

clarify that the fact that a strip search can have severe psychological impact on a student “does not, of course, outlaw it.”⁸⁹ Any effect that empathy had in gathering eight votes to find a violation of the Fourth Amendment must have happened entirely behind the scenes.⁹⁰ In the final calculation, deliberations of this kind are not only consonant with the Fourth Amendment; in cases like *Safford*, they are all but necessary.⁹¹ Indeed, if judges did not permit themselves to understand another’s perspective, the Fourth Amendment would preserve not society’s reasonable expectations of privacy, but rather the federal judiciary’s.⁹² Just as students do not “shed their constitutional rights . . . at the schoolhouse gate,”⁹³ the Court has long recognized that judges do not doff their humanity when they don their robes.⁹⁴ In this sense, the Court’s opinion in *Safford* may be a model of well-considered empathy in the law.

3. *Fourth Amendment — Search Incident to Arrest.* — The Supreme Court’s 1981 decision in *New York v. Belton*¹ was read for decades to allow police to conduct warrantless searches of cars after arresting the recent occupants, even when the occupants were already handcuffed and secured.² Last Term, in *Arizona v. Gant*,³ the Supreme Court responded to persistent criticism of *Belton*⁴ by holding that police may search a vehicle incident to arrest “only if the arrestee

⁸⁹ *Id.* at 2642. Indeed, its treatment of the circumstances of Savana’s search was significantly more detached and matter-of-fact than that of the en banc court of appeals that it affirmed.

⁹⁰ See Posting of Dan Filler, *supra* note 83; see also Bazelon, *supra* note 85, at 22 (“It matters for women to be there at the conference table to be doing everything that the court does. . . . If you want to influence people, you want them to accept your suggestions, . . . [i]t will be welcomed much more if you have a gentle touch” (quoting Justice Ginsburg) (internal quotation marks omitted)).

⁹¹ When confronting the Fourth Amendment, empathy is the mechanism by which a judge takes the role of the parties before him or her and determines whether the claimant’s stated expectation of privacy was reasonable. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

⁹² The two are very probably distinct. See Dan M. Kahan et al., *Whose Eyes Are You Going To Believe?* Scott v. Harris and the Perils of Cognitive Illiberalism, 122 HARV. L. REV. 837, 883 & n.113 (2009).

⁹³ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

⁹⁴ See, e.g., *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263 (2009) (“In defining [standards for judicial recusal,] the Court has asked whether, ‘under a realistic appraisal of psychological tendencies and human weakness . . . the practice must be forbidden’” (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975))).

¹ 453 U.S. 454 (1981).

² See *Thornton v. United States*, 541 U.S. 615, 628 (2004) (Scalia, J., concurring in the judgment) (collecting cases).

³ 129 S. Ct. 1710 (2009).

⁴ *Id.* at 1716; see, e.g., *United States v. Weaver*, 433 F.3d 1104, 1107 (9th Cir. 2006); Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 WIS. L. REV. 657, 672–81; Carson Emmons, Comment and Note, *Arizona v. Gant: An Argument for Tossing Belton and All Its Bastard Kin*, 36 ARIZ. ST. L.J. 1067 (2004); *The Supreme Court, 2003 Term—Leading Cases*, 118 HARV. L. REV. 248, 268–76 (2004).

is within reaching distance of the passenger compartment [of the vehicle] or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”⁵ As the majority hinted, *Gant* may diminish the incentives for pretextual traffic stops.⁶ But the Court’s claim that the decision re-anchors the doctrine to the goals of protecting officer safety and evidence articulated in *Chimel v. California*⁷ is unconvincing. *Chimel* itself is only tenuously linked to these goals, since the case permits searching even when officers could preserve their safety by simply moving arrestees to areas where they cannot reach weapons or evidence.⁸ And to garner a majority in *Gant*, the Court allowed searches upon a reasonable belief that the vehicle contains evidence of the offense of arrest, which adds an unjustified exception to the Fourth Amendment’s requirement of a warrant. Instead, the Court should have been more aggressive in narrowing the right of the police to search and denied law enforcement the right to rummage through rooms or vehicles merely because of where the arrest happens to occur.

