

# DEFINING GANT'S REACH: THE SEARCH INCIDENT TO ARREST DOCTRINE AFTER ARIZONA V. GANT

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*In the wake of the Supreme Court's 2009 decision in Arizona v. Gant, lower courts continue to debate whether Gant represents an overhaul of the search incident to arrest doctrine or is instead a minor tweak. This Note argues that the answer lies somewhere in the middle. It proposes that courts conduct a more searching inquiry into whether an arrestee has a reasonable possibility of access to the area searched at the time of the search, rather than apply the more lenient standard that some courts have adopted. This middle ground is more faithful to the policy considerations underpinning the search incident to arrest doctrine, while additionally providing the proper balance between officer safety and defendants' rights.*

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## INTRODUCTION

In 2009, the Supreme Court addressed the search incident to arrest doctrine in *Arizona v. Gant*,<sup>1</sup> in what many viewed as a win for the civil liberties bar.<sup>2</sup> Many scholars and courts have long criticized this doctrine, arguing that it converts searches into police entitlements<sup>3</sup> rather than a narrow exception to the warrant requirement.<sup>4</sup> Scholars hoped that the Court's ruling would rein in the search incident to arrest doctrine, preventing officers from conducting pretextual searches in the automobile context.<sup>5</sup>

The *Gant* decision contained two holdings. The first holding relied on the standard announced in *Chimel v. California*—that searches of the area of immediate control incident to arrest (sometimes referred to as *Chimel* searches) exist to preserve evidence and ensure officer safety—to find that a search of the arrestee's area of her immediate control is valid only when one of the two *Chimel* rationales is present.<sup>6</sup> In doing so, the Court clarified for vehicle searches a

<sup>1</sup> 556 U.S. 332 (2009).

<sup>2</sup> See Barbara E. Armacost, *Arizona v. Gant: Does It Matter?*, 2009 SUP. CT. REV. 275, 279 (“When the Supreme Court’s opinion in *Gant* was handed down, defense attorneys and civil rights activists were cautiously optimistic.”); Seth W. Stoughton, Note, *Modern Police Practices: Arizona v. Gant’s Illusory Restriction of Vehicle Searches Incident to Arrest*, 97 VA. L. REV. 1727, 1729 (2011) (stating that *Gant* was “widely viewed as vindicating” the concerns of those worried about pretextual searches).

<sup>3</sup> See, e.g., Thornton v. United States, 541 U.S. 615, 624 (2004) (O’Connor, J., concurring) (“[L]ower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception . . . .”); 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) (“The finding of a 1967 study that more than 90 percent of all searches receiving court consideration were incident to an arrest indicates that the exception virtually has swallowed the warrant requirement of the [F]ourth [A]mendment.”); Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL’Y REV. 381, 385 (2001) (noting that “police authority to search incident to arrest is conceived as a categorical entitlement”); cf. *Gant*, 556 U.S. at 336–37 (“When asked at the suppression hearing why the search was conducted, Officer Griffith responded: ‘Because the law says we can do it.’”).

<sup>4</sup> Cf. *Gant*, 556 U.S. at 338 (“Among the exceptions to the warrant requirement is a search incident to a lawful arrest.”).

<sup>5</sup> Stoughton, *supra* note 2, at 1729; see also Carson Emmons, Note, *Arizona v. Gant: An Argument for Tossing Belton and All Its Bastard Kin*, 36 ARIZ. ST. L.J. 1067, 1069 (2004) (arguing that the facts of *Gant* are indicative of how the doctrine “creates situations where police can search a vehicle lacking both probable cause and the two reasons [of officer safety and destruction of evidence]”).

<sup>6</sup> See *Gant*, 556 U.S. at 339, 343 (describing these underlying rationales and their foundational nature in the search incident to lawful arrest exception). This Note only addresses *Chimel* searches and does not argue that searches of the actual person incident to arrest are altered by *Gant*. Traditionally, these two types of searches (of the person and of the area of immediate control) have been treated differently. See *United States v. Robinson*, 414 U.S. 218, 224 (1973) (noting that the search incident to arrest exception is comprised of two different propositions—that searches of the person and searches of an area within the

question left open after *Chimel*: whether the officer safety and evidence preservation rationales must be present at the time of the arrest or at the time of the search. The *Gant* Court clearly answered that question in favor of the latter timeframe.<sup>7</sup> The Court's second holding is beyond the scope of this Note, as it only applies to vehicle searches.<sup>8</sup>

Thus far there have been two sources of confusion among the lower courts in interpreting and applying *Gant* outside the vehicle context. First, lower courts debate whether *Gant*'s first holding should be applied outside the vehicle context at all.<sup>9</sup> Scholars and courts have

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control of the person are lawful—and concluding that “these two propositions have been treated quite differently”). Searches of the person remain a categorical right that flows from the fact of arrest. *See Missouri v. McNeely*, 133 S. Ct. 1552, 1559 n.3 (2013) (recognizing searches of a person incident to arrest as a categorical right that does “not require an assessment of whether the policy justifications underlying the exception . . . are implicated in a particular case”).

<sup>7</sup> *See Gant*, 556 U.S. at 343 (holding that the rationales must be present at the time of the search).

<sup>8</sup> The second holding allows officers to search a vehicle when they have reason to believe that evidence of the crime of arrest might be found inside. *Id.* (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)). This holding only applies to vehicle searches. *See id.* (“Although it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify [this second holding].”). As it is highly unlikely that this holding will or should be applied outside the vehicle context, I ignore it for purposes of this Note. *See Myron Moskowitz, The Road to Reason: Arizona v. Gant and the Search Incident to Arrest Doctrine*, 79 *Miss. L.J.* 181, 200–01 (2009) (finding it unlikely that *Gant*'s second holding will extend beyond vehicle searches).

<sup>9</sup> The Third Circuit and district courts in the Second, Sixth, Eighth, and Tenth Circuits have all held that *Gant* applies to non-vehicle searches incident to arrest. *United States v. Shakir*, 616 F.3d 315, 318 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 841; *United States v. Morillo*, No. 08 CR 676(NGG), 2009 WL 3254431, at \*4 (E.D.N.Y. Oct. 9, 2009); *United States v. Jack*, No. 1:09-cr-158, 2010 WL 2506709, at \*7 (E.D. Tenn. May 25, 2010); *United States v. Taylor*, 656 F. Supp. 2d 998, 1001–03 (E.D. Mo. 2009); *United States v. Cartwright*, No. 10-CR-104-CVE, 2010 WL 3931102, at \*9 (N.D. Okla. Oct. 5, 2010), *aff'd*, 678 F.3d 907 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 452. The Eighth Circuit stated that *Gant* “may prove to be instructive outside the vehicle-search context” but ultimately found that the issue was not properly before the court. *United States v. Perdoma*, 621 F.3d 745, 751–52 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 2446 (2011). The *Perdoma* dissent argued that the issue was properly presented and should have invalidated the search. *Id.* at 756–57 (Bye, J., dissenting). District courts in the Seventh and Eleventh Circuits have held that *Gant* should be limited to vehicle searches only. *United States v. Harris*, No. 09 CR 0028-2, 2009 WL 3055331, at \*4 (N.D. Ill. Sept. 21, 2009); *United States v. Bowman*, No. 2:09-cr-182-MEF, 2010 WL 749908, at \*4 (M.D. Ala. Mar. 4, 2010). The Ninth Circuit has an intra-circuit split, with two district courts holding that *Gant* should be extended beyond the vehicle context and one declining to extend it. *Compare United States v. Gordon*, 895 F. Supp. 2d 1011, 1019 (D. Haw. 2012) (finding *Gant* applies), and *United States v. Cook*, No. CR 10-00376-3 JSW, 2011 WL 6748517, at \*5 (N.D. Cal. Dec. 22, 2011) (same), with *United States v. Kowalczyk*, Criminal No. 3:08-95-KI, 2012 WL 3201975, at \*17 n.21 (D. Or. Aug. 3, 2012) (refusing to extend *Gant* beyond vehicle searches). State courts are similarly in disagreement. *See, e.g., People v. Anderson*, No. F059205, 2011 WL 3333414, at \*16 (Cal. Ct. App. Aug. 4, 2011) (extending *Gant*); *Feaster v. State*, 47 A.3d 1051, 1068 (Md. Ct. Spec. App. 2012), *cert. denied*, 429 Md. 304 (refusing to extend *Gant*); *State v. Winters*, No. 2009-G-2919, 2010 WL 2349605, at \*6–8 (Ohio Ct. App. June 11, 2010) (applying *Gant*, but

already fleshed out the arguments regarding *Gant*'s application,<sup>10</sup> and little more is left to say about them. Instead, this Note proceeds under the assumption that *Gant* in fact applies outside the vehicle context.<sup>11</sup> This Note focuses instead on another fissure among the lower courts.

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finding that it had no effect on the doctrine as applied to the circumstances of the specific case); *State v. Ellison*, 291 P.3d 921, 927–28 (Wash. Ct. App. 2013) (explaining that the court was unsure whether to apply *Gant* and refusing to decide the question). The scholarly literature is also split on the issue. *See, e.g.*, David L. Berland, Note, *Stopping the Pendulum: Why Stare Decisis Should Constrain the Court from Further Modification of the Search Incident to Arrest Exception*, 2011 U. ILL. L. REV. 695, 713–28 (maintaining that *Gant* “significantly modified the search incident to arrest exception as it applies to automobiles” and arguing against further modification of the doctrine); 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 (2010) (arguing that *Gant* should be applied outside the vehicle context and that doing so would end many kinds of searches incident to arrest).

