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In Search of Straightforward Rules: The Burger Court's Expansion of the Search Incident to Arrest Exception to the Warrant Requirement Fourth Amendment

Stephen Gibbs

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IN SEARCH OF STRAIGHTFORWARD RULES: THE BURGER COURT'S EXPANSION OF THE SEARCH INCIDENT TO ARREST EXCEPTION TO THE WARRANT REQUIREMENT.

I. INTRODUCTION

The fourth amendment to the United States Constitution affords the people protection from unreasonable searches and seizures by mandating the issuance of a warrant.¹ The purpose of the warrant requirement is to prevent "unreasonable" government intrusions into the privacy of the people. The warrant clause effectuates this protection by demanding that the determination of the existence of probable cause to conduct a search be made "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."² The Supreme Court continually expresses a preference for warrants throughout its opinions.³ Available studies tend to show, however, that the Court's preference for warrants is more fiction than fact.⁴ Warrantless searches are presently sanctioned:

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1. The fourth amendment provides:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
   U.S. CONST. amend. IV.
3. The Court has stated that "the most basic constitutional rule in this area is that 'searches' conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment...." Coolidge v. New Hampshire, 403 U.S. 443, 454 (1971) (citation omitted).

Comparison of total number of search warrants issued with the arrests is equally illuminating. In 1966 the New York Police [Department] obtained 3,897 warrants and made 171,288 arrests. It is reliably reported that in San Francisco in 1966 there were 29,084 serious crimes reported to the police, who during the same year obtained only 19 search warrants.
upon consent,\textsuperscript{5} in "hot pursuit" situations,\textsuperscript{6} to prevent imminent destruction of evidence,\textsuperscript{7} where an automobile's mobility makes the securing of a warrant impracticable,\textsuperscript{8} and incident to a lawful arrest.\textsuperscript{9}

Searches incident to arrest, the subject of this Comment, account for more than 90 percent of all searches.\textsuperscript{10} The prevalence of the search incident to arrest exception and its insulation from judicial examination indicates that the exception has, in reality, replaced the warrant requirement of the fourth amendment.

The Supreme Court, in \textit{Chimel v. California},\textsuperscript{11} held that the proper scope of a search incident to arrest is the "arrestee and his area of immediate control. . ."\textsuperscript{12} This definition was an attempt by the Court to limit the unreasonably broad searches that had been conducted under \textit{United States v. Rabinowitz},\textsuperscript{13} while preserving the law enforcement interest in protecting the arresting officer and preventing the destruction of evidence. The \textit{Chimel} Court's failure to patently employ the analysis of \textit{Terry v. Ohio},\textsuperscript{14} however, has resulted in broad constructions of \textit{Chimel}'s "area of immediate control" standard. In addition, \textit{Chimel}'s failure to address the problem of third parties on the arrest premises has led to the emergence


6. Warden v. Hayden, 387 U.S. 294, 295-300, 310 (1967) (warrantless search of house valid because police had probable cause to believe armed robbery suspect had entered only minutes before).


10. L. TIFFANY, D. McINTYRE & D. ROTENBERG, supra note 4, at 122.


12. Id. at 763.


of the "protective sweep" doctrine\textsuperscript{16} whereby officers are permitted to search the arrest premises for potential third parties. Together, these factors have prevented Chimel from stemming the abuses of Rabinowitz.

Subsequent decisions by the Burger Court have led to the serious undermining of Chimel and further erosions of the warrant requirement. The Court's decisions in \textit{United States v. Robinson}\textsuperscript{16} and \textit{Gustafson v. Florida}\textsuperscript{17} held that the search incident to arrest exception applies to \textit{all} arrests, including those for traffic violations\textsuperscript{18} and crimes for which no evidence can possibly be found. The Court's granting of a \textit{per se} right to search, with no possibility of court review, was a departure from traditional fourth amendment analysis requiring a case-by-case examination of warrantless searches. \textit{United States v. Edwards}\textsuperscript{19} upheld, as incident to the arrest, a search of the defendant's person that was remote in time and place from the act of taking the defendant into custody. Edwards undercuts Chimel's requirement that a search incident to arrest must be contemporaneous with the arrest. In \textit{New York v. Belton}\textsuperscript{20} the Court applied Chimel to the search of an automobile pursuant to the arrest of its occupants. Belton adopted a "straight forward" rule allowing the search of the automobile interior and all containers found within, irrespective of the circumstances of the arrest.\textsuperscript{21} This approach and the Court's repeated citations to Robinson create uncertainties as to the continued viability of Chimel. In addition, Belton cannot be satisfactorily reconciled with the Court's previous decision in \textit{United States v. Chadwick}\textsuperscript{22}.