On August 25, 1999, police knocked on the door of a Tucson home after receiving a tip that the residence was being used to sell drugs.⁹ Rodney Gant answered the door and told the officers that the home’s owner was not there.¹⁰ After leaving the residence, the officers determined that there was an outstanding warrant for Gant’s arrest for driving with a suspended license and that his license was still inactive.¹¹ They returned to the home that evening and had arrested two people there when Gant pulled into the driveway.¹² Gant left his car and approached one of the officers, who immediately handcuffed him and placed him under arrest for driving without a license.¹³ After police placed Gant in the back of a patrol car, two officers searched his car, finding a gun and a bag of cocaine.¹⁴ Charged with possession of a narcotic drug for sale and possession of drug paraphernalia (the plastic bag), Gant moved to suppress the evidence seized during the warrantless search.¹⁵ The trial court found that the police lacked probable

⁵ *Gant*, 129 S. Ct. at 1723.

⁶ *See id.* at 1722–23.

⁷ 395 U.S. 752 (1969); *see Gant*, 129 S. Ct. at 1719.

⁸ *See Chimel*, 395 U.S. at 762–63.

⁹ *Gant*, 129 S. Ct. at 1714.

¹⁰ *Id.* at 1714–15.

¹¹ *Id.* at 1715.

¹² *Id.* The other two arrestees had been handcuffed and placed in separate police cars before Gant’s arrival. *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* Asked at the suppression hearing why the search was conducted, the arresting officer responded: “Because the law says we can do it.” *Id.* (quoting Joint Appendix at 75, *Gant*, 129 S. Ct. 1710 (2009) (No. 07-542), 2008 WL 2066109).

cause, but rejected the motion to suppress, holding that the search was permissible incident to arrest.¹⁶ Gant was convicted of both counts.¹⁷

Gant's "protracted"¹⁸ appellate history began when the Arizona Court of Appeals initially determined that *Belton*, which permitted police to search the passenger compartment of a vehicle incident to arrest,¹⁹ was inapplicable to arrestees like Gant who had exited the vehicle before contact with police.²⁰ After the Arizona Supreme Court denied review,²¹ the U.S. Supreme Court granted the State of Arizona's petition for certiorari.²² Before arguments, the Arizona Supreme Court ruled in *State v. Dean*²³ that *Belton* applies to a defendant who has just exited a vehicle.²⁴ The U.S. Supreme Court vacated the appeals court's judgment and remanded Gant's case for reconsideration in light of *Dean*.²⁵ The court of appeals remanded the case to the superior court for further factual findings.²⁶

The superior court again found the search permissible,²⁷ and the appellate court again reversed.²⁸ The appellate court declined to interpret *Belton* to permit officers to search a vehicle simply because they had arrested a recent occupant.²⁹ Noting that there was no evidence suggesting that the arrestees might have accessed Gant's car,³⁰ the court suppressed the evidence found therein.³¹ In dissent, Judge Espinosa argued that *Belton* created a bright-line rule permitting searches "when the defendant is arrested in close proximity to the vehicle immediately after the defendant exits the automobile."³²

The Arizona Supreme Court affirmed.³³ The majority held that *Belton* established only that the entire passenger compartment and any containers therein should be considered to be within reach of a recent occupant, and argued that *Belton* did not address whether police could

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *New York v. Belton*, 453 U.S. 454, 460 (1981).

²⁰ *State v. Gant*, 43 P.3d 188, 191–93 (Ariz. Ct. App. 2002).

²¹ *State v. Gant*, 143 P.3d 379, 380 (Ariz. Ct. App. 2006).

²² *Arizona v. Gant*, 538 U.S. 976 (2003).

²³ 76 P.3d 429 (Ariz. 2003) (en banc).

²⁴ *Id.* at 437. The U.S. Supreme Court later agreed with this reading. See *Thornton v. United States*, 541 U.S. 615 (2004).