<sup>10</sup> *See supra* note 9 (discussing the various positions of courts and scholars). For an overview of the circuit split and a deeper discussion of the merits of each position, see generally Sean Foley, Comment, *The Newly Murky World of Searches Incident to Lawful Arrest: Why the Gant Restrictions Should Apply to All Searches Incident to Arrest*, 61 U. KAN. L. REV. 753, 767–84 (2013).

<sup>11</sup> The common argument against extending *Gant* is that *Belton*, *see infra* notes 34–38 and accompanying text, dealt with the specific application of *Chimel* to car cases; therefore, *Gant* only affects searches of vehicles rather than searches incident to arrest more broadly. *See Feaster*, 47 A.3d at 1068 (“This line of cases [including *Belton*, *Thornton*, and *Gant*] never presumed to deal more broadly with [the search incident to arrest doctrine].”). Under this line of reasoning, *Gant* dealt “exclusively with the narrow problem of how to apply the *Chimel* perimeter to the passenger compartment of an automobile” and nothing more. *Id.*

But this analysis (that *Gant* does not apply outside of the vehicle context) is flawed for several reasons. First, courts that apply *Gant* note that *Belton*—a car search case—was often invoked to allow expansive searches outside the vehicle context. *See Perdoma*, 621 F.3d at 756 (Bye, J., dissenting) (noting as much); *United States v. Tejada*, 524 F.3d 809, 811–12 (7th Cir. 2008) (applying the *Belton* doctrine to a search of an apartment); *United States v. Abdul-Saboor*, 85 F.3d 664, 669 (D.C. Cir. 1996) (applying *Belton* to an apartment search). Therefore, a restriction of *Belton* is necessarily a restriction of searches incident to arrest on the whole. *See Shakir*, 616 F.3d at 318 (“Because *Gant* foreclosed such a relaxed reading of *Belton*, there is no plausible reason why it should be held to do so only with respect to automobile searches . . . .”); *Taylor*, 656 F. Supp. 2d at 1001–02 (stating that search incident decisions relying on *Belton* should be reexamined in light of *Gant* and holding that *Gant* should not be limited to the automobile context). Second, the Court in *Gant* never indicated that its first holding was limited to the vehicle context, while it explicitly did say this for its second holding. *Gant*, 556 U.S. at 343; *see also Taylor*, 656 F. Supp. 2d at 1002–03 (highlighting this distinction between the two holdings in *Gant*).

In fact, there are compelling reasons to extend *Gant*. The chief concern of the *Gant* Court—that vehicle searches were no longer aligned with *Chimel*'s rationales, *see Gant*, 556 U.S. at 343 (stating that the broad reading of *Belton* would “untether the rule from the justifications underlying the *Chimel* exception”)—is present outside the vehicle context as well. *See infra* notes 41–43 and accompanying text (describing the time-of-arrest and time-of-search tests). If the Court found *Belton*'s application to vehicle searches—where there is a diminished expectation of privacy—troubling, then *Belton*'s application outside vehicle searches is equally, if not more, troubling. Applying *Gant* broadly and properly will lead to a search incident to arrest doctrine better aligned with *Chimel*.

Once a court decides that *Gant* applies, courts still debate whether *Gant* represents an overhaul of searches incident to arrest or is instead a minor tweak to the existing doctrine. This Note argues that the answer lies somewhere in the middle—*Gant* is not the nudge that some courts treat it as,<sup>12</sup> nor is it the sea change that some scholars purport it to be.<sup>13</sup> This Note proposes that courts not treat the reasonableness inquiry as a lenient standard, easily overcome by the government. Instead, courts should take the reasonableness requirement seriously and conduct a more searching inquiry into the facts of each case.<sup>14</sup>

Part I of this Note outlines the history of the search incident to arrest doctrine.<sup>15</sup> Part II then examines how lower courts have interpreted and applied the *Gant* ruling. Part III will lay out how courts should adjust their search incident to arrest application so that it remains faithful to *Chimel*'s rationales as defined in *Gant* and will explain why this adjustment is consistent with the policy underpinnings of the search incident to arrest doctrine.

## I

### HISTORY OF SEARCHES INCIDENT TO ARREST

Ordinarily, searches conducted without a warrant are *per se* unreasonable under the Fourth Amendment.<sup>16</sup> There are many exceptions to the warrant requirement, however, including searches incident to arrest.<sup>17</sup> Part I provides an overview of this well-recognized

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<sup>12</sup> See, e.g., *Shakir*, 616 F.3d at 321 (stating that the standard remains a lenient one); *United States v. Boney*, Crim No. 11-05-SLR, 2012 WL 769480, at \*6 (D. Del. Mar. 8, 2012) (quoting the *Shakir* “lenient standard” language); *Cartwright*, 2010 WL 3931102, at \*9 (adopting the *Shakir* conclusion that the standard remains a lenient one).

<sup>13</sup> See, e.g., *Singh*, *supra* note 9, at 1762–63, 1796–97 (arguing that *Gant* “may serve to end, or at the least severely undermine, automatic searches of containers on the person and homes incident to arrest”); see also *infra* notes 125–26 (discussing how some scholars believe that *Gant* has completely erased *Chimel* searches).

<sup>14</sup> This Note assumes that *Gant* requires that searches only take place when the defendant has a reasonable possibility of access to the area searched *at the time of the search*. Once courts decide that *Gant* applies outside the vehicle context, this assumption seems uncontroversial as *Gant* explicitly stated that one of the twin rationales must be present at the time of the search. *Gant*, 556 U.S. at 343; see also *Shakir*, 616 F.3d at 318 (stating that *Gant* requires that one of the rationales be present at the time of the search).

<sup>15</sup> For a more comprehensive treatment of the doctrine's history, see George M. Dery III, *A Case of Doubtful Certainty: The Court Relapses into Search Incident to Arrest Confusion in Arizona v. Gant*, 44 IND. L. REV. 395, 397–410 (2011).

<sup>16</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967) (“[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment . . .”).

<sup>17</sup> See *Gant*, 556 U.S. at 338 (“Among the exceptions to the warrant requirement is a search incident to a lawful arrest.”).

exception, from *Chimel v. California* in 1969 to *Arizona v. Gant* in 2009.

### A. *The Bedrock: Chimel v. California*

In *Chimel v. California*<sup>18</sup> the Supreme Court announced the rule that has governed searches incident to arrest ever since. Upon arresting Ted Chimel in his home, police officers searched the entire house for evidence of the burglary for which he was arrested.<sup>19</sup> The Court found the search unreasonable.<sup>20</sup> In so holding, the Court explicitly overruled *United States v. Rabinowitz*<sup>21</sup> and set forth a new standard for the doctrine: Reasonable, and therefore legal, searches incident to arrest were limited to the person and “the area from within which he might gain possession of a weapon or destructible evidence” (sometimes referred to as the “area of immediate control”).<sup>22</sup> There were two rationales for allowing such a search: officer safety and preservation of evidence.<sup>23</sup>

The Court hoped that articulating these twin rationales would give lower courts a principled basis for deciding the reasonableness of future searches incident to arrest.<sup>24</sup> Unfortunately, these twin rationales have not served as a clear guide for lower courts.<sup>25</sup> More specifically, lower courts split over the extent to which *Chimel* restricted the search incident to arrest doctrine.

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<sup>18</sup> 395 U.S. 752 (1969).

<sup>19</sup> *Id.* at 753–54.

<sup>20</sup> *Id.* at 768.

<sup>21</sup> *United States v. Rabinowitz*, 339 U.S. 56 (1950), *overruled in part by Chimel v. California*, 395 U.S. 752 (1969). The *Rabinowitz* Court upheld a search incident to arrest where officers searched the defendant’s office for about ninety minutes. *Rabinowitz*, 339 U.S. at 58–59, 63–64.

<sup>22</sup> *Chimel*, 395 U.S. at 763.

<sup>23</sup> *Id.*

<sup>24</sup> See James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417, 1429 (“[T]he *Chimel* Court made clear its intent to develop a rational, principled, and stable search incident to arrest exception.”). *Gant* makes clear that the twin rationales were meant to be limits on the doctrine. See *Arizona v. Gant*, 556 U.S. 332, 339 (2009) (“That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding . . . evidence . . .”).

<sup>25</sup> See Logan, *supra* note 3, at 392 (“*Chimel* nonetheless led to confusion.”); see also *New York v. Belton*, 453 U.S. 454, 458 (1981) (“Although the principle that limits a search incident to a lawful custodial arrest may be stated clearly enough, courts have discovered the principle difficult to apply in specific cases.”).

B. *The Creation of Bright-Line Rules and Their Application Outside the Vehicle Context*

After *Chimel*, the Supreme Court decided a number of cases that expanded the search incident to arrest doctrine. It began with *United States v. Robinson*, holding that a search of the person was an automatic right of officers upon arrest.<sup>26</sup> In so finding, the Court relied on the need for bright-line rules to guide officer actions.<sup>27</sup> This reasoning was then extended to other situations, beginning with vehicle searches in *New York v. Belton*.<sup>28</sup> After *Belton*, lower courts began invoking the need for bright-line rules in non-vehicle searches as well.<sup>29</sup> With the use of bright-line rules, the twin rationales of *Chimel* began to fall by the wayside.