This Comment will first trace the inconsistent development of the search incident to arrest doctrine leading up to Chimel. It then analyzes Chimel and shows how its protec-

\textsuperscript{15}. See Kelder & Statman, \textit{The Protective Sweep Doctrine: Recurrent Questions Regarding the Propriety of Searches Conducted Contemporaneously within an Arrest on or Near Private Premises}, 30 \textit{SYRACUSE L. REV.} 973 (1979); see also Aaronson \& Wallace, \textit{A Reconsideration of the Fourth Amendment's Doctrine of Search Incident to Arrest}, 64 \textit{Geo. L.J.} 53, 70-72 (1975).
\textsuperscript{16}. 414 U.S. 218 (1973).
\textsuperscript{17}. 414 U.S. 260 (1973).
\textsuperscript{18}. 414 U.S. at 235.
\textsuperscript{19}. 415 U.S. 800 (1974).
\textsuperscript{21}. \textit{Id.} at 459.
tions have been circumvented by lower court interpretations. Next, an examination of Robinson, Gustafson, and Edwards will show how the Court's analysis has undermined Chimel. Finally, it will focus on Belton, its conflicts with Chadwick, and the dangers of applying Robinson to area searches.

II. DOCTRINAL DEVELOPMENT: Weeks Through Rabinowitz

A striking aspect of the historical development of the search incident to arrest doctrine is the Supreme Court's lack of consistency. The Court's decisional twists, turns, and reversals have been the subject of extensive commentary. The search incident to arrest doctrine is an example of "how a hint becomes a suggestion, is loosely turned into dictum and is finally elevated to a decision." The doctrine first surfaced in the Court's opinions in three cases, none actually involving a search incident to arrest, decided early in the twentieth century: Weeks v. United States, Carroll v. United States, and Agnello v. United States.

Weeks involved a series of warrantless searches of the defendant's home during which personal papers, later used as evidence against the defendant, were seized. The Court in Weeks stated in dicta that the right "to search the person of the accused when legally arrested to discover and seize the fruits or evidence of crime... has been uniformly maintained in many cases." The Carroll Court upheld the warrantless search of an automobile that police had probable cause to believe contained contraband liquor. In an "embelishment of the Weeks statement," the Carroll Court, again in dicta, explained the scope of a search incident to arrest to

23. See e.g., Chimel v. California, 395 U.S. 752 (1969); United States v. Rabinowitz, 339 U.S. at 68-69 (Frankfurter, J., dissenting); LaFave, SEARCH AND SEIZURE, supra note 4, at 266-70, 408-10; Aaronson & Wallace, supra note 15, at 55-60.
27. 269 U.S. 20 (1925).
28. 232 U.S. at 386-87.
29. Id. at 392. The Court failed, however, to cite any American precedent for this statement.
30. 267 U.S. at 158-59.
"whatever is found upon his person or in his control . . . ." 32

In Agnello, the Court invalidated the warrantless search of the defendant's home subsequent to the defendant's arrest a few blocks away. 33 The Agnello Court, citing Carroll and Weeks, stated: "The right . . . to search persons lawfully arrested while committing crime and to search the place where the arrest is made . . . is not to be doubted." 34 As Justice Frankfurter later observed in United States v. Rabinowitz, 35 "[i]f such a right was 'not to be doubted' it certainly cannot be supported by the cases cited." 36

The issue of the permissible scope of a search incident to arrest was first squarely presented to the Supreme Court in Marron v. United States. 37 The police in Marron, while executing a search warrant, observed criminal behavior by the defendant. Pursuant to the defendant's arrest the police seized evidence not covered by the warrant. The Marron Court held that police could search for and seize all items connected with criminal activity in the immediate possession and control of the arrestee. The Court construed the area of the arrestee's immediate control broadly, holding it to extend throughout his entire business establishment. 38

In Go-Bart Importing Co. v. United States, 39 decided four years after Marron, and on similar facts, the Court held unconstitutional a warrantless search incident to arrest. 40 Distinguishing Marron, the Go-Bart Court found the police had adequate time to obtain a warrant and had not witnessed any criminal activity at the time of arrest. 41 The Court narrowed the scope of a permissible search incident to arrest, prohibiting a "general search or rummaging of the place," and required that the search be limited to things "visible and acces-

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32. 267 U.S. at 158 (emphasis added).
33. 269 U.S. at 30-31.
34. Id. at 30 (emphasis added).
36. Id. at 77 (Frankfurter, J., dissenting). In Weeks, the Court confirmed the right to search the person of the arrestee. 232 U.S. at 392. In Carroll, the Court expanded the scope of the search to include items found upon the arrestee or in his control. 267 U.S. at 158. In neither case did the Court make reference to the right to search the place where the person is arrested.
37. 275 U.S. 192 (1927).
38. Id. at 198-99.
40. Id. at 358.
41. Id. at 357-58.
sible and in the offender's immediate custody." Go-Bart was reaffirmed one year later in United States v. Lefkowitz, another case involving a general search pursuant to the defendant's arrest. The Lefkowitz Court held the search unconstitutional and warned that "an arrest may not be used as a pretext to search for evidence."

The Court performed a complete turnaround fifteen years later in Harris v. United States, upholding a thorough search of the defendant's four room apartment as a proper search incident to arrest. Within a year the Court distinguished Harris, holding in Trupiano v. United States that a valid arrest did not legitimize a warrantless search. Trupiano suppressed evidence seized pursuant to the defendant's arrest, even though the evidence was in plain view, because the police failed to obtain a search warrant when they had ample opportunity to do so.

