Bright Line Breaking Point: Embracing Justice Scalia's Call for the Supreme Court To Abandon an Unreasonable Approach to Fourth Amendment Search and Seizure Law

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In Thornton v. United States*, the United States Supreme Court applied the bright-line rule of* New York v. Belton *to uphold the search of containers in the passenger compartment of a car when the arresting officer made initial contact with the suspect after the suspect had parked his car and started walking away. Justice Scalia concurred in the judgment but criticized the majority for relying on the bright-line rule of* Belton *to uphold the search, stating that the Court's effort to apply the* Belton *rule stretched that doctrine "beyond its breaking point."*

Justice Scalia found the search in Thornton *lawful by applying a more general reasonableness test. He stated he would "limit* Belton *searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." Virtually every commentator who has written on* Thornton *has characterized Justice Scalia's approach as "more honest" and "built on firmer ground" than* Belton *but, nevertheless, has rejected the approach, typically over a concern that it authorizes a search of an automobile on less than probable cause.*

This Article argues that Justice Scalia's approach in Thornton *should be embraced by commentators who seek greater protection for citizens as they travel the streets and highways in their vehicles. It explores the potential for applying the reasonableness test as envisioned by Justice Scalia to limit the various bright-line rules the Court has authorized over the years. Among other advantages, such an approach would limit racial profiling and other pretextual searches, thereby providing citizens protection from one of the greatest current threats to individual liberties.*

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I. INTRODUCTION

The issue of whether searches and seizures by the police should be governed by a per se rule based on the Warrant Clause of the Fourth Amendment or a more general rule of reasonableness based on the Reasonableness Clause of that Amendment has plagued the United States Supreme Court for decades.[1] At least in theory, the warrant approach, which generally requires the police, whenever practicable, to obtain a warrant prior to undertaking a search, prevailed in the contest between the two approaches.[2] The Court frequently declares that "[i]t remains a 'cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."'"[3] However, the Court has also declared that "[t]he touchstone of the Fourth Amendment is reasonableness," and decides certain types of search and seizure cases by determining whether the government conduct is reasonable without regard to whether it was possible for the police to obtain a warrant.[4] The frequency with which the Court has utilized this

1. *See* California v. Acevedo, 500 U.S. 565, 582-83 (1991) (Scalia, J., concurring) (describing the Court's jurisprudence as "lurch[ing] back and forth" between the two approaches and advocating adoption of the reasonableness approach).

2. *See, e.g.*, *id.* at 580 (majority opinion) (recognizing that warrantless searches are per se unreasonable); Horton v. California, 496 U.S. 128, 133 n.4 (1990) (reaffirming the "cardinal principle" of the warrant requirement).

3. *Acevedo*, 500 U.S. at 580 (quoting Mincey v. Arizona, 437 U.S. 385, 390 (1978)).

4. Samson v. California, 126 S. Ct. 2193, 2201 n.4 (2006); United States v. Knights, 534 U.S. 112, 118-19 (2001); *see also* Brigham City, Utah v. Stuart, 126 S. Ct. 1943, 1947 (2006) (noting reasonableness as the "ultimate touchstone" of the Fourth Amendment); Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 828 (2002) (reviewing the school

reasonableness approach has led commentators to conclude that the Court has abandoned the per se warrant approach in favor of the reasonableness approach.[5]

A second fundamental debate that plagues the Court is whether Fourth Amendment search and seizure cases should be decided on a case-by-case method of adjudication or by the application of bright-line rules.[6] Similar to its inconsistent jurisprudence in the per se warrant versus reasonableness debate, despite stating a strong preference for case-by-case adjudication in some areas of Fourth Amendment jurisprudence,[7] in other areas the Court has expressed a preference for bright-line rules.[8] In these latter areas, the Court has pointed to the administrative need for easily applied rules to justify creating bright-line rules to uphold searches under established exceptions even when the original justifications for the exceptions are not present in the particular case before the Court.[9]

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district's drug-testing policy for reasonableness as the foundation of Fourth Amendment analysis); Michigan v. Long, 463 U.S. 1032, 1051 (1983) (noting that the "touchstone" of a Fourth Amendment analysis is reasonableness).

5. *See* Akhil Reed Amar, Terry *and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1107 (1998) [hereinafter Amar, Terry *& First Principles*] (noting that since Terry v. Ohio, 392 U.S. 1 (1968), the Court has often read the Fourth Amendment as emphasizing reasonableness rather than warrants and probable cause as the Amendment's central command); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994) [hereinafter Amar, *First Principles*] (noting that the Supreme Court does not really support the strict warrant approach); Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 355-56 (2004) (arguing this shift is the result of the Court's search for determinacy and clarity in its Fourth Amendment jurisprudence at the expense, in Professor Dripps' view, of legitimacy); William W. Greenhalgh & Mark J. Yost, *In Defense of the "Per se" Rule: Justice Stewart's Struggle to Preserve the Fourth Amendment's Warrant Clause*, 31 AM. CRIM. L. REV. 1013, 1096-98 (1994) (noting that the per se rule requiring warrants has not been expressly overruled and may be dormant).

6. *See* Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 227-31 (1984) (discussing the merits and consequences of bright-line rules); Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 320-33 (1982) (discussing both the desirability and impracticability of bright-line rules); David M. Silk, Comment, *When Bright Lines Break Down: Limiting* New York v. Belton, 136 U. PA. L. REV. 281, 281-82 (1987) (providing an overview of the two approaches of the Court).

7. *See* Ohio v. Robinette, 519 U.S. 33, 39 (1996) ("[W]e have consistently eschewed bright line rules . . . .").

8. *See* United States v. Robinson, 414 U.S. 218, 235 (1973) ("[O]ur more fundamental disagreement with the Court of Appeals arises from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest.").

9. *See, e.g.*, New York v. Belton, 453 U.S. 454, 458 (1981) ("In short, '[a] single familiar standard is essential to guide police officers, who have only limited time and

Perhaps no group of cases better illustrates both the Court's struggle with the per se warrant approach versus the reasonableness approach and the bright-line rule versus case-by-case adjudication debate than those involving the search incident to arrest exception. The checkered history of the exception prior to *Chimel v. California*[10] resulted largely from the Court shifting from the per se approach to the reasonableness approach and back again (and again).[11] Following the Court's adoption of a narrow search incident exception applying the per se warrant approach in *Chimel*, the controversy turned to the application of the exception in various settings, particularly the permissible scope of the search incident to arrest of occupants of vehicles.[12] The Court resolved that issue in favor of a bright-line rule in *New York v. Belton*, permitting the search of the passenger compartment and all containers in the passenger compartment regardless of the crime for which the occupant had been arrested or the likelihood that the arrestee could gain access to the car or containers.[13] At least one commentator appears to place the blame for this bright-line rule at the feet of the reasonableness approach.[14] But in a concurring opinion in a recent case involving the search incident to arrest exception in situations involving vehicles, Justice Scalia suggested the bright-line rule in this area failed to pass constitutional muster under the reasonableness approach.[15] He proposed limiting searches of automobiles following the arrest of recent occupants to instances where the officers have facts making it "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[16]

Commentators favoring greater Fourth Amendment protection for citizens have resisted Justice Scalia's approach because it apparently would permit searches of automobiles and containers within the automobiles on suspicion less than probable cause.[17] This

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expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" (citation omitted)).

10. 395 U.S. 752 (1969).

11. For a detailed account of this history, see George Dery & Michael J. Hernandez, *Turning a Government Search into a Permanent Power:* Thornton v. United States *and the "Progressive Distortion" of Search Incident To Arrest*, 14 WM. & MARY BILL RTS. J. 677, 681-87 (2005).

12. *Belton*, 453 U.S. at 458-59.

13. *Id.* at 560.

14. *See* Dripps, *supra* note 5, at 377-78.

15. Thornton v. United States, 541 U.S. 615, 627-29 (2004) (Scalia, J., concurring).

16. *Id.* at 632.

17. *See infra* Part III.

concern with requiring probable cause to justify searches stems from an allegiance to the Warrant Clause.[18] But a reinvigorated warrant requirement is an unlikely route to greater protection of citizens' Fourth Amendment rights. As Justice Scalia has observed concerning the "victory" of the per se warrant approach over the reasonableness approach, "The victory was illusory. Even before today's decision, the 'warrant requirement' had become so riddled with exceptions that it was basically unrecognizable."[19] The real danger today to citizens' rights to be free from unreasonable search and seizure is not that a search of their cars following their arrest will be permitted on suspicion less than probable cause, but rather that a search of their cars unrelated to the reason for the arrest will occur without any level of suspicion whatsoever.[20] This is especially true because the Court's decisions in cases involving pretext and arrests for minor offenses have made citizens particularly vulnerable to being arrested whenever they engage in the common activity of operating a motor vehicle.[21]

Justice Scalia's opinion in *Thornton v. United States* is particularly intriguing because he suggests an approach that would result in greater protections for citizens by addressing arbitrary, suspicionless searches resulting from pretextual traffic stops and arrests, and, most importantly, may appeal to a conservative majority of the Roberts Court.[22] This Article argues that it is time to abandon the quest to persuade the Court to embrace and vigorously enforce the per se warrant approach in deciding Fourth Amendment search and seizure cases. Instead, those seeking expanded protection for citizens should embrace the reasonableness approach suggested by Justice Scalia in *Thornton* as a means of advocating for greater protection from unreasonable searches and seizures, hastening the demise of bright-line rules, and restoring the personal security of individuals in their vehicles. Part II of the Article examines the various opinions in *Thornton*, paying particular attention to Justice Scalia's concurring opinion calling for a revamping of the bright-line rules governing searches incident to arrest of occupants of vehicles. Part III examines

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18. *See* Amar, Terry *& First Principles*, *supra* note 5, at 1111 (explaining the "warrantist" argument that because a warrant without probable cause is plainly unreasonable, warrantless searches without probable cause are likewise unconstitutional).

19. California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring).

20. *See* Dripps, *supra* note 5, at 394-98.

21. Professor Dripps labels this cumulative effect of *New York v. Belton*, 453 U.S. 454 (1981), *Whren v. United States*, 517 U.S. 806 (1996), and *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), as the "Iron Triangle." Dripps, *supra* note 5, at 392-93.

22. 541 U.S. 615, 625-33 (2004) (Scalia, J., concurring).

the commentary on *Thornton* that resists adoption of Justice Scalia's approach, arguing that this resistance is based on an overly optimistic allegiance to the Warrant Clause. Part IV examines Justice Scalia's proposed approach in detail, demonstrating that commentators rejecting Justice Scalia's approach are missing the opportunity to champion an approach that should hold appeal for a conservative majority of the Court, would reestablish the constitutional moorings of the search incident to arrest exception in situations involving vehicles, and would address one of the significant Fourth Amendment issues of our time: arbitrary, suspicionless searches resulting from pretextual traffic stops and arrests.