One open question after *Chimel* was whether the right to search an arrestee flowed directly from the lawful arrest or whether it required a heightened showing, i.e., whether police officers enjoyed a categorical right upon arrest to search an individual or whether the officer needed to show factual circumstances justifying the search.<sup>30</sup> *United States v. Robinson* settled this question, asserting that the right to search was automatic upon a lawful arrest, regardless of the crime of arrest.<sup>31</sup> Importantly, the Court's reasoning in *Robinson* led to greater expansion of *Chimel*.<sup>32</sup> The Court trumpeted the need for a bright-line rule to govern what were described as "quick *ad hoc* judgment[s]" by a police officer regarding "how and where to search the person of a suspect whom [the officer] has arrested."<sup>33</sup>

The Supreme Court extended *Robinson* to searches involving the area of immediate control in *New York v. Belton*, where the defendant was arrested for possession of illegal narcotics after being pulled over for speeding.<sup>34</sup> During the stop, the officer smelled marijuana and saw an envelope on the floor labeled "Supergold."<sup>35</sup> He then

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<sup>26</sup> 414 U.S. 218, 235 (1973).

<sup>27</sup> *Id.*

<sup>28</sup> 453 U.S. 454, 460–61 (1981).

<sup>29</sup> See *infra* note 42 and accompanying text (discussing this trend).

<sup>30</sup> Logan, *supra* note 3, at 392.

<sup>31</sup> 414 U.S. at 235 ("It is the fact of the lawful arrest which establishes the authority to search . . .").

<sup>32</sup> See Tomkovicz, *supra* note 24, at 1430 (noting that even though *Robinson* did not involve the authority to search the spaces around a person, the case is important "because the premises the Court relied upon to resolve the defendant's claim would prove instrumental in later expansions of the authority to search *beyond* an arrestee's person"); Berland, *supra* note 9, at 711 (noting that *Robinson* would have "significant implications for the expansion of the search incident to arrest exception to automobiles").

<sup>33</sup> *Robinson*, 414 U.S. at 235.

<sup>34</sup> 453 U.S. 454, 455–56 (1981).

<sup>35</sup> *Id.*

ordered the passengers out of the car, placed them under arrest, and proceeded to search the car's passenger compartment and a jacket on the backseat, where the officer found cocaine in one of the pockets.<sup>36</sup> The Court upheld the search, announcing that an officer may, incident to a lawful arrest of an occupant of a car, search the passenger compartment and any containers found therein.<sup>37</sup> The Court explained, relying on *Robinson*, that a bright-line rule was necessary to ensure predictable results in similar factual scenarios.<sup>38</sup>

*Belton* was criticized over the following decades for giving too much power to officers and doing little to protect defendants' rights.<sup>39</sup> Nevertheless, the Court extended *Belton* in *Thornton v. United States*, holding that an officer may search a car's passenger compartment even if the "officer does not make contact [with the person arrested] until the person arrested has left the vehicle."<sup>40</sup> This allowed officers to search a vehicle where an arrestee had parked and exited the car before being approached by the arresting officer.

*Belton's* expansion of *Chimel* was not limited to vehicle searches. For instance, many lower and state courts adopted a "time-of-arrest" approach to determining the permissible area of a search, even outside of the vehicle context. This allowed the officer to arrest the defendant, remove her from the area, and then go back and search the area that the defendant *could have* reached at the time of arrest.<sup>41</sup> In defending the time-of-arrest test, courts often invoked *Belton's* reasoning—outside the vehicle context—stressing the need for bright-line rules and often assuming that the search may take place regardless of whether *Chimel's* rationales were present at the time of the

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<sup>36</sup> *Id.* at 456.

<sup>37</sup> *Id.* at 460.

<sup>38</sup> *See id.* at 459–61 (noting a circuit split and that "no straightforward rule ha[d] emerged from the litigated cases").

<sup>39</sup> *See, e.g., Arizona v. Gant*, 556 U.S. 332, 338 (2009) ("The chorus that has called for us to revisit *Belton* includes courts, scholars, and Members of this Court who have questioned that decision's clarity and its fidelity to Fourth Amendment principles."); Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 WIS. L. REV. 672 (calling *Belton* the "most troubling extension of the search incident to arrest doctrine"); Tomkovicz, *supra* note 24, at 1433–34 (stating that the *Belton* Court relied on a fiction that "threatened serious erosion" of limits on the search incident to arrest doctrine).

<sup>40</sup> 541 U.S. 615, 617 (2004).

<sup>41</sup> *See, e.g., United States v. Turner*, 926 F.2d 883, 888 (9th Cir. 1991) (upholding a search of the room where the defendant was arrested, even though the defendant had been moved to a different room to ensure that he would not be able to reach any weapons); *State v. Shane*, 255 N.W.2d 324, 328 (Iowa 1977) (holding that officers may secure the arrestee first and then make a limited search when circumstances permit); *see also* Moskovitz, *supra* note 39, at 682–85 & 685 n.137 (collecting cases).

search.<sup>42</sup> Other courts adopted a “time-of-search” approach that allowed the officer to search only the area that the defendant could conceivably reach at the time the actual search took place.<sup>43</sup>

The increasing use of bright-line rules had diluted the importance of *Chimel*'s twin rationales, with searches instead becoming automatic upon arrest. By 2009, many scholars and courts had called for a reevaluation of the doctrine, especially in the vehicle context where concern for pretextual searches was greatest.<sup>44</sup> The Court took up that call with *Arizona v. Gant*.

### C. Arizona v. Gant

In *Arizona v. Gant*,<sup>45</sup> the defendant had already parked and exited his vehicle when an officer arrested him for driving with a suspended license approximately ten feet from his car.<sup>46</sup> Officers then placed a handcuffed Gant into the back of the police car and searched Gant's car, finding a gun and a bag of cocaine in the pocket of a jacket that was lying on the backseat.<sup>47</sup>

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<sup>42</sup> See, e.g., *Watkins v. United States*, 564 F.2d 201, 205 (6th Cir. 1977) (“[T]he authority to conduct a search incident to an arrest, once established, still exists even after the need to disarm and prevent the destruction of evidence have been dispelled.”); *People v. Summers*, 86 Cal. Rptr. 2d 388, 393 (Ct. App. 1999) (Bedsworth, J., concurring) (“The right to search attaches at the moment of arrest. . . . [T]he Constitution is not offended by allowing police to delay exercise of that right until they can do so safely.”); *State v. Murdock*, 455 N.W.2d 618, 625 (Wis. 1990) (holding that the “fact of a lawful arrest automatically authorizes the search” and that the defendant’s ability to access the area searched is irrelevant, *overruled by State v. Dearborn*, 786 N.W.2d 97 (Wis. 2010); see also *Armocost*, *supra* note 2, at 311 (describing how courts have adopted *Belton*-like rules for home searches). *But see Moskowitz*, *supra* note 39, at 683–85 (criticizing cases that define the scope of home searches at the time of arrest, and arguing that this approach does not actually establish a bright line because courts must still undertake the “often-difficult task (mandated by *Chimel*) of determining how far the arrestee could reach”).

<sup>43</sup> See, e.g., *United States v. Colbert*, 454 F.2d 801, 803 (5th Cir. 1972), *vacated en banc for lack of standing*, 474 F.2d 174 (5th Cir. 1973) (invalidating search in part because “it [wa]s quite obvious that the briefcases, at the time of the search, were not within the immediate control of the defendants” (internal quotation marks omitted)); *Summers*, 86 Cal. Rptr. 2d at 390 (holding that when the arrestee is secured and removed from the place of arrest, with no others present, “it makes no sense that the place he was removed from remains subject to search merely because he was previously there”); *Stackhouse v. State*, 468 A.2d 333, 337–38, 341 (Md. 1983) (refusing to extend *Belton* to home searches and holding the search of an attic invalid where the defendant was removed from the attic before the search); see also *Moskovitz*, *supra* note 39, at 685–87 & 685 n.145 (collecting cases).

<sup>44</sup> See *Stoughton*, *supra* note 2, at 1728–29 (citing criticism of the doctrine for incentivizing pretextual vehicle stops).

<sup>45</sup> 556 U.S. 332 (2009).

<sup>46</sup> *Id.* at 335–36.

<sup>47</sup> *Id.* at 336.

Under *Belton*, it seemed clear that the search would be upheld.<sup>48</sup> But the Court rejected a broad reading of *Belton*, finding that it “would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis.”<sup>49</sup> Instead, the Court laid out a two-pronged test for when a search of a vehicle incident to arrest is appropriate.<sup>50</sup> The first prong relied heavily on *Chimel*’s principles of officer safety and evidence preservation. The Court held that police could search a vehicle under *Chimel* “only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”<sup>51</sup> In a footnote, the Court asserted that it would be rare for an officer to be unable to properly secure an arrestee, and thus vehicle searches under this rationale would be anomalous.<sup>52</sup> The Court ruled that because *Gant* was handcuffed and in the back of the squad car at the time of the search, this justification could not be used to uphold the search of *Gant*’s car.<sup>53</sup>

In dissent, Justice Alito argued that the Court effectively overruled *Belton* by erasing the bright-line rule that had previously

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<sup>48</sup> See Moskowitz, *supra* note 8, at 189 (arguing that if *Belton* was still good law, the search of *Gant*’s car was “clearly authorize[d]”).

<sup>49</sup> *Gant*, 556 U.S. at 347.

<sup>50</sup> See *id.* at 343–44 (announcing that a search of a vehicle incident to arrest would be valid (1) if the arrestee had a reasonable possibility of accessing the car at the time of the search or (2) if the officer had reason to believe that evidence of the crime of arrest might be found in the car). As mentioned in the Introduction, discussion of *Gant*’s second holding is beyond the scope of this Note.

<sup>51</sup> *Id.* at 343.

