

## THE FUTURE OF VEHICLE SEARCHES INCIDENT TO ARREST

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*“The-times-they-are-a-changin’ . . . .”*<sup>1</sup>

### INTRODUCTION

Drunk and high on more than just life, Phil, a hapless ne'er-do-well on his way home from an evening of merriment, is having fun navigating his car along a twisty mountain road. However, he is not paying much attention to the double yellow line. The radio is blaring. He is singing and marveling at the moon, wondering why it sometimes looks so big. Just then, flashing police lights in his rearview mirror rudely bring him back to earth. Phil pulls over and begins to sweat. Driving while intoxicated is the least of his worries. Phil now realizes how red his eyes look in the mirror, how pungent the odor of marijuana is on his clothes, and how much of it he has in a bag under the passenger seat. And then . . . “My gat!”<sup>2</sup> he exclaims, remembering his unlicensed Thompson automatic in the trunk. Phil collapses onto the pavement in his attempt to pass a sobriety test. The officers arrest, handcuff, and lock him in a police cruiser. He watches in tears as they search his entire car, even the trunk. Through a haze of alcohol and angst he wonders, can they do that? The answer is, Phil needs a lawyer.

The law of vehicle searches and seizures incident to arrest has changed many times in the past hundred years. The latest version came in 2009, from *Arizona v. Gant*,<sup>3</sup> which held that when police lawfully<sup>4</sup> arrest an occupant or recent occupant of a vehicle, an officer can search that vehicle incident to the arrest if (1) the arrestee is within reaching distance of the passenger compartment at the time of the search; or (2) it is reasonable to believe the

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1. *City of Ontario v. Quon*, 130 S. Ct. 2619, 2635 (2010) (Scalia, J., concurring) (arguing that though applying the 4th Amendment to new situations is often difficult, it is the Court's duty to do so).

2. “[G]at . . . *slang*. (orig. *U.S.*) Also *gatt*. [Short for GATLING.] A revolver or other gun.” THE COMPACT OXFORD ENGLISH DICTIONARY 658 (2d ed. 1991).

3. 556 U.S. 332 (2009).

4. For the purposes of this Note, all arrests are presumed lawful.

vehicle contains evidence of the offense of arrest.<sup>5</sup> Though Justice Stevens, writing for the majority, claimed to be holding true to precedent, the *Gant* rule is in fact substantially different from the previous *Belton*<sup>6</sup> rule, and, as noted by the *Gant* dissenters and many academic commentators, leaves some important questions unanswered. Given these questions, *Gant* will certainly not be the last version of the law.

This Note predicts how the Supreme Court will answer three of the biggest questions, which are as follows: (1) what exactly is meant by the “reasonable to believe” standard for the evidence-gathering search? (2) will the evidence-gathering search remain limited to evidence of the offense of arrest? and (3) will the evidence-gathering search remain restricted to the passenger compartment? To answer these questions, this Note looks at the origin of the law of vehicle searches incident to arrest and how it has changed due to politics and the personal views of the justices on the Court. Then the Note studies each justice currently sitting on the Court to determine how they might answer the above questions. Finally, it analyzes the current political climate to find ways it might influence future holdings. The next change in the law will also be influenced by the attorneys arguing the case. Phil’s fate depends on how well his attorney knows the history of the law and the thinking of the justices on the bench.

## I. THE ROOTS AND FRUITS OF THE FOURTH AMENDMENT

The Fourth Amendment arose from the discord between England and the colonies in the period immediately before the American Revolution.<sup>7</sup> It was, in part, a backlash against writs of assistance issued by the Crown. These writs allowed an official to search anywhere he wanted without cause.<sup>8</sup> After such writs were relegated to history, how the Fourth Amendment applied to real life became less certain, as indicated by the variety of its interpretations by the Supreme Court.

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5. *Gant*, 556 U.S. at 351.

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

7. See THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 40 (2008).

8. See, e.g., *id.* at 28. Writs of assistance “were issued without any suspicion of illegal activity and permitted those holding a writ to go anywhere they chose.” *Id.*

### A. *The Origin of the Fourth Amendment*

Before the Bill of Rights was ratified in 1791,<sup>9</sup> searches and seizures in the American colonies were lawful or unlawful according to the laws of the colonies.<sup>10</sup> These laws varied from “colony to colony and from decade to decade.”<sup>11</sup> Besides the arrest of suspected felons in hot pursuit,<sup>12</sup> warrantless searches and seizures were rare and therefore not a source of spite between the people and the government.<sup>13</sup> However, this did not mean there was a dearth of suspicionless governmental intrusions onto private property. It was not so much warrantless actions of which colonists complained, but rather searches and seizures pursuant to writs of assistance.<sup>14</sup> These writs were issued at the discretion of the Crown, required no suspicion of illegal activity, and permitted officers to search anywhere.<sup>15</sup> Parliament allowed their use in the colonies to prevent smuggling.<sup>16</sup> Writs of assistance were highly unpopular and most colonial courts, except those in Massachusetts, refused to issue them.<sup>17</sup> Out of this ferment, the Fourth Amendment emerged.<sup>18</sup>

### B. *Fourth Amendment Interpretation in General*

The Fourth Amendment protects citizens against unreasonable searches and seizures by the government<sup>19</sup> and sets the standard for when search warrants may be issued. It states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

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9. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 340 (16th ed. 2007).

10. David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1795 (2000).

11. *Id.*

12. Also known as “fresh pursuit . . . [The] right of a police officer to make a warrantless search of a fleeing suspect or to cross jurisdictional lines to arrest a fleeing suspect.” BLACK’S LAW DICTIONARY 738 (9th ed. 2009).

13. CLANCY, *supra* note 7, at 25.

14. *Id.* at 31.

15. *Id.* at 28; *see also supra* note 8.

16. CLANCY, *supra* note 7, at 32.

17. *Id.* at 35.

18. *Id.* at 40.

19. *Id.* at xix.

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>20</sup>

There is little mention of the Fourth Amendment in Supreme Court opinions throughout the nineteenth century.<sup>21</sup> This is because the Amendment did not apply to the states until 1961, and the federal government performed few searches and seizures.<sup>22</sup> Also, the exclusionary rule, which prevents evidence from being admitted at trial if it was obtained through means in violation of the Fourth Amendment, did not exist until 1914.<sup>23</sup> This rule gives guilty criminal defendants a way to be acquitted; hence the increase in Fourth Amendment cases since the rule was established. This, in turn, engendered an increase in the Court's interpretations of the Amendment, and the interpretations have been rather inconsistent.

This inconsistency partly results from the text of the Amendment itself. The first part of the Amendment protects against "unreasonable searches and seizures," and the second part says, "no Warrants shall issue, but upon probable cause."<sup>24</sup> Does the Amendment require a warrant for searches and seizures, or only reasonableness? The relationship between the two clauses has been called a "syntactical mystery"<sup>25</sup> and has caused controversy in the Court.<sup>26</sup> One view is that a warrant is necessary for every search and seizure unless it is impossible to obtain one.<sup>27</sup> Another view is that warrants are not constitutionally required and that the preference for warrants was "judicially created."<sup>28</sup> Proponents of this view argue that the purpose of the Warrant Clause is to indicate "when warrants may not issue, not when they may, or must."<sup>29</sup>

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20. U.S. CONST. amend. IV.

21. CLANCY, *supra* note 7, at 42.

22. *Id.*

23. *Id.* See also *Weeks v. United States*, 232 U.S. 383 (1914) (requiring exclusion of unconstitutionally obtained evidence).

24. U.S. CONST. amend. IV.

25. H. Richard Uviller, *Reasonability and the Fourth Amendment: A (Belated) Farewell to Justice Potter Stewart*, 25 CRIM. L. BULL. 29, 33 (1989).

26. 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 10.01, at 157 (5th ed. 2010).

27. See, e.g., *Dyson v. State*, 712 A.2d 573, 577 (Md. Ct. Spec. App. 1998) ("You always have to get a warrant—UNLESS YOU CAN'T."), *rev'd sub nom. Maryland v. Dyson*, 527 U.S. 465 (1999); *Katz v. United States*, 389 U.S. 347, 357 (1967) (holding that warrantless searches are "per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions"); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1471 (1985) ("[A] warrant is always required for every search and seizure when it is practicable to obtain one.").

28. *Robbins v. California*, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting). See, e.g., *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950) (holding the constitutionality of police conduct not

The Court has swung from the warrant-requirement view to the reasonableness view and back again more than once,<sup>30</sup> but since the departure of Justice Potter Stewart in 1981, the Court has become increasingly amenable to the reasonableness philosophy.<sup>31</sup> The Court recently declared that constitutionality should be determined by looking to pre-constitutional common law and traditional standards of reasonableness.<sup>32</sup> When history has no answer, then reasonableness should be determined by weighing the intrusion into an individual's privacy against the degree to which the intrusion is needed to promote a legitimate governmental interest.<sup>33</sup> Whether the Court will continue to follow the path of reasonableness or U-turn toward the warrant requirement is explored below, as well as what this means for searches of vehicles incident to arrest.

### C. *Fourth Amendment Interpretation Regarding Searches and Seizures Incident to Arrest*

Trends in the Court's interpretation of the Fourth Amendment have coincided with cultural and political changes. During Prohibition, the Court's holdings strengthened the power of the government to uphold the Eighteenth Amendment.<sup>34</sup> As Prohibition became less popular, the Court became less willing to permit law enforcement officials to intrude into people's privacy. The post-Prohibition era saw further changes.

#### 1. *The Prohibition Era*

A "search incident to arrest"—the type of search that happened to Phil<sup>35</sup>—is a judicially created exception to the warrant requirement of the

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determined by "whether it is reasonable to procure a search warrant, but whether the search was reasonable"), *overruled by* *Chimel v. California*, 395 U.S. 752 (1969).

29. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 774 (1994).

30. *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) ("[The Supreme Court's Fourth Amendment] jurisprudence [has] lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone.").

31. DRESSLER & MICHAELS, *supra* note 26, at 163.

32. *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999).

33. *Id.*

34. Kenneth M. Murchison, *Prohibition and the Fourth Amendment: A New Look at Some Old Cases*, 73 J. CRIM. L. & CRIMINOLOGY 471, 476 (1982). The Eighteenth Amendment prohibited the manufacture, sale, or transportation of alcohol in the United States. U.S. CONST. amend. XVIII, § 1, *repealed by* U.S. CONST. amend. XXI.

35. The search of Phil's car was probably a search incident to arrest, though the police could argue that the marijuana odor gave rise to probable cause. *See, e.g., infra* note 247.