Trupiano was overruled two years later in United States v. Rabinowitz. Rabinowitz signaled the decline of all fourth amendment rights of an arrestee. Relying on Harris, the Rabinowitz Court upheld the complete search, pursuant to arrest, of the defendant's office, including his desk, safe, and files. The search was upheld despite the obvious intent of the officers to conduct a warrantless search and the adequate opportunity to obtain a warrant prior to the arrest. The Court announced that the new test for searches incident to arrest was "not whether it is reasonable to secure a search warrant, but whether the search was reasonable."

The Rabinowitz test discouraged police from obtaining search warrants by implying that warrants are not required for a search pursuant to

42. Id. at 358.
43. 285 U.S. 452 (1932).
44. Id. at 467.
45. 331 U.S. 145 (1947).
47. "The mere fact that there is a valid arrest does not ipso facto legalize a search or seizure without a warrant. . . . [T]here must be some other factor . . . that would make it unreasonable or impractical to require the arresting officer to equip himself with a search warrant." Id. at 708.
48. Id. at 706.
50. Id. at 65-66. "The arresting officers were accompanied by two stamp experts, whose sole function was to examine the fruits of the search they knew would be made." Id. at 85 (Frankfurter, J., dissenting).
51. Id. at 66.
arrest. Thus, Rabinowitz encouraged warrantless searches of the arrest premises, absent probable cause or any showing of need based on the circumstances of the arrest. These abuses led the Court to reach a compromise in *Chimel v. California*.

### III. Chimel: The Warren Court's Compromise

*Rabinowitz* and *Harris* were overruled by the Warren Court's landmark decision, *Chimel v. California*, which now controls the scope of searches incident to arrest. *Chimel* considered the constitutionality of the warrantless search of the defendant's entire house and garage pursuant to his arrest in his home. The Court's holding in *Chimel* narrowed the scope of a search incident to arrest to "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." The Court properly differentiated between the arrestee's privacy interests in his person, and his privacy interest in his house, papers, and effects upon his arrest. Consequently, *Chimel* "reached the long overdue conclusion that a person's home may not be subjected to a warrantless search merely because he happens to be arrested there."

Although the holding in *Chimel* dealt specifically with the physical scope of a search incident to arrest, the Court also reaffirmed the requirement that the search must be contemporaneous with the arrest.

52. Although *Rabinowitz* remained good law for 19 years, it was the subject of critical commentary. See e.g., Way, Increasing Scope of Search Incident to Arrest, 1969 Wash. U.L.Q. 261; Note, Scope Limitations for Searches Incident to Arrest, 78 Yale L.J. 433 (1969); The Supreme Court 1966 Term, 81 Harv. L. Rev. 69, 117-22 (1967).


54. Id.

55. Id. at 753-54.

56. Id. at 763.

57. LaFave, Search and Seizure, supra note 4, at 267.

58. "The rule allowing contemporaneous searches is justified . . . by the need to seize weapons . . . as well as the need to prevent destruction of evidence of the crime. . . . But these justifications are absent where a search is remote in time or place from the arrest." *Preston v. United States*, 376 U.S. 364, 367 (1964). In *Preston*, the defendant was arrested for vagrancy while parked in his car. His car was impounded and subsequently searched. Evidence was found during a search of the car that led to his conviction for conspiracy to rob a bank. The search was held unconstitutional as being too remote in time and place to be incident to arrest.
In contrast to the broad unlimited power to search that had been exercised by the police under Rabinowitz, Chimel was viewed by some as too restrictive because it limited the area of search to the arrestee’s “immediate control.” Chimel has, however, apparently been less restrictive than these commentators contend.

A. The Chimel Loophole

Chimel, by allowing a search justified solely by the arrest event but limiting the search to the area of the arrestee’s “immediate control,” attempted to balance the law enforcement needs of protecting the arresting officer and preventing the destruction of evidence against the fourth amendment privacy interests of the arrestee. The subsequent inability of Chimel to strike this balance can be tied to the Court’s failure to patiently employ the traditional two-step fourth amendment analysis of Terry v. Ohio. The Terry analysis requires a dual inquiry: “[first], whether the officer’s action was justified at its inception, and [second], whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” Chimel approved the first step of the Terry inquiry in dicta only and thereby implied that a search is justified in every arrest. This permits the police to, in effect, create their own exigency in order to effectuate a search. By directly using only the latter half of the Terry inquiry, Chimel allowed lower courts to approve searches without any objective showing of need based on the circumstances of the arrest.

60. 392 U.S. 1 (1968) (officer may conduct a limited frisk for weapons if he reasonably believes that criminal activity is afoot and that the suspect may be armed).
61. Id. at 20.
62. See Aaronson & Wallace, supra note 15, at 60-62; Kelder & Statman, supra note 15, at 985-90. A strong argument can be made, however, that Chimel did in fact through its quotations of previous cases, intend that a search be limited by the need presented in each case. “The scope of [a] search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.” Chimel, 395 U.S. at 762 (quoting Terry v. Ohio, 392 U.S. at 19). Later the Chimel Court discussed Peters v. New York, 392 U.S. 40 (1969), and said, “[In Peters] we emphasized that the arresting officer ‘did not engage in a thorough going examination of Peters and his personal effects. . . .’ ” 395 U.S. at 764. The Chimel Court also quoted from Preston v. United States, 376 U.S. 364, 367 (1964): “The rule allowing contemporaneous
B. The Lower Courts' Broad Interpretation of Chimel

