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POST-RACIALISM AND SEARCHES INCIDENT TO ARREST

Frank Rudy Cooper

For 28 years the Court held that an officer’s search incident to arrest powers automatically extended to the entire passenger compartment of a vehicle. In 2009, however, the Arizona v. Gant decision held that officers do not get to search a vehicle incident to arrest unless they satisfy (1) the Chimel v. California Court’s requirement that the suspect has access to weapons or evanescent evidence therein or (2) the United States v. Rabinowitz Court’s requirement that the officer reasonably believe evidence of the crime of arrest will be found therein. While many scholars read Gant as a triumph for civil liberties, I see it as a failure to fully address racial profiling.

Racial profiling lives on in the post-Gant era because the Court failed to prohibit pretextual searches. Cops may leave suspects near a car in order to satisfy Gant’s first prong. More importantly, they will often be able to characterize the crime of arrest as suggesting there could be evidence in the car. For instance, if a distracted driver turns without signaling, what is to stop an officer from claiming she suspected the crime of Driving Under the Influence and was searching for beer cans? Nothing in the Gant decision.

The Gant Court fails to address pretext because it takes a post-racial approach to racial profiling. That is, it acts as if race never matters by trying to address a problem of racism through a broader category of analysis. In Gant, that means ignoring former Justice Sandra Day O’Connor’s warning in her Atwater v. City of Lago Vista dissent that the search incident to arrest rule is used for racial profiling. The Gant Court thus remedies only the general problem of officers searching for weapons after they have eliminated any safety concerns but not the specific problem of racial profiling through searches incident to arrest.

* Copyright 2012 Frank Rudy Cooper, all rights reserved. Professor, Suffolk University Law School. I thank my wonderful wife Daniella Courban, my research assistants, Raeha Blouin and Lia Marino, and research librarian, Diane D’Angelo. I also thank Chris Dearborn, Kathleen Engel, Kim McLaurin, Eric Miller, Song Richardson, and Ragini Shah. I presented versions of this article at the 2010 John Mercer Langston Writing Workshop, National People of Color legal scholarship conference, and LatCrit conference. Special thanks to the staff of the Arizona State Law Journal.
Prior to Gant, scholar Donald Dripps identified an "Iron Triangle" of cases that made search incident to arrest doctrine inimical to civil liberties; I extend that metaphor and argue the problem of racial profiling stems from a "Mindless Square" of cases. Dripps points to the combination of New York v. Belton's presumption that a car may be searched, Whren v. United States's bar on considering officer motivations, and Atwater's approval of arrests for de minimis crimes. I point out that these cases draw on the earlier United States v. Robinson case's refusal to consider whether the officer actually had the state of mind that Chimel says justifies the search incident to arrest rule. Together, Robinson, Belton, Whren, and Atwater remove the officer's mind from analysis of search incident to arrest doctrine.

In order to address post-Gant racial profiling, we must address the mindlessness of present doctrine. That means reinvigorating Chimel by excising the Rabinowitz prong from the search incident to arrest of vehicles rule. It also means explicitly asking whether it is overall reasonable to allow a search incident to arrest while considering if the arrest was a pretext for racial profiling.

If criminal procedure of the mid-twentieth century can be understood as a type of civil rights law,¹ criminal procedure of the early twenty-first century might come to be understood as an attempt to construct a post-racial era. Post-racialism is the notion that the United States has reached a point where race is so infrequently salient that it no longer makes sense to organize around it or even acknowledge its presence.² We are to be race-

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silent, even when we try to address issues that correlate closely with race. The problem is, there are many examples of ongoing disparate negative treatment of racial minorities, such as racial profiling. Post-racialism would seem to suggest taking a race-silent approach to racial profiling. The main way police officers racial profile minorities as criminals is by obtaining probable cause to arrest based on a minor traffic violation and then searching the suspect and her vehicle incident to that arrest. So a post-racialist might curb police officers’ search incident to arrest discretion in general without explaining the necessity for the curbs on the basis of race or tailoring the remedy to address race. As a case study in whether race-silent measures are as effective as directly attacking racism, this article considers the Court’s doctrine governing police searches of vehicles incident to arrests.

The Court’s vehicle search doctrine is a branch of its overall searches incident to arrest doctrine. Two early search incident to arrest cases conflict with each other and set the stage for a debate as to the appropriate scope of the doctrine. The United States v. Rabinowitz case contends that police officers’ evidence-gathering function means they should be able to search anywhere in a home that evidence might be found whenever they have probable cause to arrest a suspect. The Chimel v. California case later links a police officer’s full blown search powers in the home to twin rationales of


officer safety and prevention of destruction of evidence and thus limits the
search to the area in the “immediate control” of the suspect.\(^5\) Justice Scalia
has claimed that both Rabinowitz and Chimel are “plausible” explanations
of the rationale for the search incident to arrest.\(^6\) In an early application of
the Chimel rule, the Court in United States v. Robinson held that an officer
could fully search the person of the suspect and his immediate area after
arresting him for a traffic violation.\(^7\) Under the Robinson decision, a police
officer may make a search incident to arrest of a person even if she does not
have the state of mind of fear for either safety or evidence that justifies the
search incident rule.\(^8\) The New York v. Belton case then created a
presumption that the entire passenger compartment of a car is within the
immediate control of a suspect and held that officers may search a vehicle’s
passenger compartment incident to the arrest of the suspect for a traffic
violation.\(^9\)

The full implications of the Belton doctrine were seen in the Whren v.
United States decision, in which the Court held that the fact that our traffic
laws are so pervasive that most people can be found in violation most days
does not require police to have anything other than probable cause of the
traffic violation before arresting the subject.\(^10\) In conjunction with Belton’s
permission to search, the Whren rule means that officers have the ability to
search most people’s cars for evidence of major crimes upon a mere hunch
and a traffic violation.\(^11\) Moreover, the Whren Court explicitly holds that an
officer’s subjective decision to use the traffic violation as a pretext to search
a racial minority for evidence of drug dealing solely because of her race is
irrelevant to Fourth Amendment analysis.\(^12\) In the Atwater v. City of Lago
Vista case, the majority held that whenever police officers have probable
cause to believe that an individual has committed a traffic violation, they

the shift to Chimel to the victory of the warrant preference approach to the Fourth Amendment
over the reasonableness approach, a victory that would prove ephemeral. Edwin J. Butterfoss,
Bright Line Breaking Point: Embracing Justice Scalia’s Call for the Supreme Court to Abandon
an Unreasonable Approach to Fourth Amendment Search and Seizure Law, 82 TUL. L. REV. 77,
80 (2007).
will become clear, I do not find Rabinowitz to be a plausible justification for the search incident
to arrest rule.
\(^8\) See id. at 236.
\(^11\) See id.
\(^12\) See id. at 814–16.
may arrest the suspect even for a minor, rarely-enforced violation carrying no possible jail time.\textsuperscript{13}

Scholar Donald Dripps refers to the citizen vulnerability created by the combination of \textit{Belton}, \textit{Whren}, and \textit{Atwater} as the "Iron Triangle";\textsuperscript{14} we might go further and refer to the combination of \textit{Robinson}, \textit{Belton}, \textit{Whren}, and \textit{Atwater} as creating a "Mindless Square." Dripps is right that the combination of \textit{Belton}, \textit{Whren}, and \textit{Atwater} ends up making everything in the passenger compartment of the car, including a locked glove box and sealed containers, subject to search incident to arrest for a minor traffic violation.\textsuperscript{15} Turning Dripps’ Triangle into a Square emphasizes the significance of \textit{Robinson}'s refusal to look at officers' states of mind to the undoing of \textit{Chimel}'s limits on searches incident to arrest.

The recent \textit{Arizona v. Gant} decision marks a turning point in search incident to arrest law that places some limits on the discretion created by the Mindless Square and may thereby limit racial profiling.\textsuperscript{16} The \textit{Gant} decision limits \textit{Belton} searches to situations where the officer can establish either (1) the \textit{Chimel} rationales that the suspect has access to weapons or destructible evidence or (2) the \textit{Rabinowitz} rationale that there are reasonable grounds to believe the officer will find evidence of the crime of arrest in the car.\textsuperscript{17} Nonetheless, \textit{Gant} never mentions the fact that racial minorities are much more likely to suffer the consequences of an open-ended rule.

While many scholars read \textit{Gant} as a triumph for civil liberties, I see it as a failure to fully address racial profiling. Racial profiling lives on in the post-\textit{Gant} era because the Court failed to prohibit pretextual searches. Cops may leave suspects near a car in order to satisfy \textit{Gant}'s first prong. More importantly, they will often be able to characterize the crime of arrest as suggesting there could be evidence in the car. For instance, if a distracted driver turns without signaling, what is to stop an officer from claiming she suspected the crime of Driving Under the Influence and was searching for beer cans? Nothing in the \textit{Gant} decision.

As Eric Miller and Song Richardson’s articles in this symposium demonstrate, police officers are still prone to racial profiling.\textsuperscript{18} It would

\textsuperscript{13.} \textit{Atwater v. City of Lago Vista}, 532 U.S. 318, 354 (2001).
\textsuperscript{15.} See generally id.
\textsuperscript{17.} \textit{Id.} at 351.
have made sense for the Gant decision to reference O’Connor’s Atwater dissent. There, she explicitly criticizes the Whren decision as allowing racial profiling. By limiting a prime means of racial profiling—the bogus traffic stop as pretext for a drug search—without acknowledging the racial reasons for doing so, Gant uses a post-racial means to effect racial progress.

The core argument of this article is that the Court ought to extend the Gant limitation on vehicle searches incident to arrest by excising its Rabinowitz prong and requiring searches incident to be overall reasonable in light of any racial pretext. This would create a more race-sensitive search incident to arrest doctrine.