II. *THORNTON V. UNITED STATES*

A. Facts

When Marcus Thornton slowed down to avoid driving next to Officer Deion Nichols, a uniformed officer on patrol in an unmarked car, the officer's suspicions were aroused.[23] After pulling onto a side street to let Thornton pass him, Officer Nichols ran a license plate check and discovered that the license tags had been issued to a different make and model car than the one Thornton was driving.[24] Before Nichols had an opportunity to pull him over, Thornton drove into a parking lot and parked his car.[25] As Officer Nichols pulled in behind Thornton, he saw Thornton exit his vehicle.[26] Officer Nichols parked his patrol car, accosted Thornton, and asked for his driver's license.[27] He informed Thornton that his license tags did not match the make and model of the car he was driving.[28]

Based on Thornton's nervous behavior, Officer Nichols asked Thornton if he had any narcotics or weapons on him or in his car, to which Thornton replied he did not.[29] Thornton then agreed to a pat down, in the course of which Officer Nichols felt a bulge in Thornton's left front pocket.[30] Officer Nichols again asked if Thornton was carrying any illegal drugs.[31] Thornton admitted that he was and pulled

23. *Thornton*, 541 U.S. at 617.
24. *Id.* at 618.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* (describing that Thornton began rambling, licking his lips, and sweating).
30. *Id.*
31. *Id.*

two bags from his pocket, one containing three bags of marijuana and the other a large amount of crack cocaine.[32] Officer Nichols handcuffed Thornton, informed him he was under arrest, and placed him in the back seat of his patrol car.[33] He searched Thornton's vehicle and discovered a handgun under the driver's seat.[34]

Thornton was convicted of various crimes, including two based on his possession of the handgun.[35] He appealed the denial of his motion to suppress the handgun, arguing that the search incident to arrest permitted under *New York v. Belton* "was limited to situations where the officer initiated contact with an arrestee while he was still an occupant of the car."[36] The United States Court of Appeals for the Fourth Circuit denied his appeal, holding that the historical rationales supporting the search incident to arrest doctrine did not require *Belton* to be so limited.[37] The Fourth Circuit pointed to the fact that Thornton was in "close proximity, both temporally and spatially," to his vehicle to support its finding that the car was within Thornton's immediate control and the search was therefore lawful under *Belton*.[38]

B. Majority and Dissenting Opinions in the United States Supreme Court

The majority and dissenting opinions both attempted to apply, rather than reexamine, the rule of *Belton*. Chief Justice Rehnquist's opinion for the Court was a relatively short, straightforward application and clarification of *Belton*.[39] Taking the rule of *Belton* as a given, the Chief Justice quickly rejected Thornton's attempt to

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32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 619. Thornton was charged with "possession with intent to distribute cocaine base, possession of a firearm after having been previously convicted of a crime punishable by a term of imprisonment exceeding one year, and possession of a firearm in furtherance of a drug trafficking crime." *Id.* at 618 (citations omitted). A jury convicted Thornton on all three counts. *Id.* at 619.

36. *Id.*

37. *Id.* The Fourth Circuit identified these as "'the need to disarm the suspect in order to take him into custody' and 'the need to preserve evidence for later use at trial.'" United States v. Thornton, 325 F.3d 189, 195 (4th Cir. 2003) (quoting Knowles v. Iowa, 525 U.S. 113, 116 (1998)), *aff'd*, 541 U.S. 615 (2004).

38. *Id.* at 196.

39. *See Thornton*, 541 U.S. at 619-24. The Chief Justice viewed the case before the Court as the "wrong case" to reexamine the bright-line rule of *Belton* along the lines suggested by Justice Scalia because the question was not raised by the petition for certiorari and the government had not had an opportunity to address the issue. *Id.* at 624 n.4; *see also* Dery & Hernandez, *supra* note 11, at 693 (describing Justice Rehnquist's opinion as approaching *Thornton* "as a case determining the limits of *Belton*").

distinguish his case based on the fact that the officer first made contact with him after he exited his vehicle, finding that fact unpersuasive in distinguishing Thornton's case "as it bears no logical relationship to *Belton*'s rationale."[40] Justice Rehnquist noted that in setting forth the rule to govern the scope of a search of an automobile incident to arrest, the Court in *Belton* "placed no reliance on the fact that the officer . . . ordered the occupants out of the vehicle, or initiated contact with them while they remained within it."[41]

Although Chief Justice Rehnquist candidly conceded that "[i]t is unlikely in this case that petitioner could have reached under the driver's seat for his gun once he was outside of his automobile," he considered it unimportant that not all contraband in the passenger compartment is likely to be readily accessible to a suspect initially accosted outside his vehicle.[42] Important to Chief Justice Rehnquist was "[t]he need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment."[43] The fact that the clear rule in this case was to some extent loosed from its moorings in that it did not depend on the likelihood that the area searched was one from which the suspect could obtain a weapon or conceal or destroy evidence—the underlying justifications for the search incident exception—was less important to Justice Rehnquist than preserving the clarity of the *Belton* rule.[44] Chief Justice Rehnquist concluded that the "contact initiation" rule proposed by Thornton would obfuscate rather than clarify the limits of *Belton*.[45] That conclusion doomed Thornton's case because, as Justice Rehnquist explained in the footnote that ended his opinion, a reevaluation of the *Belton* rule was not before the Court.[46]

Justice Stevens's dissenting opinion, joined by Justice Souter, took precisely the opposite view of the case.[47] He agreed with Justice Rehnquist that the basic rationale of *Belton* for permitting a search of the passenger compartment and all containers was "an overriding desire to hew 'to a straightforward rule, easily applied, and predictably

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40. *Thornton*, 541 U.S. at 620.
41. *Id.*
42. *Id.* at 622.
43. *Id.* at 622-23.
44. *Id.* at 623-24.
45. *Id.* at 623.
46. *Id.* at 624 n.4.
47. *Id.* at 636 (Stevens, J., dissenting).

enforced.'"[48] However, he was of the opinion that the Court's extension of the *Belton* rule to pedestrians who are "'the sort of "recent occupant" of a vehicle such as [Thornton] was here'" was unnecessary and itself obfuscated the *Belton* rule.[49] Justice Stevens believed that in cases in which the arrestee is first accosted when he is a pedestrian, the *Chimel* rule applied and provided clear guidance.[50] He agreed with Justice Scalia that the only genuine justification for extending *Belton* to such cases was the interest in uncovering potentially valuable evidence.[51] Unlike Justice Scalia, he did not believe that interest justified a search and expressed concern that the decision would contribute to "'a massive broadening of the automobile exception' when officers have probable cause to arrest an individual but not to search his car."[52]

C. The Concurring Opinions

The concurring opinions in *Thornton* called for a reexamination of the *Belton* rule.[53] Justice O'Connor concurred in the Court's opinion, but wrote separately to express her dissatisfaction with the state of the law relating to searches of vehicles incident to arrest.[54] She expressed concern that "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel v. California*."[55] She believed that this was a "direct consequence of *Belton*'s shaky foundation," and that Justice Scalia's approach appeared to be "built on firmer ground."[56] She declined to join Justice Scalia's opinion, however, because "neither the Government nor the petitioner has had a chance to speak to its merit."[57]

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48. *Id.* at 634 (quoting New York v. Belton, 453 U.S. 454, 459 (1981)).
49. *Id.* at 636 (quoting *id.* at 623-24 (majority opinion)).
50. *Id.* (Stevens, J., dissenting).
51. *See id.*; *id.* at 632 (Scalia, J., concurring).
52. *Id.* at 636 (Stevens, J., dissenting) (quoting Robbins v. California, 453 U.S. 420, 452 (1981) (Stevens, J., dissenting)) (citation omitted).
53. *Id.* at 624-25 (O'Connor, J., concurring); *id.* at 625-32 (Scalia, J., concurring).
54. *Id.* at 624-25 (O'Connor, J., concurring). Justice O'Connor concurred in all but the final footnote of Justice Rehnquist's opinion in which he expressed his view that the case was the wrong case to reexamine *Belton* because the issue was not raised by the petition for certiorari nor considered by the court of appeals and reaching the issue would potentially involve overruling established precedent. *Id.* at 624.
55. *Id.* at 624.
56. *Id.* at 624-25.
57. *Id.* at 625.

Justice Scalia, in an opinion joined by Justice Ginsburg, concurred only in the judgment.[58] He felt the majority's application of the search incident to arrest doctrine to the search of Thornton's car stretched the doctrine "beyond its breaking point."[59] His concern was not simply the extension of the bright-line *Belton* rule to situations in which officers initiate contact with suspects after the suspect has left his vehicle.[60] Justice Scalia questioned the propriety of upholding all searches of vehicles under the rule and rationale of *Belton* in situations where, *at the time of the search*, the suspect had no realistic chance of accessing the car because he had been handcuffed or even removed from the scene.[61] Because the Court always held such searches lawful under *Belton* if the initial contact with the suspect occurred when the suspect was in his vehicle, Justice Scalia's opinion called for a reassessment of the *Belton* rule.[62]

Justice Scalia could see no reason why searches in cases where the arrestee was handcuffed and moved away from the vehicle could be justified under the twin rationales of the search incident exception: officer safety and destruction of evidence.[63] First, he was unpersuaded that such a search could be justified by any danger that the suspect could escape his confinement and retrieve a weapon or evidence from his vehicle.[64] Not only did such a scenario require an arrestee "'possessed of the skill of Houdini and the strength of Hercules,'" it was not borne out by the historical evidence put forth by the government.[65]

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58. *Id.* at 625 (Scalia, J., concurring).
59. *Id.*
60. *See id.* at 626-27.
61. *Id.*
62. *See id.* at 628-29.
63. *Id.* at 625-27.
64. *Id.* at 625-26.
65. *Id.* at 626 (quoting United States v. Frick, 490 F.2d 666, 673 (5th Cir. 1973) (Goldberg, J., concurring in part and dissenting in part)). Justice Scalia explained the evidence put forward by the government:

> The United States, endeavoring to ground this seemingly speculative fear in reality, points to a total of seven instances over the past 13 years in which state or federal officers were attacked with weapons by handcuffed or formerly handcuffed arrestees. These instances do not, however, justify the search authority claimed. Three involved arrestees who retrieved weapons concealed *on their own person*. Three more involved arrestees who seized a weapon *from the arresting officer*. Authority to search the arrestee's own person is beyond question; and of course no search could prevent seizure of the officer's gun. Only one of the seven instances involved a handcuffed arrestee who escaped from a squad car to retrieve a weapon from somewhere else: In [one case], the suspect jumped out of the squad car and

Second, Justice Scalia rejected the notion that because the officers could have searched the vehicle had the suspect remained in or near the car, the officers "should not be penalized for having taken the sensible precaution of securing the suspect in the squad car first."[66] Many courts had accepted this rationale and reasoned that denying the officer the right to search if she took the precaution of securing the suspect would be to require the search to take place in a manner "'entirely at odds with safe and sensible police procedures.'"[67] In Justice Scalia's view, "The weakness of this argument is that it assumes that, one way or another, the search must take place. But conducting a *Chimel* search is not the Government's right; it is an exception—justified by necessity—to a rule that would otherwise render the search unlawful."[68] Justice Scalia asserted:

> If "sensible police procedures" require that suspects be handcuffed and put in squad cars, then police should handcuff suspects, put them in squad cars, and not conduct the search. Indeed, if an officer leaves a suspect unrestrained nearby just to manufacture authority to search, one could argue that the search is unreasonable *precisely because* the dangerous conditions justifying it existed only by virtue of the officer's failure to follow sensible procedures.[69]

Finally, Justice Scalia rejected the argument that in *Belton* searches, the benefits of a bright-line rule justify upholding searches that, on their particular facts, do not trigger the underlying concerns

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> ran through a forest to a house, where (still in handcuffs) he struck an officer on the wrist with a fireplace poker before ultimately being shot dead.

Id. at 626 (citations omitted).

66. *Id.* at 627. Justice Scalia's rejection of the "now or earlier" rationale that the Court had used in determining the parameters of searches under several exceptions is a significant change in the Court's Fourth Amendment jurisprudence that seems to have gone unnoticed or unappreciated by commentators analyzing *Thornton*. *See* Edwin Butterfoss, *As Time Goes By: The Elimination of Contemporaneity and Brevity as Factors in Search and Seizure Cases*, 21 HARV. C.R.-C.L. L. REV. 603, 618-20, 633-34 (1986) (discussing the development of the "now or earlier" rationale in the context of the search incident to arrest and automobile exceptions to the warrant requirement).

67. *Thornton*, 541 U.S. at 627 (Scalia, J., concurring) (quoting United States v. Mitchell, 82 F.3d 146, 152 (7th Cir. 1996)).

68. *Id.* Justice O'Connor, in her concurrence, expressed the same concern:

> I write separately to express my dissatisfaction with the state of the law in this area. As JUSTICE SCALIA forcefully argues, lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel v. California*.

Id. at 624 (O'Connor, J., concurring) (citations omitted).