The effectiveness of Chimel's prohibition against broad, unjustified area searches has been seriously undermined by subsequent lower court interpretations of the arrestee's "area of immediate control." The "immediate control" standard has been interpreted so broadly as to give the arrestee "the skill of Houdini and the strength of Hercules. . . ." In United States v. Patterson, the defendant's wife was arrested at home pursuant to an arrest warrant charging her with uttering a forged instrument. The defendant's home was searched while he and his wife were detained in the living room by five officers. The officers seized a manila envelope out of a partially open kitchen cabinet. The contents of the envelope implicated the defendant in the robbery of a safety deposit box. Even though Patterson can only be viewed as a rummaging search for evidence, the court of appeals held that the search of the kitchen was reasonable in order to insure the officers' safety.

The emergence of the "protective sweep" doctrine, which allows arresting officers to immediately search the premises for possible third parties to insure the officer's searches is justified . . . to prevent destruction of evidence of the crime. . . ." 395 U.S. at 764 (emphasis added). "Evidence of the crime" is an overt requirement of a nexus between the arrest and the objectives of the search.

63. United States v. Mason, 523 F.2d 1122, 1131 (D.C. Cir. 1975) (Bazelon, C.J., dissenting) (footnote omitted). Some examples of the broad interpretation given to the suspect's "area of immediate control" are contained in United States v. Matlock, 558 F.2d 1328, 1331 (8th Cir. 1977) (seizure of arrestee's briefcase, believed to contain weapons, from wife's possession valid even though arrestee in patrol car); United States v. Mulligan, 488 F.2d 732, 734 (9th Cir. 1973), cert. denied, 417 U.S. 90 (1974) (gun seized from coat in closet while arrestee detained on bed); United States v. Ciotti, 469 F.2d 1204, 1207 (3d Cir. 1972), vacated on other grounds, 414 U.S. 1151 (1973) (stolen credit cards seized from briefcase while arrestee handcuffed); Aaronson & Wallace, supra note 15, at 70-72; Cook, Warrantless Searches Incident to Arrest, 24 Ala. L. Rev. 607, 612-26 (1972); Kelder & Statman, supra note 15, at 984-90; and Note, Search and Seizure Since Chimel v. California, 55 Minn. L. Rev. 1011, 1015-20 (1971).
64. 447 F.2d 424 (10th Cir. 1971).
65. Id. at 425-26.
66. Id. at 426-27. The court claimed that the defendant's wife, although in the living room and guarded by five officers, could have had access to the kitchen cabinet, "by merely turning around." Id.
safety and to prevent the destruction of evidence has resulted in the further undermining of Chimel. Since thorough searches of the premises are routinely sanctioned in "protective sweep" cases, the police have extensive opportunity to legitimately seize any evidence "inadvertently" observed in plain view, even though the item was not within the arrestee's area of immediate control. The Supreme Court implicitly approved protective sweeps, despite their erosion of Chimel, in the recent case of Payton v. New York. The Payton Court commented:

It is true that the area that may legally be searched is broader when executing a search warrant than when executing an arrest warrant in the home. See Chimel v. California, 395 U.S. 752. This difference may be more theoretical than real, however, because the police may need to check the entire premises for safety reasons, and sometimes they ignore the restrictions on searches incident to arrest.

The broad interpretation of the "area of immediate control," allowing officers to search the room in which a suspect is arrested, and any room into which he may move, combined with the officer's ability to seize evidence in plain view in any room the officer moves through or looks into pursuant to a protective sweep, reduces the present day Chimel standard to a "sort of functional paradigm of what a reasonably prudent police officer now knows he can accomplish by arranging to arrest a suspect at home."


70. In 29 out of 86 "protective sweep" cases analyzed, the precipitating arrest occurred outside the premises. Kilder & Statman, supra note 15, at 982 n.16. See e.g., United States v. Spanien, 597 F.2d 139, 140 (9th Cir. 1979).

71. Kilder & Statman, supra note 15, at 979 n.15.


73. 445 U.S. 573 (1980). Payton held that an arrest warrant is required to enter the home of the arrestee in order to effect his arrest. Id. at 603.

74. Id. at 589 (footnote omitted) (emphasis added).

75. Police Perjury: An Interview with Martin Garbus, 8 CRIM. L. BULL. 363, 372-73 (1972) provides a view of police abuse of the plain view exception to the warrant requirement.

