Belton Redux: Re-evaluating Belton's Per Se Rule Governing the Search of an Automobile Incident to an Arrest

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BELTON REDUX:
REEVALUATING BELTON'S PER SE RULE
GOVERNING THE SEARCH OF AN AUTOMOBILE
INCIDENT TO AN ARREST

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I. INTRODUCTION

In 1981, the United States Supreme Court held in New York v. Belton\(^1\) that when a police officer makes "a lawful custodial arrest of the occupant of an automobile[,]" the officer may, "as a contemporaneous incident of that arrest[,]" conduct a warrantless search of the passenger compartment of that automobile and any containers therein without violating the Fourth Amendment.\(^2\) Recently, in Thornton v. United States,\(^3\) the Supreme Court reaffirmed the Belton rule and held that it applies not only when a police officer first makes contact with the occupant of the automobile while the individual is inside the vehicle (as in Belton) but also when an officer initially makes contact with the individual after the individual has exited the vehicle.\(^4\) Nevertheless, a majority of the Court in Thornton expressed dissatisfaction with at least some aspects of the Belton rule,\(^5\) thereby indicating that the Court may reexamine that rule in the near future. Twenty-one years ago, I

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* Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology; B.S., University of Illinois, 1968; J.D., Northwestern University, 1971; LL.M., University of Illinois, 1975.
2. Id. at 460-61. 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.
4. Id. at 622-24.
5. See infra notes 68-95 and accompanying text.
analyzed the Court’s decision in Belton and concluded that “the Court unnecessarily went beyond the rationale justifying a search incident to an arrest and consequently reduced the protection afforded individuals by the [F]ourth [A]mendment . . .”6 I have not changed my view. Given the dissatisfaction with the Belton rule expressed by five Justices in Thornton, it is an appropriate time to evaluate again the holding and reasoning of Belton.7

II. NEW YORK V. BELTON

The Supreme Court formulated its current rule governing a search incident to an arrest in Chimel v. California.8 There, the


7. Two years before the Supreme Court’s decision in Thornton, Professor Myron Moskovitz called for a reexamination of Belton as well as Chimel v. California, 395 U.S. 752 (1969), the case setting forth the general principles governing the scope of a search incident to an arrest, see infra notes 8-13 and accompanying text, in light of his empirical research showing that police officers nearly always handcuff an arrestee and remove him from the place of the arrest before conducting a search of the surrounding area. Myron Moskovitz, A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton, 2002 Wis. L. Rev. 657, 697 (2002). I agree with Professor Moskovitz's criticism of the Chimel rule insofar as courts have interpreted it to allow police officers to search the area that was within the arrestee’s “immediate control” at the time of his arrest, but which he can no longer reach at the time of the search. See infra notes 342-43 and accompanying text. Nevertheless, in this Article, I focus upon the Court’s holding and rationale in Belton.

8. 395 U.S. 752 (1969). The Supreme Court has long recognized the principle that the Fourth Amendment allows a police officer to conduct a warrantless search incident to a lawful custodial arrest. Prior to its decision in Chimel, however, it wavered in defining the permissible scope of such a search. Although it consistently stated that the police may search the person of the arrestee, e.g., Agnello v. United States, 269 U.S. 20, 30 (1925); Carroll v. United States, 267 U.S. 132, 158 (1925) (dictum); Weeks v. United States, 232 U.S. 383, 392 (1914) (dictum), it vacillated in defining the permissible scope of a search of the place where the officer made the arrest. See Agnello, 269 U.S. at 30 (dictum) (“The right without a search warrant contemporaneously . . . to search the place where [an] arrest is made in order to find and seize things connected with the crime, as its fruits or as means by which it was committed, as well as weapons and other things to effect an escape from custody is not to be doubted.”); United States v. Rabinowitz, 339 U.S. 56, 58-59, 63-66 (1950) (upholding the one-and-a-half hour warrantless search of a business office that included the search of a desk, a safe, and file cabinets), overruled by Chimel, 395 U.S. at 768; Trupiano v. United States, 334 U.S. 699, 706-09 (1948) (holding invalid the warrantless search of a barn being used as a distillery); Harris v. United States, 331 U.S. 145, 152-53, 183-84 (1947) (upholding the thorough five-hour warrantless search of an entire four-room apartment that included opening the drawers of a chest and a bureau, combing the contents of a linen closet, lifting the carpets, and turning over a mattress), overruled by Chimel,
Court held that when a police officer makes a lawful\(^9\) custodial\(^10\) arrest, she can, without a warrant, search the person of the arrestee as well as the area within the arrestee's immediate control.\(^11\) According to the Court, two justifications support a warrantless search incident to an arrest: the safety of the police officer and the preservation of evidence.\(^12\) In light of these justifications, the Court explained:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample

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9. If the arrest is unlawful because, for example, the police lacked probable cause to arrest, any search incident to that arrest cannot stand. E.g., Smith v. Ohio, 494 U.S. 541, 543 (1990) (per curiam); Beck v. Ohio, 379 U.S. 89, 91 (1964); Henry v. United States, 361 U.S. 98, 102 (1959).