69. *Id.* at 627 (Scalia, J., concurring).

giving rise to the rule.[70] Although bright-line rules by definition will be over-inclusive to some extent, in Justice Scalia's view, tolerating such over-inclusiveness depends on the strength of the generality on which the rule is based.[71] Thus, in the context of a search of an automobile incident to arrest, the validity of the argument that some degree of over-inclusiveness was justified "rests on the accuracy of *Belton*'s claim that the passenger compartment is 'in fact generally, even if not inevitably,' within the suspect's immediate control."[72] Justice Scalia believed that experience demonstrated just the opposite.[73] In his view, the government's admission that "'[t]he practice of restraining an arrestee on the scene before searching a car that he just occupied is so prevalent that holding that *Belton* does not apply in that setting would . . . "largely render *Belton* a dead letter"'"[74] demonstrated that it simply was no longer true that "the passenger compartment is 'in fact generally, even if not inevitably,' within the suspect's immediate control."[75] He expressed complete agreement with a lower court judge's characterization of the current state of the law:

> "[I]n our search for clarity, we have now abandoned our constitutional moorings and floated to a place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find."[76]

Justice Scalia's solution was to recognize the truth that *Belton* searches could not be justified on the basis that an arrestee might grab a weapon or evidentiary item from his car.[77] In Justice Scalia's view, such searches could only be justified by the need to gather evidence that might be in the car.[78] He argued that this more "general sort of evidence-gathering search" was not unprecedented and proposed limiting *Belton* searches to cases "where it is reasonable to believe evidence relevant to the crime of arrest might be found in the

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70. *Id.* at 627-28.
71. *See id.* at 627-29.
72. *Id.* at 627 (quoting New York v. Belton, 453 U.S. 454, 460 (1981)).
73. *Id.* at 628.
74. *Id.* (quoting Brief for the United States at 36-37, Thornton v. United States, 541 U.S. 615 (2004) (No. 03-5165) (quoting United States v. Wesley, 293 F.3d 541, 548 (D.C. Cir. 2002))).
75. *Id.* (quoting New York v. Belton, 453 U.S. 454, 460 (1981)).
76. *Id.* at 628-29 (quoting United States v. McLaughlin, 170 F.3d 889, 894 (9th Cir. 1999) (Trott, J., concurring)).
77. *See id.*
78. *Id.* at 629.

vehicle."[79] In the case before the Court, Justice Scalia voted to uphold the search because Thornton had been lawfully arrested for a drug offense, and it was reasonable to believe that additional contraband or similar evidence related to the offense for which he was arrested might be found in the vehicle he had recently exited and which was still nearby.[80]

III. RESISTING REASONABLENESS

The commentary following *Thornton* was predictable. Many commentators decried the expansion of the *Belton* bright-line rule as unwarranted and ill-advised, but expressed hope that because five justices expressed some level of dissatisfaction with the *Belton* rule, the rule might be reexamined soon.[81] When the commentators weighed in on what rule should emerge from that hoped-for reexamination, many credited Justice Scalia's rationale and proposed rule as being more honest and "built on firmer ground,"[82] but none advocated that the Court should adopt his approach.[83] Their hesitancy stemmed largely from resistance to the reasonableness approach and a concern with protecting the Warrant Clause approach to Fourth

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79. *Id.* at 629, 632.

80. *Id.*

81. Leslie A. Lunney, *The (Inevitably Arbitrary) Placement of Bright Lines:* Belton *and Its Progeny*, 79 TUL. L. REV. 365, 394-95 (2004); David S. Rudstein, Belton *Redux: Reevaluating* Belton*'s Per se Rule Governing the Search of an Automobile Incident to an Arrest*, 40 WAKE FOREST L. REV. 1287, 1287-88 (2005). Litigants have sought such a reexamination on at least two occasions. *See* Petition for Writ of Certiorari at 2, Hrasky v. United States, 127 S. Ct. 2098 (2007) (No. 06-827) [hereinafter *Hrasky* Petition]; Petition for Writ of Certiorari at 3, Rainey v. Kentucky, 127 S. Ct. 1005 (2007) (No. 06-720). The *Hrasky* petition went so far as to argue that it was a better case than *Rainey* for the hoped for reexamination of *Belton*. *Hrasky* Petition, *supra*, at 24 n.6. Following the denial of the petition for certiorari in *Rainey*, 127 S. Ct. at 1005, the petitioner sought reconsideration and asked that the case be consolidated with *Hrasky*, but that request was also denied. Petition for Rehearing from Denial of Petition for Writ of Certiorari at 1, Rainey v. Kentucky, 127 S. Ct. 1395 (2007) (No. 06-720). Shortly thereafter, the *Hrasky* petition was also denied. *Hrasky*, 127 S. Ct. at 2098.

82. *Thornton*, 541 U.S. at 625 (O'Connor, J., concurring).

83. *See, e.g.*, Rudstein, *supra* note 81, at 1343 (noting that while Justice Scalia's rule has advantages over a per se rule, it suffers from two major flaws). Some even recognized the benefits of Justice Scalia's approach in terms of limiting arbitrary, suspicionless, and pretextual searches, but remained unpersuaded that it should be adopted. *Id.*; *see also* Dripps, *supra* note 5, at 404 (recognizing Justice Scalia's approach as a welcome attack on the "Iron Triangle," but discussing "two problematic aspects" that suggest it should not be adopted); Lunney, *supra* note 81, at 398-99 (recognizing Justice Scalia's approach would offer improvements over the majority approach, but expressing significant concerns and confusion over his approach).

Amendment search and seizure cases.[84] That led them to advocate an approach that would permit warrantless searches only as part of specifically established and well-delineated exceptions based on concerns that made obtaining a warrant impracticable, which, in turn, required focusing on the concerns justifying the search incident exception and trying to keep the exceptions as "jealously and carefully drawn"[85] as possible.[86] They generally advocated for a rejection of the bright-line rule of *Belton* and a return to applying the "wingspan" rule of *Chimel* on a case-by-case basis in all search incident cases—whether the arrest took place in the home, on the street, or in a vehicle[87]—or for limiting *Belton* searches either in the manner advocated by the defendant in *Thornton*[88] or to the passenger compartment only, not containers within the vehicle or passenger compartment.[89]

Many commentators cling to a belief that the only way to provide protection to citizens from arbitrary searches is to apply the Warrant Clause more strictly to require a warrant, or at least probable cause, to justify most searches.[90] They fear that a reasonableness approach is essentially standardless and would authorize arbitrary searches.[91] That concern was expressed very early by Justice Frankfurter in *United States v. Rabinowitz*:

> 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 the experience which it

84. *See* Amar, Terry *& First Principles*, *supra* note 5, at 1106 (explaining that for many lawyers, scholars, and judges the notion that the Fourth Amendment requires only a reasonableness analysis is "nothing less than scandalous" because "they assume that the reasonableness clause cannot be understood in isolation—it gains its true meaning only when read alongside the warrant clause").

85. Jones v. United States, 357 U.S. 493, 499 (1958).

86. *See, e.g.*, Greenhalgh & Yost, *supra* note 5, at 1016-17 (advancing the view that a warrant must be impractical or unreasonable to justify a warrantless search).

87. *See, e.g.*, Rudstein, *supra* note 81, at 1350-60 (listing the numerous advantages of the immediate control rule adopted in *Chimel*, among other possible approaches).

88. *See* Dery & Hernandez, *supra* note 11, at 700-01 (advocating for limiting *Belton* to searches involving occupants of cars and applying the *Chimel* rule in situations where the officer met the suspect outside the car).

89. *See* Rudstein, *supra* note 81, at 1338 (noting that this is the approach Justices Stevens and Souter advocated in their dissenting opinion in *Thornton*).

90. Professor Amar describes these commentators as "warrantists" and, of course, is one of their greatest critics. *See* Amar, Terry *& First Principles*, *supra* note 5, at 1106-07.

91. Greenhalgh & Yost, *supra* note 5, at 1017.

> embodies and the safeguards afforded by it against the evils to which it was a response. There must be a warrant to permit search, barring only inherent limitations upon that requirement when there is a good excuse for not getting a search warrant, *i.e.*, the justifications that dispense with search warrants when searching the person in his extension, which is his body and that which his body can immediately control, and moving vehicles.[92]

Adding to that concern is the tendency of the Court to uphold searches and seizures as reasonable under the Fourth Amendment by the simple declaration that they are so, possibly permitting unknown factors to play a role in the analysis.[93] But the Court's failure to undertake the effort does not mean the "criterion of reason" that Justice Frankfurter insisted upon cannot be found outside the Warrant Clause.[94] The road to increased protection for citizens may be to advocate for the Court to undertake this task rather than treating it as impossible or unlikely to provide adequate protection of Fourth Amendment rights.

Without entering the continuing historical debate over whether the language or the intent of the Framers was to impose a per se warrant approach or a reasonableness approach, perhaps it is time to accept the influence of reasonableness in the Court's current search and seizure jurisprudence and advocate for greater safeguards under that approach, rather than focusing on the per se warrant approach as the only route to a greater level of protection. Professor Akhil Amar, a leading advocate for the view that history and the language of the Amendment demand the reasonableness approach,[95] has identified some of the advantages of such an approach in gaining additional security for citizens.[96] He points to the Court's approach in *Terry v. Ohio*—the seminal reasonableness approach case—as a case that did not simply rely on a label of reasonableness to decide the issues before it but attempted to define why the police conduct was reasonable.[97] He suggests that the reasonableness approach offers a mechanism to provide protection for citizens that the per se warrant approach simply

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92. 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting).

93. *See* Greenhalgh & Yost, *supra* note 5, at 1090-93 (explaining the consequences of the current balancing test, including its inability to provide practical guidance).

94. *Rabinowitz*, 339 U.S. at 83 (Frankfurter, J., dissenting).

95. *See* Amar, Terry *& First Principles*, *supra* note 5, at 1098-1099; Amar, *First Principles*, *supra* note 5, at 758.

96. Amar, Terry *& First Principles*, *supra* note 5, at 1098-99.

97. *See id.*

cannot.[98] He asserts that a reasonableness approach demands proportionality and permits the Court to forthrightly consider not only privacy and secrecy, but bodily integrity, personal dignity, race, and police officer discretion, while also being responsive to popular sentiment.[99] He concludes that *Terry* "hinted at some of the factors that bear on reasonableness, but failed to develop a systematic account of these factors, needlessly leading civil libertarians to worry that under a proper reasonableness regime, government would have free rein."[100]

Perhaps civil libertarians should take up the cause of developing a search and seizure reasonableness jurisprudence that develops a systematic account of these factors rather than pressing for the primacy of the warrant. "Warrantists" are limited to arguing the search is improper because it is not supported by a warrant or probable cause—an argument that fails once bright-line rules are justified and established—rather than being able to attack directly the true evils of the searches: that they are arbitrary, pretextual, and, possibly, based on racial profiling.[101]

Another criticism of the reasonableness approach is that the approach has led to the development of bright-line rules.[102] In discussing the Court's vacillation between the per se warrant approach and the reasonableness approach, Professor Dripps characterizes *United States v. Robinson* as a "watershed decision" in the shift "away from a warrant-clause model and toward a model based on unconstrained notions of reasonableness."[103] He states that the Court in *Robinson* "rejected Robinson's claim, and the warrant-clause model along with it," concluding that after *Robinson*, "the need for bright-line rules was married to the reasonableness model of the Fourth Amendment."[104] He also describes *Belton* as a "harbinger of the sea-change" toward the reasonableness model in which the Court embraced the need for bright-line rules.[105] But Professor Dripps' view of bright-line rules being married to the reasonableness model is debatable. The alignment of the justices in *Belton* certainly does not

98. *See id.*
99. *Id.*
100. *Id.* at 1099-1100.
101. *See id.* at 1098, 1106.
102. Dripps, *supra* note 5, at 364-65.
103. *Id.* at 363.
104. *Id.* at 364-65.
105. *Id.* at 376-77.

suggest that the Court was applying a reasonableness approach.[106] The majority opinion was authored by Justice Stewart, a champion of the warrant approach;[107] Justice White, the champion of the reasonableness approach, dissented.[108] Justice Stewart began his opinion by stating the classic mantra of the warrant approach, "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."[109] Other commentators have characterized Justice Stewart's opinion as "focused on preserving the 'per se' rule while also developing clear guidelines for police and judges to apply."[110] Thus, the per se warrant approach is just as likely to blame for the creation of bright-line rules as the reasonableness approach.