Fourth Amendment. It emerged during Prohibition as part of the Court's trend of giving law enforcement officers more freedom to find contraband.<sup>36</sup> The Court solidified the incident-to-arrest exception<sup>37</sup> in *Marron v. United States*.<sup>38</sup> In *Marron*, prohibition agents raided a speakeasy with a warrant to search for liquor and articles to manufacture liquor.<sup>39</sup> After gaining entry, the agents saw liquor and arrested the man in charge.<sup>40</sup> Then they searched the premises for the items on the warrant and found a ledger showing evidence of illegal liquor trade.<sup>41</sup> The defendant argued that since the ledger was not on the warrant and was not found on his person, the agents' seizure of it violated the Fourth Amendment.<sup>42</sup> While the Court affirmed the requirement that officers performing seizures according to a warrant can only take what the warrant describes,<sup>43</sup> it upheld the seizure of the ledger by recognizing the officers' right to search the premises, without a warrant, to find "things used to carry on the criminal enterprise."<sup>44</sup> Such a search could extend to "all parts of the premises used for the unlawful purpose."<sup>45</sup> In other words, the search that resulted in finding and seizing the ledger was not done pursuant to the warrant, but rather was pursuant, or "incident," to the arrest.

Before Prohibition was repealed, the Court decided two more cases regarding the incident-to-arrest exception and clarified its limitations.<sup>46</sup> Though these decisions claimed "doctrinal continuity" with precedent,<sup>47</sup> the move towards greater protection of individuals and less permissiveness for law enforcement indicates a response to Prohibition's declining popularity among citizens and legislatures.<sup>48</sup> In *Go-Bart Importing Co. v. United States*,

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36. See *Chimel v. California*, 395 U.S. 752, 755 (1969) (finding first mention of Court approval of warrantless searches incident to arrest in dicta in *Weeks v. United States*, 232 U.S. 383, 392 (1914)); *Agnello v. United States*, 269 U.S. 20, 30–31 (1925) (sanctioning warrantless search, incident to arrest, of arrestee and place where arrest was made in order to find things connected with the crime and weapons, but scope not extended to other places); see also Murchison, *supra* note 34, at 490.

37. Jack Blum, Note, *Arizona v. Gant: Missing an Opportunity to Banish Bright Lines from the Court's Vehicular Search Incident to Arrest Jurisprudence*, 70 MD. L. REV. 826, 833 (2011).

38. 275 U.S. 192 (1927).

39. *Id.* at 193.

40. *Id.* at 194.

41. *Id.*

42. *Id.*

43. *Id.* at 196.

44. *Id.* at 199.

45. *Id.*

46. *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931).

47. Murchison, *supra* note 34, at 492.

48. See, e.g., *id.* at 478.

Prohibition agents, without a warrant, forced an arrestee to open his safe and desk.<sup>49</sup> The Court held the search unconstitutional because, among other factors, the officers had had “an abundance of information and time” to obtain a search warrant.<sup>50</sup> Evidently, the evidence-gathering justification for a warrantless search incident to arrest was fading.<sup>51</sup> The Court gave further credence to this view in *United States v. Lefkowitz*, which involved a warrantless search for evidence of crimes involving liquor.<sup>52</sup> Exigent circumstances<sup>53</sup> had not prevented the officers from obtaining search warrants, and the Court found that a mere interest in obtaining evidence of criminal activity was insufficient to make the warrantless searches reasonable.<sup>54</sup>

The fluctuations in the Court’s Fourth Amendment interpretation during the Prohibition era reflect the political debate over Prohibition and demonstrate the effect politics and popular opinion can have on the Court’s decisions. Prohibition in the United States had three stages: (1) strong initial support; (2) gradual growth of doubts; and (3) repudiation.<sup>55</sup> In the first stage, the Court showed willingness to allow government officials “broad authority to enforce prohibition.”<sup>56</sup> *Agnello* and *Marron* were products of this jurisprudence. The Court’s decisions during this stage showed “a reluctance to exclude evidence seized in searches for alcoholic beverages.”<sup>57</sup> During the second stage, the Court in *Go-Bart* and *Lefkowitz* limited the scope of the search incident to arrest. The trend of permissiveness toward government shifted and the Court “proved increasingly willing to develop doctrines that made the job of prohibition enforcement officials more

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49. 282 U.S. at 349.

50. *Id.* at 358.

51. Blum, *supra* note 37, at 834.

52. 285 U.S. 452, 458–60 (1932).

53. “[E]xigent circumstances. . . 1. A situation that demands unusual or immediate action and that may allow people to circumvent usual procedures. . . . 2. A situation in which a police officer must take immediate action . . . without first obtaining a warrant.” BLACK’S LAW DICTIONARY, *supra* note 12, at 277.

54. *Lefkowitz*, 285 U.S. at 465–66; *Trupiano v. United States*, 334 U.S. 699, 708 (1948).

55. Murchison, *supra* note 34, at 476.

56. *Id.* at 477–78 (giving as examples, the Court declaring that autos used to illegally transport liquor could be forfeited, and recognizing Congress’ authority to override a physician’s judgment about liquor’s medicinal value).

57. *Id.* at 479. *See also* *Dumbra v. United States*, 268 U.S. 435, 437–38 (1925) (affirming validity of warrant though affidavit neglected to mention the establishment searched was licensed by the government to manufacture, store, and sell wine for non-beverage purposes); *Steele v. United States*, 267 U.S. 505, 506–10 (1925) (construing statute broadly to include prohibition agent as civil officer to whom warrants may be issued); *Hester v. United States*, 265 U.S. 57, 58–59 (1924) (holding officers’ warrantless inspection of whiskey spilt on defendant’s land to be valid under “open fields” doctrine). *But see* *Amos v. United States*, 255 U.S. 313, 317 (1921) (finding that, due to implied coercion, defendant’s wife hadn’t validly consented to search of defendant’s premises).

difficult.”<sup>58</sup> During the third stage, the Court placed new emphasis on a liberal construction of the Fourth Amendment.<sup>59</sup>

## 2. *Post-Prohibition*

While the evidence-gathering rationale for warrantless searches incident to arrest was tentatively rejected in *Go-Bart* and *Lefkowitz*, it was fully repudiated in *Trupiano v. United States*.<sup>60</sup> In *Trupiano*, federal agents performed a warrantless raid on an illegal distillery.<sup>61</sup> One of the agents had worked there undercover for several weeks before the raid took place.<sup>62</sup> Therefore, the agents had had more than enough time and information to secure a search warrant, but they argued that obtaining one would have been inconvenient and that the law did not require a warrant anyway.<sup>63</sup> Since they had lawfully arrested one of the operators of the distillery, the agents relied on precedent permitting the seizure of evidence of a crime in plain view at the time of arrest.<sup>64</sup> The Court held the search to be unconstitutional because the Fourth Amendment required law enforcement agents to secure search warrants “wherever reasonably practicable.”<sup>65</sup>

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58. Murchison, *supra* note 34, at 478–79 (giving as examples, the Court: requiring strict adherence to the Volstead Act for forfeit of vehicle used in illegal liquor transportation; holding purchasing liquor was not a crime under the Volstead Act; defining the new defense of entrapment; allowing a defendant’s wife to testify on his behalf). *See also* *Gambino v. United States*, 275 U.S. 310, 314, 316 (1927) (holding that though officers were not federal agents, the Fourth Amendment still applied to their search because the Prohibition Act contemplated federal and state cooperation in its enforcement); *Byars v. United States*, 273 U.S. 28, 32 (1927) (holding warrant invalid under federal standards and search in violation of the Fourth Amendment because federal prohibition participated in state action as a federal officer; “Constitutional provisions for the security of person and property are to be liberally construed . . .”).

59. Murchison, *supra* note 34, at 480. *See also* *Nathanson v. United States*, 290 U.S. 41, 47 (1933) (holding that warrant based on mere affirmance of belief or suspicion insufficient for Fourth Amendment regardless of which statute is allegedly violated); *Sgro v. United States*, 287 U.S. 206, 210 (1932) (holding that expired warrant cannot be reissued simply by a judge or commissioner changing the date on it); *Grau v. United States*, 287 U.S. 124, 128–29 (1932) (holding warrant invalid for failing to show probable cause that a dwelling used for manufacture of liquor was also used for selling liquor); *Taylor v. United States*, 286 U.S. 1, 6 (1932) (holding that suspicious odor does not overcome requirement to obtain a search warrant). *But see* *Husty v. United States*, 282 U.S. 694, 700 (1931) (holding that warrantless search of an automobile for liquor illegally transported or possessed is valid upon probable cause; probable cause existed here because officer knew the suspect to be a bootlegger and was well acquainted with informant).

60. 334 U.S. 699 (1948), *overruled by* *United States v. Rabinowitz*, 339 U.S. 56 (1950).

61. *Id.* at 703.

62. *Id.* at 701–02.

63. *Id.* at 706.

64. *Id.* at 705.

65. *Id.*

This strict warrant requirement did not last long. Two years later, the Court went back to an evidence-gathering rationale.<sup>66</sup> In *United States v. Rabinowitz*, officers arrested the suspect at his office for forging stamps and they searched the room for evidence of the crime.<sup>67</sup> The Court distinguished *Rabinowitz* from *Go-Bart* and *Lefkowitz* by determining that those cases involved warrantless “general exploratory searches,” whereas in *Rabinowitz*, “[s]pecificity was the mark of the search and seizure.”<sup>68</sup> Even though the officers had had time to procure a search warrant, the Court held that they were not bound to do so because the search was otherwise reasonable<sup>69</sup>—determining reasonableness according to “the total atmosphere of the case.”<sup>70</sup> *Rabinowitz* was often applied in conjunction with *Harris v. United States*, a case where officers performed a search, incident to arrest, of a four-room apartment for evidence of a past offense.<sup>71</sup> The Court upheld the search without considering whether there was probable cause to support a warrant.<sup>72</sup> The *Harris-Rabinowitz* rule as applied by the Supreme Court and lower courts had the following characteristics: (1) the scope of a search was not limited to the area within reach of the arrestee, but extended to the entire premises in which the arrestee had a possessory interest; (2) it was not clear if probable cause of evidence connected with the crime was necessary; and (3) the search was limited in intensity and length by the items sought.<sup>73</sup>

This rule lasted nineteen years until, in *Chimel v. California*,<sup>74</sup> the Court retreated from the evidence-finding justification and re-established the need for exigent circumstances to justify a warrantless search.<sup>75</sup> In *Chimel*, police officers went to the suspect’s home to arrest him for the burglary of a coin shop.<sup>76</sup> They had a warrant for the suspect’s arrest but not for a search.<sup>77</sup> The suspect refused their request for permission to “‘look around,’” but they searched the entire house anyway on the grounds that the search was incident

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66. See Blum, *supra* note 37, at 835–36.

67. 339 U.S. 56, 58–59 (1950), *overruled by* *Chimel v. California*, 395 U.S. 752 (1969).

68. *Id.* at 62.

69. *Id.* at 64.

70. *Id.* at 66.

71. 331 U.S. 145, 148–49 (1947).

72. *Id.* at 151–55.

73. 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.3(b), at 459 (5th ed. 2012).

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

75. *Id.* at 768 (“[*Rabinowitz* is] no longer to be followed.”); Blum, *supra* note 37, at 837.