I. POST-RACIALISM

Post-racialism is about avoiding the acknowledgment of race. An anecdote exemplifies this quality of post-racialism. A friend told me he was talking to his eight-year-old son while the son watched television. The son said he wanted a certain toy, but there were many children in the scene and many of them were holding objects. The friend asked which toy. The son said the kid on the left was holding it. The friend said, “which kid, the black one?” The son said, “don’t say that, it’s not nice.” The son explained that he had gathered from school that he was never to refer to someone’s race because all people are the same. The friend asked, “was there a better way to identify your toy?” There was not. Like the son, when people are in a post-racial mode, they try to find broader, non-race categories for not only identifying but also addressing social problems.

To understand post-racialism’s goals, it is helpful to understand its predecessor, colorblindness. Whereas colorblind ideology argued that assuming that race does not matter is the best way to reach a racially egalitarian society, post-racialism declares that race already no longer matters in societal interactions. Colorblindness is exemplified by Chief Justice Roberts’s statement: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” He seems to mean that we should never act on the basis of having identified someone’s race. To make race immaterial, we must act as though race is already immaterial. Colorblindness implicitly accepts that people do see race but thinks a society where people do not see race would be more egalitarian, and thus advocates pretending we do not see race.

In contrast, post-racialism says that we have already reached a state where race does not matter. As a prime example of the overcoming of racism, post-racialists point to the election of Barack Obama as the first black President of this (for now) majority white nation. Chris Matthews reflected this idea when he said, “I forgot Obama was black for an hour.” But even post-racialists probably do not mean that people literally no longer ever see race. More likely, they mean that invidious racism is so infrequent and so marginalized that race makes no practical difference in most people’s lives. The implication of colorblindness, and especially of post-racialism, is that we should no longer organize around race—neither socially nor through race-based legal remedies. Post-racialism is thus a continuation of colorblindness in that it triumphantly declares that we have reached the racially egalitarian state that colorblindness was seeking.

Thomas, whom some would refer to as an apologist for white privilege, has such a fear. See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 781 n.30 (2007) (Thomas, J., concurring) (referencing privilege).


27. See Cho, supra note 2, at 1595.

28. Id. at 1595 (“Centuries of racial apartheid and neo-apartheid are eclipsed by a symbolic ‘big event’ signifying transcendent racial progress.”).

Critical race theorists, having long challenged colorblindness, are dubious about post-racialism. 30 Critic
practice of U.S. police departments. They have also shown that the practice is both ineffective and detrimental in a number of ways.

What then is a post-racialist to do about racial profiling? To understand what a race-silent approach to racial profiling might look like, we might turn to the jurisprudence of former U.S. Supreme Court Justice Sandra Day O'Connor. O'Connor is an appropriate object of this inquiry because she created much of the Court’s colorblind Equal Protection doctrine and called for a form of post-racialism before that term was widely used. She is known for her colorblindness due to her opinions in Richmond v. J.A. Croson Co. and Shaw v. Reno, which invalidated race-conscious remedies on the theory that the best way to reach a racially egalitarian society is to ignore race. Even in the case where she surprisingly allowed race-based affirmative action in higher education, she foreshadowed “post-racialism” by declaring that race-consciousness would surely be unnecessary in twenty-five years.

It should come as no surprise, then, that majorities including O'Connor were usually race-silent in the criminal procedure context, even when addressing overt racism. For example, the Ferguson v. City of Charleston case involved a South Carolina hospital that threatened forty-two women—forty-one black women and one white woman—with prosecution for drug


42. For critiques of this view on the ground that it ignores the ongoing racial effects of past de jure and de facto discrimination, see Stephen E. Gottlieb, Sandra Day O'Connor's Position on Discrimination, 4 U. MD. L.J. RACE RELIGION GENDER & CLASS 241, 244–47 (2004) (noting that O'Connor’s Grutter decision upholding affirmative action in education did so out of deference to respected employers, not out of realization of continuing effects of past and present discrimination); López, supra note 2 (linking “post-racialism” to racial stratification).

use during pregnancy. The white nurse who had created the program was quoted as saying she was opposed to "race-mixing" and the only white woman prosecuted was in a relationship with a black man. Justice Stevens, who dissented in the aforementioned anti-affirmative action cases, wrote an opinion that never mentions race, yet strikes down the program as unreasonable under the Fourth Amendment because its purported special need for avoiding the probable cause requirement was actually an ordinary law enforcement interest. In other words, Stevens addressed racism in a race-silent manner. This article will demonstrate that Gant, another Stevens opinion, is race-silent. It will also show why that is not a good thing.

II. CASE STUDY: GANT'S RACE-SILENT REMEDY FOR RACIAL PROFILING

This Part of the Article considers the race-silence in search incident to arrest doctrine. It first traces the development of the doctrine into separate strands represented by Rabinowitz's allowance of broad searches and Chimel's narrower view of searches. It then identifies how the Mindless Square of cases undoes the Chimel approach. Next it follows the road to Gant's restriction of Belton. Finally, it discusses the ways that Gant is a post-racial opinion.

A. The Rabinowitz Approach Versus the Chimel Approach

As does much of criminal procedure, search incident to arrest doctrine begins with the Weeks v. United States case, which announced that evidence obtained in contravention of the Fourth Amendment must be excluded, and, in dicta, discussed the right to search a person incident to her arrest. The Prohibition-era Carroll v. United States case then allowed the police to strip a car in search of bootleg liquor, principally upon grounds that warrants were impracticable for vehicles. After Carroll, the Court swung back and forth on the scope of searches incident to arrest. The Agnello v. United States Court asserted the search incident to arrest included the "place" of the arrest. In the Marron v. United States case, the Court

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45. Id. at n.40.
49. Id. at 153 (no warrant required because the "vehicle can be quickly moved out of the locality or jurisdiction").
limited the search to "items used to carry on the criminal enterprise," which seemed to constrict the search incident to arrest right. The Go-Bart Importing Co. v. United States and United States v. Lejkowitz cases then followed Marron. Yet, in Harris v. United States, the Court upheld a search of an entire apartment, including a sealed envelope found in a desk drawer. Nonetheless, in Trupiano v. United States, the Court required law enforcement to procure a warrant, whenever possible, before searching the premises. That set the stage for attempts to stabilize the doctrine in Rabinowitz and Chimel.

1. Rabinowitz

The Rabinowitz case has come to stand for the proposition that there ought to be a broad right to search incident to arrest. For instance, as will be noted, current Justice Antonin Scalia cites Rabinowitz for the proposition that officers may make a general search of a car for evidence relating to the crime of arrest incident to having probable cause to arrest. In Rabinowitz itself, the defendant seemed to be in the business of selling counterfeit stamps. Incident to arresting Rabinowitz, officers conducted a thorough search of the entire premises, including a desk, file cabinet, and safe. The search lasted about ninety minutes.

The Rabinowitz Court asserted that a search of a person being arrested is constitutionally reasonable under the Fourth Amendment based on long-

53. Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931) (failure to seek search warrant despite ability to do so defeats seizures incident to arrest).
55. Harris v. United States, 331 U.S. 145, 152–53 (1947) (finding that the search should not depend upon the "fortuitous circumstance[s]" of the room in which the arrest took place or that the checks were items that could be hidden and therefore might be looked for in small areas).
56. Chimel, 395 U.S. at 757–58 (citing Harris, 331 U.S. at 151).
58. See Chimel, 395 U.S. at 758–59 (citing Trupiano, 334 U.S. at 705).
61. Id. at 58–59.
62. Id. at 59.
standing precedents. Authority to further search the premises where the arrest was made had two bases. First, the right to search the premises stemmed from the right to search the person, which could take place on the premises. Second, and crucially, the right to search the premises for evidence of guilt was time-worn. Together these bases made a general, evidence-gathering search of premises incident to arrest constitutionally reasonable. Contrary cases, argued the Rabinowitz Court, condemned only “general exploratory searches,” which are invalid even with a warrant.

In addressing the defendant’s claim that the search of his premises required not only probable cause to arrest, but also a warrant, the Rabinowitz Court reveals its motive for finding a search of premises reasonable. It rejects the Trupiano requirement of getting a warrant whenever it is practical on grounds that law enforcement officers need flexibility in their “daily battle with criminals.” Based on that concern for facilitating law enforcement, the Rabinowitz Court credits the police with a thumb on the scale when balancing the reasonableness of an intrusion versus an individual’s privacy.

Justice Frankfurter’s Rabinowitz dissent begins by citing Judge Learned Hand for the proposition that a person’s right of privacy against arrest “is altogether separate from the interest in protecting his papers from indiscriminate rummage . . . .” The reason that distinction matters to Frankfurter is that he conceives of the search incident to arrest exception to the warrant requirement as narrow. The search incident to arrest rule is limited to situations where it is necessary to “protect the arresting officer,” “deprive the prisoner of potential means of escape,” or “avoid destruction of evidence.” Consequently, the search is to be only of “the person and those immediate physical surroundings which may fairly be deemed to be an extension of his person.” This criticism of Rabinowitz as confusing the grounds for searching a person incident to arrest and those for searching premises incident to arrest hits its mark.