Under the warrant approach, the Court, by insisting a warrant is required whenever practicable, in large measure limits the basis for forgiving the warrant to temporal exigency: that probable cause exists but there is insufficient time to obtain a warrant.[111] The limited "excuse" available for the absence of a warrant, and the apparent unavailability of excuses for the lack of probable cause, prevents consideration of the concerns identified by Professor Amar.[112] If temporal exigency is a primary basis for an exception, the exceptions created likely will prove either difficult to apply to the myriad situations that arise or too burdensome to apply strictly. An example is

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106. *See id.* at 377 (detailing the Justices' vote in *Belton*).

107. *See id.* at 377 (noting that Justice Stewart had long been a "staunch defender of the warrant requirement"); Greenhalgh & Yost, *supra* note 5, at 1059 (noting Justice Stewart's support of the warrant requirement).

108. *See* Dripps, *supra* note 5, at 377. That the warrant model arguably permitted a search of the scope at issue in *Belton*, but the reasonableness model as applied by Justice White would not have, supports the notion that the warrant approach is not the only place to look to provide greater protection of citizens' Fourth Amendment rights. *See* Amar, *First Principles*, *supra* note 5, at 759 (describing alternate ways to ensure Fourth Amendment protection including a defined reasonableness standard, the Seventh Amendment, and twentieth-century "legal weaponry").

109. New York v. Belton, 453 U.S. 454, 457 (1981). However, it is also true that Justice Stewart later quoted language from *United States v. Robinson* emblematic of the reasonableness model: "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *Id.* at 461 (quoting United States v. Robinson, 414 U.S. 218, 235 (1973)).

110. *E.g.*, Greenhalgh & Yost, *supra* note 5, at 1079 (citing *Belton* as an example of this approach by Justice Stewart); *see* Dery & Hernandez, *supra* note 11, at 688-89 (noting that *Belton*'s focus was a practical implementation of Fourth Amendment principles).

111. *Cf.* Amar, Terry *& First Principles*, *supra* note 5, at 1099 (describing how temporal exigency can justify the failure to obtain a warrant when there is probable cause).

112. *See id.* at 1098-99, 1114-15 (discussing the difficulty of explaining searches on less than probable cause under the warrant approach).

the Court's unwillingness to recognize that once an arrestee is confined in the back of a squad car or removed from the scene there is little justification for not getting a warrant.[113] The Court's unwillingness to require officers to assess whether the exigencies that forgive the warrant are still present, or to otherwise burden the officers, created pressure to establish a bright-line rule that does not vary with the presence or absence of the underlying justifications for the rule.[114] That led to the exception becoming "loosed from its moorings" and searches not justified by the original rational being upheld.[115] This artificiality makes delineating the boundaries of the rule similarly artificial and makes the rules more difficult, rather than easier, for officers in the field to understand and follow.[116]

All this suggests the reasonableness approach, not the per se warrant approach, may offer the better avenue to greater protection for

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113. Thornton v. United States, 541 U.S. 615, 625-27 (2004) (Scalia, J., concurring).

114. *See* United States v. Ross, 456 U.S. 798, 816 (1982). The Court stated:

> While the plurality's blanket warrant requirement does not even purport to protect any privacy interest, it would impose substantial new burdens on law enforcement. Confronted with a cigar box or a Dixie cup in the course of a probable-cause search of an automobile for narcotics, the conscientious policeman would be required to take the object to a magistrate, fill out the appropriate forms, await the decision, and finally obtain the warrant. Suspects or vehicles normally will be detained while the warrant is sought. This process may take hours, removing the officer from his normal police duties. Expenditure of such time and effort, drawn from the public's limited resources for detecting or preventing crimes, is justified when it protects an individual's reasonable privacy interests. In my view, the plurality's requirement cannot be so justified. The aggregate burden of procuring warrants whenever an officer has probable cause to search the most trivial container may be heavy and will not be compensated by the advancement of important Fourth Amendment values.

Id. at 816 n.21 (internal quotation marks omitted).

115. *See, e.g.*, *Thornton*, 541 U.S. at 618-20 (upholding search after suspect was handcuffed, arrested, and placed in the back of the patrol car, thereby nullifying any temporal exigency). Another example is with searches under the automobile exception. While the warrant requirement originally was excused based on the mobility of the automobile creating a temporal exigency, when the Court was faced with situations in which the automobile was impounded and therefore not mobile, it switched the rationale for excusing the warrant requirement to the lower expectation of privacy citizens enjoy in their vehicles, a basis not tied to the practicality of obtaining a warrant. *See* California v. Carney, 471 U.S. 386, 391 (1985) (noting that the mobility of an automobile is not the only rationale for searches); South Dakota v. Opperman, 428 U.S. 364, 367-68 (1976) (recognizing warrantless searches of automobiles are allowed because of mobility and a lesser expectation of privacy); Butterfoss, *supra* note 66, at 619-20 (noting the Court's recognition that mobility of an automobile is a tenuous rationale for delayed searches).

116. *See* Amar, Terry *& First Principles*, *supra* note 5, at 1120 ("'Focusing the inquiry squarely on the dangers and demands of the particular situation also seems more likely to produce rules which are intelligible to the police and public alike . . . .'" (quoting Terry v. Ohio, 392 U.S. 1, 18 n.15 (1968) (citations omitted))).

citizens. It seems there is little to lose. Continuing to press for a solution the Court is unwilling to adopt—a per se warrant approach with a strong warrant requirement and more narrowly drawn exceptions that forgive a warrant but not probable cause—has led to Fourth Amendment jurisprudence that permits precisely the type of searches those advocating for the warrant approach abhor most: completely arbitrary, suspicionless searches.[117]

In *Rabinowitz*, Justice Frankfurter asserted that deciding Fourth Amendment cases based on reasonableness without reference to probable cause and a warrant "is to make the arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest."[118] But that is precisely where we find ourselves now. Arrests for minor offenses are made not for the good of the community or to effectuate the purpose of the particular law being violated, but to justify searches of an arrestee that officers seek to undertake in order to find evidence of crimes for which they harbor no articulable suspicion.[119] The unwillingness of scholars to abandon the warrant approach, combined with a failure to appreciate fully the possible benefits of Justice Scalia's new approach, has caused them to give short shrift to his proposal.[120] In doing so, they have missed a chance to champion an approach that not only is more honest and "built on firmer ground"[121] than the current rule, but one which would address the greatest current threat to citizens' Fourth Amendment rights—suspicionless, arbitrary, and pretextual searches.[122] More importantly,

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117. *See* George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1518 (2005) (arguing that to ensure sufficient Fourth Amendment protection the Court could forego the warrant requirement but should never forego requiring probable cause).

118. United States v. Rabinowitz, 339 U.S. 56, 80 (1950) (Frankfurter, J., dissenting).

119. *See infra* Part IV.A.

120. *See* Dripps, *supra* note 5, at 404 (listing two problems with Justice Scalia's approach); Lunney, *supra* note 81, at 397-99 (arguing that Justice Scalia's approach could too easily expand beyond the realm of the automobile); Rudstein, *supra* note 81, at 1343-44 (arguing that Justice Scalia's approach is inconsistent and conflicts with *Chimel*).

121. Thornton v. United States, 541 U.S. 615, 625 (2004) (O'Connor, J., concurring).

122. Dane C. Ball, Thornton v. United States*: Blurring* Belton*'s Bright Line Rule Spells Disaster for Lower Courts and the Fourth Amendment*, 35 SW. U. L. REV. 1, 24 n.203 (2005) (noting that one good feature of Justice Scalia's approach in *Thornton* is that it could prevent some pretextual searches); *see* Thomas, *supra* note 117, at 1506-07, 1510-11, 1517 (discussing the need for changes in Fourth Amendment jurisprudence to address arbitrary, pretextual stops often based on racial profiling and the need to restore the preeminence of a requirement of individualized suspicion).

they are passing on an approach that has a legitimate chance of appealing to the new, possibly more conservative, Roberts Court.[123]

IV. EMBRACING REASONABLENESS AND JUSTICE SCALIA'S APPROACH IN *THORNTON*

The first compelling aspect of Justice Scalia's approach is one that virtually all commentators point to: it is more honest and, in Justice O'Connor's words, "built on firmer ground."[124] The ground on which *Belton* rested was less than firm from the start. On one level, the decision in *Belton* was a straightforward application of the *Chimel* search incident to arrest exception to the vehicle setting.[125] *Chimel* permitted searching the area within the immediate control of the arrestee, defined as the wingspan or lunging area of an arrestee.[126] If the arrestee were in a vehicle at the time of arrest, a search of some portion of the passenger compartment could be justified because it would be within the arrestee's lunging area.[127] But the ground supporting *Belton* softened when the Court attempted to justify a bright-line rule. In addition to relying on the questionable assertion that lower courts were having difficulty applying the *Chimel* rule to the vehicle setting,[128] the Court justified a bright-line rule with the assertion that the passenger compartment is "'in fact generally, even if not inevitably,' within the arrestee's immediate control."[129] That likely was not true even in *Belton* because the arresting officer had separated the four arrestees on the highway before searching the vehicle. Only

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123. *See* Craig M. Bradley, *Just One Cheer for the Court*, TRIAL, Aug. 2004, at 62, 64 (suggesting that an approach based on Justice Scalia's opinion might persuade a majority of the Court).

124. *Thornton*, 541 U.S. at 625 (O'Connor, J., concurring); *see, e.g.*, Ball, *supra* note 122, at 23 (supporting Justice O'Connor's preference for Justice Scalia's approach); Rudstein, *supra* note 81, at 1343 (agreeing that Justice Scalia's approach is more stable than the Court's bright-line reasoning in *Belton*).

125. *See* New York v. Belton, 453 U.S. 454, 460 n.3 (1981) ("Our holding today does no more than determine the meaning of *Chimel*'s principles in this particular and problematic context. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.").

126. *See* Chimel v. California, 395 U.S. 752, 763 (1969) ("There is ample justification, therefore, for a search of 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.").

127. *Belton*, 453 U.S. at 460.

128. *See* LaFave, *supra* note 6, at 330-33.

129. *Thornton*, 541 U.S. at 625 (Scalia, J., concurring) (quoting *Belton*, 453 U.S. at 460).

the four to one ratio made it plausible that the arrestees could gain access to the vehicle.

The ground supporting the *Belton* rule softened further as the Court applied it in subsequent cases. As Justice Scalia pointed out in *Thornton*, if it had ever been true that the passenger compartment was generally within the immediate control of the arrestee, the factual scenarios of cases subsequent to *Belton* demonstrated that the practice of restraining arrestees prior to searching vehicles, thus placing the passenger compartment beyond their control, became universal, supporting the charge that by continuing to uphold such searches, courts had abandoned the "constitutional moorings" of the search incident to arrest exception in cases involving vehicles.[130]

One rationale utilized by courts to uphold searches carried out after the arrestee has been restrained (and even removed from the scene) is that if such searches are declared unlawful, rather than surrender the power to search, the officer simply will perform the search before restraining the arrestee.[131] Thus, the logic goes, prohibiting such searches provides no additional privacy protection to the citizen but simply denies police the ability to undertake the search in a safe and sensible manner.[132] The Supreme Court had utilized this "now or earlier" rationale in previous cases to extend the automobile exception and the search incident to arrest exception.[133] An overlooked aspect of Justice Scalia's opinion in *Thornton* is that he directly attacks the blanket application of this logic under the reasonableness approach.[134] He takes issue with the assumption that if a search after the arrestee has been restrained is prohibited, the officer necessarily retains the authority to search prior to restraining the arrestee:

> If "sensible police procedures" require that suspects be handcuffed and put in squad cars, then police should handcuff suspects, put them in squad cars, and not conduct the search. Indeed, if an officer leaves a suspect unrestrained nearby just to manufacture authority to search, one could argue that the search is unreasonable *precisely because* the

130. *Id.* at 628-29.

