehicle searches incident to arrest). Justice Scalia may not have considered that law enforcement officers are trained to treat all suspects as dangerous, even those arrested for the most innocuous of crimes. He also overlooks or underestimates the restrictions on officers' willingness to disregard their own safety, which are created and reinforced by formal mechanisms, such as agency policies or procedures, as well as significant informal sanctions that other officers impose on those who fail to mitigate safety risks.

States work for the 385 law enforcement agencies that employ at least 250 full-time sworn officers,[194] and these officers are more likely to have backup with them when they make an arrest. Police officers may not secure a handcuffed arrestee in the back of an available police car when they view him as presenting a minimal threat either because he has been compliant throughout the arrest or because there are enough officers on scene to minimize concerns about resistance, or both. One officer may be handcuffing or interacting with the arrestee at the same time that other officers search the arrestee's vehicle.[195] In short, officers need not manipulate the situation to artificially leave an "unsecured" arrestee within reaching distance of his or her vehicle. Instead, they can maintain pre-*Gant* practices without any restriction in their ability to search a vehicle incident to arrest since *Gant* imposes no requirement that officers must make every effort—or *any* effort—to properly secure an arrestee before conducting a vehicle search incident to arrest.

Gant's restriction of vehicle searches incident to arrest may be more limited than it appears for small law enforcement agencies as well. While having multiple officers at the scene of an arrest is a law enforcement best practice, it is admittedly not feasible for all agencies. Almost one quarter of all police officers work for agencies with fewer than fifty full-time employees, and just over half of all state and local law enforcement agencies have fewer than ten full-time employees.[196] Not only are law enforcement officers working at smaller agencies unlikely to have backup available when they make an arrest, they are also less likely to be equipped to handle multiple arrestees. If the arresting officer physically arrests two or three people, he may not have room to secure them all in his vehicle, and the presence of an unsecured, but handcuffed, ar-

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[194] Brian A. Reaves, U.S. Dep't of Justice, Census of State and Local Law Enforcement Agencies 2004, at 2 tbl.2 (2007), http://bjs.ojp.usdoj.gov/content/pub/pdf/csllea04.pdf.

[195] See, e.g., Guy calls Cops Nazi's.flv [sic], YouTube, http://www.youtube.com/watch?v=8RxH1CnYhd8 (last visited July 8, 2011). From 00:05 to 05:05, an officer searches and interacts with a handcuffed woman while another officer searches her vehicle and a third officer observes. While it is unclear whether the vehicle search was incident to arrest or based on some other justification, this video illustrates a common practice when multiple officers are on scene.

[196] Reaves, supra note 194, at 2 tbl.2.

restee would likely justify a vehicle search incident to arrest after *Gant*.

C. When Will Gant *Matter?*

In light of *Gant*'s limited impact, one inevitably arrives at the question: when will *Gant* actually prohibit vehicle searches incident to arrest? *Gant* will restrict law enforcement officers' ability to conduct vehicle searches incident to arrest for crimes other than drug offenses, possession crimes, and DUI, so long as the arrest is not for a recently committed crime and the vehicle itself did not play some role in the crime beyond being where the arrestee was located during or immediately before his arrest. Even in this context, however, *Gant* will still permit vehicle searches incident to arrest if the arresting officer finds, for example, drugs or drug paraphernalia during a search of the arrestee's person incident to arrest.

Arrests for outstanding warrants may be the most common reason for an officer to physically arrest a vehicle occupant in a situation that does *not* justify a vehicle search incident to arrest after *Gant*.[197] Like a traffic infraction, an arrest pursuant to a writ of mittimus—a capias or a "cash purge warrant" issued when a defendant fails to appear for a hearing or fails to pay monies owed to the court—would not support a vehicle search incident to arrest because there is simply no possibility for evidence of the crime of arrest to exist in the vehicle. However, whether an outstanding arrest warrant for other crimes will justify a vehicle search incident to arrest post-*Gant* is a more complicated issue. Courts may treat an outstanding arrest warrant the same way that they would treat an arrest for the underlying crime *without* a warrant by holding, for example, that an arrest for an outstanding warrant for a drug crime justifies a vehicle search incident to arrest based on the nature of the offense. Alternatively, courts could hold that the warrant process itself severs the connection between the underlying crime and the circumstances of the arrest, effectively precluding a vehicle search incident to arrest unless officers have reasonable suspicion independent of the nature of the offense.