63. Id. at 60 (citing Carroll, 267 U.S. at 147).
64. Id. at 61.
65. Id.
66. Id.
67. Id. at 62.
68. Id. at 65.
69. Id. at 66.
70. Id. at 71 (Frankfurter, J., dissenting) (quoting United States v. Rabinowitz, 176 F.2d 732, 735 (2d Cir. 1949)).
71. Id. at 72.
72. Id.
73. Id. at 72–73.
Frankfurter continues the argument that the *Rabinowitz* majority is confused by providing a genealogy of the search incident to arrest doctrine. First, says Frankfurter, the *Weeks* Court merely assumed—in dicta—that "to search the person of the accused when legally arrested ... has been uniformly maintained in many cases."74 Next, the *Carroll* Court said, "[w]hen a man is legally arrested ... whatever is found upon his person or in his control which is unlawful for him to have and which may be used to prove the offense may be seized."75 Finally, those statements were "uncritically expanded" when the *Agnello*76 Court jumped to the conclusion that "[t]he right ... to search the place where the arrest is made ... is not to be doubted."77 Thus, Frankfurter’s second criticism of the *Rabinowitz* majority is that the authorities cited support only the right to search a person and that which is "in such immediate physical relation to the one arrested as to be in a fair sense a projection of his person,"78 not the whole premises where the arrest takes place.79

Frankfurter’s final criticism of the *Rabinowitz* majority is that it misconceives the very notion of Fourth Amendment reasonableness. The fundamental purpose of the Fourth Amendment was to prevent "general warrants" of the type the British had used against the colonists.80 Frankfurter complains that allowing general rummaging of premises incident to an arrest is akin to a general warrant.81 Frankfurter’s critique, therefore, is as thoroughgoing as any Fourth Amendment opinion, and would rightly provide the framework for *Chimel*’s overturning of *Rabinowitz* nineteen years later.

2. *Chimel*

In *Chimel*, police officers went to Chimel’s home to arrest him on suspicion of robbing a coin shop.82 "[O]n the basis of the lawful arrest," the officers searched his entire three-bedroom house, including the attic, the

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75. *Id.* (quoting *Carroll v. United States*, 267 U.S. 132, 158 (1925)).
78. *Id.* at 78.
79. *Id.* at 77–78.
80. *Id.* at 81.
81. *Id.*
garage, and a small workshop, for approximately sixty minutes. In the master bedroom and the sewing room, officers directed Chimel’s wife to open drawers and move the contents of drawers from side to side.

The Chimel majority rejects Rabinowitz, which it says stands for the proposition that search incident to arrest extends to all areas in the general “possession” or under the general “control” of the arrestee. For the Chimel majority, a broad reading of Rabinowitz “can withstand neither historical nor rational analysis.” Quoting Justice Frankfurter’s Rabinowitz dissent, the Chimel majority deems the broad reading of Rabinowitz to be the result of a “hint,” transformed into “dictum,” then calcified into a “decision.”

Moreover, says the Chimel majority, Rabinowitz’s rationale was undercut even by analogy to the Supreme Court’s new, more flexible test for reasonableness, as exemplified by the Terry v. Ohio decision. The Chimel majority saw searches incident to arrest as similar to a Terry frisk, which may follow a temporary detention. The Chimel majority notes that a Terry frisk is only justified by officer safety and prevention of the destruction of evidence and thus its scope is limited to a protective search for weapons or evidence on the suspect’s person or within her immediate control. Such a rationale for Terry stops suggests that searches incident to arrest should also be limited to the suspect’s person and the area within her immediate control. “Immediate control,” says the Chimel majority is limited to “the area from within which he might gain possession of a weapon or destructible evidence.” There is no justification “for searching through all the desk drawers or other closed or concealed areas,” even in the very room where the suspect is arrested. So, searches incident to arrest extend only so far as the person’s “immediate control,” and not to areas more broadly in his possession.

A further reason for this limitation bears special note with respect to the use of searches incident to arrest to racially profile. The Chimel majority declares that “one result of decisions such as Rabinowitz and Harris is to give law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest

83. Id. at 754.
84. Id.
85. Id. at 760.
86. Id.
87. Id.
88. Id. at 762; see Terry v. Ohio, 392 U.S. 1 (1968).
89. Chimel, 395 U.S. at 763.
90. Id.
91. Id.
92. Id.
suspects at home rather than elsewhere." 93 This concern with pretext searches, while arguably not in the core of the holding, helps explain how Chimel should be applied today. Unfortunately, the Court would soon turn its back on any concern with pretext in the Robinson decision.

B. The "Mindless Square": How Robinson, Belton, Whren, and Atwater Undo Chimel

The Robinson decision is an important search incident to arrest case not because it allows a broad search of the person of the arrestee but because it purportedly bars any consideration of the officer’s subjective reasons for searching. It extends Chimel by applying search incident doctrine to both the person and her grabbable area. Yet, the Robinson decision is a “sea change” in that it links the discretionary search incident to arrest to a necessity for the Court to ignore officers’ subjective motivations for their actions. This section of the Article traces the path from Robinson’s alleged application of Chimel, to Belton’s presumption that the Chimel test is met, to the rejection of limiting the bases upon which officers may arrest in Whren, to the rejection of limiting when officers may arrest in Atwater. Extending Dripps’ concept of the Iron Triangle, I refer to these four cases as the Mindless Square. It is by means of leaving the officer’s state of mind out of the area under consideration that these cases undo Chimel.

1. Robinson

In United States v. Robinson, 94 Officer Jenks stopped Robinson’s automobile and arrested him for operating the vehicle after his permit had been revoked and obtaining the permit by misrepresentation. 95 Pursuant to police department standard operating procedure, Jenks patted Robinson down. He felt an object in Robinson’s coat pocket, reached into the pocket, pulled out what turned out to be a crumpled cigarette package, opened the package, and found fourteen gelatin capsules of heroin. 96 At the federal Court of Appeals, Robinson argued that Officer Jenks may have used the traffic violation arrest as a “mere pretext for a narcotics search,” which would not have been authorized by a neutral magistrate had Jenks sought a warrant. 97 The Court of Appeals accepted the officer’s denial of such

93. Id. at 767.
95. Id. at 220.
96. Id. at 221–23.
97. Id. at 221 n.1.
motive, but still found that the heroin was obtained as a result of an unconstitutional search under the Fourth Amendment.\footnote{Id. (citing United States v. Robinson, 471 F.2d 1082, 1088 n.3 (D.C. Cir. 1972)).}

The Robinson majority upholds the search. It first notes the affirmative authority permitting the broad police power to search the arrestee incident to lawful arrest.\footnote{Robinson, 414 U.S. at 224–26.} Prior courts, it says, made clear their categorical recognition of the validity of the search incident to lawful arrest in Weeks\footnote{Id. at 224–25 (“It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime.”) (quoting Weeks v. United States, 232 U.S. 383, 392 (1914)).} and then Agnello.\footnote{Id. at 225 (“The right without a search warrant contemporaneously to search persons lawfully arrested while committing a crime and to search the place where the arrest is made in order to find and seize [sic] things connected with the crime as its fruits . . . is not to be doubted.”) (quoting Agnello v. United States, 269 U.S. 20, 30 (1925)).}

The Robinson Court contends that the Chimel Court further acknowledged the broad authority to search a person incident to arrest.\footnote{Id. at 225–26 (citing Chimel v. California, 395 U.S. 752, 762–63 (1969)).}

Next, the Robinson Court distinguishes the purpose, scope, and character of a search incident to an arrest from a protective frisk for weapons pursuant to \textit{Terry v. Ohio}.\footnote{Id. at 227.} Although the search incident to arrest is justified partially due to officer safety, it is also justified on other grounds and therefore may be a relatively extensive search of the arrestee.\footnote{Id.} A \textit{Terry} frisk, in contrast, is justified solely by a search for weapons, and so must be limited by that rationale.\footnote{Id. at 227–28.} Moreover, the character of the search incident to arrest can be distinguished from a \textit{Terry} frisk. An arrest marks the commencement of a criminal prosecution, is intended to vindicate society’s interest in having its laws obeyed, and is accompanied by future interference with an individual’s liberty.\footnote{Id. at 228.} In contrast, a protective frisk constitutes a brief intrusion.\footnote{Id. (citing Terry v. Ohio, 392 U.S. 1, 25–26 (1968)).}

Most importantly for our purposes, the majority argues that a bright line rule is necessary in the search incident to arrest context. First, the Court notes that \textit{Terry} does not narrow the broad search incident to arrest doctrine because the search incident to arrest is justified by both the need to disarm the suspect and the need to preserve evidence at trial.\footnote{Id. at 234.} Moreover, all arrests pose a danger to an officer who is exposed to the suspect for an
extended period of time, so all arrests should be treated alike for the
purpose of search justification. The Court accurately notes that “[t]he
danger to the police officer flows from the proximity, stress and uncertainty
of the arrest, and not from the grounds for arrest.” Finally, the Court does
not agree that the constitutionality of a search incident to arrest must be
litigated on a case-by-case basis, because a police officer must make a
quick, ad hoc judgment of how and where to search. The authority to
search, “while based on the need to disarm and to discover evidence, does
not depend on what a court may later decide was the probability in a
particular arrest situation” of whether evidence would be found or that the
suspect was dangerous. The Court therefore upholds the constitutionality
of the search despite the fact that Officer Jenks “did not indicate any
subjective fear of the respondent or that he did not himself suspect that
respondent was armed.” “Since it is the fact of custodial arrest which
gives rise to the authority to search,” the subjective state of mind of the
police officer is of no concern to the Court. This is the case where the
Court first established the principle that the Fourth Amendment is only
concerned with objective reasonableness, despite the likelihood that this
narrow view would result in pretextual searches. While not directly
addressing the pretext issue and the officer’s subjective mindset, the Court
effectively decides and forecloses the discussion by holding that, so long as
an intrusion is lawful, a search incident to arrest requires no additional
justification.