131. *Id.* at 627.

132. *Id.* (noting the argument presented in United States v. Mitchell, 82 F.3d 146, 152 (7th Cir. 1996) that police should not be penalized for following safe procedures).

133. *See, e.g.*, United States v. Ross, 456 U.S. 798, 824 (1982) (upholding a warrantless, delayed search based on the automobile exception); *see also* Butterfoss, *supra* note 66, at 618-20, 625, 633-34 (discussing the emergence and application of the "now or earlier" rationale in the automobile exception and search incident to arrest exception).

134. *Thornton*, 541 U.S. at 627 (Scalia, J., concurring).

> dangerous conditions justifying it existed only by virtue of the officer's failure to follow sensible procedures.[135]

If Justice Scalia's *Thornton* approach includes rejecting the "now or earlier" rationale, or at least requires a more careful application of the rationale, it is even more reason for those advocating greater protection of individual rights to champion his position.[136]

The most fundamental advantage of Justice Scalia's approach is his focus on the need to justify searches by articulating a reason to believe that evidence of a crime will be found in the location to be searched.[137] Ironically, this advantage is viewed as a fatal flaw by many commentators.[138] Because Justice Scalia suggested a "reasonable to believe" test rather than requiring probable cause, most commentators abandoned his approach.[139] While the desire to require probable cause to justify a search is understandable for those focused on a per se warrant approach, Justice Scalia's approach should not so quickly be abandoned. As mentioned earlier, the greatest threat to citizens' Fourth Amendment protections against unreasonable searches and seizures, particularly in the context of vehicle searches, is not searches that take place based on individualized suspicion less than probable cause but arbitrary searches authorized on no suspicion whatsoever.[140] Thus, Justice Scalia's requirement of suspicion—even suspicion less than probable cause—is a step forward in the protection of citizens' rights,

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135. *Id.*

136. Rejecting this rationale would result in new limits in searches incident to arrests in homes where the practice of restraining or removing the arrestee prior to the search is as prominent as it is in the cases involving vehicles. *See* Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of* Chimel *and* Belton, 2002 WISC. L. REV. 657, 657-72 (arguing that because police are generally taught to first handcuff an arrestee, the assumption that an arrestee has the ability to reach a weapon in his immediate area is unfounded); *see also* Butterfoss, *supra* note 66, at 618-20, 633-34 (noting that this rationale has played an important role in the expansion of the automobile exception and the search incident to arrest exception); Dery & Hernandez, *supra* note 11, at 703-04 (discussing the Court's expansion of the search incident to arrest exception utilizing this rationale).

137. *Thornton*, 541 U.S. at 632 (Scalia, J., concurring).

138. *See, e.g.*, Rudstein, *supra* note 81, at 1345-47 (lamenting the result of this approach that would allow a warrantless search on less than probable cause).

139. *See id.* At least one commentator read Justice Scalia's opinion to equate "reasonable to believe" with the military's conception of probable cause. *See* Ernest Harper, *Defending the Citadel of Reasonableness: Search and Seizure in 2004*, ARMY LAW., Apr. 2005, at 47, 53 (stating Justice Scalia's "reason[] to believe" test "sounds very much like probable cause, as defined by MRE 315(f)(2)"). Although such a reading would appease many of the commentators who reject Justice Scalia's approach, it seems unlikely that is what Justice Scalia intended. If probable cause were present, the automobile exception would justify the search, eliminating the need for a search incident to arrest rationale. *See* California v. Carney, 471 U.S. 386, 391-92, 394-95 (1985).

140. *See* Dripps, *supra* note 5, at 420-21.

not a step back. Only a belief that the warrant requirement still controls and has teeth in these situations would lead to concern over the fact that the search takes place on less than probable cause.

A. Relief from the "Iron Triangle"

Law review articles frequently bemoan the loss of Fourth Amendment protection for citizens while driving (or riding in) automobiles.[141] The combined effect of cases upholding pretextual stops, arrests for minor offenses, and searches under bright-line rules has been to make citizens subject to arrest and searches virtually at the unrestrained discretion of the officer in the field.[142] Professor Dripps recently baptized this phenomenon the "Iron Triangle":

> *Belton* authorizes [a] thorough search of the person and the passenger compartment incident to arrest, even though the charge is failure to pay child support and the search is of a fishing tackle-box. The decision in *Whren v. United States* held that police motives for a stop are irrelevant so long as the requisite probable cause or reasonable suspicion is present, even when Vice Squad officers stop a suspected drug dealer for driving at an unreasonable speed. The last leg in the Iron Triangle is *Atwater*, holding that the Fourth Amendment permits the arrest of persons suspected on probable cause of committing any offense, even a misdemeanor for which no jail time is authorized and even when there is no apparent risk of flight or repeated offending.[143]

Professor Dripps explains that because each leg imposes a bright-line rule, "[t]he Iron Triangle means in practice that the police have general search power over anyone traveling by automobile."[144] He argues that this practical power of officers to arrest and search any traveler at their unrestrained discretion is the sort of practice the Framers detested and offends widely shared contemporary judgments about what police

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141. *See id.*; Tracey Maclin, *The Fourth Amendment on the Freeway*, 3 RUTGERS RACE & L. REV. 117, 151-57 (2001); David S. Rudstein, *The Search of an Automobile Incident to an Arrest: An Analysis of* New York v. Belton, 67 MARQ. L. REV. 205, 205-06 (1984); Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 273-75 (1989).

142. *See* Maclin, *supra* note 141, at 145-46; Rudstein, *supra* note 81, at 1334-38; Salken, *supra* note 141, at 223-25.

143. Dripps, *supra* note 5, at 392 (footnotes omitted).

144. *Id.* at 393. Professor Dripps is not alone in making this observation. *See* Maclin, *supra* note 141, at 145-46 (noting that because of the myriad of potential traffic violations, police have incredible power to stop anyone traveling by automobile).

practices are reasonable.[145] But like other commentators, while describing Justice Scalia's opinion as an "admittedly welcome" attack on the "Iron Triangle," he finds sufficient problems with Justice Scalia's approach to reject it as the solution to the problem.[146]

Professor Dripps' main concern with Justice Scalia's approach is that the rule Justice Scalia proposes—that in order to search incident to arrest the police must have some reason to suspect evidence, contraband, or weapons—is too vague.[147] He describes it as "a standard, not a rule, and a fairly vague standard at that."[148] He reads Justice Scalia's proposal as not requiring probable cause and suggests that the Court "eventually might equate [Justice Scalia's] standard with the *Terry* reasonable-suspicion standard."[149] Although he admits that adopting such a standard "would be helpful from the standpoint of determinacy because it would give police and lower courts a familiar toolkit with which to work," he concludes that it would still not provide sufficient guidance for police and lower courts and identifies "[a]t least four major uncertainties" that would be created.[150] But several of the uncertainties that Professor Dripps identifies seem to result from a reading of Justice Scalia's opinion as calling for rewriting the basic search incident to arrest exception.[151] Read in a more limited fashion as calling for a reevaluation of the Court's utilization of bright-line rules to expand the exception to situations beyond the underlying

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145. Dripps, *supra* note 5, at 401-04. In his article, Professor Dripps characterizes the reasonableness approach of the Burger Court as relying on "widely-shared social judgments of reasonableness" and describes the approach of the Rehnquist Court as based on the "new historicism" championed by Justice Scalia, relying on "the Founders' views of reasonableness as reflected in the common law" to determine the Fourth Amendment reasonableness of contemporary police practices. *See id.* at 394. He concludes that the effect of the decisions making up the "Iron Triangle" fails "both the test of history and the test of reason," and therefore, cannot be justified under either the Burger Court or the Rehnquist Court approaches to reasonableness. *Id.* at 403-04.

146. *Id.* at 404 (noting Scalia's approach both adopts common law principles that may not have been the intent of the Framers and does not create a standard readily applicable by police); *see also supra* note 120 and accompanying text (discussing cursory treatment of Justice Scalia's approach).

147. Dripps, *supra* note 5, at 404. He expresses another concern that the rule may not be supported by Justice Scalia's desire to decide Fourth Amendment cases by looking to whether the practice was prohibited at common law. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 404-05.

151. *See id.* at 405-07. Suggesting confusion as to Justice Scalia's rule would seem to prove Professor Dripps' point about its uncertainties. But a single case, however, could clear up the basic disagreement as to how it should be read, thus eliminating the struggle Professor Dripps suggests lower courts would experience applying the rule. *See id.* at 407.

justifications of *Chimel*, Justice Scalia's approach offers an attractive escape from the "Iron Triangle."

Professor Dripps' first concern is that a "*Terry*-type approach" would require in all search incident to arrest situations "case-by-case determinations not just about the scope of the suspect's reach (the *Chimel* test) but about the likelihood that any weapons, evidence or contraband *was in fact in the area searched*."[152] This assumes that Justice Scalia was suggesting imposing his "reason to believe" test on top of the "wingspan" test of *Chimel* so that no search incident to arrest is permitted unless reasonable suspicion exists to believe contraband or weapons are accessible to the arrestee. But Justice Scalia likely did not intend to change the rule for a "wingspan" search incident to arrest—that would remain automatic. He was addressing searches beyond the wingspan that the Court justified in *Belton* by relying not on the rationales that supported the *Chimel* rule, but with the need for a bright line to define the limits of the search.[153] He was concerned with *Belton* searches, not *Chimel* searches generally.[154]

It was the Court's application of the bright-line rule of *Belton* in the *Thornton* situation—when the passenger compartment was indisputably outside the wingspan or lunging area of the suspect—that in Justice Scalia's view "stretche[d] it beyond its breaking point."[155] And it was that situation for which Justice Scalia suggested a new rationale.[156] Several times he expressed his concern with *Belton*

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152. *Id.* at 405.

153. *See* Thornton v. United States, 541 U.S. 615, 629-30 (2004) (Scalia, J., concurring).

154. Professor Dripps argues that the common law methodology relied on by Justice Scalia in deciding Fourth Amendment cases would be influenced by the fact that the common law did not permit automatic searches incident to arrest but imposed a requirement of suspicion (not a strict requirement of probable cause) that evidence, weapons, or contraband might be found during the search. Dripps, *supra* note 5, at 404. In his analysis of Justice Scalia's approach, he seems to assume that the common law methodology would be utilized to reevaluate the *Chimel* search incident to arrest rule. *See id.* at 405 n.297 ("Justice Scalia's approach might therefore undermine *Chimel* as well as *Belton*."). But though he examined the historical justification for the *Chimel* rule, Justice Scalia concluded "both *Rabinowitz* and *Chimel* are plausible accounts of what the Constitution requires, and neither is so persuasive as to justify departing from settled law." *Thornton*, 541 U.S. at 631 (Scalia, J., concurring). Thus it seems fair to evaluate Justice Scalia's approach in *Thornton* as requiring a new approach to *Belton* searches but leaving *Chimel* searches unaffected.

