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TURNING A GOVERNMENT SEARCH INTO A PERMANENT POWER: *THORNTON V. UNITED STATES* AND THE “PROGRESSIVE DISTORTION” OF SEARCH INCIDENT TO ARREST

George Dery*
Michael J. Hernandez**

INTRODUCTION

A member of Congress once lamented, “It has been said that if one dies and goes to heaven and wants to come back to Earth and have eternal life, come back as a federal program.”¹ The simple logic behind this reasoning seems unassailable. Once the federal government creates a program which offers a certain class of individuals a benefit, it has simultaneously created an interest group that will seek to maintain or even increase that benefit. Those who do not receive the largess, being too diffuse and disorganized, cannot stop the flow of federal dollars. The government program, therefore, endures and grows even if the original purpose for the entitlement has ceased to exist.

Perhaps such immortality also favors the Supreme Court’s grant of search rights to police. Once the Court has created an exception to the Fourth Amendment’s limits on government powers,² that license to search not only persists, but grows over time, regardless of the original exigencies that caused the Court to craft the rule in the first place. When *Carroll v. United States*³ created the automobile exception enabling

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¹ Mary K. Muth, *The Fable of the Bees Revisited: Causes and Consequences of the U.S. Honey Program*, 46 J.L. & Econ. 479, 479 (2003) (quoting Rep. Harris W. Fawell (R.-Ill.)).

² The Fourth Amendment provides:

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 affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

³ 267 U.S. 132, 149 (1925).

police to immediately search cars at the scene of a stop, this police right flourished in Fourth Amendment jurisprudence. First, the automobile exception was expanded to allow searches of vehicles not only on the street, but also when they are safely secured at police stations.⁴ Next, police were enabled to search not only the car itself, but any “containers” found within.⁵ Likewise, when the Court found special needs to allow school officials to search the purses of students they suspected of rule breaking or criminality,⁶ this right to search grew into a government right to randomly drug test student athletes’ urine.⁷ This official intrusion, in turn, spread beyond athletes to include urinalysis of any student participating in extracurricular activities, such as the Vocal Club or Future Farmers of America.⁸

The Court has now continued this pattern with yet another government search right, the search incident to arrest exception to the warrant requirement. Like a government subsidy, the search incident to arrest was designed in *Chimel v. California* to meet particular needs.⁹ It then was expanded in *New York v. Belton* for arrests of occupants of a car.¹⁰ Now, in *Thornton v. United States*, the Court has extended search incident to arrest once again to apply when an officer first meets a person outside a vehicle.¹¹ *Thornton*’s expansion of search incident to arrest is of particular concern because its logical inconsistencies and its confused rule have created uncertainty regarding the warrant exception’s purpose and scope.

This Article begins, in Part I, with a review of the background of the search incident to arrest rule and its foundations, justifications, and scope. Part II assesses *Thornton* — its facts, lower court litigation, and the Court’s decision. In Part III, this Article examines the Court’s analysis and considers the implications of its new ruling.

I. BACKGROUND

A. The Warrant Requirement

Government violation of a person’s privacy is such a serious act that it should occur only after sober consideration by an official who is separated from the

⁴ *Chambers v. Maroney*, 399 U.S. 42, 51–52 (1970).

⁵ *United States v. Ross*, 456 U.S. 798, 800 (1982).

⁶ *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985); *see also id.* at 351 (Blackmun, J., concurring) (reinforcing the Court’s holding).

⁷ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663–64 (1995).

⁸ *Bd. of Educ. v. Earls*, 536 U.S. 822, 830–31 (2002). *See also Earls*’ prior history. *Earls v. Bd. of Educ.*, 115 F. Supp. 2d 1281, 1282 (W.D. Okla. 2000), *rev’d*, 242 F.3d 1264 (10th Cir. 2001), *rev’d*, 536 U.S. 822 (2002).

⁹ 395 U.S. 752, 763 (1969) (stating there is justification for the search of the arrestee’s person and area within his immediate control).

¹⁰ 453 U.S. 454, 460 (1981).

¹¹ 541 U.S. 615, 619 (2004).

passions of the particular case. Such reasoning has guided the Court at least since the 1914 case *Weeks v. United States*,¹² where the Court declared clearly that the United States Marshal “[c]ould only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information, and describing with reasonable particularity the thing for which the search was to be made.”¹³ The *Weeks* Court condemned the warrantless action in the case as “without sanction of law.”¹⁴

In *Agnello v. United States*,¹⁵ the Court reaffirmed the warrant mandate, warning: “Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.”¹⁶ The Court explained the rationale behind the warrant preference in *United States v. Lefkowitz*:¹⁷

The informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.¹⁸

Justice Douglas, in *McDonald v. United States*,¹⁹ was even more candid in ruling that “there must be compelling reasons to justify the absence of a search warrant.”²⁰ He reasoned that “[t]he right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals,” and he bluntly concluded, “Power is a heady thing; and history shows that the police acting on their own cannot be trusted.”²¹

The justices of the Court thus interpreted the Fourth Amendment as having a warrant requirement because they recognized a simple fact of human nature: those

¹² 232 U.S. 383 (1914).

¹³ *Id.* at 393.

¹⁴ *Id.*

¹⁵ 269 U.S. 20 (1925).

¹⁶ *Id.* at 33.

¹⁷ 285 U.S. 452 (1932).

¹⁸ *Id.* at 464.

¹⁹ 335 U.S. 451 (1948).

²⁰ *Id.* at 454.

²¹ *Id.* at 455–56.

emotionally invested in catching a person who they believe to be a criminal will not have that individual's rights as their first priority. The pressure to rush to act might even be increased by the fact that a particular officer or agency might not be the only one pursuing the criminal, and the attendant recognition and resources may encourage unlawful shortcuts.²² In order, therefore, to ensure that the Fourth Amendment is upheld even under such stressful circumstances, a detached and neutral magistrate has to be placed between the individual and the police aiming to intrude on his or her rights.²³

The warrant requirement became such a mainstay of Fourth Amendment jurisprudence that it moved the Court, as early as 1951, to note that "[o]ver and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes."²⁴ In *Katz v. United States*,²⁵ the Court went so far as to create a presumption of Fourth Amendment violation when police intruded on privacy in the absence of a warrant.²⁶ *Katz* thus characterized searches "conducted outside the judicial process, without prior approval by judge or magistrate" as "*per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions."²⁷

The Court has, therefore, over a series of decades, reaffirmed and thus solidified its warrant requirement. The warrant preference has been applied in all manner of contexts, including cars,²⁸ phone booths,²⁹ blood samples,³⁰ state hospital offices,³¹ hotel rooms,³² and clothing pockets.³³ The warrant mandate is not, however,

²² In *Johnson v. United States*, 333 U.S. 10, 13–14 (1948), the Court explicitly acknowledged such competition by noting:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

²³ *Id.* at 14; see also *Wong Sun v. United States*, 371 U.S. 471, 481–82 (1963) (declaring that the Fourth Amendment required "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police").

²⁴ *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

²⁵ 389 U.S. 347 (1967).

²⁶ *Id.* at 357.

²⁷ *Id.* (footnote omitted).

²⁸ See *California v. Acevedo*, 500 U.S. 565 (1991); *United States v. Ross*, 456 U.S. 798 (1982); *Carroll v. United States*, 267 U.S. 132 (1925).

²⁹ *Katz*, 389 U.S. at 347.

³⁰ *Schmerber v. California*, 384 U.S. 757 (1966).

³¹ *O'Connor v. Ortega*, 480 U.S. 709 (1987).

³² *United States v. Jeffers*, 342 U.S. 48 (1951).

³³ *Minnesota v. Dickerson*, 508 U.S. 366 (1993).

without exceptions.³⁴ One such exception is the officer's right to search incident to arrest, the subject of the next section.

B. The Search Incident to Arrest Exception to the Warrant Mandate

1. The Establishment of the Current General Standard of Search Incident to Arrest in *Chimel*

In *Weeks*, one of the early cases championing the warrant requirement, the Court also acknowledged that the right "to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime" had been "always recognized under English and American law."³⁵ Despite such claim to ancient origins, the search incident to arrest exception to the warrant mandate has rarely provided the Court simple answers as to its boundaries. In *Chimel v. California*,³⁶ the Court's seminal search incident to arrest case, the Court waded through decades of precedent, which it charitably characterized as "far from consistent."³⁷ A statement nearer the truth would have to acknowledge not just inconsistency in the exception's scope, but also confusion regarding its very purpose and weakness in its foundation, based at least in part on dicta.

Unlike the essential questions about the basis, purpose, and scope of the search incident to arrest rule, the facts in the *Chimel* case were straightforward and undisputed.³⁸ Santa Ana, California, police officers arrived at Chimel's home one afternoon with a warrant for Chimel's arrest for the burglary of a coin shop.³⁹ When police

³⁴ Indeed, the warrant requirement has not been without critics. In *United States v. Rabinowitz*, 339 U.S. 56 (1950), the Court cast doubt on its own warrant mandate by contending:

It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches. It is not disputed that there may be reasonable searches, incident to an arrest, without a search warrant. . . . The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances — the total atmosphere of the case.

Id. at 65–66. *Rabinowitz* ultimately failed to carry the day, for in *Chimel v. California*, 395 U.S. 752 (1969), the Court held that *Rabinowitz* was "no longer to be followed." *Id.* at 768.

³⁵ *Weeks v. United States*, 232 U.S. 383, 392 (1914).

³⁶ 395 U.S. 752 (1969).

³⁷ *Id.* at 755.

³⁸ *Id.* at 753.