<sup>52</sup> See *id.* at 343 n.4 (considering searches under such circumstances, while reasonable under the Fourth Amendment, to be rare because police have many ways to safely execute the arrest); see also *Thornton v. United States*, 541 U.S. 615, 627 (2004) (Scalia, J., concurring) (“If sensible police procedures require that suspects be handcuffed and put in squad cars, then police should handcuff suspects, put them in squad cars, and not conduct the search.” (internal quotation marks omitted)); Armacost, *supra* note 2, at 290 (“Police officers virtually always handcuff the arrestee and place him in a secure location before they are prepared to conduct a [search incident to arrest] of the place of arrest.”); Moskowitz, *supra* note 8, at 193 (stating that the *Chimel* rationale will rarely apply to vehicle search cases “because the police will almost always secure the guy and get him away from his car before they search it”).

<sup>53</sup> See *Gant*, 556 U.S. at 344 (“Under those circumstances, *Gant* clearly was not within reaching distance of his car at the time of the search.”). Rather than explicitly overruling *Belton*, however, the Court attempted to distinguish that case from the facts of *Gant*. See *id.* (noting that in *Belton* the officer was outnumbered, the passengers were unsecured, and the arrest was for a drug crime, of which there was reason to believe there might be evidence in the car). The Court suggested that *Belton* could survive under either of *Gant*’s holdings. See *id.* at 348 (“[S]afety and evidentiary interests . . . supported the search in *Belton* . . .”). However, the second holding appeared to offer firmer ground. See *id.* at 344 (“[I]n other[ ] [cases], including *Belton* . . . the offense of arrest will supply a basis for searching the passenger compartment of an arrestee’s vehicle and any containers therein.”).

governed car searches.<sup>54</sup> According to Justice Alito, the Court left the search incident to arrest doctrine in a “confused and unstable state.”<sup>55</sup> He also pointed out that while the first holding—based on *Chimel*—only applied to vehicle searches for now, there was “no logical reason why the same rule should not apply to all arrestees.”<sup>56</sup> This expansion of *Gant* foreshadowed by Alito is discussed more fully in Part II.

## II

### LOWER COURTS' APPLICATION OF *GANT*: DEFINING REASONABLE POSSIBILITY OF ACCESS

Lower courts are split in their application of *Gant* to non-vehicle searches. *Gant* announced that searches were valid only when “the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”<sup>57</sup> The Court remarked that it would be a “rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee’s vehicle remains.”<sup>58</sup> This Part describes how lower courts differ in their understanding and application of “real possibility of access.”

One of the primary challenges for lower courts is determining what the *Gant* Court meant by “real possibility of access.” The Court began by announcing the standard as a question of whether the arrestee was “unsecured *and* within reaching distance”<sup>59</sup> at the time of the search. But at other points in the opinion, the Court only referred to the arrestee’s ability to access the vehicle.<sup>60</sup> A leading Third Circuit case discussing this language is *United States v. Shakir*.<sup>61</sup> The *Shakir* court explicitly rejected a strict two-pronged approach—one where a search would be illegal unless the defendant was unsecured *and* within reaching distance of the bag.<sup>62</sup> Instead the court focused on the *Gant*

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<sup>54</sup> See *id.* at 356–58 (Alito, J., dissenting) (“This ‘bright-line rule’ has now been interred.”).

<sup>55</sup> *Id.* at 363.

<sup>56</sup> *Id.* at 364.

<sup>57</sup> *Id.* at 343 (majority opinion).

<sup>58</sup> *Id.* at 343 n.4.

<sup>59</sup> *Id.* at 343 (emphasis added).

<sup>60</sup> See *id.* at 344 (“Under those circumstances, *Gant* clearly was not within reaching distance of his car at the time of the search.”); *id.* at 351 (“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 . . . .”); see also *United States v. Shakir*, 616 F.3d 315, 320 (3d Cir. 2010) (noting the differences in *Gant*’s language and settling upon the reasonable possibility of access as the test for determining the lawfulness of the search).

<sup>61</sup> 616 F.3d 315.

<sup>62</sup> *Id.* at 320. The Sixth Circuit, at least, has held on to the “unsecured and within reaching distance” language. See *United States v. McCraney*, 674 F.3d 614, 619–20 (6th Cir. 2012) (finding a search of a car illegal on search incident to arrest grounds where the

Court's formulations of the test later in the opinion: that a search is illegal if there is no reasonable possibility of access.<sup>63</sup> In doing so, *Shakir* rejected the idea that securing the defendant is, alone, enough to invalidate the search.<sup>64</sup> Rather, a search might still be legal if the defendant is within reaching distance of the place searched at the time of the search, even if the defendant is secured at that moment.

In *Shakir*, the defendant was handcuffed and restrained by two police officers while a third officer searched a duffel bag lying at the defendant's feet.<sup>65</sup> The court upheld the search, stating that the defendant had a reasonable possibility of access, despite being handcuffed and outnumbered by officers.<sup>66</sup> In doing so, the court announced that, while the possibility of access must be more than theoretical, the standard remained a lenient one.<sup>67</sup> In finding a reasonable possibility of access, the court noted that the defendant was standing upright (and, therefore, less restrained than if being held down), the bag was right next to the arrestee, a suspected accomplice was restrained by two unarmed security guards, the arrest was made in a public place, and it was possible that other confederates were in the vicinity.<sup>68</sup> The court's final justification was that handcuffs are not foolproof and allowing a search here protected officer safety.<sup>69</sup> Other courts have raised similar concerns.<sup>70</sup>

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defendants were "two or three feet from the rear bumper" and outnumbered by police officers even though the defendants were not handcuffed or secured in a patrol car). In *Davis v. United States*, Justice Alito described *Gant*'s holding as limiting "*Belton* to cases involving unsecured arrestees." 131 S. Ct. 2419, 2425 (2011). However, he went on to sum up *Gant* by saying that an automobile search incident to arrest is valid "if the arrestee is within reaching distance of the vehicle during the search . . ." *Id.*

<sup>63</sup> See *Shakir*, 616 F.3d at 320 ("[W]e understand *Gant* to stand for the proposition that police cannot search a location or item when there is no reasonable possibility that the suspect might access it."). Other courts have followed the *Shakir* Court's formulation. See, e.g., *United States v. Gordon*, 895 F. Supp. 2d 1011, 1020–21 (D. Haw. 2012) (endorsing the *Shakir* Court's formulation); *United States v. Cartwright*, No. 10-CR-104-CVE, 2010 WL 3931102, at \*9 (N.D. Okla. Oct. 5, 2010) (same). While the *Gant* opinion used "real possibility of access," courts such as *Shakir* have read "real" to mean "reasonable." See *Shakir*, 616 F.3d at 320 (noting that there was "no reasonable possibility that the suspect" might access a certain area). For the sake of consistency, I use "reasonable possibility of access" throughout the Note.

<sup>64</sup> See *Shakir*, 616 F.3d at 321 (noting that the search is not automatically impermissible "whenever an arrestee is handcuffed").

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 319, 321. For criticism of how the court uses these facts, see *infra* note 85.

<sup>69</sup> See *Shakir*, 616 F.3d at 320–21 ("[R]eading *Gant* to prohibit a search incident to arrest whenever an arrestee is handcuffed would expose police to an unreasonable risk of harm.").

<sup>70</sup> See, e.g., *United States v. Gordon*, 895 F. Supp. 2d 1011, 1020–21 (D. Haw. 2012) (citing *Shakir*, 616 F.3d at 320, in support of a search once the defendant is handcuffed).

Still, other courts examine more closely whether a defendant truly has a reasonable possibility of access. For instance, in *United States v. Morillo*, the court found the search of the defendant's backpack incident to arrest illegal.<sup>71</sup> Morillo was fleeing when he was tackled and arrested by police. He was handcuffed and taken back to the police car.<sup>72</sup> One officer searched Morillo's person while the other searched his backpack, finding a loaded handgun.<sup>73</sup> The *Morillo* court found the backpack search invalid because Morillo was handcuffed, was secured by officers much larger than himself, and had a broken collarbone from his struggle with the officers.<sup>74</sup> There was therefore no reasonable possibility of access.<sup>75</sup>

Similarly, Judge Bye, dissenting in *United States v. Perdoma*,<sup>76</sup> would have found no reasonable possibility of access and invalidated a bag search very similar to the one in *United States v. Shakir*.<sup>77</sup> When Perdoma was stopped and questioned by an officer in a bus terminal, he attempted to run away before he was caught, handcuffed, and escorted to the rear of the terminal by two officers.<sup>78</sup> While one officer searched his person, the other searched the bag that Perdoma had been carrying with him at the time of arrest, finding methamphetamine.<sup>79</sup> Judge Bye argued that the possibility of access was "farfetched" in this case and therefore would have found the search illegal.<sup>80</sup>

This Part has highlighted the main issue lower courts confront when applying *Gant* outside the vehicle context. Some courts find that *Gant* mandates that courts "refocus[ ]" on the issue of whether the

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<sup>71</sup> See *United States v. Morillo*, No. 08 CR 676(NGG), 2009 WL 3254431, at \*5–8 (E.D.N.Y. Oct. 9, 2009) (finding the search illegal under a search incident to arrest rationale but ultimately upholding the search under a special exigency rationale).

<sup>72</sup> *Id.* at \*1.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at \*5.

<sup>75</sup> *Id.*

<sup>76</sup> 621 F.3d 745, 753 (8th Cir. 2010) (Bye, J., dissenting). The majority opinion held that the question of *Gant*'s applicability was not properly presented to the court. See *id.* at 751–52 (finding that the defendant had not meaningfully argued how his situation was analogous to the circumstances in *Gant*). The court did acknowledge, however, that *Gant* may "prove to be instructive outside the vehicle-search context in some cases." *Id.* at 751. Nevertheless, the court stated in dicta that *Gant* must be understood within the limits of vehicle searches and warned that finding the search illegal in the instant case would present a danger to officers. See *id.* at 752–53 (reasserting the position that in the "non-vehicle search-incident-to-arrest context that it may be possible for an arrestee restrained in a room to reach items in that room").