155. *Thornton*, 541 U.S. at 625 (Scalia, J., concurring). He explained that because Thornton was nowhere near the passenger compartment at the time his car was searched, but was handcuffed and secured in the back of a squad car, the risk of him obtaining a weapon or destroying evidence from the passenger compartment was "remote in the extreme." *Id.*

156. *Id.* at 631-32.

searches[157] and concluded by stating, "I would therefore limit *Belton* searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[158] Thus, Justice Scalia did not intend to limit *Chimel* searches incident to arrest to situations where there is some likelihood that weapons, evidence, or contraband are, in fact, present within the area of immediate control of the arrestee.[159] The rule of *Chimel* as described by Professor Dripps remains unchanged by the approach suggested by Justice Scalia.[160]

Professor Dripps' second concern is that "a *Terry* approach would have to deal with the suspect's physical capabilities, especially as they relate to containers."[161] He reads Justice Scalia's approach as requiring an assessment not only of the likelihood that "[a] backpack (or a briefcase or a toolbox, etc.)" may hold evidence or contraband, but notes that it would be necessary to determine "how easy . . . it [would] be for the suspect to grab it and destroy it on the facts of a given case."[162] But again, that is not what Justice Scalia advocates. He is proposing a rule that permits a "more general sort of evidence-gathering search" of areas outside the area to which an arrestee may gain access.[163] The only assessment required is the likelihood of evidence or contraband being discovered, not the ability or likelihood of the suspect gaining access to the area.[164]

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157. *See id.* at 629, 631 (noting his concern by stating "[i]f *Belton* searches are justifiable" and "[r]ecasting *Belton* in these terms").

158. *Id.* at 632.

159. *See id.*

160. Dripps, *supra* note 5, at 405 ("*Chimel* did not (or at least does not now) require particularized suspicion of this sort; when the suspect is placed under arrest, the police may search drawers and closets within the grabbing range without any reason to think that evidence or a weapon may be there." (footnote omitted)). At least the general rule remains unchanged. If Justice Scalia's rejection of the "now or earlier" rationale is applied in the context of search incident to arrests in homes, this "automatic" search may not be permitted in cases where the suspect is restrained or removed from the scene, a limit not currently imposed by the Court. *See supra* note 66 and accompanying text.

161. Dripps, *supra* note 5, at 405.

162. *Id.*

163. *Thornton*, 541 U.S. at 629 (Scalia, J., concurring).

164. *See id.* The search authorized under Justice Scalia's approach apparently is geographically limited to the areas of the vehicle where there is reason to believe evidence exists; he did not suggest the officers could search anywhere they had reason to believe they would find evidence. In situations not involving a vehicle, some limit will have to be placed on the geographic scope of the permissible search, but that limit is likely to be defined by returning to a pre-*Chimel* notion of "immediate control," delineated by something other than wingspan or lunging area. *See id.* at 629 n.1 (referring to the use of the term "immediate control," United States v. Rabinowitz, 339 U.S. 56, 61 (1950), as used "in a broader sense than the one it acquired in *Chimel*"). Even in the case of a vehicle, how recently the suspect was in control of the car, or how nearby the car is at the time of arrest would be relevant to a

Professor Dripps' third concern is that "the test would have to account for what the police might have done differently."[165] He sets out the classic "now or earlier" rationale that has led to the expansion of searches under various exceptions:

> If the police learn that they lose the search power once the suspect is handcuffed or locked in the squad car, they may search the suspect (perhaps at gunpoint for security purposes—hardly an ideal arrangement) while the suspect is still in the car or just outside. Does the *Terry* approach require them to curtail their search authority by restraining the suspect?[166]

The short answer is that under Justice Scalia's approach, the authority of the officer does not change when the suspect is restrained. In some situations, however, the police will not have the authority to search prior to or after restraining the suspect.

Under Justice Scalia's proposed rule, the authority to search *the suspect* is unaffected by his location—the police are entitled to search the suspect before taking him into custody and can do so after removing him from his car.[167] A search of the car for evidence is similarly unaffected by the location of the suspect.[168] If it is reasonable to believe evidence relevant to the crime of arrest might be found in the car, the officers may search even after the suspect is removed—that is precisely the point of Justice Scalia's approach. He justifies the search more forthrightly by relying on an evidence-gathering rationale rather than a strained rationale of officer safety or destruction of evidence that cannot support a search if the arrestee is restrained or removed from the scene.[169] Conversely, if the officers are interested in evidence of a crime unrelated to the offense for which the suspect is arrested, they are out of luck regardless of the location of the suspect. That is the advantage of Justice Scalia's approach: it removes the incentive for pretextual arrests in order to gain the right to search.

As for conducting a "*Chimel*" search—including portions of the car—while the suspect is still in the car, the officers may again be out of luck. As mentioned earlier, a collateral benefit of Justice Scalia's approach is his rejection of the "now or earlier" rationale and his

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conclusion that it was reasonable to believe evidence would be found in the vehicle. *See id.* at 630 ("[I]t is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.").

165. Dripps, *supra* note 5, at 406.

166. *Id.* (footnote omitted).

167. *See Thornton*, 541 U.S. at 626 (Scalia, J., concurring).

168. *See id.* at 632.

169. *Id.* at 629.

calling into question the validity not only of a search after the suspect has been removed from the car but also an earlier search when the suspect is still in the car.[170] As Professor Dripps recognizes, it seems dangerous and not sensible to conduct the search of the suspect and portions of the car while the suspect remains in the car.[171] Justice Scalia dealt with this issue directly. He explained that "[i]f 'sensible police procedures' require that suspects be handcuffed and put in squad cars, then police should handcuff suspects, put them in squad cars, and not conduct the search."[172] He went on to assert that "if an officer leaves a suspect unrestrained nearby just to manufacture authority to search, one could argue that the search is unreasonable *precisely because* the dangerous conditions justifying it existed only by virtue of the officer's failure to follow sensible procedures."[173]

Finally, Professor Dripps laments that Justice Scalia's approach "would have to be squared with *Ross* and *Acevedo*."[174] He recognizes that Justice Scalia's suspicion-based approach would curtail searches incident to arrests for traffic violations, but worries that in the "common case of an arrest for possession of drugs, perceived by the officer during the process of writing a traffic citation," the new approach gives the power to search for suspected contraband without probable cause, a power the officer would not have under *Ross* and *Acevedo*.[175] But this power gain will occur in very few situations. If the officer has perceived "during the process of writing a traffic citation" facts that provide the officer with the authority to arrest for drug possession, those facts must amount to probable cause.[176] If the officer has probable cause that the car or a particular container in the car harbors drugs, *Ross* and *Acevedo* are preserved and permit the search. If the probable cause is so specific to the person and not the car such that it is not reasonable to believe drugs will be found in the car, Justice Scalia's approach (unlike current law) will not permit the search.[177] The only scenario in which the officer will have gained a

170. *Supra* notes 127-132 and accompanying text.
171. Dripps, *supra* note 5, at 406.
172. *Thornton*, 541 U.S. at 627 (Scalia, J., concurring).
173. *Id.*
174. Dripps, *supra* note 5, at 406.
175. *Id.*
176. *Id.*
177. *See Thornton*, 541 U.S. at 632 (Scalia, J., concurring). It seems unlikely this would occur in light of the Court's decision in *Wyoming v. Houghton*, 526 U.S. 295 (1999). In *Houghton*, based on the officer's observation of a syringe in the pocket of a driver stopped for a traffic violation and the driver's candid admission that he used the syringe to take drugs,

power to search that does not exist under *Ross* and *Acevedo* is if the officer perceives facts that support probable cause that the traffic violator possesses drugs on his person, and these facts make it reasonable to believe that drugs may be found in the car (authorizing a search under Justice Scalia's rule), but do not amount to probable cause to believe drugs are in the car or containers in the car (which would authorize a search under *Ross* and *Acevedo*). That scenario is unlikely to occur very frequently.[178] Thus, the ability of police officers to use the "search-incident power to circumvent the probable cause required for a warrantless search under the automobile exception" that Professor Dripps laments seems extremely limited under Justice Scalia's approach.[179]

Even if Professor Dripps' power gain situation exists to a greater extent than suggested here, Justice Scalia's approach to this situation is still a vast improvement over existing law. Currently, if the officer has probable cause to arrest for only a traffic violation—or, to use Professor Dripps example, failure to pay child support—the passenger compartment of the car, including all containers, can be searched to find drugs.[180] Under Justice Scalia's approach, the officer needs both probable cause to arrest *for a drug offense* and facts making it "reasonable to believe" that drugs will be found in the car.[181] The new approach eliminates one leg of the "Iron Triangle"—the bright-line rule of *Belton*—and puts a significant dent in the other legs. Arrests

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the Court found a search of the vehicle and the passenger's purse authorized under the automobile exception. *Id.* at 298, 302.

178. Moreover, for such a scenario to occur and result in suppression of evidence, one has to believe a judge who perhaps subjectively believed that there was only "reason to believe evidence" would be found in the car would be willing to suppress evidence rather than making the small leap to deciding that a finding of probable cause was justified. *See* Alschuler, *supra* note 6, at 248-49 ("Similarly, the Supreme Court's insistence that probable cause is a 'single familiar standard' cannot make the essentially undefined constitutional language a unitary, bright line concept. Proclaiming that 'the term "probable cause" rings a bell of certainty,' as Justice Douglas did in a dissenting opinion in *Terry v. Ohio*, is unlikely to lead any judge to condemn as unreasonable a search that the judge considers reasonable." (footnote omitted)). *But see* Rudstein, *supra* note 81, at 1348-50 (hypothesizing a situation in which "the police have probable cause to believe a particular individual committed armed robbery of a bank" but "*lack* probable cause to believe that the individual's automobile contains contraband or the fruits, instrumentalities, or evidence of the armed robbery or any other crime, although (for whatever reason) it is 'reasonable for [them] to believe' that the suspect's automobile 'might' contain evidence of the bank robbery," and arguing that Justice Scalia's approach expands the authority of the police by allowing them to search the car on suspicion less than probable cause by simply arresting the suspect in close proximity to the automobile, something they would not be permitted to do under current law).

179. Dripps, *supra* note 5, at 406-07.

180. *See id.* at 392.

181. *Thornton*, 541 U.S. at 632 (Scalia, J., concurring).

for minor traffic offenses (the *Atwater* leg) are less attractive to officers because they do not provide automatic justification to search the car. Most importantly, if the officer arrests for a minor traffic offense, and develops suspicion amounting to less than probable cause that narcotics may be in the car, she still cannot search. Justice Scalia would authorize a search only where it was "reasonable to believe evidence *relevant to the crime of arrest* might be found in the vehicle."[182] The officer needs probable cause to arrest for a drug offense to trigger the right to search the car based on a reason to believe less than probable cause. Pretextual stops (the *Whren* leg) are similarly less attractive. They may still occur because the officer executing a stop for a traffic violation motivated by a hunch relating to a drug offense may feel confident of discovering facts during the traffic stop that provide probable cause to arrest for a narcotics offense and make it reasonable to believe that evidence related to the arrest offense can be found in the car.[183] But the officer's hunch must be correct. If nothing provides suspicion during the traffic stop that rises to the level of probable cause to justify an arrest for a crime other than the traffic offense, no search can take place.[184]

Under existing law, the officer may execute the stop on a hunch counting on the search incident to the arrest for the minor traffic offense to turn up the evidence of the narcotics violation.[185] Although Professor Dripps suggests other approaches to the problem of the "Iron Triangle" may be more effective and more attractive, Justice Scalia's approach seems effective in addressing the abuses shielded from review under current law. More importantly, Professor Dripps' "more attractive" approaches depend on a reinvigoration of the warrant approach or overruling *Atwater*, making them unlikely to be adopted.[186] Even if Justice Scalia's approach is not viewed as the best,

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182. *Id.* (emphasis added).

183. Under current law, this "hunch" may be based on nothing more than racial profiling. *See* Whren v. United States, 517 U.S. 806, 813 (1996) ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.").

184. No *nonconsensual* search can take place. The pretextual stop may still be utilized to gain consent. *See* Maclin, *supra* note 141, at 131-35 (noting that police officers can request consent for a search of a vehicle). Some courts have acted under their state constitutions to eliminate that practice. *See* State v. Fort, 660 N.W.2d 415, 416 (Minn. 2003) (holding that in Minnesota officers may not seek consent during traffic stop without reasonable suspicion of criminal behavior).

185. *Whren*, 517 U.S. at 812-13 (holding that the motive for a stop is irrelevant and any resulting searches or arrests would be valid).

186. Dripps, *supra* note 5, at 407 (recognizing that an approach prohibiting arrests for minor offenses is "if you pardon the pun, Atwater under the bridge").

it may be the best we can hope for, and a more attractive choice than Professor Dripps suggests.