³⁹ *Id.*

knocked on the door and asked to come in, Chimel's wife let them inside to wait for some minutes until her husband came home from work.⁴⁰ When Chimel arrived, one of the officers "handed him the arrest warrant and asked for permission to 'look around.'"⁴¹ When Chimel refused, the police informed him that, "'on the basis of the lawful arrest,' the officers would nonetheless conduct a search," despite the lack of consent or search warrant.⁴² The police then searched "the entire three-bedroom house, including the attic, the garage, and a small workshop."⁴³ In the master bedroom and sewing room, officers directed Chimel's wife to "open drawers and 'to physically move contents of the drawers from side to side so that [they] might view any items that would have come from [the] burglary.'"⁴⁴ The search, lasting between forty-five minutes and an hour, revealed some coins, medals, and tokens.⁴⁵

At trial, Chimel objected to the admission of the recovered items, arguing they were seized in violation of the Constitution.⁴⁶ The lower courts allowed the evidence in, holding that the search of the home was justified as incident to arrest.⁴⁷ The Court, in an opinion written by Justice Stewart, was thus presented with an attic-to-garage search justified as incident to an arrest that occurred as much as an hour earlier in the front of the home.⁴⁸ In deciding whether all the aspects of this ambitious intrusion could be wedged within search incident to arrest, the Court took on the challenge of defining the boundaries of this warrant exception.⁴⁹ In doing so, the *Chimel* Court assumed the unenviable task of trying to make sense out of some half century of search incident to arrest case law.⁵⁰

Starting what would become a theme for search incident to arrest jurisprudence, Justice Stewart in *Chimel* traced the Court's first approval of the warrant exception to dictum offered in *Weeks*.⁵¹ He noted that the *Weeks* Court only made reference to search incident to arrest as a way of explaining how the United States Marshal's actions in that case fell short of Fourth Amendment reasonableness.⁵² On this point, Justice Day in *Weeks* could not have been plainer, inquiring, "What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right . . . to search

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 753-54.

⁴³ *Id.* at 754.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 754-55.

⁴⁸ *Id.* at 753-55.

⁴⁹ *Id.* at 755.

⁵⁰ *Id.* at 755-60.

⁵¹ *Id.* at 755.

⁵² See *Weeks v. United States*, 232 U.S. 383, 392 (1914).

the person of the accused when legally arrested.”⁵³ Further, in this first discussion, the Court mentioned merely the government’s right to “discover and seize the fruits or evidences of crime.”⁵⁴ Thus, in its initial foray into search incident to arrest, the Court failed to delineate any place beyond the person open to official inspection and offered only the need to secure evidence as a rationale for the intrusion.⁵⁵

Chimel noted further that, in *Carroll v. United States*,⁵⁶ decided over a decade after *Weeks*, the Court offered the following “embellishment” of *Weeks* dictum: “When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution.”⁵⁷ Therefore, the Court in *Carroll* not only cited dictum as if it were a holding, but expanded it to encompass a search not only of the arrestee’s body but of a vague area within his “control.”⁵⁸ Once on a building boom, the Court, only “a few months later,”⁵⁹ expanded the search incident to arrest rule by adding still more dictum to an already shaky foundation in *Agnello v. United States*.⁶⁰ The *Agnello* Court declared that the right to search incident to arrest, not only of the arrestee’s person, but also “the place where the arrest is made” was “not to be doubted.”⁶¹ Moreover, such an invasion enabled police to target “weapons and other things to effect an escape from custody” as well as “fruits” of crime.⁶² The subject matter of the search, therefore, miraculously expanded, despite the fact that such a discussion was beyond the holding of the case.

Lacking the full analysis that comes only with a reasoned holding, the search incident to arrest dicta was subject, as noted by Justice Stewart in *Chimel*, to drastic swings of the pendulum.⁶³ In *Marron v. United States*,⁶⁴ the Court upheld the warrantless seizure of a bootlegging ledger rationalizing that, as a search incident to arrest, the federal prohibition agents could “search the place in order to find and seize things used to carry on the criminal enterprise.”⁶⁵ Justice Butler, writing for the *Marron* Court, characterized official authority as extending “to all parts of the

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 267 U.S. 132 (1925).

⁵⁷ *Chimel v. California*, 395 U.S. 752, 755–56 (1969) (emphasis in original) (quoting *Carroll*, 267 U.S. at 158).

⁵⁸ *Id.*

⁵⁹ *Id.* at 756.

⁶⁰ 269 U.S. 20 (1925).

⁶¹ *Id.* at 30.

⁶² *Id.*

⁶³ *Chimel*, 395 U.S. at 758.

⁶⁴ 275 U.S. 192 (1927).

⁶⁵ *Id.* at 199.

premises used for the unlawful purpose.”⁶⁶ Yet, any officer relying on this broad language would be disappointed by the Court’s next incarnation of search incident to arrest in *Go-Bart Importing v. United States*.⁶⁷ In *Go-Bart*, the Court once again was faced with a search by prohibition agents.⁶⁸ The *Go-Bart* Court was troubled that agents “falsely claimed to have a warrant for the search of the premises” and further used “threat of force” to have the arrestees open a “desk and the safe . . . , ransacking the desk, safe, filing cases and other parts of the office” for a “general exploratory search.”⁶⁹ It thus distinguished the search in *Marron* as limited to things “visible and accessible and in the offender’s immediate custody.”⁷⁰ *Go-Bart* made a point of noting that the agents in *Marron* committed no “general search or rummaging of the place.”⁷¹ The Court reaffirmed this limited view of search incident to arrest in *United States v. Lefkowitz*,⁷² where it condemned a search of two desks and a “towel cabinet” in “room 604,” a space of only ten-by-twenty feet,⁷³ as being “unrestrained,”⁷⁴ “exploratory,” and “general.”⁷⁵

After deeming the search of only a single room (“room 604”) to be violative of the Fourth Amendment in *Lefkowitz*, the Court next found, in *Harris v. United States*,⁷⁶ a five-hour “careful and thorough search”⁷⁷ of a four-room apartment to be a “basically reasonable” search incident to arrest.⁷⁸ In *Harris*, five agents, each assigned to a particular room, searched the living room, bedroom, bathroom, and kitchen after arresting and handcuffing Harris in his living room.⁷⁹ Justice Vinson, writing for the *Harris* majority, declared that a search incident to arrest could extend to “include the premises under [the arrestee’s] immediate control,” and so police could search “the place where the arrest is made.”⁸⁰ *Harris* made clear that the “place” referred to included the entire premises because the arrestee “was in exclusive possession of a four room apartment,” and, therefore, his control “extended quite as much to the bedroom,” where the incriminating evidence was found, as to the living room where he was arrested.⁸¹ The arrestee’s actual reach was not a relevant

⁶⁶ *Id.*

⁶⁷ 282 U.S. 344 (1931).

⁶⁸ *Id.* at 348–50.

⁶⁹ *Id.* at 358.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² 285 U.S. 452 (1932).

⁷³ *Id.* at 458–59.

⁷⁴ *Id.* at 464.

⁷⁵ *Id.* at 465.

⁷⁶ 331 U.S. 145 (1947).

⁷⁷ *Id.* at 149.

⁷⁸ *Id.* at 155.

⁷⁹ *Id.* at 148–49.

⁸⁰ *Id.* at 151.

⁸¹ *Id.* at 152.

factor, for “the area which reasonably may be subjected to search is not to be determined by the fortuitous circumstance that the arrest took place in the living room as contrasted to some other room of the apartment.”⁸²

One year later, in spite of *Harris*, the Court again found itself limiting search incident to arrest in *Trupiano v. United States*.⁸³ In *Trupiano*, acting on weeks of inside information that an illegal distillery was manufacturing alcohol, agents raided a farm without securing a search warrant.⁸⁴ The agents seized “a still, alcohol, mash and other equipment.”⁸⁵ The Court, in an opinion authored by Justice Murphy, bridled at allowing in the evidence under search incident to arrest, which it saw as a “strictly limited right.”⁸⁶ The majority in *Trupiano* saw search incident to arrest as growing “out of the inherent necessities of the situation at the time of the arrest.”⁸⁷ Justice Murphy refused to let “the mere fact that there is a valid arrest” automatically “legalize a search or seizure without a warrant,” for this would enable the exception to swallow the warrant requirement rule.⁸⁸ Because the officers showed such “indifference to the legal process” here,⁸⁹ the Court deemed the evidence “improperly seized.”⁹⁰

Merely two years after limiting search incident to arrest in *Trupiano*, the Court sought yet again to loosen the restraints on the warrant exception in *United States v. Rabinowitz*.⁹¹ In *Rabinowitz*, a postal inspector received information that the defendant was dealing in stamps bearing forged overprints.⁹² Armed with an arrest warrant, federal officers arrested the defendant at his place of business and then proceeded to search his one-room office.⁹³ An hour and a half search of a “desk, safe, and file cabinets” resulted in the recovery of 573 stamps.⁹⁴ In considering the legality of this search, Justice Minton, who wrote the majority opinion, noted, “What is a reasonable search is not to be determined by any fixed formula,” for “in our discipline we have no ready litmus-paper test.”⁹⁵ The *Rabinowitz* Court, however, found the search reasonable as incident to arrest because of the following factors:

⁸² *Id.*

⁸³ 334 U.S. 699 (1948).

⁸⁴ *Id.* at 701–03.

⁸⁵ *Id.* at 703.

⁸⁶ *Id.* at 708.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 710.

⁹¹ 339 U.S. 56 (1950).

⁹² *Id.* at 57; see *Chimel v. California*, 395 U.S. 752, 759 (1969).

⁹³ *Rabinowitz*, 339 U.S. at 58–59.

⁹⁴ *Id.* at 59.

⁹⁵ *Id.* at 63.

(1) the search and seizure were incident to a valid arrest; (2) the place of the search was a business room to which the public, including the officers, was invited; (3) the room was small and under the immediate and complete control of respondent; (4) the search did not extend beyond the room used for unlawful purposes; (5) the possession of the forged and altered stamps was a crime⁹⁶

Justice Minton's factors-of-reasonableness approach ran counter to the Court's long-standing adherence to the warrant requirement.