10. A custodial arrest involves "the taking of a suspect into custody and transporting him to the police station." United States v. Robinson, 414 U.S. 218, 235 (1973). See also People v. Bland, 884 P.2d 312, 316 n.6 (Colo. 1994) ("A 'custodial' arrest is made for the purpose of taking the arrestee to the stationhouse for booking procedures and in order to file criminal charges."); State v. Brassfield, 615 N.W.2d 628, 631, 200 SD 110 (S.D. 2000).


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.

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.\textsuperscript{13}

In \textit{New York v. Belton}, the Supreme Court applied \textit{Chimel}'s "immediate control" rule to the arrest of the occupant of a motor vehicle.\textsuperscript{14} The facts in \textit{Belton} were as follows. After stopping an automobile occupied by four men for speeding on the New York Thruway, a state trooper obtained probable cause to believe the occupants unlawfully possessed marijuana.\textsuperscript{15} He ordered the men

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\textsuperscript{13} \textit{Chimel}, 395 U.S. at 762-63. The authority of the police to conduct a search incident to a noncustodial arrest—that is, one involving only a temporary detention of an individual for the purpose of issuing a summons or citation—is more limited. When no evidentiary basis for a search exists, such as when a police officer stops a motorist to issue a traffic citation for speeding, the police cannot conduct a search incident to the "arrest." \textit{Knowles v. Iowa}, 525 U.S. 113, 118-19 (1998). For in such situations, neither rationale justifying a search incident to arrest applies, \textit{id.} at 116-17: no evidence exists for the "arrestee" to destroy or conceal, \textit{id.} at 118, and, because the "arresting" officer will not be exposed to the "arrestee" for an extended period of time (as the officer would be if she took the individual into custody and transported him to the station house, \textit{see Robinson}, 414 U.S. at 234-35), there is less likelihood of any danger to the "arresting" officer. \textit{Knowles}, 525 U.S. at 117. On the other hand, when the offense is one for which evidence may exist, some courts allow the police to conduct a search incident to arrest because, even though the "arrestee" may not pose a significant danger to the "arresting" officer, the "arrestee" still can destroy or conceal evidence. \textit{E.g.}, \textit{Bland}, 884 P.2d at 321 (upholding a search incident to a noncustodial arrest for possession of a small quantity of marijuana). \textit{Contra State v. Taylor}, 808 P.2d 324, 324-25 (Ariz. Ct. App. 1990) (holding invalid a search incident to a noncustodial arrest for drinking beer in a public park because, "[i]f a person is to be free to leave,... there is not motivation to destroy evidence[,] [and] [i]n turn, there is no justification to search for it"); \textit{State v. Martin}, 253 N.W.2d 404, 405-06 (Minn. 1979) (holding invalid a search incident to a noncustodial arrest for possession of a small quantity of marijuana).
\textsuperscript{14} 453 U.S. 454, 460 n.3 (1981) ("Our holding today does no more than determine the meaning of \textit{Chimel}'s principles in this particular and problematic context.").
\textsuperscript{15} The officer smelled marijuana and "saw on the floor of the car an
out of the car and placed them under arrest. After frisking them and separating them from each other, the trooper examined an envelope marked "Supergold" that he had earlier observed on the floor of the car; inside the envelope, he discovered a small amount of marijuana.\textsuperscript{16} The trooper then searched each of the men as well as the passenger compartment of the automobile. On the back seat of the vehicle, he found five jackets,\textsuperscript{17} including a leather jacket belonging to Roger Belton, one of the passengers in the car. Inside a zippered pocket of Belton's jacket, the trooper discovered cocaine.\textsuperscript{18}

The Supreme Court upheld the warrantless search of Belton's jacket pocket as a valid search incident to a lawful custodial arrest.\textsuperscript{19} The Court rejected a case-by-case approach under which a police officer would have to determine in each particular case whether the interior of the arrestee's automobile was, in fact, within the arrestee's immediate control. Instead, the Court adopted a per se rule providing that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."\textsuperscript{20} The Court made it clear that its holding "encompass[es] only the interior of the passenger compartment of an automobile and ... not ... the trunk."\textsuperscript{21} In addition, the arresting officer "may also examine the contents of any

\textsuperscript{16} The Supreme Court stated that the trooper arrested the men just after he ordered them out of the car. \textit{Id.} at 456. However, both the Appellate Division of the New York Supreme Court, People v. Belton, 416 N.Y.S.2d 922, 923 (App. Div. 1979), and the New York Court of Appeals, People v. Belton, 407 N.E.2d 420, 421 (N.Y. 1980), stated that the trooper arrested the men only after he examined the "Supergold" envelope and discovered marijuana inside it.

\textsuperscript{17} \textit{Belton}, 453 U.S. at 467 (Brennan, J., dissenting) (quoting \textit{Belton}, 407 N.E.2d at 421).

\textsuperscript{18} Prior to his trial for criminal possession of a controlled substance, Belton moved to suppress the cocaine on Fourth Amendment grounds. The trial court denied the motion, after which Belton pleaded guilty to a lesser-included offense while preserving his right to appeal his Fourth Amendment claim. The Appellate Division of the New York Supreme Court affirmed, stating that "[o]nce defendant was validly arrested for possession of marijuana, the officer was justified in searching the immediate area for other contraband." \textit{Belton}, 416 N.Y.S.2d at 925. The New York Court of Appeals reversed the conviction. \textit{Belton}, 407 N.E.2d at 421. It held that "[a] warrantless search of the zippered pockets of an unaccessible [sic] jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article." \textit{Id.}

\textsuperscript{19} \textit{Belton}, 453 U.S. at 462-63.