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[197] There are no data available that identify the number of arrests based on warrants compared to warrantless arrests.

Gant will have very little effect in situations where commentators most expected it to apply—common arrests from vehicles—but it may constrain police in the context of arrests for outstanding warrants.

III. LAW ENFORCEMENT PROCEDURES & THE DIVERGENCE BETWEEN PERCEPTION AND PRACTICE

Gant was intended to cut back on the *Belton* precedent and constrain law enforcement officers' ability to conduct vehicle searches incident to arrest. But, as the preceding Part demonstrated, *Gant*'s constraint is illusory largely because of the Court's failure to consider *why* and *how* officers arrest vehicle occupants. The justifications for searches incident to arrest should be more thoroughly grounded in an understanding of the realities of law enforcement practice. For example, officers begin taking precautions to ensure their safety well before putting an arrestee in handcuffs and often even before they initiate the encounter. These precautions should matter to judges and academics, as they are a thus far ignored facet of the totality-of-the-circumstances test under which so much law enforcement behavior is reviewed. If the Fourth Amendment truly calls for the balancing of societal and personal interests, courts determining whether a search is justified by an officer safety rationale should consider the precautionary measures taken by the officer before conducting the search. When considered in this light, the costs of an invasive search may outweigh the marginal benefits. Courts and commentators typically lack information about police practices, however, and so the justifications for searches incident to arrest exist irrespective of, not in light of, law enforcement procedures designed to ensure both that arrestees will be compliant and that officers can effectively respond to noncompliance throughout their encounters. This Part seeks to close the informational gap by describing common law enforcement procedures.

Data about police practices are difficult to come by. In the lone attempt at an "empirical" study of arrest and search procedures to be published in a legal journal, Professor Moskovitz noted with some vexation that law enforcement agencies are often less than forthcoming about what exactly they train their officers to do.[198]

[198] Moskovitz, supra note 18, at 662–63.

This Part draws from information in police procedure texts, training or policy manuals, and articles intended for a law enforcement audience, as well as information and training obtained by the author during almost five years of experience as a patrol officer in a large municipal police department.[199]

A search incident to arrest is only one in a series of distinct steps that are designed to maximize safety by ensuring that an officer establishes and maintains effective control over an arrestee. The remainder of this Part provides more detailed information about the other steps in that series, as well as common law enforcement search procedures, in order to highlight the disparity between how judges and academics perceive arrests and searches and how law enforcement officers conduct them. With a better understanding of what police do and why they do it, courts will be better able to assure their opinions have the intended effect.

A. Descriptive Analysis: Arrests

Arrests are not spontaneous events. An arresting officer is under no obligation to reach for his handcuffs immediately after determining that probable cause exists and an arrest is appropriate. Instead, officers approach physical arrests strategically, choosing where the arrest is to be conducted and, to the extent possible, maximizing the tactical advantages of the situation. For example, officers routinely ask individuals whom they intend to arrest to move to a neutral or officer-controlled area. Thus, they move a suspected shoplifter from the aisles of a department store to a security office, persuade a domestic battery suspect to leave his house and stand in the yard, and ask an apparently impaired driver to step away from his vehicle in a parking lot.[200]

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[199] The Tallahassee Police Department has over 350 sworn officers and patrols an area of approximately 100 square miles. See Chief of Police, City of Tallahassee, http://www.talgov.com/tpd/chief.cfm (last visited May 18, 2011). Only about two percent of local and state law enforcement agencies have 250 or more sworn officers. Reaves, supra note 194, at 2 tbl.2.