Justice Marshall dissents in Robinson and argues that the majority’s
approach “represents a clear and marked departure from our long tradition
of case-by-case adjudication of the reasonableness of searches and seizures
under the Fourth Amendment.” Justice Marshall rebuts the majority’s
rationale on grounds that the Fourth Amendment is meant to limit police
officers. He argues that the majority’s reluctance to “overrule[e] the ‘quick
ad hoc judgment’ of the police officer is thus inconsistent with the very
function of the Amendment to ensure that the quick ad hoc judgments of

109. Id. at 234–35.
110. Id. at 234, n.5.
111. Id. at 235.
112. Id.
113. Id. at 236.
114. Id.
115. Given the ideology and famously strategic nature of Rehnquist, perhaps allowing
pretext was a goal of his majority opinion in Robinson. See generally Dickerson v. United
117. Id. at 239 (Marshall, J., dissenting).
police officers are subject to review and control by the judiciary."\textsuperscript{118} While there are exceptions to the warrant requirement, the search incident to arrest being one, an exception does not "preclude further judicial inquiry into the reasonableness of the search."\textsuperscript{119}

Marshall also argues that the majority’s refusal to conduct a case-by-case analysis of the reasonableness of a search incident to arrest will fail as a matter of practical application.\textsuperscript{120} Because the decision to issue a citation or make an arrest is subject to officer discretion, "[t]here is always a possibility that a police officer, lacking probable cause to obtain a search warrant, will use a traffic arrest as a pretext to conduct a search."\textsuperscript{121} Marshall points out that case-by-case adjudication will always be necessary to determine if a full arrest was effected for purely legitimate reasons or, rather, as a pretext for searching the arrestee" as "‘an arrest may not be used as a pretext to search for evidence.’"\textsuperscript{122} This last argument represents resistance to the eventual \textit{Whren} rule that pretext is usually allowed, at least where officers have probable cause.

2. \textit{Belton}

The movement from \textit{Rabinowitz} to \textit{Chimel} to \textit{Robinson} sets the stage for analysis of the application of the search incident to arrest rule to vehicles. The question of the scope of a search incident to arrest of a vehicle remained open. If the \textit{Chimel} rule were applied, police would only be able to search the car while it was in the "immediate control" of the suspect. In \textit{Belton}, the Court did purport to apply the \textit{Chimel} rule but did so in a way that would prove controversial. The \textit{Belton} presumption that the entirety of a vehicle is within the immediate control of an arrestee would be overturned by the \textit{Gant} decision.

In \textit{New York v. Belton}, a police officer pulled over a vehicle for speeding.\textsuperscript{123} While asking for the driver’s license and automobile registration, the police officer smelled burnt marijuana and saw an enveloped marked "Supergold," which he associated with marijuana.\textsuperscript{124} He

\begin{itemize}
  \item \textsuperscript{118} Id. at 242.
  \item \textsuperscript{120} \textit{Robinson}, 414 U.S. at 248 (Marshall, J., dissenting).
  \item \textsuperscript{121} Id.
  \item \textsuperscript{122} Id.
  \item \textsuperscript{124} Id. at 455–56.
\end{itemize}
directed the men to exit the car, arrested them for unlawful possession of marijuana, patted each one, and split them into four areas on the highway.\textsuperscript{125} He then searched the passenger compartment of the car and found a black leather jacket with cocaine in the pocket.\textsuperscript{126}

The \textit{Belton} majority first contends that \textit{Chimel}'s "immediate control" limitation on the scope of a search incident to arrest is difficult to apply in the vehicle context.\textsuperscript{127} The Court then contends the protections of the Fourth Amendment "can only be realized if the police are acting under a set of rules" which "make[] it possible to reach a correct determination beforehand" as to whether an invasion of privacy is justified.\textsuperscript{128} The police need a "single familiar standard" as guidance because they only have limited time and expertise to balance the social and individual interests involved.\textsuperscript{129} In search of that standard, the \textit{Belton} Court assumed that any articles within the passenger compartment are "generally, if not inevitably" within the immediate control of the arrestee, justifying a search of the entire passenger compartment of the vehicle including both open and closed containers.\textsuperscript{130} According to the Court, it is immaterial whether the container could hold a weapon or contraband since upon a lawful arrest, "a search incident to the arrest requires no additional justification."\textsuperscript{131} Because the arrest was lawful, the search immediately followed the arrest, and the jacket was located inside the passenger compartment in which Belton had been a passenger just prior to arrest, the search of the jacket was a valid search incident to lawful custodial arrest and did not violate the Fourth Amendment.\textsuperscript{132}

Justice Brennan dissented and accused the majority of "turn[ing] its back" on the product of the careful analysis in \textit{Chimel}.\textsuperscript{133} For Brennan, the rationale of the \textit{Chimel} exception to the warrant requirement was to protect the safety of the arresting officer and preserve easily destructible evidence.\textsuperscript{134} The standard was narrowly tailored and placed both temporal and spatial limitations on a search incident to arrest, only permitting a warrantless search when the search "is substantially contemporaneous with

\begin{itemize}
\item \textsuperscript{125} Id. at 456.
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Id. at 458.
\item \textsuperscript{128} Id. (citing Wayne R. LaFave, "Case by Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma, 1974 \textit{SUP. CT. REV.} 127, 142 (1974)).
\item \textsuperscript{129} Id. (citing Dunaway v. New York, 442 U.S. 200, 213–14 (1979)).
\item \textsuperscript{130} Id. at 460.
\item \textsuperscript{131} Id. at 461 (citing \textit{Robinson}, 414 U.S. at 235).
\item \textsuperscript{132} Id. at 462–63.
\item \textsuperscript{133} Id. at 463 (Brennan, J., dissenting).
\item \textsuperscript{134} Id. at 464–65 (citing \textit{Chimel} v. California. 395 U.S. 752, 762–63 (1969)).
\end{itemize}
the arrest and confined to the *immediate* vicinity of the arrest.”135 Brennan argued that the Court disregards the above principles, fails to create a more workable standard, and “instead adopts a fiction—that the interior of the car is *always* within the immediate control of an arrestee” who was a recent occupant of the car.136 In Brennan’s view, the majority substantially expands the scope of a search incident to lawful arrest by permitting the police to search areas and containers the “arrestee could not possibly reach at the time of arrest.”137

Brennan argued that the “bright line” created is not justified for two reasons. The first is that the mere fact of law enforcement efficiency is insufficient in itself to justify disregarding the Fourth Amendment.138 The second is that the distinction is ambiguous and will create many problems both for the police and the courts.139 Because the rule abandons the justifications for the *Chimel* rule, it gives no guidance to police officers to answer these questions themselves.140 In contrast, *Chimel* provides a sound, workable rule, which limits the search to the arrestee’s person and the area within the arrestee’s immediate control.141 If the police were unsure in a close case, they could turn to the rationale underlying *Chimel*—to prevent the arrestee from reaching weapons or contraband—to provide guidance.142

The movement from *Rabinowitz* to *Chimel* to *Robinson* to *Belton* shows an expansion, then contraction, then re-expansion with a vengeance of the scope of searches incident to arrest. While *Chimel* promised to limit such searches, *Robinson* and *Belton* purported to apply *Chimel* but in fact look much more like the overturned *Rabinowitz* rationale. *Robinson* is defensible because concern for officer safety and evidence is obviously triggered by items located on the person of the arrestee. *Belton* is much more dubious because it appends a broad right to search to the right to seize without requiring any connection to the dangers justifying the search incident rule. The *Gant* decision reestablishes that link, albeit while also dragging along a *Rabinowitz* rationale. Yet there is another reason to be concerned about *Belton*: the discretion it afforded was especially useful to racial profilers. We will see the rule’s utility for racial profilers and the failure to limit that discretion by looking at the *Whren* and *Atwater* cases.

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135. *Id.* at 465 (citing Stoner v. California, 379 U.S. 483, 486 (1964)).
136. *Id.* at 466.
137. *Id.*
138. *Id.* at 467.
139. *Id.* at 470.
140. *Id.*
141. *Id.* at 471.
142. *Id.* at 471-72.
3. *Whren*

While *Whren* is not always thought of as a search incident to arrest case, it should be. The point of a pretext stop is to get the search incident. The upshot of *Whren* is that police officers have the right to conduct a *Belton* search anytime they have probable cause to suspect someone committed a minor traffic violation. Scholars have documented that officers use probable cause that suspects have committed a minor traffic violation as a pretext for conducting a search for which they lack a justification. The *Whren* decision reflects the culmination of the *Robinson* decision's shift toward linking the right to search incident to arrest to a requirement that the Court ignore police officers' subjective motivations. The *Whren* Court relegates concerns over racial profiling to the Fourteenth Amendment's Equal Protection clause. That relegation is part and parcel of the desire to extend *Robinson*’s holding on subjectivity.

In *Whren*, while undercover narcotics officers were patrolling a “high drug area” of the city in an unmarked car, they became suspicious of an S.U.V. with temporary license plates and youthful black occupants that was waiting at a stop sign. The officers then witnessed the S.U.V. suddenly turn right, without signaling, and take off at an “unreasonable” speed. In contravention of departmental regulations, the officers followed and pulled up alongside the truck, and then one of the officers approached the vehicle. When the officer came up to the driver’s window, he immediately observed two large plastic bags of crack cocaine in Whren’s hand and arrested the petitioners.