²⁵ *Arizona v. Gant*, 540 U.S. 963 (2003).

²⁶ *Gant*, 143 P.3d at 381.

²⁷ See *id.*

²⁸ *Id.* at 386.

²⁹ *Id.* at 384.

³⁰ *Id.* at 382.

³¹ *Id.* at 386.

³² *Id.* (Espinosa, J., dissenting) (citing *State v. Dean*, 76 P.3d 429, 434 (Ariz. 2003) (en banc); *Glasco v. Commonwealth*, 513 S.E.2d 137, 141–42 (Va. 1999)).

³³ *State v. Gant*, 162 P.3d 640 (Ariz. 2007).

search after the arrestee was secure.³⁴ The court then looked at *Chimel*, which permitted searches of the arrestee and “the area into which an arrestee might reach” as necessary to protect officers and preserve evidence.³⁵ Neither justification, the court found, was applicable in this case.³⁶ Writing in dissent, Justice Bales acknowledged that “there may be good reasons to reconsider *Belton*,” but argued that any reevaluation should be performed by the U.S. Supreme Court.³⁷

The Supreme Court affirmed.³⁸ Writing for the Court, Justice Stevens³⁹ emphasized the narrowness of exceptions to the warrant requirement.⁴⁰ He tied the Court’s interpretation of *Belton* closely to *Chimel*, asserting that *Chimel* “continues to define the boundaries of the exception.”⁴¹ Though *Belton* allowed a search after all occupants were distant from the vehicle, the Court distinguished that case,⁴² noting that *Belton* involved a lone officer and four unhandcuffed arrestees⁴³ and pointing out that the United States had argued in that case that the search was permissible because the situation was not “so stabilized that it could be said that the arrest was completed.”⁴⁴

Justice Stevens acknowledged that *Belton* “has been widely understood to allow a vehicle search . . . even if there is no possibility the arrestee could gain access to the vehicle.”⁴⁵ Such a reading, Justice Stevens suggested, would “untether the rule from the justifications underlying the *Chimel* exception.”⁴⁶ Instead, the majority held that police are authorized “to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”⁴⁷ Incorporating an exception advanced by Justice Scalia, the majority also held that a warrantless search is constitutional when it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”⁴⁸ Because police could not expect to find evidence in

³⁴ *Id.* at 642–43.

³⁵ *Chimel v. California*, 395 U.S. 752, 763 (1969).

³⁶ *Gant*, 162 P.3d at 643.

³⁷ *Id.* at 646 (Bales, J., dissenting).

³⁸ *Gant*, 129 S. Ct. at 1724.

³⁹ Justice Stevens was joined by Justices Scalia, Souter, Thomas, and Ginsburg.

⁴⁰ *See Gant*, 129 S. Ct. at 1724.

⁴¹ *Id.*

⁴² *Id.* at 1716–19.

⁴³ *Id.* at 1719.

⁴⁴ *Id.* at 1717 (citing Brief for United States as Amicus Curiae at 14, *New York v. Belton*, 453 U.S. 454 (1981) (No. 80-328), 1981 WL 390388).

⁴⁵ *Id.* at 1718.

⁴⁶ *Id.* at 1719.

⁴⁷ *Id.*

⁴⁸ *Id.* (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in the judgment)) (internal quotation marks omitted).

the car that Gant had been driving with a suspended license, this exception did not render the search reasonable.⁴⁹

The majority then addressed counterarguments from both the State of Arizona and the dissenting Justices. Arizona's advocacy of a bright-line rule permitting searches incident to arrest, Justice Stevens wrote, underestimated the individual's privacy interest and, considering the disarray among the courts that read *Belton* expansively, overestimated the clarity such an approach would provide.⁵⁰ Even with a narrow reading of *Belton*, the Court contended, other case law gives police adequate tools to protect their safety.⁵¹ Rejecting the dissent's reliance on *stare decisis*, the Court contended that "[w]e have never relied on *stare decisis* to justify the continuance of an unconstitutional police practice" and that the doctrine is especially inapplicable because the *Gant* fact pattern is easily distinguishable from *Thornton v. United States*⁵² and *Belton*.⁵³ But even as the Court defended its decision as consistent with *Belton*, it also acknowledged that "[w]e now know that articles inside the passenger compartment are rarely 'within the area into which an arrestee might reach,'"⁵⁴ and called the assumptions in *Belton* "faulty."⁵⁵