76. *Chimel*, 395 U.S. at 753.

77. *Id.* at 753–54.

to arrest.<sup>78</sup> Justice Stewart, writing for the majority, said that the *Rabinowitz* doctrine, which allowed warrantless searches incident to arrest to extend to the entire house of an arrestee, had no basis in reason or history.<sup>79</sup> He said the purpose of the Fourth Amendment was to safeguard privacy by placing a magistrate—the one who issues a warrant—between the police and the private citizen.<sup>80</sup>

To come nearer to the original intent of the amendment, *Chimel* did away with the reasonableness standard of *Rabinowitz* and defined two exigencies which would allow for a warrantless search incident to arrest: (1) the arresting officer may search the person of the arrestee in order to remove weapons the arrestee may use against the officer or for means of escape; and (2) the officer can search for and seize evidence on the arrestee's person.<sup>81</sup> Both of these exigencies extend into “the area from within which [the arrestee] might gain possession of a weapon or destructible evidence.”<sup>82</sup> The first exigency is justified as a means of preserving the safety of the officer and preventing frustration of arrest, and the second as a means of preventing concealment or destruction of evidence.<sup>83</sup> While acknowledging that *Rabinowitz* was correct in that the reasonableness of a search did depend on the facts and circumstances, *Chimel* held that these facts and circumstances “must be viewed in light of established Fourth Amendment principles.”<sup>84</sup> In support of this, *Chimel* quoted Justice Frankfurter's dissent in *Rabinowitz*, which called for cognizable criteria of reasonableness.<sup>85</sup> By using the holding of *Rabinowitz* in conjunction with the Constitution, and quoting Justice Frankfurter's dissent, *Chimel* implied that *Rabinowitz* had strayed into unconstitutional territory. If *Rabinowitz* was in fact a misinterpretation

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78. *Id.*

79. *Id.* at 760.

80. *Id.* at 760–61.

81. *Id.* at 762–63.

82. *Id.* at 763.

83. *Id.*

84. *Id.* at 765.

85. Justice Frankfurter's dissent was quoted as follows:

To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an ‘unreasonable search’ is forbidden—that the search must be reasonable. What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and experience which it embodies and the safeguards afforded by it against the evils to which it was a response.

*Id.* (quoting *United States v. Rabinowitz*, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting)).

of the Constitution, why had it stood for nineteen years, and why was it overruled when it was?

Part of the reason for the demise of *Rabinowitz* was Justice Stewart's own view of what the Fourth Amendment required. He noted in *Chimel* that *Rabinowitz* had been criticized for many years and had been "relied upon less and less" in the Court's decisions.<sup>86</sup> However, none of the cases cited in *Chimel*<sup>87</sup> to support this proposition neglected to rely on *Rabinowitz* because of its specious reasoning or lack of constitutional mooring—*Rabinowitz* simply did not apply to those cases.<sup>88</sup> This suggests that the decision in *Chimel* was not really a result of a trend within the Court as there is little evidence that such a trend existed.

Another reason for the decision in *Chimel* may be that there was simply no good justification for *Harris-Rabinowitz*. After all, a convincing rationale for permitting a warrantless search on an entire premises merely because an arrest took place there had not been articulated.<sup>89</sup> The weakness of *Harris-Rabinowitz* is evident in the faulty reasoning of the *Chimel* dissent where Justices White and Black argued that since warrantless arrests had long been permitted, police would frequently arrest without a warrant, thus creating the exigent circumstance of a strong possibility that "confederates of the arrested man will . . . remove [evidence] for which the police have probable cause to search."<sup>90</sup> Therefore, if police have probable cause to believe evidence is on the premises, then they should be permitted to search without a warrant. This argument is incorrect because warrantless arrests are not always lawful, and the exigent circumstances which Justices White and Black referred to would often be created by the police themselves since such risk of destruction of evidence was created by the arrest itself and did not exist before the arrest when the officers should have obtained a warrant.<sup>91</sup>

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86. *Id.* at 768; *see id.* nn.14–15 (citing three law review articles critical of *Rabinowitz* and four Court cases that did not rely on *Rabinowitz*).

87. *Id.* at n.15.

88. *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 220 (1968) (holding search not incident to arrest because begun in arrestees' car while arrestees were already in custody in courthouse); *Katz v. United States*, 389 U.S. 347, 357 (1967) (holding search not incident to arrest because electronic surveillance even "substantially contemporaneous with . . . arrest" not a search incident to arrest); *Warden v. Hayden*, 387 U.S. 294, 299–301 (1967) (not citing *Rabinowitz* because the issue was the existence of a legal distinction between "mere evidence" and "instrumentalities, fruits, or contraband" which *Rabinowitz* could not speak to); *Stoner v. California*, 376 U.S. 483, 487 (1964) (holding search not incident to arrest because "completely unrelated to the arrest" in time and place).

89. LAFAVE, *supra* note 73, § 6.3(b), at 461.

90. *Id.*

91. *Id.* at 461–62. Though exigent circumstances can exempt police from the warrant requirement, the "police-created exigency" doctrine prohibits this exemption when exigent circumstances were created

D. *Fourth Amendment Interpretation Regarding Vehicle Searches Incident to Arrest*

Vehicle searches incident to arrest used to be governed by whatever rule controlled other searches incident to arrest.<sup>92</sup> During the reign of *Harris-Rabinowitz*, searches of vehicles in the possession or general control of an arrestee were generally unrestrained. When officers pulled someone over and arrested the driver, they could search the passenger compartment and locked trunk of the vehicle regardless of whether the arrestee could reach the place being searched. Some courts did not permit such a search when the arrest was for a minor traffic violation,<sup>93</sup> but otherwise the rule was permissive. *Chimel* narrowed the scope of vehicle searches incident to arrest as it did for other searches incident to arrest.

Courts applied the reasoning of *Chimel* regarding warrantless searches of premises to warrantless searches of vehicles.<sup>94</sup> Since *Chimel* held that searches incident to arrest were justified by the need to prevent the arrestee from obtaining weapons or destroying evidence—thereby limiting the search to the area within the arrestee’s immediate control—vehicle searches incident to arrest were also held to be so limited.<sup>95</sup> However, applying *Chimel* to vehicle searches proved difficult. Since they almost always occur when the arrestee has been arrested while outside of the vehicle, the “immediate control” requirement of *Chimel* was rarely satisfied.<sup>96</sup> Shortly after *Chimel* was decided, lower courts tended to permit vehicle searches incident to arrest even if the area searched was not within the arrestee’s immediate control; but as time went on, courts became more likely to examine the facts to determine if such searches were really valid according to *Chimel*’s reasoning.<sup>97</sup>

Such factual assessments were rendered unnecessary by *New York v. Belton*.<sup>98</sup> In *Belton*, an officer pulled over a vehicle for speeding and found four men in the car and evidence of marijuana in plain view.<sup>99</sup> The officer

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or manufactured by the police. *Kentucky v. King*, 131 S. Ct. 1849, 1857 (2011). However, the Court recently held that police-created exigencies can exempt police from the warrant requirement as long as “the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment.” *Id.* at 1858. *See infra* note 205.

92. LAFAVE, *supra* note 73, § 7.1, at 664.

93. *Id.* § 7.1(a), at 665.

94. *Id.* at 665–66.

95. *Id.* (citing *Preston v. United States*, 376 U.S. 364, 367 (1964)).

96. *Id.* at 667.

97. *Id.*

98. 453 U.S. 454 (1981).

99. *Id.* at 455–56.

ordered the men out of the car and arrested and searched each of them.<sup>100</sup> The officer then searched the passenger compartment, finding cocaine in the pocket of a jacket that he had unzipped.<sup>101</sup> The defendant argued that the cocaine had been seized in violation of the Fourth Amendment.<sup>102</sup>

The *Belton* Court cited several cases regarding searches incident to the arrest of automobile occupants.<sup>103</sup> Though the factual scenarios of these cases were similar, some of the searches were held to be valid and some were not.<sup>104</sup> The courts had found no workable definition of “the area within the immediate control of the arrestee” when the arrestee was the recent occupant of a vehicle.<sup>105</sup> The Court noted that “a single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.”<sup>106</sup> Precedent suggested a generalization that things in the passenger compartment of a vehicle are “generally, even if not inevitably,” within the immediate control of the arrestee.<sup>107</sup> In order to fashion a “familiar standard” and in light of this generalization, the Court held that “when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.”<sup>108</sup> Following from this holding was the rationale that police may also search any containers, open or closed, within the passenger compartment; because if the passenger compartment is within reach, then so are the containers.<sup>109</sup>

In addition to the efficacy of a bright-line rule, another possible reason for the Court’s willingness to treat a search of a vehicle incident to arrest differently than such a search of a house is the vehicle exception to the warrant requirement, an exception that arose in the Prohibition era and remains unchanged.<sup>110</sup> In cases where a law enforcement officer has probable cause to search a vehicle for contraband and obtaining a warrant would not be practicable, the officer may search the vehicle without a

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100. *Id.* at 456.

101. *Id.*

102. *Id.*

103. *Id.* at 459.

104. *Id.*

105. *Id.* at 460.

106. *Id.* at 458 (internal quotation marks omitted) (quoting *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979)).

107. *Id.* at 460 (footnote omitted).

108. *Id.*

109. *Id.* at 460–61.

110. *See Carroll v. United States*, 267 U.S. 132 (1925).

warrant.<sup>111</sup> The justification for this was the danger of the vehicle moving out of the jurisdiction in which the warrant was to be sought.<sup>112</sup>

*Belton* was confirmed and clarified by *Thornton v. United States*.<sup>113</sup> In *Thornton*, the officer initiated contact with the suspect after the suspect had already exited his car.<sup>114</sup> Mr. Thornton argued that *Belton* limited vehicle searches incident to arrest to “situations where the officer initiated contact with an arrestee while he was still an occupant of the car.”<sup>115</sup> Justice Rehnquist, writing for the *Thornton* majority, stated that the *Belton* holding did not rely on the fact that the officer initiated contact with the occupants of the vehicle while they remained within it, and that such a factor bore “no logical relationship to *Belton*’s rationale.”<sup>116</sup> Since where the officer initiates contact with the arrestee does not determine the span of the area within the arrestee’s immediate control, *Belton*’s rule extends to situations where the arrestee is a recent occupant of the vehicle.<sup>117</sup> *Thornton* based its reasoning on the two aims of *Chimel*—officer safety and preservation of evidence—and on *Belton*’s bright-line rule.<sup>118</sup>

## II. THE CURRENT STATE OF FOURTH AMENDMENT INTERPRETATION AND A LOOK AHEAD

The holding of *Arizona v. Gant*<sup>119</sup> is the latest Supreme Court interpretation of the Fourth Amendment as it relates to vehicle searches incident to arrest. *Gant* purported to clarify the rule and rectify what the majority described as widespread misunderstanding of *Belton*, but ultimately the case raised at least as many questions as it answered. For this reason, the law is likely to change again.