\textsuperscript{20} \textit{Id.} at 460 (footnotes omitted).

\textsuperscript{21} \textit{Id.} at 461 n.4.
containers found within the passenger compartment,""22 regardless of whether the container is "open or closed""23 and even though the container "could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested.""24 The Court defined a "container" as "any object capable of holding another object... includ[ing] closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like.""25

The Supreme Court reasoned that Chimel allows a contemporaneous warrantless search of the person of an arrestee and the area immediately surrounding him, but that lower courts had "found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant.""26 The Court implied that the lack of a "straightforward rule" that could be "easily applied, and predictably enforced,""27 had resulted in the dilution of the protection of the Fourth Amendment. The reason, the Court asserted, was that protection "'can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'""28 The Court further stated, "'[w]hen a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.""29

The Court justified its per se rule allowing a search of the passenger compartment of an automobile on the ground that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item.'""30 It supported that

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22. *Id.* at 460.
23. *Id.* at 461; *see also id.* at 460 n.4.
24. *Id.* at 461. *E.g.*, Daniels v. State, 416 So. 2d 760, 763-64 ( Ala. Crim. App. 1982) (upholding the search of an aspirin bottle, which could not have contained a weapon, incident to the arrest of a motorist for driving without a license and with an expired vehicle tag, offenses for which no evidence could be concealed inside the bottle).
26. *Id.* at 460 (quoting Chimel v. California, 395 U.S. 752, 763 (1969)).
27. *Id.* at 459.
28. *Id.* at 458 (quoting Wayne R. LaFave, "Case-by-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma, 1974 SUP. CT. REV. 127, 142 (1974)).
29. *Id.* at 459-60.
30. *Id.* at 460 (quoting Chimel, 395 U.S. at 763).
portion of the rule allowing a search of containers found inside the passenger compartment by reasoning that “if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach.” 31 The Court explained that police officers can search such containers despite their being closed because “the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have;” 32 it further explained that officers can search such containers irrespective of whether they could hold either a weapon or evidence of the criminal conduct for which the suspect was arrested because “[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment[,] [and] that intrusion being lawful, a search incident to the arrest requires no additional justification.” 33 Finally, the Court rejected the argument that the search of Belton’s jacket could not have been incident to his arrest because, by the trooper’s very act of searching the jacket and seizing its contents, the trooper had gained “exclusive control” over them. It stated that “under this fallacious theory no search or

31. Id. (citations omitted).
32. Id. at 461.
33. Id. (internal quotation marks omitted) (quoting United States v. Robinson, 414 U.S. 218, 235 (1973)). In Robinson, a police officer arrested a motorist for driving after his license had been revoked and for obtaining a license by misrepresentation. Robinson, 414 U.S. at 220-21. In accordance with departmental procedures, the officer searched the motorist, taking a “crumpled up cigarette package” from a pocket of the motorist’s coat. Id. at 221-23. The officer opened the package and found fourteen gelatin capsules of heroin, which he seized. Id. at 223. The Supreme Court held the search valid as an incident of a lawful custodial arrest. Id. at 236. Adopting a per se rule allowing a police officer to conduct a full search of the person of the arrestee after making a lawful custodial arrest, the Court stated:

[There need not 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. We do not think the long line of authorities of this Court . . ., or what we can glean from the history of practice in this country and in England, requires such a case-by-case adjudication. A police officer’s determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.

Id. at 235.
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.'\textsuperscript{34} Four Justices disagreed, in whole or in part, with the per se rule adopted in Belton. Although Justice Stevens concurred in the judgment in Belton,\textsuperscript{35} he believed that it is unreasonable for police officers who have apprehended a motorist for a minor traffic violation to conduct a warrantless search of a container discovered inside the offender's vehicle, in the absence of probable cause to believe the item contains contraband.\textsuperscript{36} Justice White, in a dissenting opinion joined by Justice Marshall, concluded that the Court's per se rule, when applied to luggage, briefcases, and other containers, constituted an “extreme extension”\textsuperscript{37} of the holding in Chimel because it allows searches of such items “in the absence of any suspicion whatsoever that they contain anything in which the

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34. Belton, 453 U.S. at 461 n.5.
35. Id. at 463 (Stevens, J., concurring in the judgment). Justice Stevens explained in his dissenting opinion in Robbins v. California, 453 U.S. 420 (1981), overruled by United States v. Ross, 456 U.S. 798 (1982), a case decided the same day as Belton, that he believed the so-called “automobile exception” to the warrant requirement justified the search in Belton. Id. at 451-52 (Stevens, J., dissenting). See infra note 258 and accompanying text.
36. Robbins, 453 U.S. at 451-52 (Stevens, J., dissenting). Justice Stevens' discussion of Belton did not make his position entirely clear. At one point in his opinion in Robbins, he criticized the Court's holding in Belton for “mov[ing] too far” by “authoriz[ing] unreasonable searches of vehicles and containers without probable cause to believe that contraband will be found," id. at 447 (emphasis added), and stated that he “disagree[d] with both of these new approaches. . . .” Id. His later criticism in Robbins of the Court's holding in Belton, however, focused upon the search of containers located inside the offender's vehicle, not upon the search of the vehicle itself. Id. at 451-52. It became clear in Thornton v. United States, 541 U.S. 615 (2004), that Justice Stevens agrees with the rule adopted in Belton insofar as it allows a warrantless search of the passenger compartment of the automobile (but not insofar as it permits a warrantless search of any separate containers therein). He stated:

When [Belton] was decided, I was persuaded that the important interest in clarity and certainty adequately justified the modest extension of the Chimel ["immediate control"] rule to permit an officer to examine the interior of a car pursuant to an arrest for a traffic violation. But I took a different view with respect to the search of containers within the car absent probable cause, because I thought "it palpably unreasonable to require the driver of a car to open his briefcase or his luggage for inspection by the officer." I remain convinced that this aspect of the Belton opinion was both unnecessary and erroneous.

Id. at 634 (Stevens, J., dissenting) (footnote omitted) (quoting Robbins, 453 U.S. at 451 (Stevens, J., dissenting)).
37. Belton, 453 U.S. at 472 (White, J., dissenting).
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police have a legitimate interest.” 38 Justice Brennan, in an opinion joined by Justice Marshall, also dissented. He asserted that by adopting the fiction that “the interior of a car is always within the immediate control of an arrestee who has recently been in the car,” 39 the Court abandoned the principles underlying its decision in Chimel, namely, that a warrantless search incident to an arrest is intended to protect the arresting officer by preventing the arrestee from gaining access to a weapon and to keep the arrestee from concealing or destroying evidence. 40 Justice Brennan also believed that, in adopting a per se rule, the Court failed to achieve its asserted goal of providing guidance to police officers in the field for two reasons: first, because the Court left open many questions concerning the factual settings in which its per se rule applies and the permissible scope of a search under that rule, 41 and second, because the rule, in abandoning the justifications underlying Chimel, “offers no guidance to the police officer seeking to work out the answers to these questions for [herself].” 42

III. THORNTON v. UNITED STATES

A. Opinion of the Court

In Thornton v. United States, 43 a uniformed police officer driving an unmarked squad car noticed Marcus Thornton when Thornton slowed down his automobile to avoid driving next to the officer. 44 Suspecting that Thornton knew he was a policeman and, for some reason, did not want to pull up next to him, the officer drove onto a side street and allowed Thornton to pass him. The officer conducted a check on the license plates on Thornton’s vehicle and learned they had been issued to a different car than the one Thornton was driving. 45 Before the officer could pull Thornton over, however, Thornton drove into a parking lot, parked, and exited his vehicle. The officer parked his squad car behind Thornton’s automobile and confronted Thornton. After engaging in a brief conversation with Thornton, the officer lawfully discovered illegal drugs in Thornton’s left front pocket. 46 The officer handcuffed Thornton, formally arrested him, and placed him in the rear seat of the squad car. The

38. Id.
39. Id. at 466 (Brennan, J., dissenting).
40. Id. at 463-64, 468-69.
41. Id. at 469-70. See infra note 228.
42. Belton, 453 U.S. at 470 (Brennan, J., dissenting).
44. Id. at 617.
45. Id. at 617-18.
46. Id. at 618.
officer then searched Thornton's car and discovered a handgun under the driver's seat.\textsuperscript{47}

The United States prosecuted Thornton for possession with intent to distribute cocaine base and for two offenses relating to his possession of the firearm. Before his trial, Thornton moved to suppress the firearm as the fruit of an unconstitutional search. The trial court denied the motion, holding, inter alia, that the automobile search was valid under \textit{Belton}. A jury then convicted Thornton of all three offenses. On appeal, the United States Court of Appeals for the Fourth Circuit affirmed.\textsuperscript{48} It also concluded that the search of Thornton's automobile was valid under \textit{Belton}.\textsuperscript{49}

The Supreme Court upheld the officer's search of Thornton's automobile, concluding that \textit{Belton}'s per se rule applies to the situation in which a police officer first makes contact with the occupant of an automobile after the occupant has exited the vehicle.\textsuperscript{50} The Court stated that in \textit{Belton}, it placed no reliance on the fact that the state trooper ordered the occupants out of the automobile or initiated contact with them while they were inside the vehicle.\textsuperscript{51} Moreover, such a factor "bears no logical relationship to \textit{Belton}'s rationale" for "[t]here is simply no basis to conclude that the span of the area generally within the arrestee's immediate control is determined by whether the arrestee exited the vehicle at the officer's direction, or whether the officer initiated contact with him while he remained in the car."\textsuperscript{52} The Court reasoned:

In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle.\ldots\ A custodial arrest is fluid and "[t]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty." The stress is no less merely because the arrestee exited his car before the

\textsuperscript{47} \textit{Id.}


\textsuperscript{49} \textit{Id.} at 196.