The petitioners were charged with violating various federal drug laws and moved to suppress the evidence on two grounds: that the initial scrutiny had not been justified by probable cause or reasonable suspicion that the petitioners were engaged in illegal drug-dealing activities and that the officers’ asserted motivation for approaching the vehicle—the traffic violation—was a pretext for an unjustified search for drugs. The district court denied the motion on the grounds that the officer’s actions in this case

145. *Id.*
146. *Id.* at 815, 817.
147. *Id.* at 808–09.
148. *Id.*
149. *Id.*
were not contrary to a normal traffic stop and the petitioners were convicted. The court of appeals affirmed the conviction, holding that, regardless of the officer's subjective intent "the stop is permissible so long as a reasonable officer under the circumstances could have stopped the car for the suspected traffic violation."\(^\text{151}\)

Before the Court, the petitioners argued that probable cause is not enough to justify a seizure in the unique context of civil traffic regulations, which are "so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible."\(^\text{152}\) This creates the temptation for officers to use traffic stops as a means to investigate other law violations where no grounds exist. Moreover, an officer may decide which vehicles to stop using impermissible factors, such as race.\(^\text{153}\) Due to this concern, the petitioners contended that the justification for an ordinary traffic stop must be whether a police officer, acting reasonably, would have made the stop for the given reasons.\(^\text{154}\)

Justice Scalia delivered the unanimous opinion of the Court and first looked to precedent to argue that the Court has "never held, outside the context of inventory search or administrative inspection, that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment."\(^\text{155}\) The Court cites Robinson\(^\text{156}\) for the proposition that "a lawful post-arrest search of the person would not be rendered invalid by the fact that it was not motivated by the officer-safety concern that justifies such searches."\(^\text{157}\) Scalia claims that the Court does not condone racially-selective law enforcement but nonetheless states that such matters should be brought under the Equal Protection Clause rather than the Fourth Amendment.\(^\text{158}\) According to Scalia, "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."\(^\text{159}\)

Scalia next rebuts the "objective" standard that the petitioners propose: whether the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given.\(^\text{160}\) Scalia deems the proposed test

\(^{150}\) Id.
\(^{151}\) Id. (emphasis in original).
\(^{152}\) Id. at 810.
\(^{153}\) Id.
\(^{154}\) Id.
\(^{155}\) Id. at 812.
\(^{158}\) Id. at 813.
\(^{159}\) Id.
\(^{160}\) Id. at 814.
to be virtually subjective on grounds that the Court would have to ask what a typical officer would likely have thought in the given situation in order to determine whether the present officer acted reasonably.\textsuperscript{161} Scalia contends that any such subjective analysis is barred by the Fourth Amendment on the theory that "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, \textit{whatever} the subjective intent."\textsuperscript{162} Moreover, Scalia rebuts the petitioner's argument that precedent supports the insistence that the police adhere to standard practices as an objective means to root out pretext.\textsuperscript{163} Adherence to local law enforcement practices would result in variable search and seizure protections.\textsuperscript{164} Finally, Scalia argues that the only cases that require courts to perform a case-by-case analysis of whether subjective motivations defeat reasonableness are searches or seizures conducted either with less than probable cause or in an extraordinary manner.\textsuperscript{165} Having been supported by probable cause of some kind of violation, and not having been conducted in an extraordinary manner, the stop in \textit{Whren} was reasonable under the Fourth Amendment.\textsuperscript{166}

Scalia's \textit{Whren} analysis is assailable on many grounds. First, it turns a blind eye to racial profiling. One might think that this result would argue against this interpretation of the Fourth Amendment, especially given the obviously quixotic nature of the proposed Fourteenth Amendment remedy.\textsuperscript{167} Second, it is not at all clear that the Fourth Amendment should not consider racism's influence on the choice to search or seize to affect the reasonableness of the intrusion.\textsuperscript{168} Third, courts are well capable of conducting reasonableness analyses, as they do in criminal law and torts cases whenever they ask what a reasonable person would have done. Here, however, we will focus on a fourth criticism: that \textit{Whren} improperly imports \textit{Robinson}'s lack of concern with subjective motivations from a

\textsuperscript{161} \textit{Id.} at 815.
\textsuperscript{162} \textit{Id.} at 814 (emphasis in original).
\textsuperscript{163} \textit{Id.} at 815.
\textsuperscript{164} \textit{Id.; see also} United States v. Robinson, 414 U.S. 218 (1973); Abel v. United States, 362 U.S. 217 (1960).
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{See generally} Kevin R. Johnson, \textit{The Story of Whren v. United States: The Song Remains the Same}, in \textit{RACE LAW STORIES} (Devon W. Carbado & Rachel Moran eds., 2006) (describing how \textit{Whren} decision condones racial profiling while providing only quixotic equal protection remedies).
\textsuperscript{168} \textit{See United States v. Botero-Ospina}, 71 F.3d 783 (10th Cir. 1995) (Seymour, C.J., dissenting) (opining that racism ought to be deemed to tilt to an intrusion toward unreasonableness) (quoted in \textit{YALE KAMISAR, WAYNE R. LAFACE, JEROLD ISRAEL, NANCY J. KING, ORIN S. KERR, BASIC CRIMINAL PROCEDURE} 348–49 (12th ed. 2008)).
context where the search requires no justification because it is a right granted incident to the right to seize—
*Robinson*—to a context where the initial seizure is in question—
*Whren*.

By characterizing this case as all about subjectivity, Scalia is able to borrow *Robinson*’s dicta endorsing pretext. The problem with that analogy is highlighted by considering the *Chimel* rationales. In *Robinson*-type situations, the *Chimel* rationales are satisfied because the safety of the officer and evidence is obviously threatened by close contact. In *Whren*-type situations, however, the *Chimel* rationales will usually not be satisfied, given that officers almost always choose to make a brief stop followed by a mere citation rather than an arrest. By means of this avoidance of the *Chimel* principles, *Whren* brought about a vast expansion of police officer discretion to use their search incident to arrest power in racially discriminatory ways.

When we see *Whren* as a search incident to arrest case, we are able to understand the litigation as a failed attempt to rein in police discretion. *Whren* was an attempt to limit the times when police could arrest, and thereby limit the times when they could search. Another attempt to limit searches by limiting arrest powers was defeated in the *Atwater* case. But this time, Justice O’Connor and three others vociferously dissent by explicitly referencing the racial profiling problem.

4. *Atwater*

In *Atwater v. City of Lago Vista*, the Court reaffirmed the *Whren* holding that the police may make a custodial arrest without balancing costs and benefits on a case-by-case basis or looking at the police officer’s subjective intent, as long as the arrest was supported by probable cause. The *Atwater* Court holds that this standard applies to all arrests, even if the arrest is only for a rarely enforced minor traffic violation carrying no jail time. The facts were as follows: Officer Bart Turek observed Atwater driving her truck with her son and daughter in the front seat, all without seatbelts, which is a misdemeanor in Texas. Turek approached the truck, yelled something to the effect of “I’ve seen you before. You’re going to jail,” and called for backup. Turek refused Atwater’s request to take her children to a neighbor before going to jail. Luckily, a friend soon arrived and took Atwater’s “frightened, upset, and crying” children to a nearby

170. *Id.* at 354.
171. *Id.* at 323.
172. *Id.* at 324.
She was soon taken before a magistrate and released on $310 bond. Atwater was charged and pleaded no contest to the misdemeanor seatbelt offenses, paid a $50 fine, and the charges were dismissed. Atwater filed suit under 42 U.S.C. § 1983 alleging the City had violated her "Fourth Amendment right to be free from unreasonable seizure." The Court granted certiorari on the question of whether the Fourth Amendment limits police officer authority to arrest without a warrant for minor criminal offenses.

The Court, per Justice Souter, rejects Atwater's claim and holds that the arrest was constitutional through an extensive analysis of founding-era English and American common law as well as by stating that police officers need a clear, unambiguous rule to apply on the streets. It should be noted that most of the Atwater Court's history has been soundly refuted by legal historian Thomas Davies.

Nonetheless, the Atwater Court has a second, ahistorical rationale. It addresses Atwater's suggested rule, which would forbid "custodial arrest, even upon probable cause, when conviction could not ultimately carry jail time and when the government shows no compelling need for immediate detention." The Court notes that on these facts, balancing Atwater's freedom from "indignity and confinement clearly outweighs anything the City can raise against it." However, the Court contends that case-by-case balancing is traditionally disfavored and, while admitting that, at first glance, Atwater's argument is clear and simple, contends complications will arise immediately upon application. The Court rejects Atwater's first proposal, which would differentiate between offenses that are "jailable" and "fine-only," on grounds that an officer on the street might not be able to distinguish between the two. This seems to characterize officers as stupid, but in order to grant them wider latitude. For the Atwater majority, the second proposed rule, requiring police to routinely determine the lawfulness of an arrest, is difficult to administer and guarantees an increase in...
litigation. In the Atwater Court’s view, the third proposed rule, which would mandate that the police not arrest in a close call, is itself ambiguous and would result in “[a] systematic disincentive to arrest.” Moreover, the Court contends: “we could not seriously expect that when events were unfolding fast, an officer would be able to tell” whether the suspect’s conduct qualified under any of the proposed exceptions. Again, the Court describes police as overwhelmed by constitutional analysis but only in order to increase their discretion.

The Atwater majority opinion is a monument to the privileging of law enforcement desires over privacy interests. Souter admits the arrest was a “gratuitous humiliation[,]” but, essentially, holds the seizure to be “individually unreasonable, . . . constitutionally reasonable.” The reason for that strange result? According to the majority, “Courts attempting to strike a reasonable Fourth Amendment balance thus credit the Government’s side with an essential interest in readily administrable rules.” That sounds like it places the proverbial thumb on the proverbial scale. In privileging law enforcement efficiency and devaluing the reason the officer arrested Atwater (to gratuitously humiliate her), Souter’s opinion completes the Mindless Square.

C. The Road to Gant

This article argues that O’Connor’s dissent in Atwater is the true beginning of the road away from Belton. It is fundamentally different from the Atwater majority in that it frankly acknowledges the problem with excessive arrest power: racial profiling through searches incident to arrest. O’Connor argues that the majority’s opinion is not clearly supported by precedent, inconsistent with the Fourth Amendment, and will grant police officers broad discretion.