The opinion in *Rabinowitz* explicitly recognized as much when it asserted for searches incident to arrest, "such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required."⁹⁷ Justice Minton, therefore, was not merely attempting to enlarge the scope of search incident to arrest, but to free it from the greater restraint of a warrant requirement.⁹⁸

Thus, in deciding whether the search of *Chimel's* home fell within the scope of search incident to arrest, the Court had inherited a tangled mess of conflicting cases. In writing for the *Chimel* Court, Justice Stewart responded by returning to basics. He recalled the "background and purpose of the Fourth Amendment," identifying the Crown's abuses of the colonists' security against unreasonable search and seizure as "one of the potent causes of the Revolution."⁹⁹ Indeed, the Fourth Amendment "was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence."¹⁰⁰ The warrant requirement was not, therefore, a mere formality, but such "a crucial part" of the Amendment that Justice Stewart declared, "We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."¹⁰¹ *Chimel* viewed the warrant mandate as so crucial that it placed the burden on the government seeking exemption from it.¹⁰²

Moreover, Justice Stewart emphasized that any exception so allowed would be narrowly construed because the "scope of a search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."¹⁰³ With the guiding principals of departing from a warrant only when circumstances made

⁹⁶ *Id.* at 64.

⁹⁷ *Id.* at 65–66.

⁹⁸ *Id.*

⁹⁹ *Chimel v. California*, 395 U.S. 752, 760–61 (1969). *See also Rabinowitz*, 339 U.S. at 69 (Frankfurter, J., dissenting).

¹⁰⁰ *Chimel*, 395 U.S. at 761.

¹⁰¹ *Id.*

¹⁰² *Id.* at 762.

¹⁰³ *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

it “imperative” and limiting any resulting intrusion to its original justification, *Chimel* determined the “proper extent” of search incident to arrest.¹⁰⁴ Upon an arrest, it was reasonable for the officer to “search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape.”¹⁰⁵ Anything less would endanger the officer and frustrate the arrest.¹⁰⁶ Additionally, it was “entirely reasonable for the . . . officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction.”¹⁰⁷ Finally, police could search not just a person, but “the area into which an arrestee might reach in order to grab a weapon or evidentiary items.”¹⁰⁸ The Court was aware that a weapon on a table or in a drawer near the arrestee could “be as dangerous to the arresting officer as one concealed in the clothing of the person arrested.”¹⁰⁹ Such common sense considerations led to limit a search incident to arrest to “the arrestee’s person and the area ‘within his immediate control’ — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.”¹¹⁰

Justice Stewart found “no comparable justification, however, for routinely searching any room other than that in which an arrest occurs — or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself.”¹¹¹ Any further intrusions would require “no less” than “adherence to the judicial process” envisioned in the warrant mandate.¹¹² Finally, recognizing that *Harris* and *Rabinowitz* were inconsistent with *Chimel*’s disciplined treatment of search incident to arrest, Justice Stewart declared that these two cases were “no longer to be followed.”¹¹³ In thus crafting its rule defining search incident to arrest’s scope, the Court in *Chimel* hoped to bring order to an area of law burdened with a half century of confusion and inconsistency.

2. *Belton*’s “Bright-Line” Test for Searching Passenger Compartments of Vehicles Incident to Arrest

Over a decade after *Chimel* had rationalized the conflicting rules regarding the scope of search incident to arrest in buildings, the Court had to confront the boundaries of this same warrant exception in relation to cars in *New York v. Belton*.¹¹⁴ In *Belton*,

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 763.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 768.

¹¹⁴ 453 U.S. 454 (1981).

New York State Trooper Douglas Nicot stopped a vehicle for speeding and discovered that none of its four occupants owned the car or was related to the owner.¹¹⁵ Further, Officer Nicot “smelled burnt marihuana” and saw on the car’s floor a “‘Supergold’ [wrapper] that he associated with marihuana.”¹¹⁶ He ordered the men out of the car, arrested them, patted them down, and finally “split them up into four separate areas of the Thruway at this time so they would not be in physical touching area of each other.”¹¹⁷ Trooper Nicot then recovered the Supergold envelope, which was holding marijuana, searched each man on the Thruway, and then searched “the passenger compartment of the car.”¹¹⁸ On the car’s backseat, the trooper found a black leather jacket belonging to Roger Belton, one of the car’s four prior occupants.¹¹⁹ Unzipping the jacket’s pocket, he found and recovered cocaine.¹²⁰

The Court in *Belton* thus had to determine the scope of a search incident to arrest of a person stopped by police while in a car. Justice Stewart, writing for the Court, began essentially as he had in *Chimel* by noting, “It is a first principle of Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so.”¹²¹ He then recognized the search incident to arrest exception to this warrant requirement but worried that “courts have discovered the principle difficult to apply in specific cases.”¹²²

Belton then struck a practical note, declaring that Fourth Amendment protection could “‘only be realized if the police are acting under a set of rules which, in most instances, make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.’”¹²³ Since the Fourth Amendment “‘is primarily intended to regulate the police in their day-to-day activities,’” it should be “‘expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged.’”¹²⁴ Justice Stewart sought to avoid a “highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions,” for it might be “literally impossible of application by the officer in the field.”¹²⁵

¹¹⁵ *Id.* at 455.

¹¹⁶ *Id.* at 455–56.

¹¹⁷ *Id.* at 456.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 457.

¹²² *Id.* at 458.

¹²³ *Id.* (quoting Wayne R. LaFave, “Case-By-Case Adjudication” Versus “Standardized Procedures”: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142).

¹²⁴ *Id.* (quoting LaFave, *supra* note 123, at 141).

¹²⁵ *Id.*

The solution lay instead in a “single, familiar standard” for 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.”¹²⁶ Priority was thus placed on a rule that would be “straightforward . . . , easily applied, and predictably enforced.”¹²⁷ In an effort to construct a “workable definition,” *Belton* offered the following generalization: “articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within ‘the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].’”¹²⁸ The Court, therefore, 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.”¹²⁹ Included in the scope of this search is any container found in the passenger compartment, “whether open or closed.”¹³⁰

Seemingly self-conscious about being seen as undoing all of *Chimel*’s hard work, Justice Stewart defended *Belton* as doing nothing more than determining “the meaning of *Chimel*’s principles in this particular and problematic context,” rather than altering that seminal case’s “fundamental principles” in any way.¹³¹ *Belton*’s expansion, as will be seen, was only one of several to be imposed on search incident to arrest doctrine.

II. *THORNTON V. UNITED STATES*

A. *Facts*

In the late morning of July 21, 2001, “Officer Deion L. Nichols was patrolling Sewells Point Road in Norfolk, Virginia, in an unmarked police car”¹³² Officer Nichols’s suspicions were aroused by a “gold car” he observed driving in a “suspicious manner.”¹³³ Specifically, while stopped at a traffic light, Officer Nichols noticed that the gold-colored car would “not pull up next to his car.”¹³⁴ He

¹²⁶ *Id.* (quoting *Dunaway v. New York*, 442 U.S. 200, 213–14 (1978)).

¹²⁷ *Id.* at 459.

¹²⁸ *Id.* at 460 (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)).

¹²⁹ *Id.* (citations omitted).

¹³⁰ *Id.* at 460–61.

¹³¹ *Id.* at 460 n.3.

¹³² Brief for the United States at 2, *Thornton v. United States*, 541 U.S. 615 (2004) (No. 03-5165) [hereinafter *United States’ Brief*]. See also Brief for Petitioner at 2, *Thornton v. United States*, 541 U.S. 615 (2004) (No. 03-5165) [hereinafter *Petitioner’s Brief*].

¹³³ See *United States’ Brief*, *supra* note 132, at 2.

¹³⁴ *Petitioner’s Brief*, *supra* note 132, at 2. Officer Nichols assumed that the driver’s failure to “come all the way up to [him]” was due to the motorist’s suspicion that he was a police officer. *United States v. Thornton*, 325 F.3d 189, 190 (4th Cir. 2003), *aff’d*, 541 U.S.

therefore drove onto a side street and turned around so that he could position his car behind the gold vehicle.¹³⁵ Officer Nichols then observed Marcus Thornton's gold Lincoln Town Car, followed it, and "ran the tag."¹³⁶ This computer check revealed that the license plates were issued to a 1982 Chevrolet two door car, instead of the Lincoln Town Car.¹³⁷ Officer Nichols then pursued the Lincoln, planning on pulling it over, but, before he could make a traffic stop, Thornton turned into a shopping center and parked his car.¹³⁸

Officer Nichols pulled behind the Lincoln¹³⁹ and approached Thornton as he was walking toward the stores.¹⁴⁰ Officer Nichols, in uniform, told Thornton that his license plates did not match his vehicle and asked to see his driver's license.¹⁴¹ Thornton, sweating and appearing nervous, licked his lips and rambled about how "someone had just given him the car."¹⁴² When, for "officer safety,"¹⁴³ Officer Nichols inquired whether Thornton had any narcotics or weapons, he replied, "no" and consented to a pat-down for weapons.¹⁴⁴ During the pat-down, Officer Nichols felt a "bulge of squishy material" in Thornton's left front pocket.¹⁴⁵ Officer Nichols again asked if Thornton was carrying narcotics, and this time he responded that he had a "bag of weed."¹⁴⁶ When Officer Nichols then requested that Thornton remove the bag, Thornton produced one bag of marijuana and another of crack cocaine.¹⁴⁷

615 (2004).

¹³⁵ Petitioner's Brief, *supra* note 132, at 2.

¹³⁶ *Id.* at 3. There appeared to be some uncertainty about whether Thornton's Lincoln Town Car was the same vehicle that had aroused Officer Nichols's suspicion. *See* United States' Brief, *supra* note 132, at 2 n.1, where it was noted:

When Officer Nichols ran the computer check on petitioner's Lincoln, he believed that it was the same gold car that he had just observed being driven on Sewells Point Road in a suspicious manner. He later became "unsure," however, "whether the gold Lincoln Town Car he managed to get behind was the one that first aroused his suspicion."

Id.

¹³⁷ Thornton v. United States, 541 U.S. 615, 618 (2004).

¹³⁸ United States' Brief, *supra* note 132, at 2.

¹³⁹ *Id.* at 3.

¹⁴⁰ Petitioner's Brief, *supra* note 132, at 3.

¹⁴¹ United States' Brief, *supra* note 132, at 3.

¹⁴² *Id.*; Thornton, 541 U.S. at 618. Thornton later explained his sweating due to "the heat of the July day." Petitioner's Brief, *supra* note 132, at 3.

¹⁴³ Thornton v. United States, 325 F.3d 189, 191 (4th Cir. 2003), *aff'd*, 541 U.S. 615 (2004).