Writing in concurrence, Justice Scalia disputed the majority's reading of *Belton*, but agreed that "an officer-safety rationale cannot justify all vehicle searches incident to arrest."⁵⁶ However, Justice Scalia advocated a broader rethinking of vehicular searches incident to arrest, arguing that "application of *Chimel* in this context should be entirely abandoned."⁵⁷ He noted that, instead of searching, police generally can — and do — assure their safety by moving arrestees away from their vehicles and securing them.⁵⁸ The only time warrantless vehicle searches should be allowed incident to arrest, Justice Scalia argued, is 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

⁴⁹ *Id.*

⁵⁰ *Id.* at 1720–21.

⁵¹ *Id.* at 1721 ("For instance, *Michigan v. Long* permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is 'dangerous' and might access the vehicle to 'gain immediate control of weapons.'" (citation omitted) (quoting *Michigan v. Long*, 463 U.S. 1032, 1049 (1983))).

⁵² 541 U.S. 615 (2004).

⁵³ *Gant*, 129 S. Ct. at 1722.

⁵⁴ *Id.* at 1723 (quoting *New York v. Belton*, 453 U.S. 454, 460 (1981)).

⁵⁵ *Id.*

⁵⁶ *Id.* at 1724 (Scalia, J., concurring).

⁵⁷ *Id.* at 1725.

⁵⁸ *Id.* at 1724. Justice Scalia ostensibly made this observation only to justify overruling *Belton* and *Thornton*, though its logic seems to inform his later criticism of *Chimel*.

cause to believe occurred.”⁵⁹ Finding it “unacceptable for the Court to come forth with a 4-to-1-to-4 opinion that leaves the governing rule uncertain,” Justice Scalia reluctantly joined the majority.⁶⁰

In a short dissent, Justice Breyer conceded that he would craft a different rule were the case before the Court for the first time.⁶¹ But he disagreed with the majority’s reading of *Belton*⁶² and, noting the large number of courts that had relied on the case, argued that the burden for overturning precedent was not met.⁶³

In dissent, Justice Alito⁶⁴ asserted that, despite the majority’s claims otherwise, “there can be no doubt” that *Gant* overturned *Belton* and *Thornton*, which applied *Belton* to recent occupants of vehicles.⁶⁵ The dissent’s most extensive criticism of the majority was that the Court reexamined *Belton* without scrutinizing *Chimel*.⁶⁶ While “*Chimel* did not say whether ‘the area from within which [an arrestee] might gain possession of a weapon or destructible evidence’ is to be measured at the time of the arrest or at the time of the search,”⁶⁷ the dissent concluded that the *Chimel* Court must have meant for the area to be measured at the time of arrest.⁶⁸ The dissent further criticized the majority for limiting its analysis to vehicular searches.⁶⁹ Finding no “special justification” for overcoming stare decisis, Justice Alito argued that there had been substantial reliance on *Belton* by law enforcement,⁷⁰ and predicted that the rule advanced by the *Gant* majority would only damage clarity by “reintroduc[ing] the same sort of case-by-case, fact-specific decisionmaking that the *Belton* rule was adopted to avoid.”⁷¹ Justice Alito also criticized Justice Scalia’s contribution to *Gant*, questioning why police may search with “reason to believe” that the car contains evidence of the crime of arrest, rather than probable cause, and wondering why the standard should be different when the officer suspects the car contains evidence of the crime

⁵⁹ *Id.* at 1725. Justice Scalia first proposed this exception in *Thornton*. See *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in the judgment).

⁶⁰ *Gant*, 129 S. Ct. at 1725 (Scalia, J., concurring).