76. Kilder & Statman, supra note 15, at 987 (police sweeps should only be al-
IV. THE BURGER COURT DISMANTLES Chimel

A. Robinson/Gustafson/Edwards

The Burger Court began its retreat from Chimel in three cases decided in the 1973 Term: United States v. Robinson,77 Gustafson v. Florida,78 and United States v. Edwards.79 The companion cases of Robinson and Gustafson addressed the issue of the permissible scope of the search of a person incident to arrest.80 Both cases involved arrests of the defendants for traffic violations after which they were subjected to thorough searches of their persons resulting in the discovery of illegal drugs.81 The Court held in Robinson:

It is the fact of the lawful arrest that establishes the authority to search and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth

80. 414 U.S. at 230. Justice Rehnquist acknowledged in Robinson that "[v]irtually all the statements of this Court affirming the existence of an unqualified authority to search incident to a lawful arrest are dicta." Id.
81. In Robinson, the defendant had been stopped by the same officer several days prior to his arrest. A subsequent check revealed that Robinson's license had been revoked. The officer spotted Robinson a few days later and arrested him for driving without a valid permit. During a search of Robinson the officer felt a lump in the defendant's shirt pocket. He removed a crumpled cigarette package, opened it, and found fourteen capsules containing heroin. 414 U.S. at 220-23.

In Gustafson, the defendant was stopped after the arresting officer observed him weaving across the lane three or four times. After the defendant was unable to produce a driver's license, the officer decided to take him to the police station for further questioning. The defendant was searched and a cigarette box which contained marihuana was found. 414 U.S. at 261-63.
Amendment, but is also a “reasonable” search under that Amendment. 82

Although the Court claimed that the authority to search incident to arrest is “based upon the need to disarm and discover evidence,” under Robinson there is no objective or subjective requirement of proof of either element in the circumstances of the arrest. 83 Robinson allowed an evidence search pursuant to an arrest for driving with a revoked operator’s permit, a crime for which there was no possible evidence on the arrestee’s person. 84 This was a direct rejection of the dicta in Chimel which had approved the scope limitations set forth in Terry, requiring the circumstances which initiated the search to justify its intensity. 85

The Robinson Court revived the rules approach of Rabinowitz, where the Court held it was “reasonable” to search the arrestee’s entire house simply because his arrest occurred there. 86 The Robinson Court held that “[t]he authority to search the person incident to a lawful custodial arrest . . . does not depend on what a court may later decide was a probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.” 87 The Robinson substitution of a per se rule for traditional case-by-case adjudication of fourth amendment claims

82. 414 U.S. at 235. The manner and degree of intrusiveness of the search is governed solely by the “conduct that shocks the conscience” test of Rochin v. California, 342 U.S. 165, 172 (1952). 414 U.S. at 236.

83. 414 U.S. at 235.

84. There was no evidence that the arresting officer believed the cigarette packet to be a weapon or believed himself in danger. “On the contrary, he admitted that he did not have any specific purpose in mind when he searched the appellant. ‘I just searched him. I didn’t think about what I was looking for. I just searched him.’” United States v. Robinson, 471 F.2d 1082, 1089 (D.C. Cir. 1972) (en banc). The court of appeals held that an arrest can only justify a search of the crime for which the arrest is made. Id. at 1094. The court also held that the arresting officer may conduct a limited frisk for weapons absent probable cause or a reasonable suspicion that the arrestee is armed or dangerous. Id. at 1098.

85. The Robinson Court distinguished Terry. “Terry v. Ohio . . . did not involve an arrest for probable cause [but only] . . . an investigative stop based on less than probable cause. . . .” 414 U.S. at 227.


86. The Warren Court subsequently rejected the inflexible rules approach of Rabinowitz in Chimel and substituted a scope determination in light of fourth amendment principles. 395 U.S. at 765, 768.

87. 414 U.S. at 235 (emphasis added).
was a serious departure from precedent.\textsuperscript{88}

Prior to Robinson, searches directed toward uncovering evidence of crimes unconnected to the crime for which the arrest was made had been clearly illegal.\textsuperscript{88} By allowing a full search of an individual arrested for a traffic violation, and by eliminating any possible judicial examination of the underlying circumstances,\textsuperscript{90} Robinson allows avoidance of the prohibition of searches for evidence of other crimes through pretext arrests. Since “in most jurisdictions and for most traffic offenses the determination of whether to issue a citation or effect a full arrest is discretionary with the officer,”\textsuperscript{91} it is almost certain that a zealous officer, following a suspect long enough, can find some violation of the traffic code and effect a warrantless search.\textsuperscript{92}

United States v. Edwards\textsuperscript{93} provided another opportunity to undermine Chimel. Edwards confronted the issue of how contemporaneous to an arrest a search must be in order to be incident to that arrest. In Edwards, the defendant was arrested for attempted burglary and jailed. Ten hours after his arrest, while he was incarcerated, the defendant’s clothing was seized from his person without a warrant. Paint chips found on the clothing were used as evidence against the defendant.\textsuperscript{94} The court of appeals held that the ten hour delay prevented the search from meeting the contemporaneous requirement of the search incident to arrest exception to the warrant require-

\textsuperscript{88} Sibron v. New York, 392 U.S. 40, 59 (1968); Terry v. Ohio, 392 U.S. 1, 21 (1968); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931). “There is no formula for reasonableness. Each case is to be decided on its own facts and circumstances.”\textsuperscript{9} Id. at 351.

This aspect of Robinson has been the subject of severe criticism by some commentators, e.g., Comment, Searches Incident to Arrest: The Expanding Exception to the Warrant Requirement, 63 Geo. L.J. 223, 231 (1974) and Note, United States v. Robinson: Chipping Away at the Fourth Amendment, 1 Ohio N.U.L. Rev. 334, 341 (1974).