[200] The emphasis on tactical safety and establishing control of a scene is pervasive in law enforcement. For example, officers control where they initiate traffic stops by delaying the activation of their emergency lights, seek the least obtrusive possible response to a 911 call by parking down the street from the target address and walking the rest of the distance, and position themselves in a certain way when two officers are speaking with a civilian. A number of police departments prefer officers to delay

After determining that a particular location is appropriate, the officer informs the arrestee that he is under arrest. This serves two purposes. First, without clear disclosure of the fact of arrest, an individual who flees or resists may avoid being charged for his resistance.[201] Second, because informing the arrestee takes a few moments, the officer gains the opportunity to gauge the arrestee's compliance. Police officers monitor the arrestee before and throughout the arrest process for behavior that suggests that physical coercion may become necessary.[202] This permits officers to be maximally responsive to resistance. Officers are taught to remain hyper-vigilant to indications of pending resistance: to a police officer, even the completely compliant individuals who represent the vast majority of arrestees present a threat.[203]

After informing the arrestee that he is under arrest, the officer commands him to face away—so he cannot watch the officer—and

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making an arrest until multiple officers are present. For additional information about officers' tactical considerations, see generally Jonathan Rubenstein, Controlling People, *in* Policing: A View from the Street 255–65 (Peter K. Manning & John Van Maanen eds., 1978).

Although it seems possible for officers to manipulate the location of the arrest to maximize the benefit of a search of the "grabbing area" incident to arrest, this Note takes the position that a well-trained officer will prioritize his or her safety over more general law enforcement interests, including where to search.

[201] This is particularly true in states that limit the criminalization of resistance to situations involving arrests, as opposed to statutory regimes that criminalize the failure to obey lawful orders that need not involve an arrest. Compare N.J. Stat. Ann. § 2C:29-2 (West 2005) (criminalizing preventing or attempting to prevent a law enforcement officer from effecting an arrest), with Fla. Stat. §§ 843.01–02 (2010) (criminalizing resistance, obstruction, and opposition to "the lawful execution of any legal duty" without limiting it to the act of arrest).

[202] See Scott D. Burns, Focus on Officer Safety: Surviving Hostile Encounters, 75-3 FBI Law Enforcement Bulletin 10 (2006), available at http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2006-pdfs/mar06leb.pdf ("Frequently, suspects exhibit body language indicators that can alert officers to pending violent behavior. Some of these can include nervousness, profuse sweating, shaking, muscle rigidity, dryness around the mouth or lips, and rapid speech. Subjects may look around for an escape route, try to place their hands in their pockets, or pay attention to verbal signals from their companions.").

[203] See, e.g., George Demetriou, Be Mindful of the Handcuff "Rip" Tactic by Violent Offenders, PoliceOne.com (May 1, 2009), http://www.policeone.com/police-products/duty-gear/restraints/articles/1816808-Be-mindful-of-the-handcuff-rip-tactic-by-violent-offenders/ ("All suspects, their family members and their friends are dangerous. . . . All suspects are armed until you know positively that they are not.").

place his hands behind his back.[204] The arresting officer keeps his own hands free during this phase of the arrest; that is, the officer does not yet have a pair of handcuffs in hand. If the arrestee complies, the officer moves in from behind the arrestee and "tests the waters" by lightly touching the arrestee on the back or shoulder with one hand.[205] If the arrestee remains compliant, the officer will establish control over the arrestee's hands, for example, by sliding his "testing" hand down the arrestee's arm and grabbing both of the arrestee's thumbs. Only if the arrestee continues to remain compliant will a well-trained officer then use his free hand to remove his handcuffs from a belt pouch or handcuff holster and apply them to the arrestee's wrists. Officers are trained to be particularly wary during the actual application of handcuffs. Not only is an officer's attention drawn momentarily away from the arrestee's behavior to the mechanics required to apply the handcuffs, but the handcuffs themselves are a potential weapon that the arrestee could use against the officer.[206] In the event that an initially compliant arrestee resists at some point, officers are trained to forsake any attempt to wrestle the arrestee into handcuffs. Instead, they

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[204] Variations exist, such as requiring the arrestee to kneel, cross one foot over the other, and place his hands on his head. Regardless of the exact instruction, the principal purpose is to put the arrestee in a disadvantageous physical position.