### A. *Arizona v. Gant*

Five years after *Thornton*, the Court retreated from the bright-line rule that allowed officers to search a vehicle incident to arrest even if the arrestee was handcuffed and in the police cruiser. The holding in *Gant* determined

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111. *Id.* at 154.

112. *Id.* at 153.

113. 541 U.S. 615 (2004).

114. *Id.* at 618.

115. *Id.* at 619.

116. *Id.* at 620.

117. *Id.* at 622.

118. *Id.* at 620, 623.

119. 556 U.S. 332 (2009).

two situations which justify the search of a vehicle incident to arrest: (1) “if the arrestee is within reaching distance of the passenger compartment at the time of the search”; or (2) if “it is reasonable to believe the vehicle contains evidence of the offense of arrest.”<sup>120</sup> The first justification is an attempt to trim the scope of the search to fit the rationale of *Chimel*. The second is an echo of Justice Scalia’s concurrence in *Thornton*.<sup>121</sup>

As arrests go, the facts of *Gant* are unremarkable. Police arrested Mr. Gant for driving with a suspended license, then handcuffed and locked him in the back of the patrol car.<sup>122</sup> They searched his car and discovered cocaine in the pocket of a jacket in the back seat.<sup>123</sup> When asked why the search was conducted, Officer Griffith replied, ““Because the law says we can do it.””<sup>124</sup> However, the Arizona Supreme Court allowed Gant’s motion to suppress the cocaine, holding that *Belton* did not answer whether police could conduct a search incident to arrest once the scene is secure, as it was in this case.<sup>125</sup> The Arizona Supreme Court then looked to *Chimel* for the answer and determined that since the scene was secure, the justifications for a search incident to arrest did not exist.<sup>126</sup> Therefore, the cocaine was obtained in violation of the Fourth Amendment.<sup>127</sup> The United States Supreme Court agreed.<sup>128</sup>

Though the justification for the first part of the *Gant* ruling—that an officer can search the area within reaching distance of the arrestee—clearly has ties to *Chimel*, the second part of the ruling—the evidence-gathering search—has less ties to binding precedent<sup>129</sup> and has been subject to a fair

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120. *Id.* at 351.

121. *Id.* at 343.

122. *Id.* at 336.

123. *Id.*

124. *Id.* at 336.

125. *Id.* at 337.

126. *Id.* at 337–38.

127. *Id.*

128. *Id.* at 351.

129. Blum, *supra* note 37, at 863 (“Justice Scalia’s evidence standard has only thin doctrinal support and was largely created out of whole cloth through his concurring opinion in *Thornton*.”). Though the evidence-gathering search had few ties to binding precedent, this is not to say it had few ties to any precedent. Justice Scalia justified the evidence-gathering search by citing Fourth Amendment cases from the early and mid-twentieth century, such as *United States v. Rabinowitz*, 339 U.S. 56 (1950). See *Thornton v. United States*, 541 U.S. 615, 629 (2004) (Scalia, J., concurring). He then reached further into the past to find support for the search, citing *King v. Barnett*, 3 Car & P. 600, 601 (1829), as well as a progenitor of the “reasonable to believe” standard found in a nineteenth century treatise on criminal procedure. *Id.* at 630 (“The officer who arrests a man on a criminal charge should consider the nature of the charge; and, if he finds about the prisoner’s person, or otherwise in his possession, either goods or moneys which there is *reason to believe* are connected with the supposed crime as its fruits, . . . he may

amount of criticism.<sup>130</sup> The “reasonable to believe” standard in particular has evoked controversy. Though “reasonable to believe” had been mentioned in Supreme Court cases before *Gant*,<sup>131</sup> the Court had not given it clear definition. Commentators have criticized it<sup>132</sup> and lower courts have split regarding its meaning. The Ninth Circuit equates it with probable cause, while “a majority of the circuits hold that a lesser standard applies.”<sup>133</sup> Before looking at how the justices currently sitting on the Court might interpret “reasonable to believe,” as well as how they might answer other questions left open in *Gant*, the record of Justice Stevens regarding vehicle searches incident to arrest must be examined for two reasons: his views on the Fourth Amendment were powerful influences in shaping the law; and since he is no longer on the bench, the lack of his influence will make way for another force.

### B. *Justice Stevens and Vehicle Searches Incident to Arrest*

Justice Stevens, writing for the majority in *Gant*, stated that *Gant* was not overruling *Thornton* and *Belton*, but was rather clarifying *Belton*’s holding by emphasizing its justifications under *Chimel*.<sup>134</sup> Though courts had “widely understood” *Belton* to allow a vehicle search incident to arrest even

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take [them] . . . .” (quoting 1 J. BISHOP, CRIMINAL PROCEDURE § 211, at 127 (2d ed. 1872) [hereinafter BISHOP] (emphasis added)). However, the “reason to believe” in BISHOP differs from Justice Scalia’s “reasonable to believe” in that in BISHOP it justifies keeping evidence already found, whereas Justice Scalia’s “reasonable to believe” is a justification for a search for evidence. Furthermore, Justice Scalia cited several old cases in support of the justification found in *Chimel v. California*. See *Thornton*, 541 U.S. at 630–31 (Scalia, J., concurring) (“*Chimel*’s narrower focus on concealment or destruction of evidence also has historical support.”).

130. See, e.g., Justin Casson, Comment, *Arizona v. Gant: Just Another Speed Bump?*, 45 GONZ. L. REV. 797, 812 (2009) [hereinafter *Speed Bump?*] (“As a result of *Gant*’s surprisingly cavalier hesitation to provide perspective on [the “reason to believe” standard], the course of law could quickly find itself back in pre-*Gant* befuddlement.”); Blum, *supra* note 37, at 851 (arguing that Scalia’s evidence standard is inconsistent with historical principles and will cause continued ambiguity within search incident to arrest jurisprudence).

131. See, e.g., *Payton v. New York*, 445 U.S. 573, 603 (1980).

132. See, e.g., *Speed Bump?* *supra* note 130, at 811 (describing the standard as “aloof” and “problematic”); Blum, *supra* note 37, at 851 (“The evidence standard is . . . inconsistent with the historical principles existing at the time of the founding.”).

133. *Speed Bump?*, *supra* note 130, at 811. Compare *United States v. Gorman*, 314 F.3d 1105, 1112, 1115 (9th Cir. 2002) (concluding that the “reason to believe” standard embodies probable cause), with *United States v. Pruitt*, 458 F.3d 477, 482 (6th Cir. 2006) (defining the standard as “a lesser reasonable belief standard, and not probable cause”); *United States v. Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005) (holding a search valid based on reasonable belief and “falling short of probable cause to believe”).

134. *Arizona v. Gant*, 556 U.S. 332, 335 (2009).

“if there is no possibility the arrestee could gain access to the vehicle at the time of the search,” Justice Stevens implied that this was a misunderstanding of *Belton* resulting from Justice Brennan’s dissent.<sup>135</sup> Justice Stevens wrote that this interpretation of *Belton* “untether[s]” it from *Chimel*, and is therefore “incompatible with [the Court’s] statement in *Belton* that it ‘in no way alters [*Chimel*’s] fundamental principles.’”<sup>136</sup> However, this statement assumes that *Belton* relied on *Chimel* for its holding, which is arguably untrue since *Belton* relied just as much, if not more, on the need to fashion a “straightforward rule.”<sup>137</sup> In order to bring the scope of vehicle searches incident to arrest more in line with *Chimel*, Justice Stevens held that such searches can take place “only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”<sup>138</sup> Ostensibly due to “circumstances unique to the vehicle context,” he also adhered to Justice Scalia’s evidence-gathering rationale.<sup>139</sup> Thus the two justifications for vehicle searches incident to arrest were created.

Justice Stevens’ opinion in *Gant* is probably not a true reflection of his views on the Fourth Amendment insofar as *Gant* refused to explicitly overrule *Belton* and established the evidence-gathering rationale. Of the justices on the Court at the time of *Gant*, Justice Stevens was the only one also on the bench when *Belton* was decided. Though he concurred in the judgment of *Belton*, he did not adhere to the reasoning of the majority with regard to the search of containers within the car.<sup>140</sup> Since Justice Stevens never liked *Belton*, his basing of *Gant* on *Belton* was arguably an attempt to garner the votes of Justices Souter, Thomas, and Ginsburg. Moreover, in his dissent in *Thornton*, Justice Stevens said the only justification for the majority’s extension of *Belton* to recent occupants was an interest in evidence-gathering and that this was outweighed by “the citizen’s constitutionally protected interest in privacy.”<sup>141</sup> Since Justice Stevens did

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135. *Id.* at 342–43. (citing *New York v. Belton*, 453 U.S. 454, 466 (1981) (Brennan, J., dissenting) (characterizing the majority’s holding as resting on the “fiction . . . that the interior of the car is *always* within the immediate control of an arrestee who has recently been in the car”) (alteration in original) (internal quotation marks omitted)).

136. *Id.* at 343 (quoting *Belton*, 453 U.S. at 460 n.3).

137. *Belton*, 453 U.S. at 458–59.

138. *Gant*, 556 U.S. at 343.

139. *Id.* See, e.g., Blum, *supra* note 37, at 845 n.166, 866 (arguing that the *Gant* majority may have accepted Scalia’s evidence standard “as the price of eliminating *Belton*’s bright-line interpretation and avoiding a plurality opinion that would leave the governing rule uncertain”).

140. *Belton*, 453 U.S. at 463 (Stevens, J., concurring); see also *Thornton v. United States*, 541 U.S. 615, 634 (2004) (Stevens, J., dissenting).

141. *Thornton*, 541 U.S. at 636 (Stevens, J., dissenting).

not mention this privacy interest in *Gant*, it is likely that his wholesale adoption of the evidence-gathering rationale was done to win Justice Scalia's support. If Justice Stevens could have imposed his own views of vehicle searches incident to arrest, he probably would have done away with special treatment of vehicles altogether and used *Chimel* as it is used in other contexts. Now Justice Stevens is no longer there and there is room for someone with different ideas and a bold pen. Justice Scalia has both.

### C. *How Do the Current Justices View the Fourth Amendment?*

Justice Alito questioned the "reasonable to believe" standard in his dissent in *Gant* and brought up other questions about the decision. The remainder of this Note will try to predict how the Court will answer them. The questions are (1) what exactly is meant by the "reasonable to believe" standard for the evidence-gathering search? (2) will the evidence-gathering search remain limited to evidence of the offense of arrest? and (3) will the evidence-gathering search remain restricted to the passenger compartment?<sup>142</sup> To answer these questions, this Note examines the record of the individual justices currently on the Court to determine their views on the Fourth Amendment and how the current political climate might influence them.