\textsuperscript{50} \textit{Thornton}, 541 U.S. at 620-21. On two previous occasions, the Court granted certiorari to determine whether the per se rule of \textit{Belton} was limited to situations in which the police officer initially made contact with the occupant of an automobile while the occupant was inside the vehicle. In neither case did the Court reach the merits. Arizona v. Gant, 540 U.S. 963 (2003) (vacating and remanding for reconsideration in light of State v. Dean, 76 P.3d 429 (Ariz. 2003)); Florida v. Thomas, 532 U.S. 774, 781 (2001) (dismissing for lack of jurisdiction).

\textsuperscript{51} \textit{Thornton}, 541 U.S. at 620.

\textsuperscript{52} \textit{Id.} at 620-21.
officer initiated contact, nor is an arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle. In either case, the officer faces a highly volatile situation. It would make little sense to apply two different rules to what is, at bottom, the same situation.\(^{53}\)

The Court rejected the argument that interpreting the Belton rule to apply beyond “occupants” of automobiles would fail to provide a “bright-line” rule,\(^{54}\) pointing out that Belton itself stated that a police officer could search the interior of a vehicle incident to a lawful custodial arrest of both “occupant[s]” and “recent occupant[s],”\(^{55}\) and that Roger Belton himself was not inside the automobile when the trooper arrested him and conducted the search of the automobile in which he had been riding.\(^{56}\) The Court acknowledged that an arrestee’s status as a “recent occupant” of an automobile may turn “on his temporal or spatial relationship to the car at the time of the arrest and search” but stated that “it certainly does not turn on whether he was inside or outside the car at the moment that the officer first initiated contact with him.”\(^{57}\) The Court refused to consider Thornton’s argument that, if it rejected his proposed “contact initiation” rule, it should limit the scope of Belton to “recent occupants’ [of an automobile] who are within ‘reaching distance’ of the car.”\(^{58}\) The Court stated that that argument fell outside the question on which it had granted certiorari and that the Court of Appeals did not address it.\(^{59}\) The Court also noted that Thornton would probably not even meet his own standard because “he apparently conceded in the Court of Appeals that he [stood] in ‘close proximity, both temporally and spatially,’” to his car when the

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53. Id. at 621 (citations omitted) (quoting Robinson, 414 U.S. at 234-35 n.5). The Court in Thornton also pointed out that:

In some circumstances it may be safer and more effective for officers to conceal their presence from a suspect until he has left his vehicle. Certainly that is a judgment officers should be free to make. But under the strictures of [Thornton’s] proposed “contact initiation” rule, officers who do so would be unable to search the car’s passenger compartment in the event of a custodial arrest, potentially compromising their safety and placing incriminating evidence at risk of concealment or destruction.

Id. at 621-22.

54. Id. at 622.

55. Id. (citing Belton, 453 U.S. at 460).

56. Id.

57. Id.

58. Id. at n.2 (quoting Brief for Petitioner at 3-4 (No. 03-5165)).

59. Id.
arresting officer approached him.60

The Supreme Court conceded that not all contraband in the passenger compartment of an automobile is likely to be readily accessible to a "recent occupant" of that vehicle.61 Indeed, the Court stated that it was unlikely that Thornton could, in fact, have reached under the driver's seat for his gun once he had exited his vehicle. Nevertheless, it pointed out that the gun and the passenger compartment in this case were no more inaccessible to Thornton than were the contraband and the passenger compartment to Roger Belton in his case.62 The Court continued:

The 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, justifies the sort of generalization which Belton enunciated. Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment.63

In addition, the Court believed that Thornton's proposed "contact initiation" rule would not clarify the constitutional limits of a Belton search, but rather would "obfuscate them."64 The Court reasoned that it would require a police officer who approached a suspect who had just exited his vehicle to determine whether he actually confronted or signaled the confrontation with the individual while the individual was in his car, or whether the individual alighted from his automobile unaware of, and for reasons unrelated to, the police officer's presence.65 Moreover, reasoned the Court, "[t]his determination would be inherently subjective and highly fact specific, and would require precisely the sort of ad hoc determinations on the part of officers in the field and reviewing courts that Belton sought to avoid."66 The Court concluded that "[e]xperience has shown that such a rule is impracticable. . . ."67

B. Separate Opinions

Although five Justices joined the text of Chief Justice

60. Id. (quoting United States v. Thornton, 325 F.3d 189, 196 (4th Cir. 2003)).
61. Id. at 622.
62. Id.
63. Id. at 622-23 (footnote omitted).
64. Id. at 623.
65. Id.
66. Id. (citing Belton, 453 U.S. at 459-60).
67. Id.
Rehnquist's opinion of the Court in Thornton, five Justices expressed dissatisfaction with at least some aspects of the Belton rule. Justice O'Connor concluded that the Court's holding in Thornton was a "logical extension" of the holding in Belton. However, she expressed her "dissatisfaction with the state of the law in this area." She stated that the per se rule adopted in Belton stood on a "shaky foundation." As a result, lower courts seem "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." Although she thought the approach proposed by Justice Scalia "appears to be built on firmer ground," she was "reluctant to adopt it" in Thornton because neither the United States nor Thornton had had a chance to address the merits of that approach.