<sup>77</sup> See *supra* note 65 and accompanying text (describing the circumstances of *Shakir*).

<sup>78</sup> *Perdoma*, 621 F.3d at 748.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 757 (Bye, J., dissenting).

defendant can access weapons or destroy evidence at the time of the search,<sup>81</sup> but nonetheless maintain that the standard for what constitutes “access” must remain a lenient one to protect officer safety.<sup>82</sup> Other courts interpret *Gant* as requiring a less lenient standard, where “reasonable possibility of access” equates to an actual ability to access weapons or destroy evidence, rather than the theoretical chance this could occur. As discussed in the next Part, this Note argues that lower courts should view *Gant* as requiring a less lenient standard, thereby constraining all searches incident to arrest and returning them to *Chimel*’s two justifications—officer safety and the preservation of evidence.

### III LOOKING FORWARD

Part III does two things. First, Part III.A looks at how lower courts struggle in attempting to define “reasonable possibility of access.” In this Subpart, I argue that “reasonable possibility of access” should not be as lenient a standard as some courts have allowed, and that the concerns articulated by courts seeking a more lenient standard are overblown. Instead, I offer an alternative interpretation that, I argue, is better aligned with *Gant*’s affirmation of *Chimel*. I then argue in Part III.B that the interpretation suggested in Part III.A strikes the proper balance between the policy underpinnings of the search incident to arrest doctrine, namely officer safety, defendants’ rights, preservation of evidence, and clarity of guidance for officers in the field.<sup>83</sup>

#### A. Reasonable Possibility of Access Should Be Construed Narrowly

Part III.A proceeds in four Subparts. First, Part III.A.1 draws the *Shakir* and *Perdoma* opinions into focus, highlighting the most relevant differences between their views of reasonable possibility of access. In Part III.A.2, I examine the *Gant* opinion in an attempt to discern what the Court might have meant by “reasonable possibility of access.” Part III.A.3 then addresses the justifications the *Shakir* court used in finding *Shakir*’s possibility of access reasonable. It focuses on two contentions: (1) that *Chimel* contemplated searches occurring after a defendant is handcuffed, and (2) that handcuffs can fail.

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<sup>81</sup> See, e.g., *United States v. Shakir*, 616 F.3d 315, 318 (3d Cir. 2010) (reading *Gant* in light of the rationales underlying *Chimel*).

<sup>82</sup> See *id.* at 321 (stating that the possibility of access must be more than theoretical but “remains a lenient standard”).

<sup>83</sup> See *infra* notes 135–38 and accompanying text (proposing a new balancing test).

Finally, Part III.A.4 concludes that Judge Bye's reasoning in *Perdoma* is more persuasive but nonetheless offers situations in which a court should find a reasonable possibility of access by the defendant. It argues that courts should examine carefully each presented factual situation for evidence that a defendant had a possibility of access closer to a *real* or *actual* possibility of access, rather than a theoretical one.

But first, it should be made clear what factors should *not* be part of the reasonableness analysis. In upholding the search incident to arrest, the *Shakir* court recited several facts from the arrest,<sup>84</sup> many of which have little or nothing to do with Shakir's ability to access the bag.<sup>85</sup> The court seemed to be painting a picture of a chaotic and dangerous arrest, when in fact their description of the situation earlier in the opinion conveys quite the opposite.<sup>86</sup> These outside factors have little to do with whether the defendant had a reasonable possibility of access and therefore should not affect the analysis. I now turn my attention to defining "reasonable possibility of access."

### 1. *The Shakir and Perdoma Decisions in Sharp Relief*

Important in the *Shakir* court's decision was that, while difficult, Shakir could have dropped to the floor to access the bag near his

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<sup>84</sup> See *supra* notes 63–69 and accompanying text (describing how the arrest occurred in a public place, that the defendant was standing, that there was a suspected accomplice restrained nearby, and that it was possible that there were other confederates in the area).

<sup>85</sup> The *Shakir* court is not the only court to rely on seemingly irrelevant factors in deciding whether a reasonable possibility of access exists. See, e.g., *United States v. Cartwright*, No. 10-CR-104-CVE, 2010 WL 3931102, at \*10 (N.D. Okla. Oct. 5, 2010) (noting that there were members of the public present and there was a possibility of accomplices among them in finding an "objectively reasonable possibility of access"). The *Shakir* court mentioned that there was a suspected accomplice restrained some fifteen feet away. 616 F.3d at 316, 319, 321. But the possibility of the accomplice retrieving a bag that was in an officer's control, in my opinion, seems beyond a reasonable possibility. Cf. *United States v. McCraney*, 674 F.3d 614, 619 (6th Cir. 2012) (finding that the defendants were secured and not within reaching distance of the passenger compartment when they were at the rear bumper of the car being searched and they were not handcuffed). And although the court noted the possibility of other accomplices at large, this is complete speculation, and there was no articulable reason why the officers might have so believed. Moreover, while it could be argued that an arrest in a public place is inherently more dangerous because of the presence of civilians, it is likely that a home arrest is, in fact, more dangerous for officers because the arrestee has a "home field advantage." This is why officers are allowed to search a home when there is a reason to believe there might be confederates in the home. See *Maryland v. Buie*, 494 U.S. 325, 333 (1990) (noting that "[u]nlike an encounter on the street . . . an in-home arrest puts the officer at the disadvantage of being on his adversary's 'turf'" and that "[a]n ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings.").

<sup>86</sup> See *Shakir*, 616 F.3d at 316 (describing Shakir as polite and compliant and quoting the arresting officer as saying the arrest was "very low key" (internal quotation marks omitted)).

feet.<sup>87</sup> To do so, Shakir, a very large man,<sup>88</sup> would have needed to drop down to the floor and unzip the bag while handcuffed (or otherwise remove the handcuffs) in an effort to destroy evidence or acquire a weapon to use against the three officers right next to him.<sup>89</sup>

Notably, Judge Bye, dissenting in the factually similar case of *United States v. Perdoma*, would have found no reasonable possibility of access to Perdoma's bag.<sup>90</sup> He noted that Perdoma was handcuffed and was moved to a separate area before being searched.<sup>91</sup> In fact, Perdoma was handcuffed, was being physically searched, and was outnumbered three to one while his bag was examined.<sup>92</sup> The possibility that Perdoma could have "broken free, singlehandedly overpowered three police officers, and, while handcuffed behind his back, unzipped his luggage, and gained access to a weapon or evidence" was exactly the kind of "farfetched" possibility that should not justify a search incident to arrest after *Gant*.<sup>93</sup>

So which interpretation of "reasonable" is right? First, as described in Part III.A.2, courts should look to the language of *Gant* itself.

## 2. *Distilling the Gant Opinion*

Unfortunately, the *Gant* opinion offers little guidance for lower courts trying to determine whether an arrestee has a reasonable possibility of access. The factual scenario in *Gant* only tells us that when an arrestee is handcuffed and in the backseat of the patrol car, the arrestee does not have a reasonable possibility of access to his vehicle.<sup>94</sup> But there are three other helpful hints in the opinion. First,

<sup>87</sup> *Id.* at 321.

<sup>88</sup> *See id.* at 316 (describing officers' initial difficulty in handcuffing Shakir with only one set of handcuffs because of his girth).

<sup>89</sup> This calls to mind Judge Goldberg's remarks in *United States v. Frick* that such an arrestee would need to possess "the skill of Houdini and the strength of Hercules." 490 F.2d 666, 673 (5th Cir. 1973) (Goldberg, J., concurring in part and dissenting in part); *see also* Thornton v. United States, 541 U.S. 615, 626 (2004) (Scalia, J., concurring) (quoting *Frick*, 490 F.2d at 673).

<sup>90</sup> 621 F.3d 745, 757 (8th Cir. 2010) (Bye, J., dissenting). *Compare supra* notes 65–68 and accompanying text (describing the facts in *Shakir*), *with supra* notes 78–79 and accompanying text (describing the facts in *Perdoma*).

<sup>91</sup> *Perdoma*, 621 F.3d at 757 (Bye, J., dissenting).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *See* *Arizona v. Gant*, 556 U.S. 332, 344 (2009) (observing that *Gant* had been arrested and secured in the patrol car at the time of the search); David S. Chase, Note, *Who Is Secure?: A Framework for Arizona v. Gant*, 78 *FORDHAM L. REV.* 2577, 2594 (2010) ("The search [in *Gant*] could not be justified under the first rationale because officers handcuffed and secured *Gant* in a police car, and he was not within reaching distance of the automobile."). The facts of *Belton* might have presented a case where one of

the Court noted that officers will almost always secure the scene in such a way that there is no reasonable possibility of access to the car<sup>95</sup>—in effect, the *Chimel* rationales will virtually never justify a search incident to an arrest involving a vehicle.<sup>96</sup> Second, the Court grounded its holding in the justifications of *Chimel*<sup>97</sup>—officer safety and evidence preservation.<sup>98</sup> Finally, the Court repudiated the expansive view of *Belton*.<sup>99</sup> Therefore, a strong argument exists that non-vehicle searches incident to arrest that relied on *Belton* for their authority must be reexamined.<sup>100</sup> While determining reasonable possibility of access remains a fact-specific inquiry,<sup>101</sup> we can begin to draw generalized conclusions about what *Gant* requires, as described in the next paragraph.