#### 1. *Scalia*

Justice Scalia has laid bare his views on how vehicular searches incident to arrest ought to be conducted. His concurrences in *Thornton* and *Gant*, as well as his questions in the oral argument of *Gant*, indicate that he believes such searches must be reasonable in order to be valid and that reasonableness ought to be determined by looking to tradition. When the attorney for Arizona argued before the Court that *Belton* was a workable rule given the fact that police had used it for twenty-seven years, Justice Scalia replied that twenty-seven years was not a long time and asked: "If you stopped Thomas Jefferson's carriage to arrest Thomas Jefferson and you pulled him off to the side of the road, could you . . . then go and search his carriage?"<sup>143</sup> The attorney had no answer. Justice Scalia was "struck" by the fact that the attorney had made no effort to present the law as it had been before *Belton*, and said that if it had always been reasonable to search the conveyance of an

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142. *Gant*, 556 U.S. at 364 (Alito, J., dissenting). The search is restricted to the passenger compartment due to the passenger-compartment restriction in *Belton*. See *supra* note 108 and accompanying text.

143. Transcript of Oral Argument at 7, *Arizona v. Gant*, 556 U.S. 332 (2009) (No. 07-542).

arrestee, then *Gant* would be an easy case.<sup>144</sup> During the respondent's argument, Justice Scalia again looked for an indication of how searches of vehicles incident to arrest had traditionally been treated.

Looking for historical precedent upon which to hang his hat and getting nothing from Arizona's attorney,<sup>145</sup> Justice Scalia grounded his concurrence in "traditional standards of reasonableness."<sup>146</sup> In his opinion, *Belton* failed to meet these standards because its purported reliance on officer safety was "fanciful."<sup>147</sup> Since vehicle searches incident to arrest "virtually always" occur when the arrestee is secured and in the police cruiser, there is no actual danger to police.<sup>148</sup> Therefore, *Belton* really had nothing to do with officer safety, but instead was a return to the broad evidence-gathering searches allowed before *Chimel*.<sup>149</sup> Justice Scalia's problem with the *Gant* majority was that it refused to overrule *Belton* and *Thornton*. He wanted those cases to be abandoned entirely because they failed to provide a clear rule for police and allowed for manipulation, "inviting officers to leave the scene unsecured . . . in order to conduct a vehicle search."<sup>150</sup>

An evidence-gathering search is in fact the only kind that Scalia would allow of a vehicle incident to arrest, barring the unusual case of an officer actually being in danger of an unsecured arrestee. He joined the opinion in *Gant* only to prevent leaving *Belton* and *Thornton* as they were.<sup>151</sup> Justice Scalia noted in his concurrence in *Thornton* that if *Belton* searches were justifiable at all, it is only because the car might contain evidence relevant to

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144. *Id.* at 7, 9.

145. *See id.* at 8 ("[Y]ou give me nothing to hang my hat on," Scalia tells petitioner's attorney). It is not true, however, that Justice Scalia was entirely lacking in precedent regarding what was reasonable regarding searches at the time of the framing. *See supra* note 129.

146. *See Gant*, 556 U.S. at 351 (Scalia, J., concurring) ("To determine what is an 'unreasonable' search within the meaning of the Fourth Amendment, we look first to the historical practices the Framers sought to preserve; if those provide inadequate guidance, we apply traditional standards of reasonableness."); *see also* Andrew Fois & Lauren Simmons, *Thomas Jefferson's Carriage: Arizona v. Gant's Assault on the Belton Doctrine*, 5 CRIM. L. BRIEF 4, 23 (2009) ("In order to determine what is and is not 'reasonable' under the Fourth Amendment, Justice Scalia always begins by looking to 'the historical practices the Framers sought to preserve.'").

147. *Gant*, 556 U.S. at 353 (Scalia, J., concurring).

148. *Id.* at 351. For example, in *Thornton v. United States*, 541 U.S. 615, 625–26 (2004), the prosecution only presented one instance of a handcuffed arrestee escaping a squad car and grabbing a weapon from another place—an arrestee ran through the woods to his home and hit the officer on the wrist with a fireplace poker before being shot dead.

149. *Gant*, 556 U.S. at 353 (Scalia, J., concurring).

150. *Id.*

151. *Id.* at 354.

the crime of arrest.<sup>152</sup> The authorities which he used to justify this search were all pre-*Chimel*, some going as far back as the early nineteenth century.<sup>153</sup> He said that an arrest “distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging,” also noting that it is reasonable to assume that evidence of a crime is likely to be found at the scene of arrest.<sup>154</sup> Acknowledging that both *Rabinowitz* and *Chimel* were “plausible accounts of what the Constitution requires,” he reasoned that *Rabinowitz* was the only honest justification for *Belton*.<sup>155</sup> Justice Scalia said the evidence-gathering search should be limited to evidence of the crime of arrest because of the many cases in which a motorist may be arrested and the officer would have “no reasonable basis to believe relevant evidence might be found in the car.”<sup>156</sup>

As for the “reasonable to believe” standard that has caused so much controversy, according to Justice Scalia an officer has reason to believe there is evidence of the crime of arrest in the car when the crime is one for which evidence “could be expected to be found.”<sup>157</sup> For example, the officer who arrested Mr. Gant had no reason to believe there would be evidence in the vehicle of the crime of arrest since Mr. Gant had been arrested for driving without a license and the officer could not expect to find evidence for such a crime.<sup>158</sup> “Reasonable to believe” therefore is not a mysterious code for reasonable suspicion or probable cause or something in between, but rather is simply to be taken literally.<sup>159</sup> If the officer has a reason to believe there is

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152. *Thornton v. United States*, 541 U.S. 616, 629 (2004) (Scalia, J., concurring) (citing *United States v. Rabinowitz*, 339 U.S. 66 (1950), as well as several other pre-*Chimel* cases as justification for the evidence-gathering search).

153. *Id.* Justice Scalia showed unwillingness to accept *Chimel* as the final word on searches and seizures incident to arrest when, during the oral arguments for *Gant*, Mr. Gant’s attorney told Justice Scalia that the Fourth Amendment requires warrantless searches to be tied to “the twin exigencies on which they are based.” Transcript of Oral Argument, *supra* note 143, at 32. Justice Scalia expressed skepticism and asked why this was true for vehicle searches and not searches of persons; “I mean, if the police arrest Mother Teresa, they are still entitled to frisk her, right, even though there’s little likelihood that she has a Gatt?” *Id.* See *supra* note 129.

154. *Thornton*, 541 U.S. at 630.

155. *Id.* at 631.

156. *Id.* at 632.

157. *Arizona v. Gant*, 556 U.S. 332, 353 (2009) (Scalia, J., concurring).

158. *Id.*

159. It could be argued that there is ambiguity within the *Gant* opinion: Compare *id.* at 335 (majority opinion) (stating that a vehicle search incident to arrest is justified “when it is reasonable to believe that evidence of the offense of arrest *might be found* in the vehicle.”) (emphasis added), with *id.* at 351 (stating that a vehicle search incident to arrest is justified when “it is reasonable to believe the vehicle contains evidence of the offense of arrest.”). However, the phrase “might be found” neither adds nor

evidence of the crime of arrest in the car, the officer may search the car for that evidence. In other words, if the crime of arrest is a crime for which evidence could be found in the car, then the officer can search the car for such evidence. Suspicion is not needed.

Justice Scalia also said he would extend the evidence-gathering rationale to evidence “of another crime that the officer has probable cause to believe occurred.”<sup>160</sup> Taken literally, this means any crime at all, not just crimes for which the officer has probable cause to believe were committed by the arrestee or other occupants of the vehicle. This would be absurd.<sup>161</sup> Justice Scalia probably meant crimes for which the officer had probable cause to believe *the arrestee committed*, as indicated by his statement in *Thornton* that it is not irrational for police to search for evidence “when and where the perpetrator of a crime” is arrested.<sup>162</sup> It is also likely that he would be inclined to extend the evidence-gathering search beyond the passenger compartment. During the *Gant* oral argument, he said it did not make sense to limit the search to the passenger compartment once the officer-safety rationale has been eliminated,<sup>163</sup> and since he would eliminate the officer-safety rationale, he would also likely extend the search to the entire vehicle.

## 2. Alito

Notwithstanding Justice Stevens’s claim to the contrary, Justice Alito’s dissent in *Gant* argued that the majority “effectively overruled” *Belton* and *Thornton*.<sup>164</sup> Not only was the Court not asked to overrule those cases,

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subtracts anything to the test because adding “might be found” to “reasonable to believe” is like multiplying a number by one—the result is the same.

160. *Id.* at 353. Perhaps the reason some courts have been confused and interpreted “reason to believe” to mean “probable cause” is that they mistakenly read this passage to mean that the officer needs probable cause to believe there is evidence in the vehicle, when actually it says the officer merely needs probable cause to believe a crime occurred.

161. Because of the vehicle exception to vehicle searches when probable cause exists, see *Carroll v. United States*, 267 U.S. 132 (1925), it is not absurd for an officer to search a vehicle if he has probable cause to believe there is evidence inside, but Justice Scalia’s statement is absurd because it literally states that the officer can search the arrestee’s car for evidence of any crime the officer has probable cause to believe occurred, even if there is no probable cause that the evidence is in the arrestee’s car or that the arrestee committed the crime.

162. *Thornton v. United States*, 541 U.S. 615, 630 (2004) (Scalia, J., concurring).

163. Transcript of Oral Argument, *supra* note 143, at 17.

164. *Gant*, 556 U.S. at 356 (2009) (Alito, J., dissenting) (“Although the Court refuses to acknowledge that it is overruling *Belton* and *Thornton*, there can be no doubt that it does so.”).

Justice Alito said, but it was not justified in doing so.<sup>165</sup> He wrote that the widespread application of *Belton*—which allowed officers to search the passenger compartment of a vehicle even after the arrestee had been secured—did not result from Justice Brennan’s mischaracterization of *Belton*, but rather that such application of *Belton* was widespread because Justice Brennan’s characterization was in fact correct.<sup>166</sup> He added that Justice Scalia’s evidence-gathering rationale was basically pulled out of thin air.<sup>167</sup>

Since, under Justice Alito’s view, the Court overruled *Belton* and *Thornton*, it must justify its departure from stare decisis.<sup>168</sup> He presented five factors to determine if there is justification for abandoning precedent: (1) whether the precedent has engendered reliance; (2) whether there have been relevant changed circumstances in the world; (3) whether the precedent has proved unworkable; (4) whether the precedent has been undermined by later decisions; and (5) whether the precedent was badly reasoned.<sup>169</sup> Justice Alito argued that all of these factors weighed in favor of keeping the *Belton* rule.<sup>170</sup> As the majority recognized, *Belton* had been widely relied upon and taught in police academies.<sup>171</sup> Circumstances regarding arrests of vehicle occupants and knowledge thereof had not changed significantly. Though workability had been an issue with regards to “whether a search is or is not contemporaneous with an arrest,” this problem was small compared to other issues that would arise from *Gant*. *Belton* had not been undermined, but quite the opposite—it had been reaffirmed just five years before in *Thornton*. Finally, Justice Alito said that *Belton* was reasoned according to a correct interpretation of *Chimel*; that is, that the *Chimel* rule was intended to apply to “cases in which the arrestee is handcuffed before the search is conducted.”<sup>172</sup>

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165. *Id.* at 358 (listing factors for determining whether there is a “special justification” for abandoning stare decisis and finding such departure not justified in this case (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000))).