⁶¹ *Id.* at 1725–26 (Breyer, J., dissenting).

⁶² *Id.* at 1725.

⁶³ *Id.* at 1726.

⁶⁴ Justice Alito was joined by Chief Justice Roberts, Justice Kennedy, and (with the exception of one part of the opinion) Justice Breyer.

⁶⁵ *Gant*, 129 S. Ct. at 1726 (Alito, J., dissenting). He also pointedly noted that the narrower reading of *Belton* garnered a majority only because of a tactical vote by Justice Scalia. *Id.*

⁶⁶ *Id.* at 1731.

⁶⁷ *Id.* at 1730 (alteration in original) (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)).

⁶⁸ *Id.*

⁶⁹ *Id.* at 1731.

⁷⁰ *Id.* at 1728 (internal quotation marks omitted).

⁷¹ *Id.* at 1729.

of arrest and when she suspects it contains evidence of another crime.⁷²

The death of the rule allowing searches incident to arrest even when the arrestee is secured — whether the rule was created by *Belton* itself or renegade lower courts — is unlikely to result in many mourners in academia or on the bench. Even the dissenting Arizona Supreme Court justices did not mask their distaste for *Belton*,⁷³ and the U.S. Supreme Court dissenters in *Gant* spent far less ink arguing that *Belton* was right than they spent arguing that it was not wrong enough to overturn. *Belton* was widely criticized for rewarding officers for conducting pretextual traffic stops, including those motivated by race.⁷⁴ Though the Court only hinted that it shared these concerns,⁷⁵ limiting the ability of officers to use minor traffic violations as a substitute for probable cause is a positive development. Still, those cheering *Gant* should take pause. Exceptions to the Fourth Amendment's warrant requirement are supposed to be "jealously and carefully drawn," and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative."⁷⁶ Neither *Gant* holding meets that standard. In narrowing *Belton*, the Court relied uncritically on *Chimel*,⁷⁷ without recognizing that it — like the broad reading of *Belton* — is "untether[ed]"⁷⁸ to the justifications of preserving evidence and protecting officer safety. And to garner a majority, the Justices accommodated Justice Scalia's

⁷² *Id.* at 1731. Justice Alito subsequently expressed concerns about the "host" of uncertainties created by *Gant* in *Montejo v. Louisiana*, 129 S. Ct. 2079, 2092–93 (2009) (Alito, J., concurring); *Meggison v. United States*, 129 S. Ct. 1982, 1982 (2009) (Alito, J., dissenting from denial of certiorari); and *Grooms v. United States*, 129 S. Ct. 1981, 1981 (2009) (Alito, J., dissenting from denial of certiorari).

⁷³ *State v. Gant*, 162 P.3d 640, 649–50 (Ariz. 2007) (Bales, J., dissenting).

⁷⁴ See, e.g., Brief for Amicus Curiae Nat'l Ass'n of Criminal Def. Lawyers in Support of Respondent at 9–10, *Gant*, 129 S. Ct. 1710 (2009) (No. 07-542), 2008 WL 3911137; 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 7.1(c), at 527 (4th ed. 2004) ("[T]he *Belton* case creates [the risk] that police will make custodial arrests which they otherwise would not make as a cover for a search which the Fourth Amendment otherwise prohibits."); Peter J. Wasson, *Troopers on Mission To Stop Drugs*, WAUSAU DAILY HERALD, June 24, 2000, at 1A (reporting on the Wisconsin State Patrol's policy of frequent car stops and quoting a state trooper saying that "[w]e're looking for any and all violations A bad headlight might turn into an arrest of a drunk driver, a drug dealer or a drug user." (internal quotation marks omitted)).

⁷⁵ The majority's statement that "[c]ountless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to the security of their private effects violated as a result [of *Belton*]" may be a subtle acknowledgement of the risk of pretextual searches. *Gant*, 129 S. Ct. at 1722–23.