¹⁴⁴ United States' Brief, *supra* note 132, at 3.

¹⁴⁵ Petitioner's Brief, *supra* note 132, at 3.

¹⁴⁶ United States' Brief, *supra* note 132, at 3.

¹⁴⁷ *Id.* Specifically, Officer Nichols found bags of "green leafy material consistent with marijuana" as well as a bag with a "large amount of an off-white rocklike substance consistent with crack cocaine." Thornton, 325 F.3d at 191.

Officer Nichols arrested Thornton, handcuffed him, and placed him in the back of the police car.¹⁴⁸ Officer Nichols then walked over to Thornton's car and searched it, finding a loaded semi-automatic "Bry-Co nine millimeter handgun" under the driver's seat.¹⁴⁹ On the drive to the police station, Thornton volunteered that he had "just robbed some cat out at Ocean View, and that's where he got the dope."¹⁵⁰

On December 12, 2001, a federal grand jury charged Thornton with possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841(a)(1), possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1), and possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1).¹⁵¹ Before trial, Thornton moved to suppress the drugs, statement, and firearm.¹⁵² The district court denied the motion, finding, in part, that Officer Nichols lawfully searched the vehicle incident to arrest and, in the alternative, that Officer Nichols could have recovered the pistol pursuant to an inventory search.¹⁵³ After a two-day trial, the jury convicted Thornton on all three counts.¹⁵⁴

B. Lower Court Rulings

Thornton appealed to the United States Court of Appeals for the Fourth Circuit on the "sole contention" that *Belton*'s search incident to arrest exception required Officer Nichols to "initiate . . . contact with Thornton, either by actually confronting Thornton, or signaling confrontation with Thornton, while Thornton was still in his vehicle."¹⁵⁵ After a review of *Chimel* and *Belton*, the court, in an opinion authored by Circuit Judge Diana Gribbon Motz, focused on Thornton's argument that he was not an "occupant of an automobile" when Officer Nichols first confronted him, and, therefore, fell outside of the *Belton* rule.¹⁵⁶ Judge Motz noted that the Sixth Circuit Court of Appeals, in *United States v. Hudgins*,¹⁵⁷ held that where an "officer initiates contact with the defendant, either by [actual confrontation] . . . or by signaling confrontation . . . , while the defendant is still in the automobile," any later search of the vehicle's "passenger compartment falls within the scope of *Belton* and will be upheld as reasonable."¹⁵⁸ If instead, the defendant "*has voluntarily exited the*

¹⁴⁸ United States' Brief, *supra* note 132, at 3.

¹⁴⁹ *Thornton*, 325 F.3d at 191.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Thornton v. United States*, 541 U.S. 615, 619 (2004).

¹⁵⁵ *Thornton*, 325 F.3d at 191–92.

¹⁵⁶ *See id.* at 193.

¹⁵⁷ 52 F.3d 115 (6th Cir. 1995), *cert. denied*, 516 U.S. 891 (1995).

¹⁵⁸ *Thornton*, 325 F.3d at 193 (quoting *Hudgins*, 52 F.3d at 119).

automobile and begun walking away from the automobile before the officer has initiated contact with him, the case does not fit within Belton's bright-line rule."¹⁵⁹ The case would then be governed by a "case-by-case analysis" of *Chimel's* general rule.¹⁶⁰

Judge Motz then noted that no consensus existed among the other courts of appeals as to whether to follow the *Hudgins* rule.¹⁶¹ State courts were likewise divided in struggling with this issue.¹⁶² The *Thornton* court, therefore, felt free to reject *Hudgins's* "initiate contact" limitation of *Belton*.¹⁶³ Judge Motz marshaled a series of points to support this holding. First, although the Supreme Court had not ruled on the issue, dicta in *Michigan v. Long*¹⁶⁴ seemed to indicate that police could search a vehicle incident to arrest "even if the officer has not initiated contact while the arrestee was still in the automobile."¹⁶⁵ In *Long*, patrol officers had seen a speeding car swerve to a stop in a ditch.¹⁶⁶ When officers reached the scene, Long was already out of his car and at the rear of the vehicle.¹⁶⁷ Under these circumstances, the *Long* Court concluded, "It is clear . . . that if the officers had arrested Long . . . they could have searched the passenger compartment [under *Belton*]."¹⁶⁸

Judge Motz, moreover, thought that *Hudgins's* contact-in-car rule ran counter to the "historical rationales" of the search incident to arrest exception.¹⁶⁹ The needs to disarm the arrestee and to preserve evidence existed "regardless of whether the arrestee [exited] the automobile voluntarily or because of confrontation with an officer."¹⁷⁰ Judge Motz further worried that *Hudgins's* limit on *Belton* could undermine the officer safety rationale and, therefore, "could very well endanger an officer."¹⁷¹ In particular, the Fourth Circuit fretted:

[W]hen encountering a dangerous suspect, it may often be much safer for officers to wait until the suspect has exited a vehicle before signaling their presence, thereby depriving the suspect of any weapons he may have in his vehicle, the protective cover of

¹⁵⁹ *Id.* (emphasis added by 4th Cir.) (quoting *Hudgins*, 52 F.3d at 119).

¹⁶⁰ *Id.* (quoting *Hudgins*, 52 F.3d at 119).

¹⁶¹ *Id.* at 194.

¹⁶² *See id.*

¹⁶³ *Id.*

¹⁶⁴ 463 U.S. 1032 (1983).

¹⁶⁵ *Thornton*, 325 F.3d at 194.

¹⁶⁶ *Long*, 463 U.S. at 1035.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1035 n.1.

¹⁶⁹ *Thornton*, 325 F.3d at 195.

¹⁷⁰ *Id.* (quoting *Knowles v. Iowa*, 525 U.S. 113, 116 (1998)).

¹⁷¹ *Id.*

the vehicle, and the possibility of using the vehicle itself as either a weapon or a means of flight.¹⁷²

Judge Motz thus would not force “officers to choose between forfeiting the opportunity to preserve evidence . . . and increasing the risk to their own lives and the lives of others.”¹⁷³

The Fourth Circuit acknowledged, in rejecting the contact-in-car rule, that a concern existed that “*Belton* . . . cannot be stretched so as to render it limitless by permitting officers to search any vehicle from which an arrestee has emerged, regardless of how much time has elapsed since his exit or how far he is from the vehicle when arrested.”¹⁷⁴ Judge Motz offered a formulation that Thornton was “positively linked” to his vehicle prior to arrest.¹⁷⁵ Such a limit would require “close proximity, both temporally and spatially.”¹⁷⁶ The Fourth Circuit, however, failed to offer a clear definition of its “positive link” space and time boundary for *Belton*’s bright-line rule.

C. The Supreme Court’s Thornton Decision

The Court, in an opinion written by Chief Justice Rehnquist, approached *Thornton* as a case determining the limits of *Belton*.¹⁷⁷ Indeed, the Chief Justice referred to two previous missed opportunities to decide “whether *Belton*’s rule is limited to situations where the officer makes contact with the occupant while the occupant is inside the vehicle, or whether it applies as well when the officer first makes contact with the arrestee after the latter has stepped out of his vehicle.”¹⁷⁸ The *Thornton* Court refused to squander this third chance, holding that *Belton* “governs even when an officer does not make contact until the person arrested has left the vehicle.”¹⁷⁹

Chief Justice Rehnquist began the Court’s analysis with a brief review of *Belton*.¹⁸⁰ He properly noted that *Belton* aimed to “lay down a workable rule” for searches incident to arrest following traffic stops but conceded that *Chimel*’s “‘area immediately surrounding’ the arrestee” rule was “difficult to apply in specific cases.”¹⁸¹ Chief Justice Rehnquist completed his *Belton* overview by restating its

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 196.

¹⁷⁵ *Id.* (quoting *United States v. Sholola*, 124 F.3d 803, 817 (7th Cir. 1997)).

¹⁷⁶ *Id.*

¹⁷⁷ See *Thornton v. United States*, 541 U.S. 615, 617 (2004).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See *id.* at 619.

¹⁸¹ *Id.*

specific holding 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."¹⁸²

The Court in *Belton*, of course, spoke of "the occupant of an automobile" because it made its ruling on the facts presented before it in the case.¹⁸³ Even Chief Justice Rehnquist recognized that the officer in *Belton* first made contact with his arrestee as a driver behind the wheel of a vehicle.¹⁸⁴ These facts in *Belton*, however, were deemed irrelevant by the *Thornton* Court.¹⁸⁵ Chief Justice Rehnquist declared, "[W]e [in *Belton*] placed no reliance on the fact that the officer in *Belton* ordered the occupants out of the vehicle, or initiated contact with them while they remained within it."¹⁸⁶ Such circumstances bore "no logical relationship to *Belton*'s rationale," for in "all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle."¹⁸⁷ *Thornton* declared that the stress of an arrest "is no less merely because the arrestee exited his car before the officer initiated contact, nor is an arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle."¹⁸⁸

In applying *Belton* to arrestees first accosted outside a vehicle, *Thornton* aimed to give police a choice of options when confronting a suspect.¹⁸⁹ Chief Justice Rehnquist speculated that "[i]n some circumstances it may be safer and more effective for officers to conceal their presence from a suspect until he has left his vehicle."¹⁹⁰ Limiting a *Belton* search to only those situations where an officer initiated contact with the arrestee while still in the vehicle, however, would remove such an option. This was because officers who first made contact after a suspect left the car would be "unable to search the car's passenger compartment in the event of a custodial arrest, potentially compromising their safety and placing incriminating evidence at risk of concealment or destruction."¹⁹¹ Chief Justice Rehnquist refused to force police to take "such a gamble."¹⁹²

Finally, *Thornton* attempted to head off criticisms of its extension of *Belton*.¹⁹³ Responding to *Thornton*'s contention that *Belton*'s bright-line rule would be muddled by an application to "more than vehicle 'occupants,'" Chief Justice Rehnquist argued

¹⁸² *Id.* at 620 (quoting *New York v. Belton*, 453 U.S. 454, 460 (1981)).

¹⁸³ *Belton*, 453 U.S. at 455-56.