166. *Id.* at 357.

167. *Id.* at 356 (“The second part of the new rule is taken from Justice Scalia’s separate opinion in *Thornton* without any independent explanation of its origin or justification . . .”).

168. “[S]tare decisis . . . The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.” BLACK’S LAW DICTIONARY, *supra* note 12, at 1537.

169. *Gant*, 556 U.S. at 358 (Alito, J., dissenting).

170. *Id.* at 358–91.

171. *Id.* at 359 (“The opinion of the Court recognizes that ‘*Belton* has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years.’”).

172. *Id.* at 358–62.

After Justice Alito explained why *Gant*'s new rule was uncalled for, he gave some insight as to how he thought it would be applied. "Reasonable to believe" is not probable cause in his opinion,<sup>173</sup> but he neglected to describe exactly what he believed the standard to be. The fact that he compared "reasonable to believe" to probable cause suggests that he would require some degree of suspicion for the standard to be met. Given the justification for the evidence-gathering standard, he saw no reason why such a search should be restricted to evidence of the crime of arrest or to the passenger compartment.<sup>174</sup> Justice Alito would likely overrule *Gant* and return to *Belton-Thornton*. If he is unable, then instead of dissenting, he would likely attempt to "clarify" *Gant* in such a way as to make it more like *Belton*. To do so, he would expand the evidence-gathering search to evidence of any crime for which it is "reasonable to believe" the car may contain, and require a low degree of suspicion for "reasonable to believe" so that the standard would nearly always be met. He would not limit the search to the passenger compartment, since he indicated the evidence-gathering rationale does not justify such a limitation.<sup>175</sup>

### 3. *Breyer*

In his dissent in *Gant*, Justice Breyer conceded that Justice Stevens was right in that *Belton* could produce results at odds with "its underlying Fourth Amendment rationale," the underlying rationale being *Chimel*.<sup>176</sup> If *Gant* had been a case of first impression then Justice Breyer would have looked for a better rule than *Belton*, but since *Belton* had been followed by "numerous other courts," he thought the principle of stare decisis trumped the faults of the current state of the law.<sup>177</sup> Therefore, Justice Breyer agreed with Justice Alito's dissent in *Gant*, except insofar as Justice Alito argued that *Belton* was not badly reasoned.<sup>178</sup> A survey of Supreme Court opinions, concurrences, and dissents written by Justice Breyer regarding the Fourth Amendment sheds a bit more light on his views on vehicle searches incident to arrest. His repertoire suggests that he tends to judge the validity of a search according to

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173. *Id.* at 364.

174. *Id.*

175. *See id.*

176. *Id.* at 354 (Breyer, J., dissenting).

177. *Id.*

178. *Id.* at 355 ("I . . . join Justice Alito's dissenting opinion with the exception of Part II-E.").

reasonableness; and reasonableness according to facts, circumstances, and a balancing of the government's interests against those of the private citizen.<sup>179</sup>

When the next case comes along, *Belton* will no longer be the most relevant precedent; *Gant* will be. Therefore, since Justice Breyer deemed *Belton* insufficiently reasoned and indicated that a better rule could be found, he will likely not return to *Belton*, but instead adhere to *Gant*. Obedience to *stare decisis* would motivate him not to extend the scope of the evidence-gathering rationale nor introduce a new standard of suspicion. Since precedent has both permitted and prohibited suspicionless evidence-gathering searches incident to arrest,<sup>180</sup> how he would interpret "reasonable to believe" is anyone's guess.

#### 4. *Thomas*

Justice Thomas joined the majority in *Gant* and *Thornton*. He said nothing in the oral arguments of either. The few opinions he has written on the Fourth Amendment indicate that he believes, like Justice Scalia, that the constitutionality of a search is determined by reasonableness, and reasonableness is determined by looking to the common law at the time of the framing.<sup>181</sup> In *Wilson v. Arkansas*, to determine whether the Constitution requires police to knock and announce before entering a person's home, Justice Thomas looked all the way back to seventeenth century England and found that, though the sheriff could break into a private home "if otherwise

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179. See *Herring v. United States*, 555 U.S. 135, 157–59 (2009) (Breyer, J., dissenting) (distinguishing between police and judicial record-keeping errors, arguing that the exclusionary rule should apply to police errors); *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 197–99 (2004) (Breyer, J., dissenting) (arguing there is no good reason to rule contrary to "generation-old" precedent which invalidated laws compelling responses to police questioning); *Illinois v. Lidster*, 540 U.S. 419, 427–28 (2004) (holding that officers acted reasonably in stopping motorists to ask them if they had information about a local crime; determining reasonableness by balancing the level of public concern with the level of police interference with liberty); *Illinois v. McArthur*, 531 U.S. 326, 328 (2001) (holding that officers acted reasonably in preventing a man from entering his home while they obtained a warrant); *Bond v. United States*, 529 U.S. 334, 339 (2000) (Breyer, J., dissenting) (arguing that travelers have no reasonable expectation that strangers will not manipulate their luggage); *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999) (Breyer, J., concurring) (arguing that when police have probable cause to search a vehicle they can search passenger's belongings within the car when those belongings could conceal the object of the search; "history is meant to inform, but not automatically to determine, the answer to a Fourth Amendment question").

180. See, e.g., *supra* note 129.

181. *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) ("Although the underlying command of the Fourth Amendment is always that search and seizures be reasonable, . . . our effort to give content to this term may be guided by the meaning ascribed to it by the Framers of the Amendment." (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985))).

he cannot enter, . . . before he breaks [into the home], he ought to signify the cause of his coming, and to make request to open doors.”<sup>182</sup> Justice Thomas used the same originalist construction in *Florida v. White* when determining if it was constitutional for police to seize without warrant a vehicle deemed contraband under state statute.<sup>183</sup> However, while his analysis in *Wilson* was predominantly based on ancient law and commentary, in *White* he looked both at the law at the time of the framing and analyzed how that law had since been interpreted. This can be explained by the fact that in *Wilson* the Court was determining for the first time if the wizened doctrine of knock-and-announce was “part of the reasonableness inquiry under the Fourth Amendment,”<sup>184</sup> whereas in *White* the law regarding vehicle exceptions to the Fourth Amendment had been established in the early twentieth century.<sup>185</sup>

The differences in Justice Thomas’ stances in *Thornton* and *Gant* may be analogous to the differences in his analyses of *White* and *Wilson*. His joining the majority opinion in *Thornton* was perhaps a result of his view that *Belton* was in accordance with common law at the time of the framing, and since *Gant* purported to uphold *Belton*, he joined the majority for the same reason he joined the majority in *Thornton*. Also, given that his views on constitutional interpretation are similar to those of Justice Scalia, the evidence-gathering rationale was likely an additional incentive for Justice Thomas to join the majority in *Gant*.<sup>186</sup> Since Justice Thomas has given no indication of any particular views on vehicle searches incident to arrest, and has indicated his propensity to adjudicate according to an originalist perspective, it is likely that he would, along with Justice Scalia, expand the scope of the evidence-gathering rationale to all areas of the car, and perhaps to crimes other than that of arrest. For the same reason, his understanding of “reasonable to believe” would likely be the same as Justice Scalia’s.

## 5. *Kennedy*

Justice Kennedy joined Justice Alito’s dissent in *Gant* and was part of the majority in *Thornton*. He was skeptical of Arizona’s attorney’s oral

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182. *Id.* at 931–32 (quoting *Semayne’s Case*, (1603) 77 Eng. Rep. 194 (K.B.) 195–96).

183. 526 U.S. 559, 561 (1999) (citing the Florida Contraband Forfeiture Act, FLA. STAT. §§ 932.701–932.707 (1997)). *See, e.g., id.* at 563 (“In deciding whether a challenged governmental action violates the [Fourth] Amendment, we have taken care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed.”).

184. *Wilson*, 514 U.S. at 929.

185. *White*, 526 U.S. at 563 (citing *Carroll v. United States*, 267 U.S. 132 (1925)).

186. *See supra* note 153.

arguments in *Gant*, telling him that his attempt to justify his argument according to officer safety was weak. “It seems to me there are good reasons for searching that car,”<sup>187</sup> Justice Kennedy said, and expressed disappointment that the attorney did not argue in favor of *Belton* on grounds besides officer safety. Likewise, in the *Thornton* oral argument, Justice Kennedy expressed his favor of *Belton* searches of vehicles, though not necessarily the reasoning behind *Belton* since he found other, more reasonable justifications for the search, such as the fact that the police can eventually perform an inventory search on the vehicle anyway, and because of the nature of the vehicle itself.<sup>188</sup> Since he believes broad vehicle searches can be justified without *Chimel*, he would likely interpret “reasonable to believe” as leniently as possible in order to give the searches the same scope as an inventory search. Similarly, he would extend the evidence-gathering search to all areas of the car and to evidence of any crime of which the police have reason to believe the car may contain evidence.

#### 6. *Roberts*

The Chief Justice joined Justice Alito’s dissent in *Gant*. In terms of Fourth Amendment jurisprudence, the contrast between Chief Justice Roberts and the previous Chief Justice Rehnquist, is great. While Chief Justice Rehnquist had a strong interest in the Fourth Amendment and wrote the majority opinion for twenty-five cases which dealt with it, Chief Justice Roberts has only written two.<sup>189</sup> “The ultimate touchstone of the Fourth Amendment is ‘reasonableness’” he wrote in *Brigham v. Stuart*,<sup>190</sup> holding that police acted reasonably in entering a house without a warrant when they had “an objectively reasonable basis for believing”<sup>191</sup> that occupants fighting within the house were seriously injuring each other. In the other case, *Georgia v. Randolph*,<sup>192</sup> he wrote a dissent which Justice Scalia joined,

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187. Transcript of Oral Argument, *supra* note 143, at 23.

188. See, e.g., *id.* (“[The car is] movable. . . . It can have contraband in it. It can be stolen. It can be taken for joy rides.”); Transcript of Oral Argument at 16, *Thornton v. United States*, 541 U.S. 615 (2004) (No. 03-5165) (“[W]hy don’t we save ourselves a lot of trouble and say that in almost all of these cases, the police have an interest in what happens to the vehicle, they’re going to take it anyway, so they might as well do the inventory search right away . . .”).

189. Thomas K. Clancy, *Symposium on Criminal Procedure: II. Exclusion and Other Remedies: The Irrelevance of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L. REV. 191, 191 (2010).

190. 547 U.S. 398, 403 (2006).

191. *Id.* at 400.