183. Id. at 350.
184. Id. at 350–51.
185. Id. at 351 n.22.
186. Id. at 346.
188. Atwater, 532 U.S. at 347.
189. Id.
1. O'Connor's Atwater Dissent

O'Connor first notes that on the rare occasions that the Court has considered the constitutionality of a warrantless arrest for a fine-only misdemeanor, it has "indicated disapproval." \(^{190}\) She notes that while in *United States v. Watson*, \(^{191}\) there was a "clear and consistently applied common law rule permitting warrantless felony arrests," there is no clear and consistently applied common law rule governing warrantless misdemeanor arrests. \(^{192}\) Consequently, the Court must engage in the balancing test required by the Fourth Amendment. \(^{193}\) When that is done, "[a]ny realistic assessment of the interests implicated by such arrests demonstrates that probable cause alone is not a sufficient condition." \(^{194}\) She then argues that *Whren* is not at odds with this proposition, as *Whren* held only that "when there is probable cause to believe that a person has violated a minor traffic law, there can be little question that the state interest in law enforcement will justify the relatively limited intrusion of the traffic stop." \(^{195}\)

O'Connor deems *Whren* inapt here because justifying a full arrest on the same evidence as a traffic stop, "defies any sense of proportionality and is in serious tension with the Fourth Amendment proscription of unreasonable seizures." \(^{196}\) First, the high toll a custodial arrest exacts on an individual's liberty and privacy outweighs the State's limited interest in taking a person suspected of committing a fine-only offense into custody. \(^{197}\) This is especially true "in light of the availability of citations to promote the State's interest when a fine-only offense has been committed." \(^{198}\) O'Connor suggests that in these situations, the police officer should issue a citation, unless the officer can point to "specific and articulable facts" that would "reasonably warrant [the additional] intrusion" of a full custodial arrest. \(^{199}\)

O'Connor then refutes the majority's concern for clarity by noting that the need for officers to be certain of what they are allowed to do by no means "trumps the values of liberty and privacy at the heart of the

\(^{190}\) *Id.* at 362 (O'Connor, J., dissenting) (citing United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973) (Stewart, J., concurring)).


\(^{193}\) *Id.*

\(^{194}\) *Id.* at 363.

\(^{195}\) *Id.* at 364.

\(^{196}\) *Id.*

\(^{197}\) *Id.* at 365.

\(^{198}\) *Id.*

\(^{199}\) *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).
Amendment's protections. For arrests in fine-only situations, application of the Terry rule appropriately responds to "the Fourth Amendment's command of reasonableness and sensitivity to competing values protected by that Amendment." Moreover, "the Terry rule has been workable and easily applied by officers on the street." Finally, the concerns for officer certainty as to what is allowable are better resolved by application of the doctrine of qualified immunity in a subsequent civil suit.

Ultimately, O'Connor's Atwater dissent protests that the "per se rule that the Court creates has potentially serious consequences for the everyday lives of Americans." Her "concerns lie not with the decision to enact or enforce these laws, but rather with the manner in which they may be enforced." O'Connor's language is eloquent on this point:

Under today's holding, when a police officer has probable cause to believe that a fine-only misdemeanor offense has occurred, that officer may stop the suspect, issue a citation, and let that person continue on her way. Or, if a traffic violation, the officer may stop the car, arrest the driver, search the driver, search the entire passenger compartment of the car including any purse or package inside, and impound the car and inventory all of its contents. Although the Fourth Amendment expressly requires that the latter course be a reasonable and proportional response to the circumstances of the offense, the majority gives officers unfettered discretion to choose that course without articulating a single reason why such action is appropriate.

Such unbounded discretion carries with it grave potential for abuse. Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest. An officer's subjective motivations for making a traffic stop are not relevant considerations in determining the reasonableness of the stop. But it is precisely because these motivations are beyond our purview that we must vigilantly ensure that officers'
Justice O’Connor thereby warned the Court of the dangers of unfettered police discretion, the potential abuse of pretextual searches, and the need to limit these searches through objective means.

O’Connor’s concern in her Atwater dissent is that officer discretion under Belton and Whren is too likely to lead to abuse. As evidence, she points to racial profiling: “Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual.” Her reference to racial profiling is somewhat surprising given that her opinions in Croson and Shaw suggest that she believes that racism is either no longer prevalent or does not justify race conscious remedies. In contrast, O’Connor’s Atwater dissent suggests that race-based police harassment both continues to exist and requires a remedy. The Gant decision would eventually limit the impact of selective enforcement by means of Belton searches but in the post-racial way of not mentioning the racial profiling problem.

2. Thornton

Before we reach Gant, though, we need to read the case that people acknowledge as its ancestor: Thornton v. United States. Specifically, we need to consider Scalia’s concurrence therein, which identifies problems with Belton that Gant would address. In Thornton, the Court held the Belton rule applies to “recent occupants” of a vehicle. In the case, the officer ran a check on Thornton’s license tags, which revealed that the tags had been issued to another vehicle. Before the officer had an opportunity to pull Thornton over, the petitioner drove into a parking lot, parked and got out of the vehicle. The officer then pulled in behind Thornton, got out of the car, and searched the petitioner. After finding marijuana and crack cocaine on

206. Id. at 372 (internal citations omitted) (emphasis added).
207. Id.
210. Id. at 617.
211. Id. at 618.
212. Id. This may have been an unsuccessful case of a suspect trying to “game” the Fourth Amendment. See Margaret Raymond, The Right to Refuse and the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure, 54 BUFF. L. REV. 1483 (2007).
213. Thornton, 541 U.S. at 618.
Thornton’s person, the officer handcuffed him and secured him in the back seat of the patrol car.\textsuperscript{214} The officer then searched Thornton’s vehicle and found a handgun under the driver’s seat.\textsuperscript{215}

Chief Justice Rehnquist wrote the majority opinion and first cited Belton as establishing a “clear rule for police officers and citizens alike.”\textsuperscript{216} Rehnquist claimed that in Belton the Court did not rely on when the officer initiated contact with the defendant, and so the scope of the search is not determined by whether the arrestee exited the vehicle at the officer’s discretion or whether the officer initiated contact while the arrestee remained in the car.\textsuperscript{217} Rehnquist added that the arrest of a suspect who is next to a vehicle presents identical concerns, namely the risk of danger to the arresting officer and the destruction of evidence, as the arrest of one who is inside a vehicle.\textsuperscript{218}

The Court considered the fact that the defendants in this case could not possibly have accessed the place the gun was found to be immaterial.\textsuperscript{219} The need for a bright line rule justified the generalizations established in Belton (that the passenger compartment is generally within the immediate control of the arrestee), and so it is reasonable to allow officers to search the entire passenger compartment once probable cause to arrest is established.\textsuperscript{220}

Justice O’Connor concurred in part to express her dissatisfaction with the law in the Belton area, where she believed Belton’s shaky foundation had led lower courts to devolve the search incident to lawful arrest exception to the warrant requirement into a police entitlement.\textsuperscript{221} She concluded that Justice Scalia’s proposal rested on firmer ground, but she was reluctant to adopt the proposal because neither the Government, nor the petitioner had a chance to argue the merits of Scalia’s rule.\textsuperscript{222}

Justice Scalia concurred in the judgment but argued that the Court’s application of the Chimel/Belton rule to this case stretches the search incident to lawful arrest “beyond its breaking point” as the petitioner here was neither in nor anywhere near the passenger compartment of the vehicle.

\begin{itemize}
  \item \textsuperscript{214} \textit{Id.}
  \item \textsuperscript{215} \textit{Id.}
  \item \textsuperscript{216} \textit{Id.} at 620.
  \item \textsuperscript{217} \textit{Id.} at 620–21.
  \item \textsuperscript{218} \textit{Id.} at 621 (citing United States v. Robinson, 414 U.S. 218, 234–35 (1973)). In a footnote, the Court rejected the defendant’s proposed “contact initiation” rule, which would limit the scope of Belton to recent occupants who are within reaching distance of the car because it was outside the questions on which the Court granted certiorari and was not addressed by the Court of Appeals. \textit{Id.} at 622 n.2.
  \item \textsuperscript{219} \textit{Id.} at 622.
  \item \textsuperscript{220} \textit{Id.} at 623.
  \item \textsuperscript{221} \textit{Id.} at 624 (O’Connor, J., concurring).
  \item \textsuperscript{222} \textit{Id.}
\end{itemize}
vehicle. In the first section of his concurrence, Scalia recognized and rejected three possible justifications for searching Thornton. The first justification was that, despite being handcuffed and secured in the back of a squad car, the petitioner might have escaped and retrieved a weapon or evidence from his vehicle. Scalia noted that such a Houdini-esque escape had only happened once in the previous thirteen years. The second justification was that the officer should not be penalized for taking the sensible precaution of securing the suspect in the car first even though he could have conducted the search at the time of arrest. Scalia rejected this argument because it presumes that a search incident to lawful arrest is a police entitlement, not an exception, justified by necessity. Scalia went so far as to say that if an officer left a suspect free only to justify a search, that would make the search constitutionally unreasonable. It is hard to believe in light of his Whren opinion, but Scalia says, “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.” The third justification was that while the arrestee posed no risk in this case, Belton searches generally are reasonable, and so the bright-line rule comes to the right conclusion the majority of the time. In fact, Scalia noted, the rule yields the incorrect result the majority of the time. In virtually all cases “a motorist is handcuffed and secured in the back of a squad car” and therefore poses no risk of danger to the officer or evidence.

Scalia nonetheless concludes that Belton searches are still justifiable, but simply because the car might contain evidence relevant to the crime for which the suspect was arrested. Scalia cites precedent, such as Rabinowitz and (supposedly) Chimel, where the Court did not justify a search incident to lawful arrest as a means to prevent concealment or destruction of evidence, but rather justified the searches as necessary to find evidence of

223. Id. at 625 (Scalia, J., concurring).
224. Id.
225. Id. at 625–26.
226. Id. at 626.
227. Id.
228. Id.
229. See id. at 627.
230. Id.
231. Id.
232. Id. at 627–28.
233. Id.
234. Chimel v. California, 395 U.S. 752, 763 (1969). One can only assume that Scalia’s characterization of Chimel as supporting the Rabinowitz general search was wishful thinking.
the crime for which the suspect was arrested. Scalia further cites late nineteenth and early twentieth century authorities mentioning the same idea. In Scalia's view, only in the years leading up to Chimel did the Court begin to reference the concerns regarding the concealment and destruction of evidence. Scalia argues that the Court should "at least be honest" and concede that Belton is not a mere application of Chimel, but rather it is a return to the broader search incident to arrest permitted before Chimel. Recasting Belton in this way would distinguish the rules when officer safety is at issue and when the state is merely interested in evidence gathering. Scalia would thus limit Belton searches to cases where it is reasonable to believe evidence might be found in the vehicle. In Thornton, it was reasonable to believe that evidence of a drug offense would be found in the vehicle from which the defendant had just alighted and so he would uphold the search.