¹⁸⁴ *See Thornton*, 541 U.S. at 619.

¹⁸⁵ *Id.* at 621.

¹⁸⁶ *Id.* at 620.

¹⁸⁷ *Id.* at 620-21.

¹⁸⁸ *Id.* at 621.

¹⁸⁹ *See id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 621-22.

¹⁹² *Id.* at 622.

¹⁹³ *See id.* at 622-24.

that *Belton* already extended beyond “occupants” to “recent occupants,” for Belton himself was “not inside the car at the time of the arrest and search; he was standing on the highway.”¹⁹⁴ As to what constituted a “recent occupant” of a vehicle, the Court hedged by making the vague assertion that the question might turn on a person’s “temporal or spatial relationship to the car at the time of the arrest and search.”¹⁹⁵ Although *Thornton* was not any more definite about this “temporal or spatial relationship,” it was clear on one point: “recent occupant” status “certainly [did] not turn on whether [a person] was inside or outside the car at the moment that the officer first initiated contact with him.”¹⁹⁶

Further, Chief Justice Rehnquist aimed to address another concern raised by *Thornton*’s new rule. He acknowledged that “[t]o be sure, not all contraband in the passenger compartment is likely to be readily accessible to a ‘recent occupant.’”¹⁹⁷ In particular, it was “unlikely in this case that petitioner could have reached under the driver’s seat for his gun once he was outside of his automobile.”¹⁹⁸ The Court minimized this flaw by noting that *Belton* shared it, for “the firearm and the passenger compartment in general were no more inaccessible than were the contraband and the passenger compartment in *Belton*.”¹⁹⁹ What made up for *Thornton*’s and *Belton*’s lack of justification in reality was the “need for a clear rule, readily understood by police officers.”²⁰⁰ In any case, *Thornton*’s extension of *Belton* was seen as no worse than the defendant’s proposed “contact initiation” rule, which itself would “obfuscate” constitutional limits by requiring officers to make “ad hoc determinations” in the field.²⁰¹ Thus, even though imperfect, *Thornton*’s new rule entered Fourth Amendment jurisprudence with the roaring endorsement that it was better than the alternative.

¹⁹⁴ *Id.* at 622.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 622. The Court, in discussing its “recent occupant” rule, might have been fortunate that *Thornton* had not contended that he was too far away in time and place for *Belton* to apply in the first place. On this point, Chief Justice Rehnquist noted that “petitioner conceded that he was in ‘close proximity, both temporally and spatially,’ to his vehicle” *Id.* at 619 (quoting *United States v. Thornton*, 325 F.3d 189, 196 (4th Cir. 2003)). One can only speculate as to what the outcome of *Thornton* would have been if the defendant never conceded he was close in time and space to the car at the time of arrest.

¹⁹⁷ *Id.* at 622.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 623.

²⁰¹ *Id.*

III. CONCERNS CREATED BY *THORNTON*'S RATIONALES*A. Thornton Undermined Chimel's Efforts to Adhere to the Warrant Requirement and to Remain True to its Original Justifications*

Thornton cast doubt over much of the careful work accomplished by *Chimel*. Justice Stewart, in his meticulous tracking of the swinging pendulum of search incident to arrest case law in *Chimel*,²⁰² took great pains to bring the Court back to respecting the warrant mandate.²⁰³ He reminded officials seeking to avoid the warrant requirement that they carried the burden to establish the reasonableness of warrantless intrusions.²⁰⁴ Further, the standard to be met was significant, for police could not dispense with a warrant unless "exigencies" made such a course "imperative."²⁰⁵ Finally, any search resulting from an exception to the warrant mandate had to be "strictly tied" to its original justifications.²⁰⁶

Chief Justice Rehnquist, in expanding the official right of intrusion in *Thornton*, appeared to approach search incident to arrest from an entirely different perspective than Justice Stewart had in *Chimel*.²⁰⁷ In *Thornton*, the Court began its discussion with *Belton* and *Chimel*, without any reference to the existence of the warrant requirement.²⁰⁸ It was as if in the *Thornton* Court's view, search incident to arrest could, indeed should, be considered in isolation as a police right to search. The official license of intrusion was such a given that much of *Thornton*'s opinion focused not on the standard issue of whether the government had proven that a search of the passenger compartment was "imperative," but on whether the defendant could convince the Court that officer safety would be maintained without an expansion of search rights.²⁰⁹ Chief Justice Rehnquist's focus was, therefore, on state interests in officer safety and evidence integrity.²¹⁰ He considered whether an officer meeting a person inside or outside a car created possible differences in the reach of an arrestee's "immediate control."²¹¹ *Thornton* emphasized that the "danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty."²¹² The Chief Justice considered the officer's viewpoint in

²⁰² See *Chimel v. California*, 395 U.S. 752, 757–60 (1969).

²⁰³ *Id.* at 761.

²⁰⁴ *Id.* at 760–61.

²⁰⁵ See *id.* (quoting *McDonald v. United States*, 335 U.S. 451, 455–56 (1948)).

²⁰⁶ *Id.* at 762 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

²⁰⁷ See *United States v. Thornton*, 541 U.S. 615, 620–22 (2004).

²⁰⁸ *Id.* at 619–20.

²⁰⁹ See *id.* at 621–24.

²¹⁰ See *id.* at 621–22.

²¹¹ *Id.* at 620–21.

²¹² *Id.* at 621 (quoting *United States v. Robinson*, 414 U.S. 218, 234–35 (1975)) (emphasis added in *Thornton*).

crafting the rule, for he wished to allow for circumstances where officers could maximize safety and effectiveness.²¹³ The Court, therefore, replaced its traditional presumption of unreasonableness in the absence of a warrant with a presumption of danger to officers, for “[e]very arrest must be presumed to present a risk of danger to the arresting officer.”²¹⁴ The result has been an ugly discordance between *Chimel* and *Thornton*. While Justice Stewart condemned the “routine[] searching” which occurred in *Chimel*,²¹⁵ Chief Justice Rehnquist in *Thornton* deplored having to litigate “in each case the issue of whether or not there was present one of the reasons supporting the authority” to search.²¹⁶

Although Justice Stewart would not have approved of *Thornton*, he certainly would have recognized its approach. One aspect of *Thornton* in particular would have given the *Chimel* Court an eerie sense of *déjà vu*. Casting about for support for its ruling, the *Thornton* Court noted that *Michigan v. Long*²¹⁷ had indicated that officers in that case could have committed a *Belton* search of the car, even though they had first met the driver only after he had exited his vehicle.²¹⁸ Unfortunately, *Long* simply did not involve search incident to arrest, and, therefore, Justice O’Connor’s comment on that issue was dictum.²¹⁹ Justice Stewart would have seen this reliance on dicta as par for the course for search incident to arrest case law. He had suffered through such flawed reasoning when reviewing *Weeks* and *Agnello* in his survey of precedent in *Chimel*.²²⁰

The concern caused by *Thornton*’s resort to dicta is the same as it was with *Weeks* and *Agnello* — when the Court makes rulings on issues that have not had the benefit of a full analysis based on litigated facts, the guidance from such holdings is unclear. Undisciplined asides in *Weeks* and *Agnello* led to wide swings in the interpretation of the scope of search incident to arrest, such as upholding the search of “all parts of the premises” in one case²²¹ and striking down the search of a single ten-by-twenty foot room in another.²²² *Thornton*, by leaving behind both *Chimel*’s case-by-case rule assessing an arrestee’s area of immediate control and *Belton*’s

²¹³ *See id.*

²¹⁴ *Id.* (quoting *Washington v. Chrisman*, 445 U.S. 1, 7 (1982)).

²¹⁵ *See Chimel v. California*, 395 U.S. 752, 763 (1969).

²¹⁶ *Thornton*, 541 U.S. at 620 (quoting *New York v. Belton*, 453 U.S. 454, 459 (1981)).

²¹⁷ 463 U.S. 1032 (1983).

²¹⁸ *Thornton*, 541 U.S. at 621; *see also Long*, 463 U.S. at 1035 & n.1.

²¹⁹ *See Long*, 463 U.S. at 1049 n.14. In *Long*, the Court held that officers possessing reasonable suspicion that the suspect is armed and presently dangerous in a *Terry* stop involving an automobile can “frisk” the passenger compartment for weapons. *See id.* at 1049–50.

²²⁰ *Chimel*, 395 U.S. at 755.

²²¹ *Marron v. United States*, 275 U.S. 192, 199 (1927).

²²² *United States v. Lefkowitz*, 285 U.S. 452, 458, 467 (1932).

bright-line passenger-compartment-of-a-car-stopped-by-an-officer standard, enters a similar unknown.

Thornton effectively conceded as much with its reluctant creation of the “recent occupant,” a new class of suspect *Thornton* was forced to craft in light of its extension of *Belton*.²²³ Since police could now search incident to arrest a vehicle that a person no longer occupied when an officer made contact, *Thornton*’s new outer limit of those subject to *Belton* was the “recent occupant.”²²⁴ What exactly constituted a “recent occupant” was unclear, even to the *Thornton* Court. The most Chief Justice Rehnquist hazarded to offer as a relevant circumstance that a court “may” consider was a person’s “temporal or spatial relationship to the car at the time of the arrest and search.”²²⁵ As to any specifics regarding exactly what time and place in relation to the car, *Thornton* gave only silence.²²⁶ No mention is made of seconds, minutes, feet, or yards, let alone any reference to particular numbers. For guidance to future officers, the Court would only specify which criterion *not* to consider: recent occupant status “certainly does not turn on whether [a person] was inside or outside the car at the moment that the officer first initiated contact with him.”²²⁷ The stage is thus now set for needless litigation as to the boundaries of *Thornton*’s not-so-bright-line rule. Attorneys in the courts and officers on the beat will struggle in their attempts to determine who qualifies as a “recent occupant” of a vehicle. The spawning of case after case attempting to clarify the outer boundaries of *Thornton*’s time and space rule creates the very confusion *Belton* originally aimed to avoid.