\textsuperscript{89} See United States v. Lefkowitz, 285 U.S. 452, 467 (1932); Amador-Gonzales v. United States, 391 F.2d 308, 314-15 (5th Cir. 1968).

\textsuperscript{90} Id. at 235.

\textsuperscript{91} Id. at 248 (Marshall, J., dissenting).

\textsuperscript{92} LaFave, “Case-by-Case Adjudication” Versus “Standardized Procedures”: The Robinson Dilemma, 1974 Sup. Cr. Rev. 127 suggests that inquiring “under what circumstances a physical taking of custody is a justifiable means for invoking the criminal process” might be the means of preventing the potential abuse inherent in Robinson. Id. at 157.

\textsuperscript{93} 415 U.S. 800 (1974).

\textsuperscript{94} Id. at 801-02.
The Supreme Court reversed, holding that an arrest was a continuing process and that ten hours was a "reasonable delay." Edwards seriously undermines the Chimel standard of contemporaneity for a valid search incident to arrest.96 In addressing the ability of the police to have obtained a warrant, the Court, citing Cooper v. California97 said, "[i]t was no answer to say that the police could have obtained a search warrant," for the Court held "the test to be not whether it is reasonable to procure a search warrant, but whether the search itself was reasonable, which it was."98 The Court's reliance on Cooper is misplaced. Cooper was not based on the search incident to arrest doctrine, but on a state statute authorizing searches of impounded vehicles.99 Rather than rely on Cooper, the Court should have looked to Coolidge v. New Hampshire100 which instructs that an object that may be searched at the time of arrest cannot later be seized and searched without a warrant at the pleasure of the police.101 By rejecting the demands of Chimel to procure a warrant whenever possible and by substituting a "reasonableness" approach for the search, Edwards comes dangerously close to reviving the "reasonableness test" of Rabinowitz, rejected outright in Chimel.

B. New York v. Belton: Robinson Applied to Area/Container Searches

The most recent search incident to arrest case decided by the Supreme Court is New York v. Belton.102 Even though Belton is an area search case, its repeated citations to Robins-

son may sound the death knell for Chimel. In addition, Belton is in direct conflict with the Court's 1977 decision in United States v. Chadwick.\textsuperscript{104} In Belton, an automobile containing the defendant and three other men was stopped for speeding. As he spoke with the driver, the officer smelled the odor of burnt marihuana and observed an envelope marked 'Supergold' on the floor of the car. The officer associated this type of envelope with marihuana.\textsuperscript{106} He ordered the men out of the vehicle, patted them down for weapons and placed them under arrest. On returning to the car, he seized the envelope from the floor and searched the rest of the passenger compartment. On the back seat he found defendant's leather jacket and inside a zippered pocket found cocaine.\textsuperscript{106} The trial court denied the defendant's motion to suppress the cocaine and the defendant appealed. The New York Court of Appeals relied on United States v. Chadwick\textsuperscript{107} and Arkansas v. Sanders\textsuperscript{108} in holding the search and seizure unconstitutional.\textsuperscript{109} The court reasoned that the search was not incident to arrest because the officer had gained "exclusive control" over the jacket and "there [was] no longer any danger that the arrestee or a confederate [might] gain access to the article."\textsuperscript{110}

The Supreme Court based its opinion on Chimel rather than Chadwick and Sanders. Terming the "area of immediate

\textsuperscript{104} 433 U.S. 1 (1977) (warrantless search of luggage or personal property not immediately associated with the person, after its reduction to exclusive police control and absent exigent circumstances, held not a valid search incident to arrest).

\textsuperscript{105} 453 U.S. at 456.

\textsuperscript{106} Id.

\textsuperscript{107} 433 U.S. 1 (1977).

\textsuperscript{108} 442 U.S. 753 (1979) (automobile exception of Chambers v. Maroney, 399 U.S. 42 (1970) allowing warrantless searches of automobiles on probable cause does not apply to personal luggage found within the automobile).

The Supreme Court's recent decision in United States v. Ross, 102 S.Ct. 2157 (1982), has partially overruled Sanders and expanded the automobile exception to the warrant requirement. See infra note 125. Ross permits the search, based on probable cause, of all containers found in an automobile, including personal luggage, except where the officer's probable cause is limited to a single, particular item. For example, if an officer has probable cause to believe that contraband is being transported in a green suitcase, then a search is limited to any green suitcase found in the suspect's automobile. If, however, the officer simply possesses probable cause to believe that contraband is being transported somewhere in the vehicle, then all containers capable of concealing the contraband may be searched. 102 S.Ct. 2157, 2170-71. This creates the novel situation where the less information the police have, the less restricted they are in their ability to search.


\textsuperscript{110} Id. at 449, 407 N.E.2d at 423, 429 N.Y.S.2d at 576-77.
control” standard of Chimel “difficult to apply in specific cases,” the Court chose the “straightforward rule” approach of Robinson. It held that pursuant to the custodial arrest of an occupant of an automobile, the passenger compartment is always within the arrestee’s “immediate control” under Chimel, therefore the police may conduct a full search of the passenger compartment and the contents of all containers found within.