[205] The rationale for this action is based on gauging the suspect's "fight or flight" response on the understanding that some arrestees will begin to resist only after the officer makes physical contact with them or after handcuffs are partially applied. See, e.g., McCullough v. Quarterman, No. H-06-3974, 2008 WL 5061512, at *7 (S.D. Tex. Nov. 24, 2008) (noting that inmate who was being handcuffed began physically resisting after one handcuff had been applied). By making physical contact with the arrestee before retrieving the handcuffs, the officer is prepared to respond to resistance without having to first secure his handcuffs or put them beyond the reach of the combative arrestee.

[206] There have been many instances of an arrestee's use of handcuffs to attack or threaten the arresting officer. See Parker v. Gerrish, 547 F.3d 1, 5–6 (1st Cir. 2008); United States v. Steptoe, 126 F. App'x 47, 49 (3d Cir. 2005); Cooper v. Rakers, No. 09-556-GPM, 2010 WL 1241530, at *1 (S.D. Ill. Mar. 23, 2010); McCullough, 2008 WL 5061512 at *7; Poole v. Gee, No. 8:07-CV-912-EAJ, 2008 WL 3367548, at *8–*10 (M.D. Fla. Aug. 8, 2008); Owens v. Chrisman, No. 3:07-0021, 2008 WL 217118, at *8 (M.D. Tenn. Jan. 23, 2008); Parker v. City of S. Portland, No. 06-129-P-S, 2007 WL 1468658, at *11 n.50 (D. Me. May 18, 2007); Riddle v. Baber, No. 2:05CV00031, 2005 WL 2605545, at *2 (W.D. Va. Oct. 14, 2005); Birdine v. Gray, 375 F. Supp. 2d 874, 876 n.2 (D. Neb. July 5, 2005).

are instructed to subdue the arrestee to a point where handcuffs can be applied with minimal effort.[207]

Properly applied, handcuffs hold the arrestee's arms behind his back with the backs of the arrestee's hands facing each other.[208] Law enforcement training emphasizes that threats originate from the hands—hands can wield a weapon or be used themselves as weapons.[209] Behind-the-back handcuffing minimizes the arrestee's range of motion, reducing the threat posed by a secured arrestee by limiting his ability to grab or use a weapon or throw a punch.[210]

B. Descriptive Analysis: Searches

A search of the arrestee's person incident to arrest does not have to be conducted immediately after the arrest.[211] If an officer is unable to make the arrest in an ideal location, it is common for him to remove the arrestee from the place of arrest and relocate to an officer-controlled area before conducting a search of the arrestee's person.[212] An officer thoroughly searches arrestees before placing

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[207] Charles Remsberg, The Tactical Edge: Surviving High-Risk Patrol 487 (1986) ("If [a suspect] is still fighting and is not stabilized, you should not be attempting to handcuff him . . . . It's control first, then handcuffing.") (emphasis omitted); Demetriou, supra note 203.

[208] Remsberg, supra note 207, at 498–506 ("Remember: EVERY arrestee should be handcuffed with hands behind him—and stay handcuffed—regardless of how cooperative he appears to be."); Portland Police Bureau, Manual of Policy and Procedure § 870.20 (2009); John Wills, Officer . . . It Hurts, LawOfficer.com (Apr. 30, 2008), http://www.lawofficer.com/article/needs-tags-columns/officerit-hurts ("It is not tactically sound to cuff someone in the front."). Law enforcement agencies typically have policies that allow arrestees to be handcuffed with their hands in front of them only in exceptional circumstances, such as for arrestees with certain medical conditions.

[209] See Lawrence Mower & Brian Hayes, LV Officer at Costco Recorded in 911 Call, Las Vegas Review-Journal, July 14, 2010, at 1A (citing an expert witness for the proposition that "[o]fficers are trained to look for threats, and in particular, a suspect's hands").