Justice Scalia, in an opinion joined by Justice Ginsburg, concurred in the judgment of the Court in Thornton. He pointed out that when the police officer searched Thornton's car, Thornton was not in the passenger compartment of the vehicle or anywhere near it but, rather, was handcuffed and secured in the rear seat of the officer's squad car. Therefore, "[t]he risk that he would nevertheless 'grab a weapon or evidentiary item' from his car"—the only justification for a search incident to arrest—"was remote in the extreme." "The Court's effort to apply [its] current doctrine to this search," concluded Justice Scalia, "stretches it beyond its breaking point . . . ." Justice Scalia proposed that a search of an automobile

68. Justices Kennedy, Thomas, and Breyer joined Chief Justice Rehnquist's opinion in its entirety. Justice O'Connor joined all but a footnote in which the Chief Justice responded to Justice Scalia's opinion concurring in the judgment. Id. at 624 (O'Connor, J., concurring in part). For a discussion of Justice Scalia's approach, see infra notes 75-79, 271-86 and accompanying text. In the footnote Justice O'Connor did not join, the Chief Justice concluded that the Court should not address the approach taken by Justice Scalia because: 1) Thornton never argued that the courts should adopt such an approach; 2) none of the lower courts considered the approach; 3) the question presented in the petition for certiorari did not fairly encompass that approach; and 4) the United States did not have an opportunity to respond to such an approach. Id. at 624 n.4 (opinion of Rehnquist, C.J.).

69. Id. at 624 (O'Connor, J., concurring in part).

70. Id.

71. Id.

72. Id.

73. See infra notes 75-79, 271-86 and accompanying text.

74. Thornton, 541 U.S. at 625 (O'Connor, J., concurring in part).

75. Id. (Scalia, J., concurring in the judgment).

76. Id. (quoting Chimel v. California, 395 U.S. 752, 763 (1969)).

77. Id.
incident to the arrest of one of its occupants or recent occupants be justified not on the ground that the arrestee might grab a weapon or evidentiary items from the vehicle, but instead on the ground that "the car might contain evidence relevant to the crime for which he was arrested." Accordingly, Justice Scalia would limit such searches to cases in which "it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." 

Applying this rule to the facts in Thornton, Justice Scalia concluded that the search was valid. He reasoned that because the police officer lawfully arrested Thornton for a drug offense, "it was reasonable for [the officer] to believe that further contraband or similar evidence relevant to the crime for which [Thornton] had been arrested might be found in the vehicle from which he had just alighted and which was still within his vicinity at the time of arrest." Justice Scalia therefore voted to affirm the lower court's decision on that ground.

Justice Stevens, in an opinion joined by Justice Souter, dissented. He stated that when Belton was decided, he was "persuaded that the important interest in clarity and certainty adequately justified the modest extension of the Chimel rule to permit an officer to examine the interior of a car pursuant to an arrest for a traffic violation." He also reiterated the position he took in Belton: in the absence of probable cause to believe contraband will be found, it is unreasonable for police officers who have apprehended a motorist for a traffic violation to conduct a warrantless search of any

78. Id. at 629.
79. Id. at 632.
80. Id.
81. Id. In response to Chief Justice Rehnquist's assertion that his approach went beyond the scope of the question presented in the petition for certiorari and therefore, under the applicable court rule, see SUP. CT. R. 14.1(a) ("Only the questions set out in the petition [for certiorari], or fairly included therein, will be considered by the Court."), could not be considered by the Court, see supra note 68, Justice Scalia stated that the court rule does not constrain the Court's authority "to reach issues presented by the case, and in any event does not apply when the issue is necessary to an intelligent resolution of the question presented." Thornton, 541 U.S. at 632-33 n.3 (Scalia, J., concurring in the judgment) (citations omitted).
82. Id. at 633 (Stevens, J., dissenting).
84. Justice Stevens stated this position in Robbins, 453 U.S. at 451-52 (Stevens, J., dissenting), which was decided the same day as Belton.
containers inside the vehicle.  

With respect to the precise issue involved in Thornton, Justice Stevens concluded that, irrespective of whether one agrees with his view concerning the search of containers inside the passenger compartment of an automobile, “the interest in certainty that supports Belton’s bright-line rule surely does not justify an expansion of the rule . . . [to the situation] involv[ing] a pedestrian who [is] in the vicinity, but outside the reaching distance, of his or her car.” Justice Stevens concluded that Belton was concerned only with the situation involving the arrest of a suspect who was “seated in or driving” a car at the time the police officer approached him. He explained that, after a police officer arrests an individual who was seated in or driving an automobile when the officer approached, the officer's safety normally is “no longer in jeopardy,” yet the officer must decide whether he should conduct a search for incriminating evidence, and if so, how broad a search he should conduct. “Belton,” Justice Stevens stated, “provided previously unavailable and therefore necessary guidance for that category of cases.” On the other hand, he explained, “[t]he bright-line rule crafted in Belton is not needed for cases in which the arrestee is first accosted when he is a pedestrian, because Chimel itself provides all the guidance that is necessary.” He believed that the only “justification for extending Belton to cover such [situations] is the interest in [dis]covering potentially valuable evidence.” But “that goal,” concluded Justice Stevens,

must give way to the citizen’s constitutionally protected interest in privacy when there is already in place a well-defined rule limiting the permissible scope of a search of an arrested pedestrian. The Chimel rule should provide the same protection to a “recent occupant” of a vehicle as to a recent occupant of a house.