3. Gant

Finally, then, we are brought to the Gant case. Therein, after Gant was arrested for driving with a suspended license, handcuffed, and locked in the back of the patrol car, two police officers searched his car and discovered a gun and cocaine in the pocket of a jacket on the backseat. Gant moved to suppress the evidence seized from his car on the grounds that Belton did not authorize the search because the defendant posed no threat to the officers and no evidence of the crime of arrest could be found in his vehicle. The Arizona Supreme Court held that, while Belton defined the scope of the search incident to arrest, Chimel stated the rationale for the search incident to arrest exception, namely to protect officer safety and to preserve evidence.

Justice Stevens, who dissented in Thornton, delivered the opinion of the Gant Court and held the search unjustified because there was no reason to believe either that Gant could have accessed weapons or evidence at the time of the search or that evidence of the crime of arrest would be found in

236. Id. at 629–30.
237. Id. at 630.
238. Id. at 631.
239. Id. at 632.
240. Id.
241. Id.
243. Id. at 336.
244. Id.
the car. Stevens begins his analysis by addressing the reasonableness of a warrantless search and noting that the search incident to lawful arrest exception derives from the interests in evidence preservation and officer safety. Chimel defines the grounds for the search and ensured that the scope of the search is commensurate with its purposes.

Stevens then discussed Belton, where the Court defined the “area within the immediate control” of an occupant of an automobile. Based largely on the assumption that articles inside the passenger compartment of an automobile are generally within the immediate control of the arrestee, the Belton Court held that a police officer could search the entire passenger compartment of an automobile and all containers therein upon arrest. Despite the limited holding in Belton, lower courts had adopted the broad reading of the case, which states that a vehicle need not be within an arrestee’s reach to justify a vehicle search incident to arrest. This broad reading of Belton permits police officers to search a vehicle incident to arrest even where there is no possibility that the arrestee could gain access to the vehicle, and effectively grants police an “entitlement” to search a vehicle incident to every arrest. Stevens notes that this reading untethers the rule from the justifications underlying the Chimel exception.

The Gant Court thus rejects the broad reading of Belton and holds that the Chimel rationale authorizes a search incident to arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment or where it is “reasonable to believe” that evidence relevant to the crime of arrest might be found in the vehicle. The Court thus not only adopts the Chimel rationale for searches incident to lawful arrest but also incorporates Scalia’s Thornton concurrence authorizing a search for evidence of the crime of arrest. Stevens adopts Scalia’s Rabinowitz justification with a minimalist statement that it is justified by concerns that are “sui generis” in the vehicle context.

Stevens next provides three justifications for rejecting the State’s argument that the broad reading of Belton correctly balances law

245. Id. at 343–44.
246. Id. at 337–38.
247. Id. at 338.
248. Id. at 340.
249. Id. at 341–43.
250. Id.
251. Id.
252. Id. at 343.
253. Id.
254. Id.
255. Id. at 350–51.
enforcement interests, including the interest in a bright line rule, with the arrestee’s limited privacy interest in his vehicle.\textsuperscript{256} First, Stevens argues that the State’s interpretation would seriously intrude upon an individual’s privacy interest by granting the police “unbridled discretion to rummage at will among a person’s private effects.”\textsuperscript{257} Second, the State exaggerates the clarity of the broad \textit{Belton} reading, which has “generated a great deal of uncertainty” for a rule purporting to be a “bright line.”\textsuperscript{258} Finally, a broad reading is unnecessary to protect law enforcement safety and evidentiary interests since the majority’s view and other established exceptions to the warrant requirement authorize a vehicle search where safety or evidentiary concerns are present.\textsuperscript{259} Stevens also rejects Justice Alito’s argument that the doctrine of stare decisis requires that the Court adhere to the broad reading of \textit{Belton} because that doctrine does not justify the continuance of an unconstitutional police practice.\textsuperscript{260}

Scalia concurred and argued that the \textit{Belton}/\textit{Thornton} rule is unreasonable since the police virtually always have applied less intrusive and more effective means to ensure their safety.\textsuperscript{261} Scalia believed that the majority’s standard, authorizing a search where the arrestee is within reaching distance of the passenger compartment, fails to provide the necessary guidance to police officers and leaves room for officer manipulation.\textsuperscript{262} He echoed his \textit{Thornton} concurrence and argued that the Court should abandon the \textit{Belton}/\textit{Thornton} “charade” and hold that a vehicle search incident to arrest is reasonable only when the object of the search is for evidence of the crime of arrest.\textsuperscript{263} This formulation both preserves the outcome of prior cases and tethers the scope and rationale of the doctrine to the triggering event.\textsuperscript{264} Scalia, however, joins the majority only as a means of choosing the lesser of two evils, for he believes that

\begin{footnotesize}
\begin{enumerate}
\item[	extsuperscript{256}]
\textit{Id.} at 344–47.
\item[	extsuperscript{257}]
\textit{Id.} at 345.
\item[	extsuperscript{258}]
\textit{Id.} at 346.
\item[	extsuperscript{259}]
\textit{Id.} at 346–47 (citing Maryland v. Buie, 494 U.S. 325, 334 (1990) (holding that incident to arrest, an officer may conduct a limited protective sweep of those areas he reasonably believes a dangerous person may be hiding); Michigan v. Long, 463 U.S. 1032, 1049 (1983) (permitting an officer to search a vehicle’s passenger compartment where a passenger is dangerous or might access the vehicle to gain immediate control of weapons); United States v. Ross, 456 U.S. 798, 820–21 (1982) (holding that an officer may search any area of the vehicle for which he has probable cause)).
\item[	extsuperscript{260}]
\textit{Id.} at 348–51.
\item[	extsuperscript{261}]
\textit{Id.} at 351–52.
\item[	extsuperscript{262}]
\textit{Id.} at 352–54.
\item[	extsuperscript{263}]
\textit{Id.} at 353.
\item[	extsuperscript{264}]
\textit{Id.}
\end{enumerate}
\end{footnotesize}
Justice Alito’s dissent, which would have left the prior understanding of *Belton* and *Thornton* in effect, is “plainly unconstitutional.”

D. Gant as a Post-racial Opinion

The *Gant* holding was a big deal. It has generated much commentary in law reviews. While the discussion has acknowledged race, it has not recognized the extent to which race should be central to the discussion. Police officers racially profile all the time. The point of racial profiling someone is to catch them “dirty.” The search incident to arrest is the primary means of potentially catching the prey.

Justice O’Connor’s *Atwater* dissent entered racial profiling into the Court’s explicit discussion about searches incident to arrest. It is helpful to recall that she specified the search incident to arrest rule as the problem: “if a traffic violation, the officer may stop the car, arrest the driver, search the driver, search the entire passenger compartment of the car including any purse or package inside.” Moreover, she pinpointed what searches incident to arrest are used for, declaring, “as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual.” The fact that O’Connor made those statements, and in such a noteworthy case, makes it hard to believe the members of the Court are not aware that searches incident to arrest result in widespread racial profiling.

In that light, Stevens’s refusal to mention race in the *Gant* opinion seems to be a studied decision. While the omission could be explained in many ways, it does seem to be a strategic choice. Why might this choice be necessary? Because some are trying to impose a post-racial era upon us. It has become increasingly unacceptable to mention race at all. Even when racial disparities are the problem, broader categories of remedy are proposed, such as class. The *Gant* decision’s omission of reference to O’Connor’s *Atwater* dissent, and of race at all, is in keeping with the post-racial trend.

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265. *Id.* at 354.
269. *Id.*
III. WHY GANT FAILS TO FULLY ADDRESS RACIAL PROFILING

A. Richardson and Miller on Continuing Police Prejudice

Leading criminal procedure scholar Eric Miller’s contribution to this Symposium, *Detective Fiction*, argues that while the Court has created a fiction that police officers have expertise that justifies judicial deference, the Court makes no reference to evidence of specific training and its effectiveness. The result is that the Court promotes race-based policing. He develops that argument by distinguishing role-based versus rule-based, authoritarian versus consensual, and craft versus managerial styles of regulating policing. Role-based authority prizes officers’ insights that are developed in their role as crime investigators. Rule-based authority would place the Constitution and Courts above the police. Moreover, the Court facilitates an authoritarian versus a consensual style of policing. A consensual style of policing would emphasize community cooperation in policing based on mutual respect. The authoritarian model privileges deference to police authority based on their role. As I have noted in my article “Who’s the Man?”: Masculinities Studies, Terry Stops, and Police Training,” police in an authoritarian mode emphasize “order maintenance” through deference to their authority. Finally, Miller distinguishes between craft and managerial authority. Craft authority emphasizes the expertise of street police over management’s regulations. The Court’s belief in street-officer, craft-based authority leads it to defer in almost all cases to officers’ discretion, even when they violate rules set by management. As Miller says, “if the officer is sufficiently well trained and experienced, the Court will defer to her on-the-spot tactical judgments rather than rely upon the policy decisions of her executive superiors or the judiciary.”

For Miller, this judicial deference to authoritarian policing leads to racial profiling because it allows the use of police officers’ order maintenance

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270. Miller, supra note 18, at 218.
271. Id. at 226.
272. Id. at 254; see also Andrew E. Taslitz, Respect and the Fourth Amendment, 94 J. CRIM. L. & CRIMINOLOGY 15 (2003) (arguing for respect-based policing).
273. Miller, supra note 18, at 242.
275. Miller, supra note 18, at 248.
276. Id. at 224.
techniques, including pretextual searches, for investigation. In Miller’s view, we began losing the battle against racial profiling when the Court removed the implicit dangerousness requirement from Terry stops. In conjunction with the Robinson/Whren pretext approach, which leads to the Mindless Square, allowing officers to go fishing for crime in the absence of a danger-based necessity facilitates racial profiling. Moreover, when accepting evidence from pretextual searches, the Court makes no effort to ascertain whether the officer is skillful or merely lucky. As a result, anything goes, especially racial profiling.