[210] Officers may apply additional restraints to arrestees who remain combative after being handcuffed, such as four-point restraints or hobbles that prevent the arrestee from freely moving his arms or legs. See, e.g., Portland Police Bureau, supra note 208, § 870.20 ("Members are authorized to use hobble restraint cords when necessary to subdue or secure a violent or unruly person. Restraint cords should not be used in lieu of handcuffs.").

[211] United States v. Edwards, 415 U.S. 800, 803 (1974).

[212] "Relocate" is used here to mean walking a short distance, such as out of a house into the front yard or from inside of or behind a store to the parking lot. It does not refer to transporting an arrestee in a police vehicle; absent exceptional circumstances,

them in a police vehicle, and additional person-searches are typically conducted by every officer who takes custody of the arrestee. An arrestee who is placed in handcuffs, put in the arresting officer's police car, and then moved to a transport unit and brought to the police department for questioning, before finally being taken to jail or a booking facility, can expect no less than four searches: one at the scene of the arrest, another when the transport officer takes custody, a third when the transport officer turns the arrestee over to the questioning officer, and a fourth when the questioning officer turns him back over to a transport officer.[213]

The nature of a search of the arrestee incident to arrest is such that police *do not know* what they are looking for—the search is intended to locate everything from large weapons to items as small as a handcuff key or single piece of crack cocaine the size of a small raisin and weighing just one-tenth of a gram.[214] By design, therefore, searches incident to arrest are both thorough and invasive. A widely circulated law enforcement text first published in 1980 instructs officers to search a person this way:

> Your search should be systematic, so you cover [the arrestee's] entire body from his head to his toes. A good place to look first is around the suspect's midriff. . . .
>
> After checking the waist area, go to the top of his head and check all areas down to his toes. Work from top to bottom, right to left—and maintain the same search system on *each* suspect. That way you won't forget any area.
>
> No area of the body or item of clothing should be immune from searching. Adversaries have been known to carry guns in the crotch of their pants . . . inside their hats . . . up their

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arrestees are always (or *should* always be) searched before they are placed into a police vehicle and transported.

[213] These policies are intended to reduce the potential that the arrestee will retain possession of weapons or evidence. The consequences of such an oversight were dramatically demonstrated in 2003 by Ricardo Alfonso Cerna, who shot and killed himself in a police interrogation room using a concealed handgun that officers failed to locate when he was arrested and transported to the police department. Lance Pugmire, Deputy Shooting Suspect Kills Himself at Station, L.A. Times, Dec. 20, 2003, at B1. The suicide was captured on video, which is widely available on the internet.

[214] See U.S. Drug Enforcement Admin., Drug Trafficking in the United States, U.S. Dep't of Justice, http://www.justice.gov/dea/concern/drug_trafficking.html (last visited May 18, 2011).

> sleeves . . . on cords around their necks . . . under coats and vests . . . or fastened to their arms or legs by rubber bands or tape. Sometimes, they hide them in slings and bandages. . . . Others have carried guns taped in their arm pits or under their breasts.
>
> A favorite spot for concealing weapons, often overlooked, is inside boots. . . .
>
> Male officers (and female officers, too, for that matter) are often reluctant to search a male suspect's crotch area. . . .
>
> Similarly, male officers may be hesitant about searching female prisoners on the street . . . . In searching a female, first pull out her blouse tail if it's tucked in; sometimes guns or other weapons will fall out. Also consider unsnapping her bra and shaking it by its straps . . . . In checking between and under her breasts, on the insides of her thighs and around her crotch, use the edge of your hand. This can protect you against accusations of improper advances.[215]

Clothing, personal belongings, and containers in the arrestee's possession can also be thoroughly searched—potentially including electronic devices.[216]

Law enforcement officers are trained to secure the occupants of a vehicle before searching the vehicle.[217] If the occupants are arrestees, they may be handcuffed, subjected to a search of their persons, and secured in a police car. If the occupants are not being arrested, officers may ask them to step out of the vehicle and then secure them to the extent possible, which usually involves decreasing their mobility by having them sit on a nearby sidewalk.[218] Ideally, there will be multiple officers on scene—at least one to watch the vehicle occupants while another searches the vehicle.