Thornton thus removed the one factor that could be assessed easily and quickly by police without reference to measuring by watch or ruler — contact in the car. Paradoxically, *Thornton* aimed to preserve *Belton*’s rule by erasing its bright line. This approach is especially bizarre in light of *Thornton*’s celebration of *Belton* as laying down a “workable rule”²²⁸ which was “clear,” “readily understood by police,” and “not depend[ent] on differing estimates.”²²⁹ The entire defense in the first place of *Belton*’s generalized approach was its ease of application by officers in the field.²³⁰ As will be shown in the next section, *Thornton*, in its expansion of search incident to arrest not only beyond *Chimel*’s original justifications, but also beyond *Belton*, has given the Court the dubious distinction of crafting a rule both stripped of its original boundaries and of its hoped-for clarity.

²²³ *Thornton*, 541 U.S. at 622.

²²⁴ *See id.*

²²⁵ *See id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 619.

²²⁹ *Id.* at 622–23.

²³⁰ *Thornton* declared that “[t]he need for a clear rule . . . justifies the sort of generalization which *Belton* enunciated.” *Id.*

B. Thornton's Destruction of Belton's Clarity Created the Very Danger of New Ad Hoc Inquiries the Court Sought to Avoid

Thornton, as previously noted, went beyond *Belton* to include the cars of people first contacted by police outside of those vehicles, and thus left any hope of a “bright-line” rule behind. In drawing its passenger compartment boundary, *Belton*’s whole purpose was to provide a “straightforward rule, easily applied, and predictably enforced”²³¹ so that the Fourth Amendment could meaningfully “regulate the police in their day-to-day activities.”²³² In pursuing the clarity that comes with a per se rule, Justice Stewart gave up the precision offered to citizens by a totality of the circumstances test for the individual case.²³³ He conceded that the passenger compartment was not “inevitably” within “the area into which an arrestee might reach in order to grab a weapon or evidentiary item.”²³⁴ But the lack of surgical exactitude was compensated for by avoiding a “highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions”²³⁵

By extending *Belton*, the *Thornton* Court has created the worst of both worlds: it has retained the inaccuracy of *Belton*’s passenger compartment standard while destroying its ease of application. *Thornton* has ironically set up a situation inviting “precisely the sort of ad hoc determinations on the part of officers in the field and reviewing courts that *Belton* sought to avoid.”²³⁶ This is amply demonstrated by Chief Justice Rehnquist’s attempt to liken police contacts with occupants who have alighted from a vehicle to contacts with those still inside it.²³⁷ He considered the stress of an arrest to be

no less merely because the arrestee exited his car before the officer initiated contact, nor is an arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle. In either case, the officer faces a highly volatile situation. It would make little sense to apply two different rules to what is, at bottom, the same situation.²³⁸

²³¹ *New York v. Belton*, 453 U.S. 454, 459 (1981).

²³² *Id.* at 458 (quoting LaFave, *supra* note 123, at 141).

²³³ *Id.* at 459–60.

²³⁴ *Id.* at 460 (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)).

²³⁵ *Id.* at 458 (citing LaFave, *supra* note 123, at 141).

²³⁶ *Thornton v. United States*, 541 U.S. 615, 623 (2004) (citing *Belton*, 453 U.S. at 549–60).

²³⁷ *Id.* at 620–21.

²³⁸ *Id.* at 621.

If stress is the standard, especially in light of the fact that “[e]very arrest must be presumed to present a risk of danger to the arresting officer,”²³⁹ what about the peril that exists in accosting a suspect when he or she walks up to a car that he or she is about to drive? Is this not, “[i]n all relevant aspects,” a situation which “presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle”?²⁴⁰ If this situation falls within the new rule, does *Thornton* also cover arrests where people just happen to be walking past their cars? After all, such owners in all likelihood are in possession of keys to the vehicle and so could make a lunge for its passenger compartment. Finally, why limit a *Belton* search to a car owned or driven by a suspect? *Belton* itself involved a case where the vehicle in question was not owned by anyone whom the officer seized and searched.²⁴¹ Moreover, the Court has in the past not been averse to extending the reach of warrant exception searches to items owned by third parties.²⁴² Arrests present such stress that arrestees have been known to take desperate measures. Randomly reaching into a nearby car, *any* nearby car, in hopes of finding a weapon, tire-iron, or other blunt object certainly seems to be within the realm of possibility — indeed much more likely than Marcus Thornton escaping his handcuffs, exiting the patrol car, and gaining access to the passenger compartment of his Lincoln Town Car.²⁴³

Rather than avoiding at all costs the ad hoc inquiries that *Thornton* so feared, the Court should simply seek to make any such issues straightforward and workable. The best way to pursue such a course would be to adhere to the rules already established and tested in precedent. In such an approach, *Belton* searches would be limited to the facts which originally supported *Belton* — officers would search passenger compartments of vehicles after making or signaling contact with the motorist while he or she is still in the car. Justice Stewart, after all, only crafted the bright-line “passenger compartment” rule in *Belton* to address the difficulty in applying *Chimel* “in specific cases,”²⁴⁴ in particular, where an officer was concerned about the “interior of an automobile” where “the arrestee is its recent occupant.”²⁴⁵

²³⁹ *Id.* (quoting *Washington v. Chrisman*, 455 U.S. 1, 7 (1982)).

²⁴⁰ *Id.*

²⁴¹ *Belton*, 453 U.S. at 455 (Justice Stewart noted that “the policeman . . . discovered that none of the men owned the vehicle or was related to its owner.”).

²⁴² See *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999) (extending the automobile exception to include searches of items owned by persons other than the driver of the vehicle). The *Houghton* Court upheld the search of a lady’s purse found in the car of a male driver, even though the officer had admitted in testimony that “he had no probable cause to search (the female passenger) and that men do not usually carry purses.” Brief for the Respondent at 1, *Wyoming v. Houghton*, 526 U.S. 295 (1999) (No. 98-184).

²⁴³ See *Thornton*, 541 U.S. at 618 (describing Thornton’s arrest and placement in the back seat of the patrol car).

²⁴⁴ *Belton*, 453 U.S. at 458.

²⁴⁵ *Id.* at 460.

According to this reasoning, the Court should have no difficulty in applying search incident to arrest in situations outside the automobile. It would simply fall back to the carefully crafted rule originally presented in *Chimel*. In situations where an officer met a motorist outside a car, he or she could search incident to arrest the “arrestee’s person and the area ‘within his immediate control.’”²⁴⁶ *Chimel* saw such a rule as eminently workable. Indeed, Justice Stewart was so comfortable in relying on officers’ ability to determine the area of immediate control that he was ready to let them assess which desk drawers would be in *Chimel*’s reach rather than allowing a “routine[] searching” of “all the desk drawers.”²⁴⁷ Police, being on the front line, know best the dangers they face. *Chimel* exploited this first-hand experience by allowing officers to summon it in making decisions as to an arrestee’s reach. Any arbitrarily-drawn search power beyond search incident to arrest’s original justifications would thus constitute an unnecessary intrusion on Fourth Amendment rights.

C. Thornton Continued Search Incident to Arrest’s Pattern of Expanding Police Power Beyond its Original Justifications, Making it an Unchallengeable Search Right

Much of *Thornton*’s reasoning explaining its expansion of official power could insulate the search incident to arrest exception from future challenge. Such an approach in search incident to arrest precedent is hardly new, as demonstrated by *Thornton*’s own citations.²⁴⁸ A review of the cases *Thornton* cited, as well as a sampling of others it failed to mention, demonstrates that the post-*Chimel* precedent was generally directed toward consistent expansion of search incident to arrest. This is so despite the fact that in any particular case the underlying rationales increasing police search rights did not themselves need to be consistent.

Thornton’s role as part of a larger Court tradition of expanding search incident to arrest was demonstrated first by Chief Justice Rehnquist’s discussion of *United States v. Robinson*.²⁴⁹ *Thornton* relied on *Robinson* to reject the contention that “‘there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority’” to search.²⁵⁰ In *Robinson*, Officer Jenks lawfully arrested the defendant for “operating a motor vehicle after the revocation of his operator’s permit,” a crime carrying a mandatory jail term in the District of Columbia.²⁵¹ During the search incident to this arrest, Officer Jenks felt

²⁴⁶ *Chimel v. California*, 395 U.S. 752, 763 (1969).

²⁴⁷ *Id.*

²⁴⁸ *Thornton*, 541 U.S. at 620 (citing *United States v. Robinson*, 414 U.S. 218 (1973)); *id.* at 621 (considering *Washington v. Chrisman*, 455 U.S. 1 (1982)).

²⁴⁹ *Id.* at 620.

²⁵⁰ *Id.* (quoting *Belton v. New York*, 453 U.S. 454, 459 (1981) (quoting *Robinson*, 414 U.S. at 235)).

²⁵¹ *Robinson*, 414 U.S. at 220.

an object in Robinson's left breast pocket.²⁵² Although he "'couldn't tell what it was,'" the officer reached in Robinson's pocket and recovered a "'crumpled up cigarette package"' in which he found heroin.²⁵³ It would have been difficult under the facts for Officer Jenks to have argued credibly that he worried that the crumpled cigarette package could hold either a weapon to resist arrest or evidence proving the crime of driving without a license. The *Robinson* Court, however, was undaunted by the lack of such justifications in this particular case.²⁵⁴ Justice Rehnquist, writing for the *Robinson* Court, declared:

The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.²⁵⁵

The search power instead rested simply on the existence of a legal arrest.²⁵⁶ Once it is established that the arrest is lawful, "a search incident to arrest requires no additional justification."²⁵⁷ Thus, the Court in *Robinson* did not flinch from its recognition of an absolute rule for search incident to arrest, even when its scope reached further than *Chimel*'s original justifications.

Robinson's bright-line clarity was abandoned, however, in the very next year in *United States v. Edwards*.²⁵⁸ *Edwards*, however, still offered a kind of consistency by continuing the expansion of search incident to arrest. In *Edwards*, the defendant was arrested and jailed for attempting to break into a post office.²⁵⁹ At the crime scene, police saw pry marks and paint chips at the point of entry.²⁶⁰ The next morning, police bought trousers and a shirt for Edwards "to substitute for the clothing which he had been wearing at the time of and since his arrest."²⁶¹ Without a warrant, police examined his clothing and found "paint chips matching the samples . . . taken from the window."²⁶² The clothing and paint chip evidence were admitted at trial,²⁶³ and the defendant was convicted. The Court of Appeals reversed, determining that the

²⁵² *Id.* at 223.