The Court's pronouncement that it will be a "rare case"<sup>102</sup> in which an arrestee has a reasonable possibility of access tilts the presumption towards not allowing searches incident to arrest in most

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the arrestees had a reasonable possibility of access, but the Court did not decide that issue. See *Gant*, 556 U.S. at 344 (distinguishing *Belton* but never saying definitively whether the defendants in *Belton* had a reasonable possibility of access). But in *United States v. Davis*, 569 F.3d 813, 817 (8th Cir. 2009), the Eighth Circuit found a reasonable possibility of access on facts similar to *Belton*, where four passengers outnumbered the two arresting officers and three of the passengers were unsecured at the time of the search.

<sup>95</sup> *Gant*, 556 U.S. at 343 n.4.

<sup>96</sup> See Armacost, *supra* note 2, at 290 ("Police officers virtually always handcuff the arrestee and place him in a secure location before they are prepared to conduct a [search incident to arrest] of the place of arrest."); Moskowitz, *supra* note 8, at 193 (stating that the *Chimel* rationale will almost never arise in vehicle search cases "because the police will almost always secure the guy and get him away from his car before they search it").

<sup>97</sup> See *Gant*, 556 U.S. at 343 ("Accordingly, we reject [the broad] reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.").

<sup>98</sup> See *id.* at 339 (stating that the purpose of *Chimel* is "protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy"); *Chimel v. California*, 395 U.S. 752, 763 (1969) (justifying its holding on the need to protect officer safety and to allow seizure of evidence the arrestee might conceal or destroy).

<sup>99</sup> See *supra* note 49 and accompanying text (noting the *Gant* Court's finding that a broad reading of *Belton* "would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis").

<sup>100</sup> See *United States v. Shakir*, 616 F.3d 315, 318 (3d Cir. 2010) ("Because *Gant* foreclosed such a relaxed reading of *Belton*, there is no plausible reason why it should be held to do so only with respect to automobile searches . . ."); *United States v. Taylor*, 656 F. Supp. 2d 998, 1002 (E.D. Mo. 2009) (stating that search incident decisions relying on *Belton* should be examined in light of *Gant*).

<sup>101</sup> See, e.g., *Boykins v. State*, 717 S.E.2d 474, 475 (Ga. 2011) (finding the search invalid where the government did not offer any evidence "as to appellant's physical location after his arrest" or "any other information from which [the court] could make a determination that the center console remained within appellant's arm's reach as required by *Gant*").

<sup>102</sup> *Gant*, 556 U.S. at 343 n.4.

cases. In other words, reasonable possibility of access should no longer be considered a “lenient” standard—rather, it is a standard that calls upon a judge to find that the defendant had an actual possibility of access at the time of the search.<sup>103</sup> This is especially true when one considers that the broad reading of *Belton*, which was explicitly repudiated by *Gant*, represented a more relaxed, or lenient, standard for searches incident to arrest.<sup>104</sup> A repudiation of *Belton* is thus a repudiation of the lenient standard it created. And, in most instances, once an officer has handcuffed a suspect, there is no reasonable possibility of access. The next Subpart explains—and then challenges—the reasons that the *Shakir* court declined to follow the line of thinking described above.

### 3. Addressing the *Shakir* Court’s Reservations

Contrary to the argument laid out in Part III.A.2, *supra*, the *Shakir* court held that the handcuffed defendant still had a reasonable possibility of access. In justifying this holding, the court found that *Chimel* contemplated that searches could take place after the defendant was restrained in some way.<sup>105</sup> As support for this claim, the court relied on language from *Chimel*—language that specified items a defendant might use to escape when under arrest.<sup>106</sup> Importantly, however, when the *Chimel* Court referred to items of “escape,” it was referring only to searches of the person.<sup>107</sup> When it mentioned searches of the area of immediate control, the Court *only* mentioned weapons and evidentiary items that might be concealed or destroyed.<sup>108</sup> This is an important distinction, as searches of the person can and do take place after the arrestee has been secured.<sup>109</sup>

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<sup>103</sup> *But see Shakir*, 616 F.3d at 321 (stating that the standard remains a lenient one).

<sup>104</sup> *See, e.g., United States v. Tejada*, 524 F.3d 809, 811–12 (7th Cir. 2008) (applying *Belton* to a search of an apartment); *United States v. Abdul-Saboor*, 85 F.3d 664, 668–69 (D.C. Cir. 1996) (same); *United States v. Palumbo*, 735 F.2d 1095, 1097 (8th Cir. 1984) (applying *Belton* to a search of a hotel room).

<sup>105</sup> *Shakir*, 616 F.3d at 320.

<sup>106</sup> *Id.*

<sup>107</sup> *See Chimel v. California*, 395 U.S. 752, 763 (1969) (“[I]t is reasonable for the arresting officer to search *the person* arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape.” (emphasis added)).

<sup>108</sup> *See id.* (“And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule.”). When describing the area of immediate control, the Court only references weapons and evidence. *See id.* (equating the area of “immediate control” to “the area from within which [the defendant] might gain possession of a weapon or destructible evidence”).

<sup>109</sup> *See United States v. Edwards*, 415 U.S. 800, 803 (1974) (stating that searches of the person may be conducted later, including at the stationhouse after arrest); *Stoughton, supra* note 2, at 1768 (stating that an arrestee can expect “no less than four searches [of his person]: one at the scene of the arrest, another when the transport officer takes custody, a

Moreover, after *Robinson*, these searches are a categorical right of police officers.<sup>110</sup> Additionally, being able to search for items that might be used to help someone escape says nothing about when that search takes place, as one could search for and seize items that could potentially help a suspect escape custody *before* actually securing the suspect.<sup>111</sup> As discussed in Part I.B, there is debate in the lower courts over when the search can take place, and *Chimel* provides no explicit guidance here.<sup>112</sup> Therefore, the *Shakir* court cannot so easily come to the conclusion that *Chimel* permits searches after a defendant has been handcuffed.

The *Shakir* court also raised the concern that handcuffs can fail, potentially exposing officers to added dangers.<sup>113</sup> There is no doubt that handcuffs can and do fail on occasion, but the question is whether they fail with enough frequency to lend credibility to the argument that defendants have a reasonable possibility of access to items when cuffed. The *Shakir* court stated that at least four officers were killed in 1991 by persons who had previously been handcuffed and that such episodes continue today.<sup>114</sup> According to FBI statistics, there have been a total of 122 officers killed from 2002 to 2011 during arrest situations—just over an average of twelve deaths per year.<sup>115</sup> It is unclear, however, how many of these were a result of handcuff failure or even how many occurred after officers had handcuffed the arrestee. Some of these deaths occurred before the officers handcuffed the suspect, as the statistics measure deaths during “arrest situations,” which include deaths that occur in the process of arresting an individual.<sup>116</sup> At any

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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”).

<sup>110</sup> See *United States v. Robinson*, 414 U.S. 218, 235 (1973) (“It is the fact of the lawful arrest which establishes the authority to search [the person] . . .”). Searches of the person remain a categorical right that flows from the fact of arrest, and searches of the person have historically been treated differently from searches of the area of immediate control. See *supra* note 6 (drawing this distinction).

<sup>111</sup> See *Moskovitz*, *supra* note 39, at 689–90 (describing how the language in *Chimel* does not directly state when the search must take place).

<sup>112</sup> See *id.* (noting the lack of guidance in *Chimel*); see also *supra* notes 41–43 and accompanying text (describing the time-of-arrest and time-of-search tests).

<sup>113</sup> *United States v. Shakir*, 616 F.3d 315, 320–21 (3d Cir. 2010); *United States v. Gordon*, 895 F. Supp. 2d 1011, 1021 (D. Haw. 2012) (quoting *Shakir* for the proposition that prohibiting searches after a defendant is handcuffed could expose police to an unreasonable risk of harm).

<sup>114</sup> See *Shakir*, 616 F.3d at 321 (“[I]n 1991 alone . . . at least four police officers were killed by persons who had already been handcuffed.” (quoting *United States v. Sanders*, 994 F.2d 200, 209–10 (5th Cir. 1993))).

<sup>115</sup> *Law Enforcement Officers Killed & Assaulted 2011*, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/leoka/2011/tables/table-19> (last visited Feb. 3, 2014).

<sup>116</sup> See *generally* FED. BUREAU INVESTIGATION, SUMMARIES OF OFFICERS FELONIOUSLY KILLED (2012), available at <http://www.fbi.gov/about-us/cjis/ucr/leoka/2011/>

rate, these statistics—without more—do not amount to a reasonable possibility that an arrestee will escape handcuffs and injure an officer, especially when one considers that there are more than thirteen million arrests in the United States per year.<sup>117</sup> Courts should be required to summon more evidence of officer danger before concluding that handcuff failure is a serious enough problem to justify a search after a defendant has been handcuffed.<sup>118</sup>

#### 4. *The Upshot*

On balance, when deciding between the *Shakir* court or Judge Bye's dissent in *Perdoma*, Judge Bye's claim that the search of a defendant's bag was unreasonable under the circumstances—where the defendant was handcuffed, outnumbered by officers, and the officers had sole possession of a zipped bag—is the better reading of *Gant*. The Court in *Gant* sought to reaffirm *Chimel*'s dedication to officer safety and evidence preservation.<sup>119</sup> The *Gant* Court affirmatively stated that at least one of *Chimel*'s principles must be present at the time of the search in order for the search to be lawful.<sup>120</sup> As the Court noted, officers will usually be able to fully arrest a defendant so that no real possibility of access to their vehicles exists.<sup>121</sup> The dangers present during an arrest are highest during the actual act of arrest.<sup>122</sup>

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officers-feloniously-killed/leoka-summaries-by-state-2011.pdf (describing, for example, officer deaths in Colorado and Delaware that occurred during arrest situations but before the suspect was handcuffed).