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[215] Ronald J. Adams et al., Street Survival: Tactics for Armed Encounters 260–63 (1997) (discussing specifically searches for weapons but applicable to all person searches).

[216] See United States v. Finley, 477 F.3d 250, 259–60 (5th Cir. 2007) (cell phone); United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996) (pager).

[217] Remsberg, supra note 207, at 294 (providing the emphatic instruction, "NEVER TRY TO SEARCH AN OCCUPIED VEHICLE").

[218] Id. at 295.

As with a search of the person, a vehicle search incident to arrest is intended to locate weapons and other contraband. In the vehicle context, this involves checking

> the glove box . . . armrests . . . door panels . . . the sides of the seats next to the doors . . . under the seats, including in the springs . . . inside torn upholstery . . . inside heater and air conditioning vents, especially if loose . . . under headrests . . . on the shelf-like lip under the instrument panel . . . in ash trays and litter bags . . . under floor mats . . . behind or in center arm rests . . . behind visors . . . inside the gasoline cap . . . under the spare tire, etc.[219]

Law enforcement training emphasizes two precepts: First, even an apparently innocent item can conceal a weapon or have a concealed compartment that may contain contraband.[220] Second, officers are trained to apply what is known as the "plus one rule," meaning that officers should never assume that they have found all the weapons or contraband on a person or in any given area.[221] Rather, no matter what they have found, officers should always as-

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[219] Id. at 296 (ellipses in original) (discussing these areas primarily as locations where weapons may be hidden but mentioning the frequency with which contraband may be hidden there as well). In other contexts, such as arrests that occur in a house or business, officers can conduct an exhaustive search of the grabbing area. Chimel v. California, 395 U.S. 752, 763 (1969). This may include inside desk drawers, underneath furniture, between couch cushions, behind and inside books, within trashcans, and within nearby closets so long as they are near where the arrest occurred.

[220] See, e.g., Wendy Kierstead, Officer Safety Handbook of Unusual Weapons Along with Concealment Methods for Weapons and/or Contraband (3d ed. 2004) (providing information about and photographs of camouflaged firearms, camouflaged bladed weapons, hidden or concealed compartments or diversion safes, camouflaged explosive devices, and miscellaneous items of interest to police, such as camouflaged handcuff keys and a ring that emits pepper spray). Perhaps the most notorious use of a diversion safe, which protects its contents by disguising itself as an innocent item rather than by being difficult to gain access to, arose in 2007, when football player Michael Vick was detained in Miami International Airport for having a water bottle with a hidden compartment that was originally thought to contain marijuana. See Michael Vick's Water Bottle Raises Suspicion at Miami Airport, USA Today (Jan. 19, 2007), http://www.usatoday.com/sports/football/nfl/falcons/2007-01-18-vick-water-bottle_x.htm).

[221] Robert Stering, Police Officer's Handbook: An Introductory Guide 90 (2005) ("When conducting a search on a person, always consider the 'plus-one rule.' If one weapon is found, you should assume that the suspect has two weapons. If two weapons are found, you should assume that there are three, and so on.").

sume that there is more to find. These two precepts motivate law enforcement officers to handle and examine innocent items in their effort to perform a meticulous search, which may appear far more invasive than what is warranted by the circumstances.

An analysis of police search and arrest procedures makes clear that the traditional focus, which determines the validity of a search by considering the situation as it existed at the time of the search, is incomplete. How police approached the scene, controlled the location, interacted with individuals, and secured the arrestee are all important factors in a proper Fourth Amendment balancing inquiry.