⁷⁶ *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (alteration in original) (footnote omitted) (quoting *Jones v. United States*, 357 U.S. 493, 499 (1958); *McDonald v. United States*, 335 U.S. 451, 456 (1948)).

⁷⁷ See *Gant*, 129 S. Ct. at 1714.

⁷⁸ *Id.* at 1719.

exception to the warrant requirement, even while admitting the holding could not be defended using *Chimel*'s rationales.⁷⁹

In *Chimel*, the Court permitted a search of the areas into which the arrestee might reach, reasoning that “[a] gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested.”⁸⁰ This reasoning has superficial appeal, but puzzlingly treats the police officer as powerless to manipulate or control the area within an arrestee’s reach.⁸¹ Of course, that is rarely the case. Police can exercise control over when an arrestee is handcuffed, when he is taken to a patrol car, where he is located during any intervening time, and accordingly, the area he might reach during the course of the arrest. As Justice Scalia recognized, these procedures give officers “a less intrusive and more effective means of ensuring their safety — and a means that is virtually always employed.”⁸² A sample of police procedures found “[n]ot one regulation, training bulletin, or other piece of information [that] indicated that officers were directed or advised to do, as a general practice, what the Court in *Chimel* assumed they would: allow the arrestee to stand unrestrained where he was when arrested while the officers conduct a search of the area around him.”⁸³ A representative example from the National Parks Service instructs officers that:

An officer making an arrest while in a duty status shall: (A) Identify himself/herself as a police officer in a clear and understandable voice . . . (B) Advise the person that he/she is being arrested. The arrestee shall also be advised of the reason for the arrest as soon as possible. (C) Handcuff the arrestee (D) Search the arrestee and the immediate area (within legal constraints) for evidence, weapons, or contraband.⁸⁴

Police procedures regarding vehicular arrests similarly urge officers to secure the arrestee before searching.⁸⁵ Common sense suggests do-

⁷⁹ *Id.*

⁸⁰ *Chimel v. California*, 395 U.S. 752, 763 (1969).

⁸¹ This line of thinking continued in *Gant*, in which descriptions of police action have a noticeably passive quality. *Gant* permits searches “when an arrestee is within reaching distance,” *Gant*, 129 S. Ct. at 1721, as if that distance were up to the sole discretion of the arrestee. The Court noted that all of the arrestees in *Gant*, “*had been* handcuffed and secured,” *id.* at 1715 (emphasis added), with no acknowledgment that the officers themselves had performed the handcuffing and securing.

⁸² *Id.* at 1724 (Scalia, J., concurring).

⁸³ Moskowitz, *supra* note 4, at 667. The dissenters in *Gant* acknowledged this fact, citing Moskowitz’s article for the proposition that handcuffing suspects prior to searches incident to arrest is “the prevailing practice.” *Gant*, 129 S. Ct. at 1730 (Alito, J., dissenting).

⁸⁴ Moskowitz, *supra* note 4, at 665 (first omission in original) (internal quotation marks omitted). More bluntly, the Illinois State Police Academy commands cadets to “[a]lways handcuff prior to searching.” *Id.* at 666 (internal quotation marks omitted).

⁸⁵ *Id.* at 675 (“With backup on the scene, remove all occupants from the vehicle before you put any part of your body into the car. (1) To conduct a proper search, you will have to put yourself in awkward positions. (2) Your sidearm may be exposed and your attention will be focused on the

ing otherwise would take one's attention away from the arrestee, the very person whose dangerousness is supposed to justify the search. Indeed, under *Gant*, police may leave seemingly unthreatening arrestees in their cars, while paradoxically using the claim that the arrestee might be dangerous to justify a search.⁸⁶