Justice Stevens also criticized the majority for extending the scope of Belton without providing any guidance for the future application of the broadened rule. He stated, “We are told [by the Court] that officers may search a vehicle incident to arrest ‘[s]o long

85. Thornton, 541 U.S. at 634 (Stevens, J., dissenting).
86. Id. at 634-35.
87. Id. at 635.
88. Id. at 635-36.
89. Id. at 636.
90. Id.
91. Id.
92. Id.
as [the] arrestee is the sort of "recent occupant" of a vehicle such as [Thornton] was here... [b]ut we are not told how recent is recent, or how close is close...."93 This, he asserted, will result in individuals being unable to know the scope of their constitutional protection and in police officers not being able to know the scope of their authority.94 Justice Stevens concluded by expressing his "fear that [the Court's] decision [in Thornton] will contribute to 'a massive broadening of the automobile exception' when officers have probable cause to arrest an individual but not to search his car."95

IV. REEVALUATING BELTON

A. The Need for a "Standardized Procedure"

The Supreme Court in New York v. Belton96 adopted a per se rule governing the search of an automobile incident to the arrest of one of its occupants because it believed that "[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."97 The Court reasoned that without a standard that, in most cases, allows police officers to determine correctly beforehand whether an invasion of an individual's privacy is justified, the protections of the Fourth Amendment cannot be realized.98 It concluded, however, from an examination of the inconsistent results reached in a number of lower court cases applying the "immediate control" approach of Chimel v. California,99 that "no straightforward rule"100 had emerged concerning the proper scope of a search of the passenger compartment of an automobile incident to the lawful custodial arrest of one or more of its occupants.101 To establish a workable rule to govern this category of cases, the Court read the Chimel rule in light of the generalization that items inside the passenger compartment of an automobile are usually within the area from which an arrestee could obtain a weapon or evidentiary item, which led it to formulate its per se rule allowing the police to

93. Id. (internal citation omitted).
94. Id.
97. Id. at 458 (quoting Dunaway v. New York, 442 U.S. 200, 213-14 (1979)).
98. Id.
100. Belton, 453 U.S. at 459.
101. Id.
search the passenger compartment and any containers therein. 102

As I previously argued, the Supreme Court in Belton did not satisfactorily explain why the particular area of Fourth Amendment law in question needs to be governed by a rule expressed in terms of a "standardized procedure." 103 Nor did the Court offer such an explanation in Thornton v. United States 104 when it reaffirmed the per se rule of Belton. Indeed, in United States v. Drayton, 105 a case decided twenty-one years after Belton, the Supreme Court stated that "for the most part per se rules are inappropriate in the Fourth Amendment context." 106 Justice Brennan recognized this in his dissenting opinion in Belton: "[I]n determining whether to grant an exception to the warrant requirement, courts should carefully consider the facts and circumstances of each search and seizure, focusing on the reasons supporting the exception rather than on any bright-line rule of general application." 107 Moreover, in numerous Fourth Amendment cases decided since Belton, the Court has refused to adopt a bright-line rule to govern police conduct. For example, in Richards v. Wisconsin, 108 the Court unanimously rejected a per se rule that would have allowed police officers to dispense with the knock-andannounce requirement 109 when executing a search warrant in a felony drug investigation. 110

102. Id. at 460.
103. Rudstein, supra note 6, at 218.
105. 536 U.S. 194 (2002).
106. Id. at 201 (discussing Florida v. Bostick, 501 U.S. 429, 439 (1983)); see also United States v. Banks, 540 U.S. 31, 35-36 (2003) ("Although the notion of reasonable execution [of a warrant] must ... be fleshed out, we have done that case by case, largely avoiding categories and protocols for searches. Instead, we have treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones."); Ohio v. Robinette, 519 U.S. 33, 39 (1996) ("[T]he 'touchstone of the Fourth Amendment is reasonableness.' Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances. In applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.") (quoting Florida v. Jimeno, 500 U.S. 248, 250 (1991)).
109. See Wilson v. Arkansas, 514 U.S. 927, 930, 934 (1995) (holding that the Fourth Amendment incorporates the common law requirement that, as a general rule, police officers entering a dwelling to conduct a search or seizure must knock on the door and announce their identity and purpose before attempting a forcible entry).
110. Richards, 520 U.S. at 388.
Instead, it required that police officers determine in each case whether, under the particular facts and circumstances, they have a reasonable suspicion that knocking and announcing their presence would be dangerous or futile or would inhibit the effective investigation of crime.\textsuperscript{111}

On the other hand, while "generally eschew[ing] bright-line rules in the Fourth Amendment context,"\textsuperscript{112} the Supreme Court has