CONCLUSION

Academic literature has taken *Gant*'s purported restriction of vehicle searches incident to arrest for granted. Commentators have focused on the prevalence of alternative justifications for warrantless searches,[222] the effect *Gant* will have on non-vehicle searches incident to arrest,[223] or questions about *Gant*'s implementation.[224] Yet the core assumption—that *Gant* will substantially limit law enforcement officers' ability to search vehicles incident to arrest—is mistaken. *Gant* will not significantly reduce vehicle searches incident to arrest because both the evidence preservation and officer safety justifications are far more permissive than they first appear.

Although *Gant* will prevent vehicle searches incident to arrests for traffic violations, the rarity of such arrests prevents *Gant* from

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[222] See sources cited supra note 15.

[223] See Armacost, supra note 15, at 311–12; Colin Miller, Stranger Than Dictum: Why *Arizona v. Gant* Compels the Conclusion that Suspicionless *Buie* Searches Incident to Lawful Arrests Are Unconstitutional, 62 Baylor L. Rev. 1 (2010); Myron Moskovitz, The James Otis Lecture: The Road to Reason: *Arizona v. Gant* and the Search Incident to Arrest Doctrine, 79 Miss. L.J. 181, 199–201 (2009); Singh, supra note 95, at 1776–93.

[224] For example, commentators have asked whether the good faith doctrine applies to evidence seized in violation of *Gant*. See, e.g., Zachary C. Larsen, A Narrow Extension of "Good Faith" to Police Reliance on Settled Case Law: The Crossroads of *Gant* and *Herring*, 27 T.M. Cooley L. Rev. 249, 253–58 (2010); see also Petition for Writ of Certiorari at 17–18, United States v. Gonzalez, 131 S. Ct. 3055 (2011) (No. 10-82), 2010 WL 2786992 (describing a split on this question between the Ninth Circuit on one hand and the Fifth, Tenth, and Eleventh Circuits and the Utah Supreme Court on the other).

doing much work in this context. Vehicle occupants are most commonly arrested for drug offenses, possession crimes, and DUI--crimes for which the mere fact of arrest serves to justify a vehicle search incident to arrest under *Gant*'s evidentiary rationale. And even when the arrest does not give officers reasonable suspicion that evidence of the crime of arrest is located in the vehicle, factual circumstances common to many arrests will often provide such reasonable suspicion, particularly with arrests for recently committed crimes and those in which the vehicle played some role. Finally, in cases where neither the nature of the offense nor the factual circumstances surrounding the arrest provides reasonable suspicion, *Gant*'s effect is blunted by law enforcement's continued ability to conduct a search of the arrestee's person and the possibility of discovering drugs, paraphernalia, or other contraband, an arrest for any of which would then justify a vehicle search incident to arrest.

Like the evidentiary holding, the officer safety holding in *Gant* is far more permissive than it first appears. Officers at larger police departments, which have enough personnel to have multiple officers at the scene of an arrest, may be able to search the arrestee's vehicle while the arrestee is handcuffed but not secured in the back of a police car. Officers at smaller departments, who typically make arrests without backup, may be able to conduct vehicle searches incident to arrest when there are more arrestees than can be put in a single police car.

Whether a vehicle search incident to arrest is reasonable depends in part on the environment in which it occurs, but courts and commentators lack detailed information about that environment. That lacuna leads to holdings that are predicated on speculation, such as the Supreme Court's establishment of an irrebuttable presumption that the passenger compartment of a vehicle is *always* within an arrestee's grabbing range.[225] By providing a more detailed description of the process by which officers create the environment in which they make arrests and conduct searches, this Note seeks to promote academic and judicial consideration of factors critical to both precisely defining those two events—ubiquitous in the context of law enforcement—and to assuring that changes to policy and governing law have the desired effect. Using *Gant* and the

[225] New York v. Belton, 453 U.S. 454, 459–60 (1981).

search incident to arrest doctrine as an example, this Note suggests that the traditional determination of what constitutes a reasonable search is incomplete: to properly balance Fourth Amendment privacy interests against the essential need for officer safety, judges and academics must realign their perspectives on police to take modern police procedures into account.

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