Justice Scalia acknowledged *Chimel*'s weak connection to its purported rationales, but only urged the Court to "abandon the *Belton-Thornton* charade . . . and overrule those cases."⁸⁷ But if *Chimel* should be "entirely abandoned"⁸⁸ in the vehicle context, then it is all the more imperative that it be discarded in the home context, because — as the Supreme Court reaffirmed in *Gant* — "a motorist's privacy interest in his vehicle is less substantial than in his home."⁸⁹ That is not to say all searches incident to arrest should be impermissible. When first articulated by the Court in dicta in *Weeks v. United States*,⁹⁰ the doctrine allowed law enforcement "to search the person of the accused when legally arrested."⁹¹ A blanket rule permitting a search of the arrestee's person remains closely linked to the goals articulated in *Chimel*. Arrested suspects are frequently found with hidden weapons or evidence to which, even when handcuffed, they might have access.⁹² Other than a search of the arrestee, officers have few tools for protecting themselves.⁹³ Indeed, a more expansive search occasionally may be justified, such as when the arrestee is disabled or injured and cannot be safely moved away from areas from which he might retrieve a weapon.⁹⁴ But those exceptions cannot justify a blanket rule permitting searches of the cars and residences of arrestees, simply because police happened to arrest them there.

search of the vehicle. (3) Your defensive movements may be limited." (quoting the North Carolina Department of Crime Control and Public Safety) (internal quotation marks omitted)).

⁸⁶ Justice Scalia pointed out this bizarre consequence of *Gant* in his concurrence. *Gant*, 129 S. Ct. at 1724–25 (Scalia, J., concurring); see also *United States v. Erwin*, 507 F.2d 937, 939 (5th Cir. 1975) ("They cannot allow the arrestee freedom of movement, and then later use that freedom to justify an exploratory search of the dwelling.").

⁸⁷ *Gant*, 129 S. Ct. at 1725 (Scalia, J., concurring).

⁸⁸ *Id.*

⁸⁹ *Id.* at 1720 (majority opinion) (citing *New York v. Class*, 475 U.S. 106, 112–13 (1986)); see also *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring) ("[I]t is beyond dispute that the home is entitled to special protection as the center of the private lives of our people."); *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976).

⁹⁰ 232 U.S. 383 (1914).

⁹¹ *Id.* at 392.

⁹² See, e.g., *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2530 (2009) (arrestees in police cruiser used ride to station to hide drugs in car); *Police Blotter*, PALM BEACH POST, Dec. 20, 2006, at 8 (arrestee found with knife hidden in clothing).

⁹³ See *United States v. Robinson*, 414 U.S. 218, 234–35 (1973) (noting the danger of "the extended exposure which follows the taking of a suspect into custody and transporting him to the police station").

⁹⁴ See Moskowitz, *supra* note 4, at 680.

Gant's second holding — allowing searches when there is reason to believe that the car contains evidence of the offense of arrest — is even more troubling. The Court acknowledged that the holding cannot be defended as necessary to protect officers or evidence,⁹⁵ but offered little explanation for why the rule is justified, merely asserting that “circumstances unique to the vehicle context” make the search permissible, without explaining what those circumstances are.⁹⁶ Justice Scalia's only proffered justifications were that the rule preserves the outcomes of *Belton* and *Thornton*⁹⁷ and ties the search to the reason for the arrest.⁹⁸ It is hard to argue that the rule here is “carefully drawn” or “imperative” when the explanation for it is so scant.⁹⁹

Moreover, neither Justice Scalia nor the majority defined what “reason to believe” means, though evidence suggests the “reason” may be disconcertingly flimsy. The standard is presumably less stringent than probable cause¹⁰⁰ because warrantless searches of vehicles upon probable cause were already generally permissible.¹⁰¹ The majority suggested that it is the *type* of offense that makes a search reasonable, finding that driving with a suspended license was “an offense for which police could not expect to find evidence in the passenger compartment.”¹⁰² Justice Scalia's concurrence in *Thornton* reinforces this reading, citing police stops for failing to wear a seatbelt and speeding as those in which a search would be impermissible.¹⁰³ In general, however, Justice Scalia suggested a very low bar for searches when he posited in *Thornton* that “it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.”¹⁰⁴ At best, this presumption seems very weak.¹⁰⁵ Many arrests are made long after the crime, when evidence is no more likely to

⁹⁵ *Gant*, 129 S. Ct. at 1719.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1725 (Scalia, J., concurring). This rationale is particularly unpersuasive given that Justice Scalia expressed no concern about *Gant* effectively overruling a large number of lower court decisions.