Professor Dripps is not alone in his rejection of Justice Scalia's approach based on concern about authorizing searches on less than probable cause. Professor David Rudstein, another commentator who concedes Justice Scalia's proposed rule is "certainly 'built on firmer ground,'" identifies the rule's most serious flaw as allowing the police to conduct a warrantless search of an automobile and its contents on less than probable cause.[187] He views the probable cause standard as the means to safeguard citizens from "'rash and unreasonable interferences with privacy,'"[188] and he argues Justice Scalia's "less-than-probable-cause standard" does not adequately protect citizens' legitimate expectation of privacy in their automobiles and containers transported in those automobiles.[189] He argues "there is no valid reason to eliminate the requirement of probable cause merely because the police arrested the driver or passenger of the vehicle."[190]

This argument understates the magnitude of the triggering event required by Justice Scalia's approach. Unlike an arrest for a mere traffic violation that currently triggers authority for a *Belton* search, the authority to search on less than probable cause under Justice Scalia's approach is triggered only if the officer has probable cause to believe the individual is involved in criminal activity. An arrest for a traffic offense provides no authority to search the vehicle or containers on less than probable cause because no evidence of the offense for which the citizen was arrested will exist in the car or the containers.[191] Only if the arrest is for a more serious offense for which there might be evidence in the vehicle or the containers, and the officer can articulate why it is reasonable to believe such evidence will be found there, may the officer search.

In fact, as Professor Rudstein recognizes, in many cases the facts making it reasonable to believe evidence will be found in the car or containers will amount to probable cause.[192] He concedes that "[i]n many cases, the same probable cause supporting the arrest of an occupant or recent occupant of an automobile will provide probable

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187. Rudstein, *supra* note 81, at 1343-45 (internal quotation marks omitted).

188. *Id.* (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

189. *Id.* at 1345-46.

190. *Id.* at 1346.

191. An exception may be an arrest for driving under the influence, for which evidence may exist in the car, but driving under the influence is more serious than a typical, minor traffic offense.

192. Rudstein, *supra* note 81, at 1346-47.

cause to search the arrestee's vehicle and containers therein."[193] Thus, it is a very limited number of cases in which Justice Scalia's approach grants officers broader authority than a rule based on probable cause, adding credibility to Justice Scalia's assertion that it makes sense to grant such authority because the fact of the arrest (for a crime, not a traffic offense) distinguishes the individual from society at large and distinguishes the search from "general rummaging."[194] Most importantly, of course, it protects against the arbitrary, *suspicionless* searches that currently take place following arrests for minor traffic violations.

An additional concern of Professor Rudstein is that Justice Scalia's proposed rule would conflict with the *Chimel* rule governing the search of a home or office incident to the arrest of an individual.[195] That concern seems hard to justify. There is nothing new in the idea that searches in a home are treated differently than searches outside the home, particularly when vehicles are involved.[196] Professor Rudstein's true concern seems to be possible confusion about when to apply the *Chimel* rule or when to apply Justice Scalia's new rule in situations outside the home.[197] He asserts that Justice Scalia apparently would limit searches under his rule to the passenger compartment and containers in the passenger compartment but complains that Justice Scalia's rationale seems to apply with equal force to the trunk.[198] The answer to that concern is that Justice Scalia's rationale *and* his rule likely *do* apply to the trunk; Justice Scalia likely would not limit the search to the passenger compartment as Professor Rudstein suggests.[199]

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193. *Id.* at 1347. Professor Maclin has suggested there is no real difference between probable cause and reason to believe. Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1332 (1990) (noting that various "scholars of diverse viewpoints agree that the probable cause test is now the functional equivalent of a reason to suspect").

194. Thornton v. United States, 541 U.S. 615, 630 (2004) (Scalia, J., concurring). This is consistent with the rationale the Court has utilized in recent cases. *Cf.* Samson v. California, 126 S. Ct. 2193, 2197-99 (2006) (noting that a parolee or probationer does not enjoy the same legitimate expectation of privacy as the rest of society because of his status in the continuum of possible punishments after an arrest).

195. Rudstein, *supra* note 81, at 1343-44.

196. *See id.* at 1310-11.

197. *Id.* at 1344.

198. *Id.*

199. Professor Rudstein concedes that Justice Scalia "did not expressly state this limitation of his proposed rule," but bases his conclusion on the fact that Justice Scalia several times in his opinion referred to the searches in question as "*Belton* searches." *Id.* at 1344 n.294. But Justice Scalia intended to redefine the rationale and the scope of *Belton* searches and did not intend to retain the artificial bright line drawn in that case. His

The point of Justice Scalia's new rule is that it is based on an evidence-gathering function, not the safety and destruction of evidence rationale dependent on accessibility to the arrestee that motivated the Court to draw a line at the trunk in *Belton*. That focus eliminates any basis for a line at the trunk and eliminates the possible confusion Professor Rudstein identifies.

Professor Rudstein also asserts that Justice Scalia would limit his rule "to situations in which the arrestee was an occupant or recent occupant of the vehicle," and questions "why should that same rule not also apply when the police arrest an individual inside his home and his car is parked on the driveway next to his front door, or when the police arrest an individual while he is walking towards his car and is in close proximity to it?"[200]

Although Justice Scalia did seem to be limiting his rule as Professor Rudstein suggests—he referred to "motorists" being arrested and to "*Belton*" searches—it makes sense under Justice Scalia's approach to distinguish the situation Professor Rudstein points to and require that the automobile be in some way related to or involved in the arrest (the arrest occurred when the arrestee was an occupant or recent occupant) in order for it to qualify under the search incident to arrest exception.[201] Because Justice Scalia relies on the arrest to distinguish the arrestee from society at large and distinguishes the search from general rummaging, a relationship between the *arrest*—not simply the arrestee—and the car seems essential to invoking the exception to justify a search of the car.[202] An automobile that just happens to be owned by the arrestee should require some other basis to justify a search. Justice Scalia's suggestion that the temporal and geographic proximity of the arrestee to the vehicle were relevant to the authority to

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references to *Belton* searches likely were meant to refer generally to searches of automobiles incident to arrest, the scope of which he intended to redefine.

200. *Id.* at 1344.

201. Of course, under current law, the situations are treated differently presumably because the passenger compartment is within the lunging area only of occupants and recent occupants. But once those individuals have been restrained or removed from the scene, that is no longer true, but the rule nevertheless does not change. According to the petition for certiorari in *Hrasky*, lower courts currently are confused whether *Thornton* requires both a temporal and spatial proximity to the vehicle or simply a temporal proximity. *Hrasky* Petition, *supra* note 81, at 9. There is a split of authority regarding the need for the suspect to be close enough to the vehicle at the time of arrest to have a realistic chance of accessing it. Some courts have abandoned any realistic requirement of spatial proximity. *See id.* at 9-12 (citing as one example Black v. State, 810 N.E.2d 713 (Ind. 2004) (noting that the "suspect had exited his vehicle, entered an auto shop, and requested an oil change before police arrived on the scene and arrested him")).

202. *See* Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J. concurring).

search supports the idea that a vehicle unrelated to the arrest process simply would not qualify to be searched under the exception.[203]

B. The New Search Incident to Arrest Exception Under Justice Scalia's Thornton *Approach*

Contrary to the picture of a confused search and seizure jurisprudence painted by some commentators, Justice Scalia's approach provides the basis for a logical and consistent set of rules, grounded in the concerns underlying the Fourth Amendment, that prevents "'rash and unreasonable interferences with privacy'" and is easily understood and complied with by police officers.[204] Most importantly, and seemingly overlooked by commentators who reject Justice Scalia's approach, is a recognition that "conducting a *Chimel* search is not the Government's right; it is an exception—justified by necessity."[205]

While the authority to search the person upon arrest remains unquestioned, any search beyond the person to prevent destruction of evidence or obtaining a weapon depends on such a search being necessary. Under this approach, if the suspect is removed from the scene or restrained in a way that makes such conduct impossible, a search cannot take place. In addition, any search beyond the wingspan is governed by three basic principles. First, searches for evidence generally must "follow the suspicion"—that is, they must be justified by suspicion that the individual is involved in criminal activity and evidence will be found in the particular place searched.[206] Second, searches in the home require greater justification than those outside the home.[207] And third, searches to protect officer's safety are more readily justified, but must be limited to efforts to protect the officer and others from a nonabsurd danger.[208]

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203. *See id.* at 632.

204. Rudstein, *supra* note 81, at 1345 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

205. *Thornton*, 541 U.S. at 627 (Scalia, J., concurring); *see also id.* at 624 (O'Connor, J., concurring) (voicing agreement with Justice Scalia's forceful argument that lower courts "seem now to treat the ability to search a vehicle incident to . . . arrest . . . as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*," and describing this "erosion" as a "direct consequence of *Belton*'s shaky foundation").

206. *See id.* at 632 (Scalia, J., concurring).

207. *See* Rudstein, *supra* note 81, at 1310-11.

208. *See Thornton*, 541 U.S. at 625-29 (Scalia, J. concurring).

1. Follow the Suspicion

This is not a new principle.[209] Until the explosion of bright-line rules that authorized suspicionless searches, this proposition would have been widely accepted and recognized. Even the cases authorizing suspicionless searches generally require special justification for such searches.[210] The principle that the authority to search follows the suspicion is the principle Justice White urged in *Chimel* and should guide the Court in search incident to arrest cases.[211] In *Chimel*, Justice White would have permitted a more extensive search than the majority.[212] He suggested that when a lawful arrest occurred in a home, the likelihood of "confederates," or others who would attack the officers or destroy evidence, being present created an exigency that forgave the warrant requirement.[213] In his view, an exigency would permit the officers already lawfully in the home to search anywhere in the house where they had probable cause to believe evidence or contraband would be found.[214]

While Justice White's "follow the suspicion" principle would have expanded the scope of the search incident to arrest in the home, it led him to dissent in *Belton* because "searches of luggage, briefcases, and other containers in the interior of an auto are authorized in the absence of any suspicion whatsoever that they contain anything in which the police have a legitimate interest."[215] Although Justice White required probable cause as the level of suspicion required to justify the expanded search in *Chimel*, he was focused on searches in the home.[216] Justice Scalia's "reasonable to believe" standard would address Justice White's concern, shared by Justice Scalia and commentators, about

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209. *See* Maryland v. Garrison, 480 U.S. 79, 84 (1987).

210. *See, e.g.*, Samson v. California, 126 S. Ct. 2193, 2199 (2006) (holding as valid a search, regardless of a lack of suspicion, warrant, or probable cause, because of the status of the suspect (a parolee)).

211. *See* Chimel v. California, 395 U.S. 752, 773-74, 780 (1969) (White, J., dissenting).

212. *Id.*

213. *Id.* at 773-74.

214. *Id.* at 774. Although the Court did not adopt his approach, it later did address the exigency of potential officer-attacking or evidence-destroying confederates whom Justice White believed often would be present and should forgive the warrant. *See* Maryland v. Buie, 494 U.S. 325, 327 (1990) (holding that the Fourth Amendment permits a "protective sweep"). The Court's careful, incremental approach to that question (unlike the bright-line rule of *Belton*) supports the second principle, that searches in the home require greater justification, as well as the third principle, that searches to protect officer safety are more readily justified but must be limited to efforts to alleviate the danger.

215. New York v. Belton, 453 U.S. 454, 472 (1981) (White, J., dissenting).

216. *Chimel*, 395 U.S. at 773-74 (White, J., dissenting).

searches authorized "in the absence of any suspicion whatsoever."[217] This simple principle—that a search for evidence must be justified by some level of suspicion that evidence will be found in the place searched—serves to avoid the arbitrary, suspicionless searches that have become common under the *Belton* bright-line rule. And it is not a difficult concept for officers to understand and apply. It is the rule that already governs their conduct in situations other than the bright-line rule exception of *Belton*.