192. 547 U.S. 103 (2006).

accusing the majority of “creat[ing] constitutional law”<sup>193</sup> by holding a third-party consent search unreasonable if the co-occupant against whom evidence is obtained was present and objected to the search. This holding was based on “widely shared social expectations,” which Chief Justice Roberts argued is a weak foundation on which to sustain a constitutional holding since such expectations are often impossible to determine.<sup>194</sup> He criticized the Court for embracing a bright-line rule that lacked reasonableness or a constitutional justification.<sup>195</sup> His time as a judge on the United States Court of Appeals for the District of Columbia indicates a tendency to find probable cause with relative ease, though this has been deemed consistent with current Supreme Court holdings regarding the probable cause threshold.<sup>196</sup>

Given his propensity to rule in favor of the government in Fourth Amendment cases,<sup>197</sup> it is no surprise that Chief Justice Roberts joined the dissent in *Gant*, arguing that *Belton* should be upheld. The fact that he would have upheld *Belton*’s bright-line rule shows he found it reasonable and constitutionally justified, unlike the bright-line rule in *Randolph*. However, if the evidence-gathering search can be expanded to all parts of the vehicle and to evidence other than that related to the crime of arrest, Chief Justice Roberts will be more amenable to this search because it would further enable law enforcement. His mention in *Stuart* of “an objectively reasonable basis for believing”<sup>198</sup> may give some insight as to how he would interpret “reasonable to believe.” As applied in *Stuart*, it is similar to Justice Scalia’s “reasonable to believe” in that the officer needs merely some rational explanation of the belief for the standard to be satisfied.<sup>199</sup>

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193. *Id.* at 127 (Roberts, C.J., dissenting).

194. *Id.* at 129–31 (“A wide variety of often subtle social conventions may shape expectations about how we act when another shares with us what is otherwise private, . . . . The Constitution, however, protects not these but privacy.”).

195. *Id.* at 137 (“Rather than draw such random and happenstance lines—and pretend that the Constitution decreed them—the more reasonable approach is to adopt a rule . . . flow[ing] more naturally from [precedent].”).

196. Thomas K. Clancy, *Hints of the Future?: John Roberts Jr.’s Fourth Amendment Cases as an Appellate Judge*, 35 U. BALT. L. REV. 185, 200–02 (stating that while on the district court, Roberts sat on four cases involving probable cause and each time ruled against the person seeking to suppress evidence).

197. *Id.* at 214 (“Judge Roberts’s record discloses a willingness—perhaps even an eagerness—to depart from the reasoning of the lower courts to uphold the governmental actions.”).

198. *Brigham v. Stuart*, 547 U.S. 398, 400 (2006).

199. *See supra* p. 24.

## 7. Ginsburg

Justice Ginsburg joined the majority in *Gant* and joined Justice Scalia's concurrence in *Thornton*. She and Justice Scalia are not common allies on the bench,<sup>200</sup> and her stances taken in *Thornton* and *Gant* are probably not indicative of how she would answer the three questions in a subsequent case. Past cases indicate that she does not view the Fourth Amendment as he does. For example, she disagreed with Justice Scalia in *Herring v. United States* where Justice Scalia and the rest of the majority found that the exclusionary rule did not apply when an officer found drugs through a warrantless search and acted upon a reasonable belief that such a warrant existed.<sup>201</sup> In her dissent, Justice Ginsburg said she shared Justice Stevens' "more majestic conception" of the Fourth Amendment.<sup>202</sup> One of several reasons she gave for favoring the exclusionary rule—even in cases of police acting in good faith—was that in the absence of the rule, she did not believe police would be sufficiently motivated to ensure accurate records of warrants.<sup>203</sup>

She was the lone dissenter in *Kentucky v. King* where the majority held that exigent circumstances justified warrantless police entry into an apartment.<sup>204</sup> The police suspected a drug dealer to be inside and smelled burning marijuana coming from within.<sup>205</sup> They knocked, announced themselves, then forced entry after hearing what they thought was destruction of evidence.<sup>206</sup> The majority found that the entry was valid because the exigent circumstances did not arise after the police violated or threatened to violate the Fourth Amendment.<sup>207</sup> Justice Ginsburg held fast to the warrant requirement for searches of homes, arguing that police could have easily secured one in this case, and that any exigent circumstance must exist before the arrival of the police and be unprompted by police conduct.<sup>208</sup>

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200. See Michael Edmund O'Neill, *(Un)Reasonableness and the Roberts Court: The Fourth Amendment in Flux*, CATO SUP. CT. REV. 183, 201 (2008–2009).

201. 555 U.S. 135, 144 (2009).

202. *Id.* at 151 (Ginsburg, J., dissenting) (quoting *Arizona v. Evans*, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting)).

203. *Id.* at 156 ("I doubt that police forces already possess sufficient incentives to maintain up-to-date records. The Government argues that police have no desire to send officers out on arrests unnecessarily, . . . [H]owever, [h]ere the officer wanted to arrest Herring and consulted the Department's records to legitimate his predisposition.").

204. 131 S. Ct. 1849, 1864 (2011) (Ginsburg, J., dissenting). See *supra* note 91.

205. *King*, 131 S. Ct. at 1854 (majority opinion).

206. *Id.* at 1854, 1863.

207. *Id.* at 1863.

208. *Id.* at 1864, 1866 (Ginsburg, J., dissenting).

Justice Ginsburg's distrust of police in ensuring Fourth Amendment protection would probably prevent her from allowing "reasonable to believe" to give police license to search a car without any suspicion. Her questioning in the oral arguments for *Gant* indicates that she would be amenable to extending the evidence-gathering search to areas beyond the passenger compartment. For example, when Arizona's attorney mentioned that *Belton* "makes sense with respect to the ambit of the passenger compartment,"<sup>209</sup> Justice Ginsburg pointed out that in *Belton* the restriction to the passenger compartment was based on what was within reaching distance, and since the trunk was out of reach, it was excluded from the search.<sup>210</sup> However, in *Gant* nothing was truly within reaching distance of the arrestee, so the limitation to the passenger compartment lacked its original justification.

#### 8. *Sotomayor*

Justice Sotomayor has not yet written an opinion about the Fourth Amendment while on the Supreme Court and has never written on a case directly regarding vehicular searches and seizures incident to arrest. However, during her six years as a judge on a United States District Court and over a decade sitting on the Second Circuit, she produced several opinions regarding searches and seizures in general. These can help form an inference as to how she would answer the three questions.

As a judge on the federal district and circuit court, Judge Sotomayor had a reputation for tough sentencing and "was not viewed as a pro-defense judge."<sup>211</sup> One study found that she generally imposed longer sentences than did her colleagues, "especially to white-collar criminals."<sup>212</sup> In spite of this reputation, her record indicates a tendency, when the case is close, to favor Fourth Amendment protection over governmental invasion of privacy.<sup>213</sup> She showed this bias from the beginning of her judicial career when, in 1993, she said "[t]he Fourth Amendment erects around each of us a barrier against

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209. Transcript of Oral Argument, *supra* note 143, at 17.

210. *Id.* at 17–18.

211. Jess Bravin & Nathan Koppel, *Nominee's Criminal Rulings Tilt to the Right of Souter*, WALL ST. J., June 5, 2009, <http://online.wsj.com/article/SB124415867263187033.html>.

212. *Firefighter in Sotomayor Claim to Testify Against Her*, USA TODAY (July 9, 2009), [http://www.usatoday.com/news/washington/2009-07-09-sotomayor-hearings-firefighter\\_N.htm](http://www.usatoday.com/news/washington/2009-07-09-sotomayor-hearings-firefighter_N.htm).

213. See, e.g., Kevin R. Johnson, *An Essay on the Nomination and Confirmation of the First Latina Justice on the U.S. Supreme Court: The Assimilation Demand at Work*, 30 CHICANO-LATINO L. REV. 97, 153 (2011) ("As a court of appeals judge, Sonia Sotomayor . . . dissented in two Fourth Amendment cases in which she argued for stronger protection from unreasonable searches and seizures than the majority afforded criminal defendants.").

governmental intrusion.”<sup>214</sup> She dissented in a decision to uphold a series of strip searches of adolescents in juvenile detention centers, arguing that since the nature of the searches was severely intrusive, the searches should not have been allowed “in the absence of individualized suspicion.”<sup>215</sup> In another dissent, she argued that a person retains the privacy expectation of someone in his own home even if he can be seen from the street through an open door.<sup>216</sup> In *Krimstock v. Kelly*,<sup>216</sup> though the case was ruled on procedural due process grounds rather than the Fourth Amendment, she indicated her aversion to governmental intrusion by halting New York City’s practice of seizing the vehicles of drivers who had been accused of driving under the influence.<sup>217</sup>

Though Justice Sotomayor holds the Fourth Amendment and freedom of the individual from government meddling in high esteem, she does not hold this esteem to a radical degree. She rejected a Fourth Amendment challenge by a federal employee whose employer searched his office computer.<sup>218</sup> While recognizing a legitimate expectation of privacy in the contents of his computer, Judge Sotomayor held that the search was constitutional because “there were reasonable grounds to believe” that the search would reveal evidence of misconduct.<sup>219</sup> She also found no constitutional violation when police searched a car that was stolen and missing a VIN after the occupants had fled the scene;<sup>220</sup> or when police searched a vehicle upon probable cause, though they had used a ruse to lure the defendants away from the vehicle.<sup>221</sup>

One case is particularly noteworthy because it speaks both to Justice Sotomayor’s view on searches and seizures and also to how the political climate can influence a judicial decision. *Cassidy v. Chertoff*<sup>222</sup> dealt with a federal statute<sup>223</sup> which authorized otherwise unconstitutional searches of vehicles. The statute was passed in the wake of the terrorist attacks on September 11, 2001, in order to increase vessel and port security.<sup>224</sup> It directed the Coast Guard to identify vessels posing a high risk of being involved in a terrorist attack. Officials on vessels so identified could then

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214. *United States v. Castellanos*, 820 F. Supp. 80, 82 (S.D.N.Y. 1993).

215. *N.G. & S.G. ex rel S.C. v. Connecticut*, 382 F.3d 225, 238 (2d Cir. 2004) (Sotomayor, J., dissenting).

216. *United States v. Gori*, 230 F.3d 44, 58 (2d Cir. 2000) (Sotomayor, J., dissenting).

217. 306 F.3d 40 (2d Cir. 2002).

218. *Leventhal v. Knappek*, 266 F.3d 64 (2d Cir. 2001).

219. *Id.* at 75.

220. *United States v. Clarke*, No. 92 Cr. 1138, 1993 U.S. Dist. LEXIS 16083 (S.D.N.Y. Nov. 10, 1993).

221. *United States v. Howard*, 489 F.3d 484, 492, 497 (2d Cir. 2007).

222. 471 F.3d 67 (2d Cir. 2006).