The primary reason that I say “especially racial profiling” is well explained by noted criminal procedure scholar Song Richardson’s article in this symposium, Cognitive Bias, Policing, and the Fourth Amendment. Richardson asserts, and then proves, that “as a result of psychological biases, officers are more likely to attribute the ambiguous behaviors of nonwhites to criminality and the identical behaviors of whites to external factors.” Note that Richardson does not assert that all, or even most, officers are racist. She does say, however, that many people are implicitly biased against racial minorities. That means that non-conscious psychological processes affect people’s behaviors, perceptions, and judgments. Richardson briefly surveys the evidence and concludes such biases significantly affect policing in the form of racial profiling.

The Fourth Amendment problem here is that the Court’s thin definition of unreasonableness facilitates police officers’ reliance on their implicit biases as a basis for deciding whom to investigate. As Richardson says, “incentive structures within organizations can affect epistemic motivation by encouraging or discouraging [the] information gathering” that might reduce implicit bias. From the point of view of the institutional control

277. Id. at 260.
278. Id. at 262.
279. Id. at 232.
280. Richardson, Cognitive Bias, supra note 18, at 268.
281. But remember that if racism means stereotyping racial minorities as more likely to commit crimes, most cops, including many racial minorities, are likely racist. See Andre Douglas Pond Cummings, Just Another Gang: “When the Cops are Crooks Who Can You Trust?”, 41 How. L.J. 383, 404 (1998) (describing aggressive policing based on belief that racial minorities are more likely to commit crimes).
283. Richardson, Cognitive Bias, supra note 18, at 272.
284. Id. at 276.
that the Court might have chosen to exercise over police officers who racial 
profile, we might ask the same question Richardson does:

Allowing officers to consider race . . . communicates to officers 
that it is appropriate to associate race with criminality; after all, 
why else does the Court permit them to consider a target’s race, 
even when they do not have any specific information that a 
suspect of a particular race was engaged in criminal activity? 285

We might ask similar questions regarding pretext and searches incident to 
arrest: Why enact the Mindless Square of cases if you don’t condone racial 
profiling? Why not explicitly remedy racial profiling in Gant, especially 
after O’Connor’s warning about it? Seemingly, because the Court is seeking 
to create a post-racial era by ignoring race.

Together, Miller and Richardson reveal the scope of the racial profiling 
problem. The Court’s way of looking at the police, by deferring to their 
authoritarian impulses under the guise of deferring to their undocumented 
expertise, facilitates racial profiling. As I have demonstrated, the Mindless 
Square approach to search incident to arrest doctrine is a significant part of 
that permissiveness. Moreover, the Court’s refusal to acknowledge implicit 
bias, despite much evidence that has been presented to them, is itself a 
message to officers to continue their racist practices. I argue that pretext 
searches are the principal means by which implicit bias is converted into 
intrusions upon racial minorities. In the face of these problems, we ought to 
be critical of the Gant decision—both its Rabinowitz prong and its refusal to 
consider pretext need to be reconsidered.

B. The Gant Decision’s Rabinowitz Prong Maintains Excessive Police 
Discretion

Given the significant racial profiling problem raised by search incident to 
arrest doctrine, we ought to challenge the very assumptions of this doctrine. 
In the context of Gant, the best way to challenge the doctrine is to ask why 
the Court inserted a Rabinowitz prong. Scholar Edwin Butterfoss called for 
Gant’s suturing of a Rabinowitz-prong to the Chimel justifications for 
searches incident to arrest as a sensible approach. 286 Others felt a pure 
Chimel approach was called for. 287 This article agrees with the latter group.

285. Id. at 279.
286. See Butterfoss, supra note 5.
287. See Angad Singh, Stepping Out of the Vehicle: The Potential for Arizona v. Gant to 
End Automatic Searches Incident to Arrest Beyond the Vehicular Context, 59 AM. U. L. REV. 
1759 (2010). Noted scholar Jeffrey Fagan points out that at least one state Supreme Court, New
The primary reason for objecting to the Gant decision’s Rabinowitz prong is that it is philosophically inconsistent. Simply put, Rabinowitz allows a search of the entire area that is generally in the “possession” or generally in the “control” of the arrestee.\(^{288}\) Chimel, on the other hand, requires that the suspect be in “immediate control” of the area to be searched.\(^{289}\) We know that distinction is more than semantics because the Chimel case overturns Rabinowitz. If the Gant Court were being honest, it would choose between the Chimel and Rabinowitz rationales. It does not do so because Scalia’s vote was necessary. Scalia’s Gant concurrence goes so far as to admit he has compromised. At best, then, Gant is the result of a sausage-making process.

The problem with the Gant decision’s Rabinowitz prong is that it leaves police with wide discretion to search. While it is true that (absent danger to the officer or evidence) officers can no longer argue that waiting too long at a stop sign justifies a search incident to arrest, suppose a civilian gets distracted and strays just over the line into the next lane. In that case, the officer could characterize her arrest as based on suspicion of drunk driving. She could say she was searching for evidence of the crime of arrest, such as beer cans. What is to stop courts from refusing to suppress evidence so gained? Nothing in the Gant opinion. After all, Gant makes the search for evidence dependent not upon probable cause or even reasonable suspicion, but a new and undefined concept called “reasonable to believe.”\(^{290}\) If Gant had stuck to a Chimel rationale, the officer in my hypothetical would not get a general search for evidence. The Gant decision thus maintains a significant degree of the wide discretion that officers have been using to racial profile minority motorists.\(^{291}\)

C. Gant Still Allows Pretext

Perhaps even more significantly, the Gant decision does not address the heart of the racial profiling problem. If police officers only used their search incident to arrest powers when they legitimately thought the crime justified a search, the practice would not be nearly as offensive to the Fourth Amendment. The central problem with the current use of searches incident
to arrest is that officers are making an end-run around the Fourth Amendment. In common parlance, it would be considered “unreasonable” to allow someone to do something prohibited by simply pretending she was doing something else. When officers use the traffic stop as a pretext to do a search they cannot justify, they are accomplishing their prohibited goal by means of semantics. That should be deemed constitutionally unreasonable.

The central problem is that the *Gant* decision leaves pretext doctrine untouched. An officer can still seize someone for the purpose of doing a search she cannot justify. The new rule merely makes her articulate her pretext as a belief that the suspect was a danger to the people or evidence, or that she would find evidence of the crime of arrest in the car. Standard police practices make it unlikely (though not impossible) that officers can articulate a danger rationale. But note that an officer could choose to let a suspect she does not fear remain near the car and thereby get the automatic *Belton* search of the car. While Scalia suggested such a ruse would make the search unreasonable in his *Thornton* concurrence, neither he nor Stevens refers to that idea in the *Gant* decision.

More importantly, the *Gant* decision allows pretextual articulations of a belief that evidence would be found in the car. As the prior lane-weaving example demonstrates, such a belief will not be particularly hard to manufacture. Given that courts are barred from considering officers’ states of mind under *Whren*, the officer’s stated belief will be hard to counter. Even though the officer’s belief must be reasonable, how would one establish that it was unreasonable? Logic would suggest that one could point out that no reasonable officer would make such a search. But *Whren* characterizes such an argument as virtual subjectivity and seemingly forecloses it. Consequently, *Gant* leaves pretext alive and well. And we know that officers will use discretion to articulate pretext in order to racial profile.

IV. CONCLUSION

Having traced the problems with the *Gant* decision, this article concludes with a brief outline of a potential solution. First, we must acknowledge that post-racialism is a failure in the search incident to arrest context. The Court cannot fully address the use of searches incident to arrest without acknowledging that racial profiling is the heart of the problem. O’Connor’s
Atwater dissent did that. The Gant decision fails to do so. The result is a decision that makes it harder to racial profile but far from impossible.

Second, if we care about racial profiling, we have to limit police discretion. To do so in the search incident to arrest context requires a return to the heart of the Chimel approach. That means excising the Rabinowitz prong from the Gant decision. Such a move is justified by the fact that Chimel and Rabinowitz are inconsistent. But it is especially important because the Rabinowitz prong will be the primary means by which officers continue to use search incident to arrest law to racial profile.

Finally, a true return to the Chimel approach involves disabling pretext searches by breaking apart the Mindless Square of search incident cases. The Court could start by acknowledging that the analogy between the Robinson and Whren situations is false. The Chimel approach might justify a Robinson-type search incident to arrest of a person as a matter of course based on the inherent danger to the officer from close contact with the arrestee. But Robinson's pretext dictum does not justify the initial seizure in Whren. Instead, all searches and seizures should be subject to an overall reasonableness inquiry that takes racist motivations into account in the balancing analysis. 294 Remember that even Justice Scalia has opined that leaving a suspect free for the purpose of generating a search rationale is constitutionally unreasonable. 295 An overall reasonableness inquiry into whether there was a racial pretext is especially appropriate in the context of searches incident to arrest, where the intrusion itself is granted as an incident to the justified seizure but is not itself justified. This proposal is hardly a modest one in the current criminal procedure context, but if we are serious about addressing racial profiling, we will have to acknowledge race.

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294. See United States v. Botero-Ospina, 71 F.3d 783 (10th Cir. 1995) (Seymour, C.J., dissenting) (arguing the race-based resentment engendered by a law enforcement practice is a factor making it unreasonable) (quoted in Yale Kamisar, Wayne R. LaFave, Jerold Israel, Nancy J. King & Orin S. Kerr, Basic Criminal Procedure 348–49 (12th ed. 2008)).