²⁵³ *Id.*

²⁵⁴ *Id.* at 235.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ 415 U.S. 800 (1974).

²⁵⁹ *Id.* at 801.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 802.

²⁶² *Id.*

²⁶³ *Id.*

warrantless seizure of Edwards's clothing had occurred "'after the administrative process and the mechanics of the arrest [had] come to a halt.'" ²⁶⁴ The Court, in an opinion written by Justice White, reversed the Court of Appeals. ²⁶⁵

The *Edwards* Court allowed the search of the inmate's clothing by broadening search incident to arrest's timing boundaries. Justice White considered it "plain that searches and seizures that could be made on the spot at the time of the arrest may legally be conducted later when the accused arrives at the place of detention." ²⁶⁶ As support for this contention, Justice White relied on *Abel v. United States*, ²⁶⁷ seeing "little difference" between a search "at the place of arrest" and, "when the accused decides to take the property with him," a search "'at the first place of detention when the accused arrives there.'" ²⁶⁸ Perhaps such a ruling made sense in *Abel*, where the defendant, arrested in an espionage case, brought false documents, including a birth certificate, a certificate of vaccination, and a bank book, with him to I.N.S. headquarters. ²⁶⁹ The *Abel* Court took care to note that the arrestee "took with him only what he wished. He chose to leave some things behind in his room, which he voluntarily relinquished." ²⁷⁰ Making the same argument in *Edwards* seems forced. The property seized and searched in *Edwards* was the pair of pants the suspect was wearing when arrested. ²⁷¹ Had Edwards chosen to leave his pants behind at the place of arrest rather than take them with him to the station, he would have added a charge of indecent exposure to his woes.

Justice White himself seemed less than comfortable with this reasoning, offering a second rationale for police delay. ²⁷² This additional argument was based on the particular facts presented in *Edwards*. The Court of Appeals had viewed the seizure of Edwards's trousers as occurring "after the administrative mechanics of arrest [had] been completed" and, therefore, saw the defendant as an incarcerated prisoner rather than as an arrestee. ²⁷³ To stave off this change in status, Justice White characterized the situation as one where "the normal processes incident to arrest and custody had not been completed when Edwards was placed in his cell." ²⁷⁴ Because it was late at night, and no substitute clothes were yet available, "it would certainly have been unreasonable for the police to have stripped [Edwards] of his

²⁶⁴ *Id.* (quoting *Edwards v. United States*, 474 F.2d 1206, 1211 (6th Cir. 1973)).

²⁶⁵ *Id.* at 809.

²⁶⁶ *Id.* at 803.

²⁶⁷ 362 U.S. 217 (1960).

²⁶⁸ *Edwards*, 415 U.S. at 803 (quoting *Abel*, 362 U.S. at 239).

²⁶⁹ *Abel*, 362 U.S. at 238–39.

²⁷⁰ *Id.* at 239.

²⁷¹ *Edwards*, 415 U.S. at 802.

²⁷² *Id.* at 804–05.

²⁷³ *Id.* at 804.

²⁷⁴ *Id.*

clothing and left him exposed in his cell throughout the night.”²⁷⁵ The delay until clothes were purchased the next morning was therefore not relevant, for the Court said of the change of clothes:

This was and is a normal incident of a custodial arrest, and reasonable delay in effectuating it does not change the fact that Edwards was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention.²⁷⁶

One is left to ponder the varying approaches taken by the Court in *Robinson* and *Edwards*. Within the span of one year, the Court went from promoting a bright line test in *Robinson* to relying on the particular facts of the case in *Edwards*. However, the one constant, a seeming given in search incident to arrest precedent, was the extension of official right of intrusion.

Such expansion would continue in the Court’s next case of this kind, *Rawlings v. Kentucky*.²⁷⁷ Unlike *Edwards*, where the Court expanded the scope of search incident to arrest to include searches after arrest and incarceration, in *Rawlings*, the Court extended the scope of this warrant exception backwards before an actual arrest.²⁷⁸ In *Rawlings*, police saw the defendant claim ownership of 1,800 tablets of LSD.²⁷⁹ Police then searched Rawlings, finding “\$4,500 in cash in [his] shirt pocket and a knife in a sheath at [his] side.”²⁸⁰ Rawlings later contended that the money and knife recovered from his person were not found incident to arrest because police had not formally arrested him until after the search.²⁸¹ Justice Rehnquist, writing for the Court, made short work of this argument. Justice Rehnquist wrote, “[T]he police clearly had probable cause” to arrest Rawlings before the search, and “the formal arrest followed quickly on the heels of the challenged search”; therefore, the Court did “not believe it particularly important that the search preceded the arrest rather than vice versa.”²⁸²

Extension of search incident to arrest occurred again in *Washington v. Chrisman*, a case where the Court returned to making broad rules to cover every case.²⁸³ In *Thornton*, Chief Justice Rehnquist relied on *Chrisman* for the blanket statement that “[e]very arrest must be presumed to present a risk of danger to the

²⁷⁵ *Id.* at 805.

²⁷⁶ *Id.*

²⁷⁷ 448 U.S. 98 (1980).

²⁷⁸ *Id.* at 111.

²⁷⁹ *Id.* at 101.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 110–11.

²⁸² *Id.* at 111.

²⁸³ 455 U.S. 1, 7 (1982).

arresting officer.”²⁸⁴ *Chrisman* involved an arrest of Carl Overdahl, a student at Washington State University caught by police leaving a student dormitory “carrying a half-gallon bottle of gin.”²⁸⁵ Hoping to prove he was old enough to consume alcohol, Overdahl asked if he could retrieve his identification from his dorm room.²⁸⁶ Officer Daugherty responded that he would have to accompany Overdahl, and both went to his room on the eleventh floor.²⁸⁷ The officer leaned on the doorjamb when Overdahl entered, watching both his arrestee and his roommate, Chrisman.²⁸⁸ Officer Daugherty then noticed “seeds and a small pipe lying on a desk 8 to 10 feet from where he was standing.”²⁸⁹ Suspecting marijuana, Officer Daugherty then entered the room, inspected, and ultimately recovered the marijuana seeds and pipe.²⁹⁰ Chrisman was then charged with and convicted of drug offenses.²⁹¹ The Supreme Court of Washington reversed, ruling that Officer Daugherty had no right to actually enter the dorm room.²⁹² The state court reasoned that “there was no indication that Overdahl might obtain a weapon or destroy evidence, and, with the officer blocking the only exit from the room, his presence inside the room was not necessary to prevent escape.”²⁹³

The Court, in an opinion by Chief Justice Burger, refused to consider the probable lack of danger stemming from an arrest of a college drinker or the slim chances of escape from an eleven-by-seventeen foot room on the eleventh floor.²⁹⁴ The *Chrisman* Court declared that “an arresting officer’s custodial authority over an arrested person does not depend upon a reviewing court’s after-the-fact assessment of the particular arrest situation.”²⁹⁵ The Court therefore held that “it is not ‘unreasonable’ under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest.”²⁹⁶ Once again, the Court upheld a search without concerning itself about whether the justifications originally advanced for it actually existed. Indeed, it openly declared the lack of need for any such inquiry.

²⁸⁴ Thornton v. United States, 541 U.S. 615, 621 (2004) (quoting *Chrisman*, 455 U.S. at 7).

²⁸⁵ *Chrisman*, 455 U.S. at 3.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 4.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.* at 5.

²⁹³ *Id.*

²⁹⁴ *Id.* at 3, 7.

²⁹⁵ *Id.* at 7.

²⁹⁶ *Id.*

Finally, in 1998, the Court placed a limit on search incident to arrest — by requiring that it occur only when an arrest actually exists.²⁹⁷ In *Knowles v. Iowa*, a police officer stopped Patrick Knowles for speeding forty-three miles per hour in a twenty-five miles per hour zone.²⁹⁸ Iowa law empowered the officer either to arrest Knowles for speeding or merely issue him a citation and allow him to go on his way.²⁹⁹ An Iowa statute further provided that “the issuance of a citation in lieu of an arrest ‘does not affect the officer’s authority to conduct an otherwise lawful search.’”³⁰⁰ The Court, in an opinion written by Chief Justice Rehnquist, was therefore confronted with the issue of whether officers could conduct a search incident to arrest in situations lacking any custodial arrest.³⁰¹

The Court in *Knowles* refused to go so far.³⁰² Such a course would detach completely the search incident to arrest exception from its original rationales.³⁰³ The entire point of the police right to search incident to arrest was the “danger to the police officer” which “flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty.”³⁰⁴ In contrast, people experiencing a mere *Terry* stop would be “less hostile to the police.”³⁰⁵ Thus, a citation would not implicate the first rationale of “officer safety.”³⁰⁶ The second basis for search incident to arrest for traffic citations was equally lacking, for detainees were “less likely to take conspicuous, immediate steps to destroy incriminating evidence.”³⁰⁷ Finally, in this case, Chief Justice Rehnquist doubted whether any “further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car.”³⁰⁸

The *Knowles* Court bolstered its refusal to extend search incident to arrest by listing for police “other, independent bases to search for weapons and protect

²⁹⁷ *Knowles v. Iowa*, 525 U.S. 113, 113 (1998).

²⁹⁸ *Id.* at 114.

²⁹⁹ *Id.* The Court specified that an Iowa statute provided that “Iowa peace officers having cause to believe that a person has violated any traffic or motor vehicle equipment law may arrest the person and immediately take the person before a magistrate.” *Id.* at 115. *See* IOWA CODE ANN. § 321.485(1)(a) (West 1997). Further, the *Knowles* Court noted that “Iowa law also authorizes the far more usual practice of issuing a citation in lieu of arrest or in lieu of continued custody after an initial arrest.” *Knowles*, 525 U.S. at 115. *See* IOWA CODE ANN. § 805.1(1) (West Supp. 1997).

³⁰⁰ *Knowles*, 525 U.S. at 115 (quoting IOWA CODE ANN. § 805.1(4) (West Supp. 1997)).