2. Searches in the Home Require Greater Justification

This principle is a long-standing one on which the Court increasingly has relied in recent years.[218] This overriding principle justifies different treatment of searches in a home incident to an arrest and searches of a vehicle incident to arrest. Different treatment does not mean there is a conflict or that confusion would be generated.[219] The same principle applies in both situations: a search for evidence incident to arrest beyond the person and the area within the immediate control must be justified by suspicion that evidence will be discovered in the place searched.[220] The suspicion required, not surprisingly, is greater in the home.[221] In fact, the greater protection afforded the home requires not only suspicion at the level of probable cause, but also a warrant.[222] Such a requirement is logical even under the reasonableness approach. Justice White, an advocate of the reasonableness approach, recognized that reasonableness sometimes required a warrant, and that searches of the home were one of those times.[223] Justice Scalia's approach, by recognizing that a search (other than for protection of the officer) beyond the person and the area within the immediate control is really an "evidence-gathering" search, signals to

217. Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring); *Belton*, 453 U.S. at 472 (White, J., dissenting).

218. *See* Kyllo v. United States, 533 U.S. 27, 31 (2001).

219. The current state of the law has different rules governing these different situations. *Belton* governs searches involving occupants and recent occupants of vehicles, while *Buie*, governs searches in the home.

220. *See Chimel*, 395 U.S. at 762-64 (discussing the limits to a search incident to arrest in the home and in a vehicle).

221. *See* Carroll v. United States, 267 U.S. 132, 153 (1925) (noting the reduced practicality of a warrant to search a car compared to a house because of its ready mobility).

222. *See* Maryland v. Buie, 494 U.S. 325, 331 (1990) (noting that searches of the home are "generally not reasonable without a warrant issued on probable cause").

223. *Id.*

officers that they need to justify such a search as they would any other search for evidence.[224]

It is basic search and seizure law that a home search generally requires a warrant and probable cause—an easily understood concept for officers.[225] Officers are not likely to be confused or surprised to learn that a lesser justification is required outside the home. They are familiar with the difference between reasonable suspicion that permits them to stop and frisk and probable cause that permits them to arrest and to search under *Ross* and *Acevedo*.[226] Learning and remembering that in the limited context of a search incident to arrest of an occupant or recent occupant of a vehicle that they are permitted to search the vehicle for evidence based on reasonable suspicion should not be difficult; arguably it is easier than remembering the artificial bright-line of *Belton* that (for reasons that may not be present in the particular case) the police officers can search an automobile and containers inside following an arrest, but they cannot enter the trunk.[227] And with the bright line removed from the officers' options, if they err, they are likely to err by thinking they need probable cause in this situation as they do in other auto situations, those governed by *Ross* and *Acevedo*. Such a mistake does not result in an unjustified invasion of privacy because the officers will refrain from searching, which should please those advocating for greater protection for citizens. The officers' mistaken belief does deprive society of evidence (if the suspicion is correct), but society's interest was relatively weak—the officer did not even have probable cause to believe the evidence was in the vehicle.

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224. United States v. Thornton, 541 U.S. 615, 629 (2004) (Scalia, J., concurring). "Evidence gathering" is referenced in the sense of looking for evidence to incriminate the individual, not seeking to protect evidence from destruction, one of the underlying rationales justifying the search of the arrestee and the area within the immediate control. *See id.*

225. *See* Steagald v. United States, 451 U.S. 204, 222 (1981).

226. *See* Dripps, *supra* note 5, at 404-05 (recognizing, although not finding satisfactory, that adopting the *Terry* reasonable suspicion standard would provide police with a "familiar toolkit" and would add determinancy to the Court's jurisprudence in this area).

227. *See* Alschuler, *supra* note 6, at 231 ("[T]he task of marking the boundary of even a bright line rule usually is not mechanical; and when the rule is artificial, delimiting its boundary becomes a matter of guesswork."); *id.* at 234 ("[T]o require that officers master and apply a multiplicity of artificial rules may demand more than they should be expected to provide. A rule of reason that takes an officer's unhappy lot as its starting point may be fairer, not only from the perspective of the sound administration of public justice, but also from the perspective of the officer himself."); *id.* at 287 ("What renders substantive fourth amendment law incomprehensible . . . is not the lack of categorical rules but too many of them. . . . Only a police officer who studies Professor LaFave's three-volume treatise on evenings and weekends can master the epicycles.").

One danger of adopting Justice Scalia's approach in *Thornton* is that he will not draw the distinction suggested here between the home and a vehicle and in future cases will permit expanded searches of the home. This possibility is suggested by Justice Scalia's reliance on *United States v. Rabinowitz* to justify the "evidence-gathering" search he advocated should be authorized in *Thornton*.[228] As Justice Scalia explained, the Court in *Rabinowitz* upheld a search of the arrestee's business without restricting the authority to search to the lunging area of the arrestee and "did not justify the search as a means to prevent concealment or destruction of evidence."[229] Instead, the Court "relied on a more general interest in gathering evidence relevant to the crime for which the suspect had been arrested."[230] Justice Scalia also cited a familiar series of cases upholding similar searches in homes.[231] But Justice Scalia also noted that the narrower rule of *Chimel* "also has historical support."[232] He characterized the *Rabinowitz* rule, if extended to its logical end, as "hard to reconcile with the influential case of *Entick v. Carrington*," and concluded that although "both *Rabinowitz* and *Chimel* are plausible accounts of what the Constitution requires, . . . neither is so persuasive as to justify departing from settled law."[233] Moreover, while he argued that an honest assessment of the searches permitted under *Belton* would recognize them as "a return to the broader sort of search incident to arrest that we allowed before *Chimel*," he was careful to add, "limited, of course, to searches of motor vehicles, a category of 'effects' which give rise to a reduced expectation of privacy and heightened law enforcement needs."[234] Thus, it seems safe to conclude that Justice Scalia does not view his new approach as opening the door to expanded searches of homes incident to arrest. It seems likely he would find it logical to draw a distinction and provide greater protection in the home. That approach has been a consistent theme of his opinions in Fourth Amendment cases.[235]

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228. *See Thornton*, 541 U.S. at 629 (Scalia, J., concurring).
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.* at 630.
233. *Id.* at 631.
234. *Id.* (citations omitted).
235. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 40 (2001) (holding that police may not use sense-enhancing technology to gather any information about the inside of a home that could not have been gained without a physical intrusion into the home without a warrant).

Rather than leading to expanded searches incident to arrest in the home, application of Justice Scalia's analysis in *Thornton* may result in new limits on such searches. If Justice Scalia's apparent rejection in *Thornton* of the "now or earlier" rationale is adopted and applied to homes, a number of searches that currently take place under the exception would be eliminated.[236] At present, as with vehicle searches, many searches in the home of the lunging area take place after the suspect has been restrained or removed. If Justice Scalia is consistent, these searches would no longer be reasonable.

3. Searches to Protect Officer Safety are More Readily Justified but Limited to Efforts To Eliminate Danger

Justice Scalia rejected the notion that suspects handcuffed in the back of squad cars pose a risk of escaping and recovering a weapon from their vehicle sufficient to justify a bright-line rule.[237] Although the danger likely exists before the suspect is confined, Justice Scalia suggested conducting a search prior to confinement in order to "manufacture authority to search" likely was also unreasonable.[238] Without a bright-line rule, any search of the vehicle incident to arrest for safety reasons requires articulation of the danger that justifies the search. This is consistent with the rules for search incident to arrest in the home.

Searches incident to arrest in the home are limited to the person of the arrestee and the area within his immediate control—there is no bright line extending the search beyond the immediate area of the arrest as there is in vehicle cases under *Belton*.[239] To address possible danger (attacks by confederates of the arrestee) to officers effecting arrests in homes, the Court in *Maryland v. Buie* permitted a cursory

236. Justice Scalia's belief that homes deserve greater protection certainly suggests that there would be no reason not to apply this rationale to the home. *See, e.g.*, *Kyllo*, 533 U.S. at 40 (evidencing Justice Scalia's solicitousness towards the home). In addition, in addressing the possibility that the search in *Thornton* might be justified by danger to the officer of the suspect escaping the back of the squad car and retrieving a weapon from the car, he analogized it to the danger of an arrestee in a home escaping and recovering a weapon in the next room, which would not justify a search of additional rooms under *Chimel*, suggesting that he believes the same general principles apply to the search incident to arrest doctrine in each situation. *Thornton*, 541 U.S. at 627 (Scalia, J., concurring).

237. *Id.* at 625-26.

238. *Id.* at 627.

239. *Compare* Chimel v. California, 395 U.S. 752, 763 (1969) (holding that there is no justification for searching any room, area, or items outside of the arrestee's immediate control without a warrant), *with* New York v. Belton, 453 U.S. 454, 459-60 (1981) (adopting the bright-line rule that the entire area within the passenger compartment may be searched incident to arrest).

inspection on reasonable suspicion of areas from which such confederates might be hiding.[240] The same approach likely would apply to searches incident to arrest of occupants and recent occupants of a vehicle where circumstances (e.g., passengers present who are not being arrested) provide reasonable fear that a weapon may be in the vehicle and used against the officer. Current law, *Michigan v. Long*, already provides for just such a scenario; it permits police to conduct an area search of the passenger compartment to uncover weapons, as long as they possess an articulable and objectively reasonable belief that the suspect is potentially dangerous.[241] If the suspect has been confined to the back of a squad car, but his passengers have not been arrested, surely the principle of *Long* permits a limited search to uncover weapons.[242] The Court in *Buie* pointed to *Long* as support for the search for safety it was permitting in the home incident to an arrest.[243]

V. CONCLUSION

The approach to searches incident to arrest in situations involving vehicles suggested by Justice Scalia in *Thornton* offers relief from the "Iron Triangle" that currently permits suspicionless searches of citizens and their vehicles at the unconstrained discretion of individual officers in the field, often justified by pretextual reasons that hide improper motives. His suggested approach offers the added benefit of providing a rationale that may appeal to the conservative Court that will be deciding these cases in the years to come. Early commentary on *Thornton*, however, demonstrates reluctance to embrace Justice Scalia's approach because it authorizes searches of vehicles on less than probable cause. But the new power to search on less than probable cause is a minor expansion of the current authority of officers, and the gain in relief from the "Iron Triangle's" arbitrary search regime seems worth the price.

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240. 494 U.S. 325, 327 (1990). *Buie* also provides an "automatic" right to cursorily inspect closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. *Id.* at 334. No comparable area exists in the case of a vehicle. Justice Scalia in his opinion in *Thornton* equated the vehicle to an adjoining room in the search incident to arrest in a home situation. *See* 541 U.S. at 629-30 (Scalia, J., concurring). If that analogy is accurate, the rules governing searches for safety reasons are consistent in case of an arrest in a home and an arrest of an occupant or recent occupant of a vehicle.

241. 463 U.S. 1032, 1051 (1983).

242. *See id.*

243. *Buie*, 494 U.S. at 327.

Commentators also resist Justice Scalia's approach because it utilizes the reasonableness approach, which they fear cannot be contained and will lead to an overbroad authority to search. But the alternative, the warrant approach, has not proved effective in preventing a broad expansion of search authority. Whether this is because the Court has abandoned it, because the warrant requirement has become so riddled with exceptions as to be ineffective, or because the Court is willing to utilize bright-line rules to uphold searches that cannot be justified by the rationales supporting the exception being utilized, the point is that the time is ripe for a new approach. Those who believe the language and history of the Fourth Amendment demand the warrant approach may attack this proposal to embrace the reasonableness approach as sacrificing principle for pragmatism. I prefer to stand on the principle that the Fourth Amendment should at a minimum provide citizens with protection from arbitrary, suspicionless searches, something it is not accomplishing at present. Justice Scalia's approach offers the possibility of legitimate protection from such searches. It is time to stop "spitting into the wind" that has been blowing against the warrant approach for decades and take advantage of a shift in the wind by seeking and advocating for a reasonableness approach that provides citizens the Fourth Amendment protection they deserve.