223. Maritime Transportation Security Act, 46 U.S.C. §§ 70101–70119 (2006).

224. *Cassidy*, 471 F.3d at 70.

search random vehicles on it without any degree of suspicion.<sup>225</sup> Writing for the majority, Judge Sotomayor said that “[e]xpert determinations by the Coast Guard . . . based on an explicit Congressional delegation of legislative authority . . . are entitled to significant deference.”<sup>226</sup>

She would likely find the evidence-gathering rationale of *Gant* to be unconstitutional. This may be inferred because of her tendency to rule in favor of Fourth Amendment protection over governmental intrusion, and because the rationale is arguably not firmly tethered to the Constitution or long-standing precedent. By the same logic, it is unlikely that she would rule in favor of extending the evidence-gathering search to the trunk or to evidence not related to the crime of arrest. Her view of the Fourth Amendment as a shield against the government would lead her to require some level of suspicion to satisfy “reasonable to believe.” One could argue that Justice Sotomayor would likely agree with the majority in *Gant* since, after a year on the bench, she had voted with Justice Ginsburg ninety percent of the time,<sup>227</sup> and Justice Ginsburg was in the majority in *Gant*. However, this argument is undermined by the fact that Justice Sotomayor had also voted with Justice Breyer ninety percent of the time after a year on the bench,<sup>228</sup> and Justice Breyer dissented in *Gant*.

## 9. *Kagan*

Before Justice Kagan’s appointment to the position of United States Solicitor General in 2009, she had never argued a case before any court.<sup>229</sup> She was granted tenure at Harvard Law School “despite the reservations of some colleagues who thought she had not published enough.”<sup>230</sup> Given her lack of a paper trail, there is little basis on which to speculate how Justice Kagan views the Fourth Amendment and how she would resolve the three questions.

In the few Fourth Amendment cases that have come before the Court with Justice Kagan on the bench, she has not shown any specific inclinations regarding searches and seizures. She sided with the majority of

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225. *Id.* at 86–87.

226. *Id.* at 84.

227. Adam Liptak, *The Roberts Court Comes of Age*, N.Y. TIMES, June 29, 2010, <http://www.nytimes.com/2010/06/30/us/30scotus.html?pagewanted=all>.

228. *Id.*

229. Nina Totenberg, *Seen as a Rising Star, Kagan Has Limited Paper Trail*, NPR (May 9, 2010), <http://www.npr.org/templates/story/story.php?storyId=126611113>.

230. Katharine Q. Seelye et al., *A Climb Marked by Confidence Canniness*, N.Y. TIMES, May 10, 2010, <http://www.nytimes.com/2010/05/10/us/politics/10kagan.html?pagewanted=all>.

eight in *Kentucky v. King*,<sup>231</sup> neglecting to join Justice Ginsburg's dissent in favor of the defendant. In *Davis v. United States*, she again sided with the majority, holding that *Gant* did not retroactively apply when an officer performed a *Belton* search in good-faith reliance on binding precedent.<sup>232</sup> *Davis* was another opportunity not taken to join Justice Ginsburg in favor of the defendant.

While an assistant professor of law at the University of Chicago, she wrote in an article about the confirmation process of nominees to the Supreme Court that "many of the votes a Supreme Court Justice casts have little to do with technical legal ability and much to do with conceptions of value."<sup>233</sup> In her own confirmation hearing, Senator John Cornyn asked her what she had meant by this statement.<sup>234</sup> She answered that she had been referring to "the fundamental principles embodied and articulated in our Constitution."<sup>235</sup> Though the Senator tried with many questions to ascertain what exactly she held those principles to be, Ms. Kagan never shed any light on this except to say that she would always look to legal sources, and never her own values, when deciding a case.<sup>236</sup> Whether *King* or *Davis* indicate a future tendency to rule in favor of law enforcement over defendants is hard to say. There is simply not enough information on Justice Kagan's views on the Fourth Amendment to make an honest guess about how she would answer the three questions.

#### D. *Summary of the Justices' Likely Answers to the Three Questions*

Justice Scalia is the new Justice Stevens when it comes to vehicle searches incident to arrest. Of all the justices on the bench, he is the one with the strongest opinions on the subject.<sup>237</sup> His concurrences in *Thornton* and *Gant*, and willingness to compromise in *Gant* in order to shape the law to his liking, indicate that he will act likewise in the future. Justice Scalia is also the anti-Stevens in the sense that Justice Scalia would like vehicle searches incident to arrest to be based on reasonableness, whereas Justice Stevens

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231. 131 S. Ct. 1849, 1864 (2011) (Ginsburg, J., dissenting). See *supra* note 91.

232. *Davis v. United States*, 131 S. Ct. 2419 (2011).

233. Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 932 (1995).

234. *The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 459 (2010) (questions for the record from Sen. John Cornyn).

235. *Id.*

236. *Id.*

237. See, e.g., Clancy, *supra* note 189, at 195 ("When it comes to search and seizure, it is now Scalia's Court.").

wanted such searches to be more strictly limited to the exceptions described in *Chimel*.

A prediction of how the other justices would define “reasonable to believe” is, as shown above, not exactly based on hard science. Rather, it is speculation founded on which side they took in *Thornton* or *Gant*, their views on the Fourth Amendment in general, and their tendency to rule in favor of the police or the defendant. Even though there are cases where some of the justices, such as Justice Sotomayor,<sup>238</sup> have written about “reasonable to believe” or similar phrases, these cases give little indication of how the justice would define the standard in terms of a vehicle search incident to arrest. Those justices who would like the evidence-gathering search to be more limited than the scope Justice Scalia has delineated will probably construe “reasonable to believe” to require some degree of suspicion, perhaps even approaching probable cause. Below is a chart summarizing how each justice would likely answer the three questions. Since nothing indicates that any of the justices would give a different answer to the questions regarding the physical scope of the search and what is being searched for, these two questions have been combined.

<i>Justice</i>	<i>Does “reasonable to believe” require some degree of suspicion?</i>	<i>Should the search be extended beyond the passenger compartment and to evidence other than for crime of arrest?</i>
Scalia	no	yes
Alito	yes	maybe
Breyer	maybe	no
Thomas	no	yes
Kennedy	no	yes
Roberts	no	yes
Ginsburg	yes	maybe
Sotomayor	yes	no
Kagan	maybe	maybe

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238. See *supra* note 219 and accompanying text.

E. *Current Political Climate and Its Possible Effect on Future Fourth Amendment Interpretation*

As Prohibition influenced the Court's interpretation of the Fourth Amendment, there are factors today that may have an effect on the law, one being the War on Terror. Since the terrorist attacks on September 11, 2001, many commentators have observed a broadening of police-search authority.<sup>239</sup> The statute that influenced Judge Sotomayor's decision in *Cassidy* is one example.<sup>240</sup> Others, such as The Patriot Act,<sup>241</sup> have led police to use searches not merely to detect evidence for criminal prosecutions, but also for preventative purposes, such as gathering information on criminal or terrorist threats.<sup>242</sup> Though over ten years have passed since the attacks in New York City, President Obama signed an extension of key provisions of the Patriot Act in 2011.<sup>243</sup> Heightened security at airports and other places of public transportation indicates that the trend of allowing the government greater freedom to search private individuals is not abating.

Which justices will be influenced the most or at all by the government's anti-terror regime is hard to say. Like with Justice Sotomayor in *Cassidy*,<sup>244</sup> deference to the legislature may trump an interest in protecting people from the government. As with Prohibition, how politics influences the Court may well depend on public opinion. So far, there has been little public backlash against legislative measures to protect against terrorism. Until there is, the Court will be more likely than not to find such measures constitutional.<sup>245</sup>

#### CONCLUSION

Like Phil's car on the mountain road, the law of vehicle searches and seizures incident to arrest has weaved and lurched, sometimes following the

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239. See William Bloss, *Escalating U.S. Police Surveillance after 9/11: An Examination of Causes and Effects*, 4 SURVEILLANCE & SOC'Y 208, 208 (2007).

240. See *supra* note 223.

241. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), Pub. L. No. 107-56 (2001).

242. Bloss, *supra* note 239, at 210.

243. *Obama Signs Last-Minute Patriot Act Extension*, FOXNEWS.COM (May 27, 2011), <http://www.foxnews.com/politics/2011/05/27/senate-clearing-way-extend-patriot-act/%7cdate/>.

244. See *supra* p. 36 and note 222.

245. Another possible influence on the Court may be how lower courts have interpreted and applied *Gant*. After all, confusion among the courts was a factor in *Belton*'s holding. See *supra* p. 17, note 104 and accompanying text. However, lower courts' interpretation and application of *Gant* is beyond the scope of this Note.

trail of history into darkness and sometimes getting distracted by moonshine. And what about Phil? After numerous appeals, his case has finally arrived in Washington, D.C. Will Phil go to prison, or can his nifty new attorney Bill get Phil acquitted, at least on the drug and gun charges? Well, Bill has a tough row to hoe. It is likely that the Court as composed now would extend the evidence-gathering search to all areas of the car for which it is reasonable to believe evidence of the crime of arrest may be found. Even those who disagreed with the rationale for the search in *Gant* are likely to uphold it because they will essentially reclaim the broad *Belton* search by simply extending the evidence-gathering scope. Also, as Prohibition motivated the Court to allow for greater police intrusion into privacy, legislation related to September 11, 2001 would have a similar effect.

Bill would do well to search the dusty tomes of ancient common law for precedent prohibiting a search for evidence without suspicion and countering the notion that an arrest distinguishes an arrestee from the rest of society.<sup>246</sup> At the same time, Bill needs to appeal to the less originalist justices on the Court by arguing that *Gant* is not just *Belton* in disguise, but worse in that it offers greater intrusion into personal privacy than *Belton* ever did. If Bill prevails, then the evidence-gathering search may remain restricted to the passenger compartment, thus dismissing Phil of the gun charge. Bill may even persuade the Court to abolish the evidence-gathering rationale entirely, thus perhaps acquitting Phil of the drug charge.<sup>247</sup> However, the trend in the law and politics is against Phil and Bill. Ultimately, the law will likely evolve into allowing a search of the entire car with a limitation imposed by “reasonable to believe;” another bright-line rule, but one with a more rational justification, one that, as Justice Scalia said, is more honest.<sup>248</sup>

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246. See *supra* note 154 and accompanying text.

247. Even if Bill could persuade the Court to eliminate the evidence-gathering search, his wit may not be sufficient to prevent the drug and gun evidence from being admitted under the inevitable-discovery doctrine. This doctrine can allow evidence into court even though it was discovered through a technical illegality if police can show that they would have found the evidence in spite of the illegality. 29 AM. JUR. 2D *Evidence* § 652 (2012). In addition, given Phil’s physical state at the time of arrest and the smell of marijuana, the police may have had probable cause to search the car for drugs, in which case the search would be legal regardless of *Gant*. See discussion *supra* pp. 15–16.

248. *Thornton v. United States*, 541 U.S. 615, 631 (2004) (Scalia, J., concurring) (“[I]f we are going to continue to allow *Belton* searches on *stare decisis* grounds, we should at least be honest about why we are doing so.”).