The Court in Belton, by characterizing the search as one incident to arrest, has directly resolved the issue of whether “the ‘grabbing distance' authorized in the Chimel case is conditioned upon the arrestee’s continued capacity ‘to grab’” in a manner directly in conflict with the rationale behind Chimel. In Belton, the defendant was removed from the car, frisked and then placed under arrest. Only then did the officer go back to the car and search. At the time of his search of the car the officer was not in danger because he had already searched the arrestees for weapons. The officer had the envelope of marihuana in his possession so that there was no opportunity for destruction of the evidence. By allowing the officer to go back and search the car after the arrests and hold that search as being incident to arrest, Belton, under the guise of Chimel, allows a search of the area the arrestee could have reached prior to his arrest. The defendant was totally unable to “gain possession of a weapon or destructible evidence” Chimel’s justification for allowing the search of the arrestee’s area of “immediate control.” Here, Belton and United States v. Chadwick cannot be reconciled despite the legal fiction given Chimel’s area of “immediate control” in Belton. Chadwick held:

111. 453 U.S. at 458.
112. Id. at 459.
113. Id. at 460.
115. 453 U.S. at 456.
116. Under the facts and holding of Belton it would seem that an officer could place a defendant under arrest, handcuff him, put him in the patrol car and then go back to the defendant's car and search a locked briefcase seized from the backseat of the car.
118. Id. See 453 U.S. at 466-69 (Brennan, J., dissenting).
Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.\textsuperscript{120}

Although the Court in Belton attempted to distinguish Chadwick by the fact that the search in Chadwick occurred one hour after defendant's arrest,\textsuperscript{121} Chadwick held that items are reduced to exclusive police control "from the moment" of the arrest.\textsuperscript{122} In Belton, with the defendant under arrest outside the automobile, the automobile's contents were under the "exclusive control" of the officer.\textsuperscript{123} Under Chadwick, "when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority."\textsuperscript{124} Chadwick clearly mandates that in Belton the officer should have locked the car, brought the arrestee to the police station, had the vehicle impounded, and then procured a search warrant for the automobile.

It might be argued that the "automobile exception"\textsuperscript{125} to the warrant requirement under United States v. Ross\textsuperscript{126} and

\begin{itemize}
  \item 120. Id. at 15 (footnote omitted) (emphasis added).
  \item 121. 453 U.S. at 462.
  \item 122. 433 U.S. at 4.
  \item 123. This was the theory of the New York State Court of Appeals, but that court applied it only to the jacket. "Once defendant had been removed from the automobile and placed under arrest, a search of the interiors of a private receptacle safely within the exclusive custody and control of the police may not be upheld as an incident to his arrest. United States v. Chadwick, 433 U.S. 1; Arkansas v. Sanders, 442 U.S. 753." 407 N.E.2d 420, 423, 429 N.Y.S.2d 574, 577. Justice Stewart summarily dismissed this argument in a footnote: "But under this fallacious theory no search nor seizure incident to a lawful custodial arrest would ever be valid; by seizing an article even on the arrestee's person, an officer may be said to have reduced that article to his 'exclusive control.'" 453 U.S. at 461 n.5. Justice Stewart, however, fails to grasp Chadwick's distinction between the seizure of a container and the search of its contents. See People v. Laiwa, 122 Cal. App. 3d 190, 206-07, 175 Cal. Rptr. 840, 850 (1981) (White, P.J., dissenting).
  \item 124. 433 U.S. at 15.
  \item 125. The automobile exception allows a warrantless search "where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained." Chambers v. Maroney, 399 U.S. 42, 51 (1970) (citations omitted).
  \item 126. 102 S. Ct. 2157 (1982). See supra note 108.
\end{itemize}
Carroll v. United States\textsuperscript{127} should apply, allowing the officer to search the automobile based on probable cause alone. This reasoning would not apply to Belton, however, because the officer only had probable cause to search for the marihuana he smelled. This probable cause evaporated as soon as he seized the envelope containing marihuana.\textsuperscript{128} Any further intrusion must require a warrant.

The Court's justification for allowing searches of the contents of containers, "if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach,"\textsuperscript{129} is a simple bootstrap of the fiction that the whole interior is always within his reach. The Court's further justification for the search, that a lawful arrest always overrides an arrestee's privacy interest in any container which he may possess,\textsuperscript{130} directly contradicts Chadwick. The Chadwick Court stated that "[u]nlke searches of the person, [United States v. Robinson . . .], searches of the possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest."\textsuperscript{131} Furthermore, by including luggage in its definition of containers,\textsuperscript{132} Belton produced the curious result of allowing a warrantless search of luggage within the passenger compartment incident to arrest and absent probable cause, although under Chadwick\textsuperscript{133} and Sanders,\textsuperscript{134} even the presence of probable cause did not justify search of the luggage without a warrant.\textsuperscript{135}