⁹⁸ *Id.*

⁹⁹ *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). The dissent correctly characterized the majority's adoption of the rule as “uncritical[.]” *Gant*, 129 S. Ct. at 1731 (Alito, J., dissenting).

¹⁰⁰ See *Chambers v. Maroney*, 399 U.S. 42, 51 (1970) (“[T]he Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution.”).

¹⁰¹ See *Gant*, 129 S. Ct. at 1721 (citing *United States v. Ross*, 456 U.S. 798, 820–21 (1982)).

¹⁰² *Id.* at 1719.

¹⁰³ *Thornton v. United States*, 551 U.S. 615, 632 (2004) (Scalia, J., concurring in the judgment) (citing *Atwater v. Lago Vista*, 532 U.S. 318, 323–24 (2001); *Knowles v. Iowa*, 525 U.S. 113, 118 (1998)).

¹⁰⁴ *Id.* at 630. Justice Scalia argued that this approach is consistent with cases that had fallen into disfavor after *Chimel*. *Id.* at 629–31.

¹⁰⁵ Even if one were to find this claim compelling, Justice Scalia again failed to explain why his reasoning would not apply to home searches.

be found where the suspect happens to be arrested than anywhere else the suspect has been in the intervening time.¹⁰⁶

It is possible that Justice Scalia meant his contribution to *Gant* to be more modest or that the other Justices in the majority would have restrained its application. But the majority failed to articulate limits on the new exception to the warrant requirement, permitting the kind of “slight deviation[] from legal modes of procedure” that the Court has previously warned can allow unconstitutional practices to get a “first footing.”¹⁰⁷ And like *Gant*’s first holding, its second curiously gives police broader rights to search merely because of where the arrest occurred. The search is, in effect, a spoil of the arrest.

The *Gant* majority’s aim of bringing the law regarding warrantless searches incident to arrest back to the justifications of preserving officer safety and evidence was a commendable one, and the evidence seized from *Gant*’s car was rightly suppressed. But *Gant* is only a half-step forward, eliminating one legal fiction but reaffirming *Chimel*, a decision that itself lacks any realistic link to the pragmatic necessities of policing. And for a decision that begins by suggesting that exceptions to the Fourth Amendment’s warrant requirement must be “specifically established and well-delineated,”¹⁰⁸ *Gant* is surprisingly cavalier about defining the scope of its second exception or explaining why such searches are more than merely convenient.¹⁰⁹ Truly requiring that exceptions to the warrant requirement be justified by necessity will take more boldness.

4. *Sixth Amendment — Right to Counsel — Interrogation Without Counsel Present.* — In *Edwards v. Arizona*,¹ the Supreme Court held that once an individual in custody asserts the Fifth Amendment right to counsel, no subsequent waiver of that right is valid in a police-initiated interrogation.² In *Michigan v. Jackson*,³ the Court extended this presumption to the Sixth Amendment right to counsel. Thus, under *Jackson*, once an indicted defendant asserts the right to counsel, any subsequent waiver of that right is invalid in a police-initiated in-

¹⁰⁶ Such a presumption seems even weaker than the “reasonable suspicion” standard justifying *Terry* stops. *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (“[A]n officer’s reliance on a mere ‘hunch’ is insufficient to justify a stop.” (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968))).

¹⁰⁷ *Coolidge v. New Hampshire*, 403 U.S. 443, 454 (1971) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

¹⁰⁸ *Gant*, 129 S. Ct. at 1716 (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

¹⁰⁹ *Id.* at 1723 (“[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.” (alteration in original) (quoting *Mincey v. Arizona*, 437 U.S. 385, 393 (1978))) (internal quotation marks omitted).

¹ 451 U.S. 477 (1981).

² *Id.* at 484–85.

³ 475 U.S. 625 (1986).