<sup>117</sup> FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2009: ARRESTS 1 (2010), available at <http://www2.fbi.gov/ucr/cius2009/documents/arrestmain.pdf> (noting that there were an estimated 13,687,241 arrests in the United States in 2009, excluding traffic violations).

<sup>118</sup> Justice Scalia endorsed the idea that Fourth Amendment doctrine should be based on factual realities concerning officer danger. See *Thornton v. United States*, 541 U.S. 615, 626 (2004) (Scalia, J., concurring) (stating that the evidence produced by the government—of seven instances in the last thirteen years of officers being attacked by arrestees after being handcuffed—did not justify a broad search incident to arrest authority).

<sup>119</sup> See *Arizona v. Gant*, 556 U.S. 332, 343 (2009) (rejecting the broad reading of *Belton* and embracing a view that tethers the doctrine to “the justification underlying the *Chimel* exception”); *Armacost*, *supra* note 2, at 311 (“*Gant* made clear that *Chimel* searches are strictly limited to their justification: to prevent suspects from accessing weapons or destroying or concealing evidence.”); Michael Goodin, *Arizona v. Gant: The Supreme Court Gets It Right (Almost)*, 87 U. DET. MERCY L. REV. 115, 135 (2010) (stating that the Court “returned the vehicle search incident to arrest to the justifications identified in *Chimel*”).

<sup>120</sup> See *Gant*, 556 U.S. at 343 (holding that the passenger must be “unsecured and within reaching distance . . . at the time of the search” (emphasis added)).

<sup>121</sup> See *id.* at 343 n.4 (stating that it will be a “rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee’s vehicle remains”); see also *supra* note 52 (discussing this rarity in more depth).

<sup>122</sup> Cf. *Thornton*, 541 U.S. at 621 (stating that the danger of an arrest to a police officer “flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty”

After police have control of the situation—as they did in *Perdoma*, where they had him handcuffed, outnumbered, and moved to a different location<sup>123</sup>—the danger presented is greatly diminished, and the twin justifications of *Chimel* are absent in most cases.<sup>124</sup>

However, it is important to note that *Gant* need not eliminate *Chimel* searches—searches of the area of immediate control—completely as some have suggested<sup>125</sup> or advocated.<sup>126</sup> Instead, courts should restrict *Chimel* searches in a manner consistent with those courts applying the time-of-search test.<sup>127</sup> Moreover, searches of the area of immediate control must be justified by articulable facts that give rise to a true reasonable possibility of access (meaning closer to an actual possibility of access, rather than to a theoretical possibility of access). I argue that, in order to serve *Chimel*'s rationales, the subsequent inquiry into reasonableness does not need to be a lenient standard.

Even with a more exacting review of what constitutes reasonable possibility of access, there are a number of scenarios where defendants will clearly still have a reasonable possibility of access and, thus, where a search will be appropriate. Whether a defendant has a

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(quoting *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973)); Moskowitz, *supra* note 39, at 665 (quoting findings from police department procedures that it “is much safer to search a handcuffed prisoner” (quoting BOSTON POLICE DEPT., RULES AND PROCEDURES, RULE 315, SEC. 6 (n.d.)); *id.* (quoting police department training manual’s direction that “[a] search should not be initiated in arrest situations until the individual is handcuffed and incapacitated as much as possible” (quoting BOSTON POLICE ACAD., TRAINING BULLETIN 26–89: SEARCHING PRISONERS (n.d.)) (internal quotation marks omitted)); Stoughton, *supra* note 2, at 1766–67 (stating that officers are trained to be “particularly wary during the actual application of handcuffs,” since the officer’s attention is drawn away momentarily from the arrestee’s behavior and the arrestee might resist arrest, and that the threat is reduced once the arrestee is handcuffed).

<sup>123</sup> See *supra* notes 76–79 and accompanying text (describing the facts of *Perdoma*).

<sup>124</sup> See *Gant*, 556 U.S. at 343 & n.4 (stating that, once officers have fully effectuated an arrest, a *Chimel* search is not reasonable because there is no real possibility of access); Armacost, *supra* note 2, at 312 (stating that, once officers handcuff and move the arrestee to a secure location, the justifications for the search under *Chimel* have evaporated).

<sup>125</sup> See Armacost, *supra* note 2, at 312 (stating that applying *Gant* to home searches “will virtually eliminate such searches”); Robert G. Rose, *The “Search-Incident-to-Arrest [But Prior-to-Securement]” Doctrine: An Outline of the Past, Present, and Future*, 23 REGENT U. L. REV. 425, 444 (2011) (arguing that *Gant* should not be applied to non-vehicular arrests because doing so would “eviscerate” an officer’s ability to search incident to arrest).

<sup>126</sup> See Moskowitz, *supra* note 39, at 660 (arguing that *Chimel*'s area of immediate control rule was dicta and should be abandoned).

<sup>127</sup> See Armacost, *supra* note 2, at 311–12 (stating that time-of-search courts rarely uphold searches of the immediate area of control); see also note 43 and accompanying text (describing the time-of-search test).

reasonable possibility of access is necessarily a fact-specific inquiry.<sup>128</sup> For instance, a search might be justified where officers are outnumbered and simply cannot secure all persons in an area, because any one of those persons could have a reasonable possibility of access.<sup>129</sup>

This does not, as some have suggested, necessarily create a perverse incentive for officers to leave suspects unsecured.<sup>130</sup> Reasonable possibility of access should turn on whether officers *could have* secured the suspects, not on whether they decided to. Therefore, if the officers *could have* secured the suspects but decided not to, the search would be illegal.<sup>131</sup> Indeed, it seems unlikely that officers would be willing to manufacture such a situation where they might put themselves at risk just to conduct a search.<sup>132</sup>

Another example of when a search would be permissible is when an arrestee is not dressed and he needs to put on clothes before being taken to the station. Here the arresting officer (if not able to get clothes for the arrestee) should be able to search any area from which

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<sup>128</sup> See *United States v. Rabinowitz*, 339 U.S. 56, 63 (1950), *overruled in part* by *Chimel v. California*, 395 U.S. 752 (1969) (“What is a reasonable search is not to be determined by any fixed formula. . . . The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case.”); Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 *Miss. L.J.* 341, 342 (2004) (noting that “legitimate Fourth Amendment doctrine is prone to indeterminacy”); *id.* at 349 (arguing that the courts have a “legitimacy deficit” in part because of their reliance on bright-line rules).

<sup>129</sup> See *United States v. Davis*, 569 F.3d 813, 817 (8th Cir. 2009) (upholding a search of a car where two officers had handcuffed one defendant and placed him in the patrol car while three passengers were unsecured).

<sup>130</sup> See *Arizona v. Gant*, 556 U.S. 332, 362 (2009) (Alito, J., dissenting) (stating that a rule that turned on whether an officer chose to secure an arrestee would “create a perverse incentive for an arresting officer to prolong the period during which the arrestee is kept in an area where he could pose a danger to an officer” (quoting *United States v. Abdul-Saboor*, 85 F.3d 664, 669 (D.C. Cir. 1996)) (internal quotation marks omitted)).

<sup>131</sup> See *Thornton v. United States*, 541 U.S. 615, 627 (2004) (Scalia, J., concurring) (“Indeed, if an officer leaves a suspect unrestrained nearby just to manufacture authority to search, one could argue that the search is unreasonable *precisely because* the dangerous conditions justifying it existed only by virtue of the officer’s failure to follow sensible procedures.”); *cf.* *United States v. McCraney*, 674 F.3d 614, 619–20 (6th Cir. 2012) (finding a search incident to arrest of a car illegal where the defendants were “two or three feet from the rear bumper” and outnumbered by police officers, even though the defendants were not handcuffed or secured in a patrol car). For an officer to engage in such activity would be against standard procedure in most instances. See *Moskovitz*, *supra* note 39, at 674–76 (finding that officers are supposed to handcuff and remove the suspect before searching).

<sup>132</sup> See, e.g., *Armacost*, *supra* note 2, at 315 (arguing that police officers will not jeopardize their safety for a search); *Singh*, *supra* note 9, at 1796 (arguing that *Gant* only creates perverse incentives for officers if officers value the search more than eliminating the risk of physical harm to themselves).

the suspect would get clothes, in addition to being able to search the clothes before the suspect puts them on.<sup>133</sup>

There might also be instances where a handcuffed person could still be considered to have a reasonable possibility of access, but these should be rare instances where it is apparent that the arrestee is dangerous and uncooperative. As the *Gant* Court stated, it should be the “rare case” in which these searches are authorized.<sup>134</sup>

### B. *Balancing Defendants’ Rights, Officer Safety, Evidence Preservation, and Clarity*

In crafting a proper search incident to arrest rule, there are four major considerations: defendants’ privacy rights,<sup>135</sup> officer safety,<sup>136</sup> evidence preservation,<sup>137</sup> and clarity of guidance for officers in the field.<sup>138</sup> Therefore, these four factors must be balanced in determining both (1) when there is no reasonable possibility of access—as when an arrestee is secured or is unable to reach the area searched—and (2) when the area of control should be measured—whether at time of

<sup>133</sup> See *People v. Jones*, 767 P.2d 236, 236–38 (Colo. 1989) (en banc) (upholding a search during home arrest where—after the defendant requested permission to put on pants before being transported to police station—officers searched the pants before handing them to the defendant, finding a marked bill from a drug buy in the pocket of the pants).