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\textsuperscript{127} 267 U.S. 132 (1925).
\textsuperscript{128} "Meanwhile, the policeman had smelled burnt marihuana and had seen on the floor of the car an envelope marked 'Supergold' that he associated with marihuana." 453 U.S. at 455-56 (emphasis added).
\textsuperscript{129} Id. at 460 (footnote omitted).
\textsuperscript{130} 453 U.S. at 461. The court stated that containers may be searched "since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justified the infringement of any privacy interest the arrestee may have." Id.
\textsuperscript{131} 433 U.S. at 16 n.10.
\textsuperscript{132} 453 U.S. at 460 n.4.
\textsuperscript{133} 433 U.S. 1 (1977).
\textsuperscript{134} 442 U.S. 753 (1979).
\textsuperscript{135} 453 U.S. at 472 (White, J., dissenting). This inconsistency was later reme- died by the Court's subsequent decision in United States v. Ross, 102 S. Ct. 2157 (1982), which permits a warrantless search based on probable cause of any luggage found in an automobile. See supra note 108. Justice Powell, in Sanders, made these observations about luggage:

\textit{[A] suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associ-}
The Belton Court cites Robinson’s justification for unlimited searches of the person incident to arrest and extends this rationale to container searches: “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 arrest requires no additional justification.”

Allowing the search of a locked briefcase without any “additional justification” other than the defendant’s arrest, seems totally inconsistent with the fourth amendment’s mandate that “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures has not been abridged by the container search doctrine.”

442 U.S. at 764 (footnote omitted).

In his concurring opinion to Robbins v. California, 453 U.S. 420, 429 (1981) where he discusses his views on Belton, Justice Powell now appears to trade “marginal privacy of containers within the passenger area of an automobile for protection of the officer and of destructible evidence.” Id. at 431 (emphasis added).

136. 453 U.S. at 461 (citing United States v. Robinson, 414 U.S. at 235). The danger of using Robinson as authority for the search of containers is evidenced by the application of Belton by the California Court of Appeal in a case now awaiting review before the California Supreme Court: People v. Laiwa, 122 Cal. App. 3d 190, 175 Cal. Rptr. 840 (Oct. 2, 1981). In Laiwa, the defendant, walking in a parking lot, appeared to police to be under the influence of phencyclidine (PCP). A test for nystagmus (jerky eye movement) confirmed their suspicions. The officer took the defendant’s handbag from him and placed him under arrest. He was then handcuffed and placed in a patrol car. His handbag was subsequently searched and found to contain PCP. The court applied Belton to the search and said:

Other courts have apparently also read Chadwick too broadly. In People v. Minjares, supra, 34 Cal. 3d 410, 153 Cal. Rptr. 224, 591 P.2d 514, our Supreme Court . . . in dictum . . . stated, ‘It is clear from Chadwick itself that the tote bag would not have been subject to a warrantless search if appellant had been arrested on the street and the bag taken from his possession. . . ’ (At pp. 419-420, 153 Cal. Rptr. 224, 591 P.2d 514.) However, in light of Belton, it is apparent that Chadwick simply does not declare the standard against which to assess the validity of a search incident to a lawful arrest.

Although in Belton the search was of an automobile, the court made clear that its holding applied to all custodial arrest searches. The court cited Chimel v. California. . . [and] clarified the application of that holding as it applied to automobile searches. It is clear therefore that the search here did not offend the federal constitutional provisions against warrantless searches.

122 Cal. App. 3d at 196, 175 Cal. Rptr. at 844.
V. Conclusion

Although the Supreme Court routinely begins its analysis of fourth amendment cases by expressing its preference for search warrants, a search pursuant to a search warrant is now the exception rather than the general rule. Whereas a search warrant must name the place to be searched and the things to be seized, a search incident to arrest is almost devoid of practical limitation. The limited research that exists on search warrants shows a marked police tendency not to obtain search warrants, even when there is adequate time, unless mandated to do so by the courts. Through its approval of unlimited searches incident to arrest, Rabinowitz actually discouraged police from obtaining warrants. In Chimel, the Warren Court attempted to stem the abuses of Rabinowitz while maintaining law enforcement interests. Lower court constructions of Chimel, however, have skewed its balance in favor of law enforcement officers, resulting in continued infringement of fourth amendment rights.

Burger Court decisions have further eroded Chimel and the warrant requirement. Robinson allows warrantless searches of the person for evidence, irrespective of whether any evidence can possibly exist for the crime for which the arrest is made. Edwards, by upholding a search ten hours after the defendant's arrest as incident to the arrest, seriously undercuts Chimel's contemporaneity requirement. Belton purports to apply Chimel but continually cites to Robinson. Belton's per se rule, allowing searches of personal containers and luggage, safely insulates police conduct from judicial scrutiny, thereby inviting pretext arrests and other abuses. Consequently, Belton is in direct conflict with Chadwick's determination that an arrestee's fourth amendment expectations of privacy in his possessions do not evaporate upon his arrest. Although Chief Justice Burger claims that the Court is "construing the Constitution, not writing . . . a manual for law enforcement officers," the Court's decisions in the search inci-

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137. U.S. Const. amend. IV.
138. Id.
139. L. Tiffany, D. McIntyre & D. Rotenburg, supra note 4, at 100.
dent to arrest area cloud this assertion. It is now clear that in search of "straightforward rules" the Court is abandoning the fourth amendment's core principle, that "[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances that rendered its initiation permissible."  

Stephen Gibbs