³⁰¹ *Id.* at 114.

³⁰² *Id.* at 118–19.

³⁰³ *See id.* at 117–19.

³⁰⁴ *Id.* at 117 (quoting *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973)).

³⁰⁵ *Id.* (quoting *Cupp v. Murphy*, 412 U.S. 291, 296 (1973)).

³⁰⁶ *Id.*

³⁰⁷ *Id.* (quoting *Cupp*, 412 U.S. at 296).

³⁰⁸ *Id.* at 118.

themselves from danger.”³⁰⁹ Officers had an automatic right to order both drivers and passengers out of lawfully stopped vehicles.³¹⁰ Police further were allowed to “pat down” any driver or passenger whom they had “reasonable suspicion” might be “armed and dangerous,” and such a search could include the passenger compartment of a vehicle.³¹¹ Such protections would make any extension of search incident to arrest unnecessary.

Knowles’s list of search options for police who genuinely sense peril calls into question *Thornton*’s perceptions of danger for police in approaching persons already outside their vehicles. In *Pennsylvania v. Mimms*,³¹² one of the cases *Knowles* mentioned as creating alternative search rights for police, the Court held that “a police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle.”³¹³ In *Mimms*, the State “freely concede[d]” that there was “nothing unusual or suspicious” about the driver’s behavior in the case, and so the officer “had no reason to suspect foul play” in the particular traffic stop.³¹⁴ The government, however, highlighted the need to allow the order-out practice in all cases so as to protect officer safety.³¹⁵ It urged that “[e]stablishing a face-to-face confrontation” by ordering the driver out of the car “diminishes the possibility, otherwise substantial, that the driver can make unobserved movements; this, in turn, reduces the likelihood that the officer will be the victim of an assault.”³¹⁶ The *Mimms* Court flatly stated, “We think it too plain for argument that the State’s proffered justification — the safety of the officer — is both legitimate and weighty.”³¹⁷ The Court noted that one study found “approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile.”³¹⁸ The *Mimms* holding was, therefore, based on the life-or-death distinction between dealing with suspects when inside or outside a vehicle. When inside, detainees can hide furtive movements and procure hidden weapons; when outside, they cannot.

The difference between suspects inside a car and outside a car impressed the Court so greatly that, in *Maryland v. Wilson*,³¹⁹ it extended police order-out rights to cover passengers as well as the driver. In *Wilson*, Chief Justice Rehnquist, who

³⁰⁹ *Id.* at 117.

³¹⁰ *Id.* at 117–18 (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977); *Maryland v. Wilson*, 519 U.S. 408, 414–15 (1997)).

³¹¹ *Knowles*, 525 U.S. at 118 (citing *Terry v. Ohio*, 392 U.S. 1 (1968); *Michigan v. Long*, 463 U.S. 1032, 1049 (1983)).

³¹² 434 U.S. 106 (1977).

³¹³ *Wilson*, 519 U.S. at 410 (citing *Mimms*, 434 U.S. at 106).

³¹⁴ *Mimms*, 434 U.S. at 109.

³¹⁵ *Id.* at 110.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ 519 U.S. 408, 409 (1997).

authored the Court's opinion, determined that "the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger."³²⁰ The Court in *Wilson* therefore held, "[A]n officer making a traffic stop may order passengers to get out of the car pending completion of the stop."³²¹

Mimms' and *Wilson's* bright line between persons inside and outside a vehicle suddenly disappeared in *Thornton*, where, "[i]n all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety . . . as the arrest of one who is inside the vehicle."³²² Chief Justice Rehnquist's language on this point could not be stronger. He did not dither by saying that the situations were similar or shared characteristics — he declared that they were "identical."³²³ This is in spite of the fact that the Chief Justice wrote the Court's opinion in both *Wilson* and *Thornton*. The official right of intrusion grew in both cases, despite the complete contradiction in the underlying rationales.

Still another search option mentioned in *Knowles* effectively undermined *Thornton's* rationale. In refusing to allow search incident to arrest when no actual arrest existed, the *Knowles* Court allayed fears of danger to officers by recalling that *Terry v. Ohio*³²⁴ and *Michigan v. Long*³²⁵ ensured officer safety by allowing pat downs of persons or passenger compartments whenever officers had "reasonable suspicion" that the person they were confronting was "armed and dangerous."³²⁶ When crafting this rule, the Court in *Terry* was acutely aware of the dangers facing police. *Terry* recognized that "American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded."³²⁷ The *Terry* Court therefore refused to "blind" itself to "the need for law enforcement officers to protect themselves and other prospective victims of violence"³²⁸

Despite this deep concern for officer safety, the *Terry* Court chose to forgo creating a bright-line right to search detainees. Chief Justice Warren, writing for the Court in *Terry*, explicitly rejected a "rigid all-or-nothing model" for deciding law enforcement's right to search.³²⁹ Instead, *Terry* struck a balance between the important competing interests by creating a "narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has

³²⁰ *Id.* at 413.

³²¹ *Id.* at 415.

³²² *Thornton v. United States*, 541 U.S. 615, 621 (2004).

³²³ *Id.*

³²⁴ 392 U.S. 1 (1968).

³²⁵ 463 U.S. 1032 (1983).

³²⁶ *Knowles v. Iowa*, 525 U.S. 113, 118 (1998).

³²⁷ *Terry*, 392 U.S. at 23.

³²⁸ *Id.* at 24.

³²⁹ *Id.* at 17.

reason to believe that he is dealing with an armed and dangerous individual”³³⁰ Thus, the *Terry* Court empowered officers, trained in the skills of assessing danger in the field, the opportunity to rely on their own perceptions and judgments in determining whether to perform pat downs.³³¹ Chief Justice Warren gave police the chance to apply their own experience and expertise in forming reasonable suspicion for a *Terry* search.³³² Thus, regardless of the decision in *Thornton*, officers reasonably sensing danger already had the right to pat down suspects for weapons.³³³ *Thornton*’s extension of *Belton* to unknown limits, therefore, should not be necessary to preserve officer safety.

CONCLUSION

Thornton constitutes the Court’s latest expansion in a long line of precedent of the search incident to arrest exception to the warrant requirement. After its struggle in *Chimel* to link the scope of search incident to arrest to its original justifications, the Court, with the rare exception,³³⁴ has incrementally increased this official power of intrusion. Such a trend is natural, if not inevitable. Once a search right is crafted to protect police, who would be brave enough, or perhaps cold and harsh enough, to limit such a rule ensuring the safety of those who risk their lives by protecting the citizenry? It is little wonder, then, that the justices who do muster the courage to question expanding search incident to arrest often are writing dissents.

The voices of these dissenting justices are instructive here, for they anticipate, in some measure, the dangers created by the reasoning employed in *Thornton*. Once the Fourth Amendment is framed in terms of the interests of the officer as against those of the criminal, there might be a tendency to side with the protectors of societal order. Justices Frankfurter and Jackson, in their dissenting opinion in *Rabinowitz*, essentially acknowledged the distaste involved in overturning convictions of the guilty in order to protect the Fourth Amendment.³³⁵ Justice Frankfurter noted, “It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.”³³⁶ He cautioned that “while we are concerned here with a shabby defrauder, we must deal with his case in the context of what are really the great themes expressed by the Fourth Amendment. A disregard of the historic materials underlying the Amendment does not answer them.”³³⁷

³³⁰ *Id.* at 27.

³³¹ *See id.* at 27, 30.

³³² *See id.* at 23.

³³³ *Id.* at 30.

³³⁴ *See Knowles v. Iowa*, 525 U.S. 113, 114 (1998).

³³⁵ *United States v. Rabinowitz*, 339 U.S. 56, 68–69 (1950) (Frankfurter, J., dissenting).

³³⁶ *Id.* at 69.

³³⁷ *Id.*

Lacking such discipline, the Court runs the risk of losing sight of the original warrant mandate and the narrowness of its exceptions. Such a problem has particularly plagued the search incident to arrest exception, for it has suffered the “progressive distortion” of starting as a “hint” which became a “suggestion,” and then “loosely turned into dictum and finally [was] elevated to a decision.”³³⁸ Such a “precarious foundation”³³⁹ has allowed unchecked expansion of the search incident to arrest exception. This, in turn, has resulted in making “the arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest.”³⁴⁰

Such a standard, or lack thereof, might harm the intended beneficiaries of the search incident to arrest rule. Once the Court, as in *Thornton*, moved beyond the hoped-for clarity of the *Belton* rule, it created uncertainty as to the exception’s outer limits. This could cause confusion for the officer in the field. In the end, *Thornton*’s rule “offers no guidance to the police officer seeking to work out these answers for himself.”³⁴¹ This could lead to the unfortunate result seen by Justice Brennan in his *Belton* dissent that the “‘bright-line’ rule fails on its own terms.”³⁴²

Thornton might not only have crafted a failed rule, but also have contributed, in its small way, to making it an eternal search right. Regardless of its original merit, the search incident to arrest exception has tended to gain in girth and strength each time the Court has looked at it. As Justice Murphy wrote in his *Harris* dissent, “What has heretofore been a carefully circumscribed exception to the prohibition against searches without warrants has now been inflated into a comprehensive principle of freedom from all the requirements of the Fourth Amendment.”³⁴³ With this dynamic in Fourth Amendment litigation playing out once again in *Thornton*, it would thus be wise for anyone seeking to avoid the grim reaper to come back, not as a government program, but as a search incident to arrest.

³³⁸ *Id.* at 75. Justice Frankfurter further characterized search of a place incident to arrest as “an innovation based on confusion, without historic foundation, and made in the teeth of a historic protection against it.” *Id.* at 79.

³³⁹ *Id.* at 76 (referring to dicta in *Weeks v. United States*, 232 U.S. 383, 392 (1914)).

³⁴⁰ *Id.* at 80.

³⁴¹ *New York v. Belton*, 453 U.S. 454, 470 (1981) (Brennan, J., dissenting) (emphasis in original).

³⁴² *Id.* at 469.

³⁴³ *Harris v. United States*, 331 U.S. 145, 191 (Murphy, J., dissenting).