<sup>134</sup> *Gant*, 556 U.S. at 343 n.4.

<sup>135</sup> See *Gant*, 556 U.S. at 344–45 (recognizing that a broad search incident to arrest rule “creates a serious and recurring threat to the privacy of countless individuals”); *Chimel v. California*, 395 U.S. 752, 768 (1969) (explaining the rule in *Chimel* and rejecting prior approaches on the need to afford citizens their Fourth Amendment protections); Goodin, *supra* note 119, at 145 (arguing that *Gant* ensures that individuals’ rights are protected); Scott R. Grubman, *Bark with No Bite: How the Inevitable Discovery Rule Is Undermining the Supreme Court’s Decision in Arizona v. Gant*, 101 J. CRIM. L. & CRIMINOLOGY 119, 157 (2011) (stating that the Court in *Gant* ruled as it did “out of concern over and respect for the important constitutional interests that a motorist has in his vehicle”).

<sup>136</sup> See *Gant*, 556 U.S. at 339 (stating that one of the purposes of the search incident to arrest doctrine is to protect arresting officers); *Thornton*, 541 U.S. at 623 (basing its holding in part on the need to ensure officer safety); *Chimel*, 395 U.S. at 763 (explaining the need to protect officers); Armacost, *supra* note 2, at 313 (“The discussions surrounding *Belton* and *Gant* focused largely on questions having to do with officer safety . . . .”); Chase, *supra* note 94, at 2597–99 (discussing the need for a test that accounts for officer safety). *But see* Dery, *supra* note 15, at 416 (noting that *Gant* might expose officers to more dangerous situations).

<sup>137</sup> See *Chimel*, 395 U.S. at 763 (explaining how the need to preserve evidence that could be destroyed by the arrestee can justify a search).

<sup>138</sup> See *Thornton*, 541 U.S. at 623 (stating the “need for a clear rule, readily understood by police officers”); *New York v. Belton*, 453 U.S. 454, 460 (1981) (stating the need for a “workable rule”); Goodin, *supra* note 119, at 142–43 (arguing that *Gant* provides a workable rule for officers during arrests in the vehicle contexts). *But see* Armacost, *supra* note 2, at 313–16 (noting that the Court focuses on bright-line rules as a way to guide police officer action in the field, but arguing that bright lines are unnecessary for police safety); Dery, *supra* note 15, at 415–17 (arguing that *Gant*’s holding creates uncertainty for officers in the field).

arrest or time of search.<sup>139</sup> The approach described in the previous Subpart achieves the proper balance between the four considerations of a search incident to arrest.

Most obviously, a rule that does not assess reasonable possibility of access leniently does more to protect individual rights; it means that *Chimel* searches—searches of the area of immediate control incident to arrest—become rarer. This is because many *Chimel* searches will involve either a home or a container carried with the defendant—both places where courts have determined defendants have a greater expectation of privacy than in their cars.<sup>140</sup> The approach I advocate for in this Note avoids the illogic of a *Chimel* search being the “rare case” in the vehicle context (where there is a diminished expectation of privacy) but remaining commonplace in situations where defendants have a greater expectation of privacy.

Moreover, the approach suggested in Part III.A should not have a negative effect on officer safety. After all, searches incident to arrest are almost always conducted after the arrestee is handcuffed and removed from the scene, and by then the danger is over.<sup>141</sup> Additionally, adhering to my approach would not allow officers to circumvent the rule by leaving an arrestee unsecured or otherwise creating conditions that would allow a search.<sup>142</sup>

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<sup>139</sup> Cf. *Gant*, 556 U.S. at 338 (stating that warrantless searches are judged on their reasonableness); *Armacost*, *supra* note 2, at 309 (describing how the Court has moved toward a “Fourth Amendment based on reasonableness balancing rather than warrants and probable cause”).

<sup>140</sup> See, e.g., *Florida v. Jardines*, 133 S. Ct. 1409, 1419 n.1 (2013) (Kagan, J., concurring) (citing *Gant* for the proposition that “people’s expectations of privacy are much lower in their cars than in their homes”); *Gant*, 556 U.S. at 345 (“[A] motorist’s privacy interest in his vehicle is less substantial than in his home . . . .”); *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (“With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”); *Payton v. New York*, 445 U.S. 573, 589 (1980) (“In [no other setting] is the zone of privacy more clearly defined than [in] . . . an individual’s home . . . .”). The same is true for containers. See, e.g., *United States v. Chadwick*, 433 U.S. 1, 13 (1977) (stating that the “factors which diminish the privacy aspects of an automobile do not apply to respondents’ footlocker” and that “a person’s expectations of privacy in personal luggage are substantially greater than in an automobile”). Of course, there is a significant difference between personal effects on the person, which can be searched at any time, and luggage, which cannot be searched without a warrant or exigency once officers have the property in their exclusive control. For a helpful overview of the doctrine see *People v. Diaz*, 244 P.3d 501, 503–10 (Cal. 2011). When this Note refers to containers, it is only referring to items that would not be considered an extension of the person, such as a purse or wallet.

<sup>141</sup> See *Armacost*, *supra* note 2, at 311–12 (highlighting the usual police practice of securing and removing an arrestee before a search, removing any possible security-based justification for a search).

<sup>142</sup> See *supra* notes 130–32 and accompanying text.

Moreover, this approach will not substantially undermine an officer's ability to gather evidence as she will still have other warrant exceptions that can be employed to conduct a search.<sup>143</sup> Even absent an exception to the warrant requirement, the police need not allow evidence to be destroyed. The police can always seek to obtain a warrant and, if officers are afraid that a third party may destroy evidence in the interim, they can secure the area while waiting for judicial approval of the warrant.<sup>144</sup>

Perhaps most importantly, many of these other exceptions to the warrant requirement require probable cause or an otherwise heightened showing, meaning that the officer needs more than the simple fact of arrest to justify the search or seizure.<sup>145</sup> This reduces the risk of abuse by officers. The heightened requirements of these exceptions give defendants greater protections while still granting officers a number of tools to gather and preserve evidence.<sup>146</sup>

Finally, the approach suggested in Part III.A presents fairly straightforward guidance for officers: (1) the search must take place when the arrestee is within reaching distance of the place searched, and (2) there must be a reasonable possibility that the arrestee could gain access to the area. This sort of reasonableness analysis is familiar to officers, as they make decisions about probable cause and reasonable suspicion every day.<sup>147</sup> If the officer searches, she knows that she

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<sup>143</sup> Exceptions include: plain view seizures (*Horton v. California*, 496 U.S. 128, 133, 136–37 (1990) (allowing seizure of evidence that is in plain view, specified as being both clearly incriminating and positioned such that an officer can both see the object and access it lawfully)); *Buie* searches (*Maryland v. Buie*, 494 U.S. 325, 333, 337 (1990) (allowing sweep of areas when an officer has a reasonable belief that the area poses a danger to those present)); inevitable discovery (*Nix v. Williams*, 467 U.S. 431, 448 (1984) (refusing to exclude evidence tainted by police malfeasance or mistake that would ultimately have been discovered through lawful means)); inventory searches (*Illinois v. Lafayette*, 462 U.S. 640, 644 (1983) (permitting searches incidental to administrative needs associated with processing an arrestee)); and consent searches (*United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (holding that, unless invalidated for other reasons, searches are valid upon consent of the person searched)).

<sup>144</sup> See *Illinois v. McArthur*, 531 U.S. 326, 328 (2001) (describing how officers had prevented the defendant from reentering his home for two hours while a warrant was obtained); *United States v. Griffith*, 537 F.2d 900, 904–05 (7th Cir. 1976) (invalidating a search incident to arrest and stating that officers could have “posted a guard on the room, obtained a search warrant, and later returned to search the room”).

<sup>145</sup> See, e.g., *Buie*, 494 U.S. at 337 (requiring reasonable belief that an area contains individuals posing a danger to those present before officers may conduct a protective sweep of the home); *Illinois v. Gates*, 462 U.S. 213, 230–41 (1983) (noting that probable cause is necessary for a search warrant).

<sup>146</sup> *Armacost*, *supra* note 2, at 303–04 (describing how, though inventory searches can substitute for searches incident to arrest, inventory searches ultimately prove to be a costly substitute because of the procedures involved).

<sup>147</sup> See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1045–46 (1983) (allowing “frisks” of a vehicle upon reasonable belief that the suspect is dangerous and might gain access to

will need to articulate facts to show that these two circumstances existed.

#### CONCLUSION

*Arizona v. Gant* can and should be understood to require a strict showing in determining whether a defendant had a reasonable possibility of access. True, applying *Gant* in this way would further limit the search incident to arrest doctrine, but not in a way that exposes officers to greater harm, which is always a primary concern of the courts. Officers expose themselves to great risk during arrests, and those risks should not be downplayed. However, the modern conception of the search incident to arrest doctrine is out of step with those risks when searches take place long after the danger has passed. Thus, courts should make “reasonable possibility of access” a stricter standard. While evidence preservation is also an important part of the doctrine, officers retain a litany of warrant exceptions that allow them to search for and seize evidence. A narrower search incident to arrest rule will not alter that. What it *will* do, however, is protect defendants’ rights, while continuing to protect officers in the field.

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weapons); *Gates*, 462 U.S. at 230–35 (replacing the two-pronged test for probable cause determinations with a totality of the circumstances approach); *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (allowing frisks when officers have reasonable grounds to believe that the person is armed and dangerous).