\textsuperscript{111} Id. at 394; see also Banks, 540 U.S. at 35-38 (holding that the question of when the police can legitimately forcibly enter premises to execute a search warrant after knocking and announcing and receiving no reply must be determined on the facts of each particular case); United States v. Drayton, 536 U.S. 194, 207 (2002) (reiterating that "the totality of the circumstances" in a particular case controls whether an individual voluntarily consented to a search); Illinois v. Wardlow, 528 U.S. 119, 126 (2000) (Stevens, J., concurring in part and dissenting in part) (stating that the Court "wisely endorse[d] neither a per se rule" authorizing the investigative stop of anyone "who flees at the mere sight" of the police nor a per se rule that the fact that a person "flees upon seeing the police can never, by itself, be sufficient to justify" an investigative stop); Illinois v. Rodriguez, 497 U.S. 177, 186 (1990) ("Whether the basis for [the] authority [to consent to a search] exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment . . . ."); Maryland v. Buie, 494 U.S. 325, 334-35 (1990) (holding that to conduct a "protective sweep" of spaces not immediately adjoining the place of arrest, the police must have an articulable and reasonable suspicion that the "area to be swept harbors an individual posing a danger" to those on the scene of the arrest); Bostick, 501 U.S. at 436-37 (rejecting the Florida Supreme Court's per se rule that every encounter on a bus between a drug interdiction police officer and a passenger constitutes a "seizure" for purposes of the Fourth Amendment). The Supreme Court has further stated:

Both petitioner and respondent . . ., in their attempts to fashion a bright-line rule applicable to all investigatory pursuits, have failed to heed this Court's clear direction that any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account all of the circumstances surrounding the incident in each individual case.

Michigan v. Chesternut, 486 U.S. 567, 572 (1988) (internal quotation marks omitted) (quoting INS v. Delgado, 466 U.S. 210, 215 (1984)) (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)); see also United States v. Dunn, 480 U.S. 294, 301 n.4 (1987) (rejecting the Government's invitation to adopt a bright-line rule that the curtilage of a dwelling extends no farther than the nearest fence surrounding a fenced home, and instead concluding that curtilage questions should be resolved on a case-by-case basis with particular reference to four listed factors); United States v. Sharpe, 470 U.S. 675, 685 (1985) ("Much as a 'bright line' rule [to determine whether a detention is too long in duration to be justified as an investigative stop] would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria.").

\textsuperscript{112} Maryland v. Wilson, 519 U.S. 408, 413 n.1 (1997).
“not . . . always done so.”113 For instance, in Pennsylvania v. Mimms,114 a pre-Belton case, the Court held that a police officer making a lawful traffic stop could, as a matter of course, order the driver to exit the vehicle pending completion of the stop.115 The Court determined the “reasonableness” of the police action by balancing the public interest in permitting such conduct against the individual’s right to personal security free from arbitrary interference by law enforcement officers,116 and it concluded that the “weighty”117 public interest in the safety of the police officer118 outweighs the intrusion on the driver’s personal liberty occasioned by the officer’s order to exit the vehicle.119 Given the legality of the initial stop of the vehicle, the Court believed that the additional intrusion on the driver by requiring him to get out of the car is de minimis.120

In Maryland v. Wilson,121 a case decided after Belton, the Court extended the per se rule of Mimms to passengers in a lawfully stopped automobile.122 Applying the same balancing test it applied in Mimms,123 the Court concluded that “the same weighty interest in officer safety is present regardless of whether the occupant of the

113. Id.
115. Id. at 111 n.6.
116. Id. at 109 (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)).
117. Id. at 110.
118. Among other things, the Court focused upon “the inordinate risk confronting an officer as he approaches a person seated in an automobile.” Id. “According to one study,” the Court stated, “approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile.” Id. (quoting Adams v. Williams, 407 U.S. 143, 148 n.3 (1963)) (citing Allen P. Bristow, Police Officer Shootings—A Tactical Evaluation, 54 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 93, 93 (1963)). In addition, the Court pointed out that “it appears ‘that a significant percentage of murders of police officers occurs when the officers are making traffic stops.’” Id. (quoting Robinson, 414 U.S. 218, 234 n.5 (1973)).
119. Id. at 110-11.
120. Id. at 111. The Court reasoned:

The driver is being asked to expose to view very little more of his person than is already exposed. The police have already decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver’s seat of his car or standing alongside it. Not only is the insistence of the police on the latter choice not a “serious intrusion upon the sanctity of the person,” but it hardly rises to the level of a “petty indignity.”

Id. (quoting Terry v. Ohio, 392 U.S. 1, 17 (1968)).
121. 519 U.S. 408 (1997).
122. Id. at 415.
123. Id. at 413-14: see supra text accompanying note 116.
stopped car is a driver or passenger."\textsuperscript{124} Indeed, the Court recognized that "the fact that there is more than one occupant of the vehicle increases the possible sources of harm to the officer."\textsuperscript{125} With respect to the personal security side of the balance, the Court acknowledged that "the case for the passengers is in one sense stronger than that for the driver" because, while probable cause to believe that the driver committed a minor traffic offense exists, "there is no such reason to stop or detain the passengers."\textsuperscript{126} Nevertheless, reasoned the Court, "as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle,"\textsuperscript{127} and "[t]he only change in their circumstances which will result from ordering them out of the car is that they will be outside of, rather than inside of, the stopped car"\textsuperscript{128}---a place from which they will be denied access to any weapons that might be concealed inside the passenger compartment of the vehicle.\textsuperscript{129} The Court concluded that this "additional intrusion on the passenger is minimal"\textsuperscript{130} and outweighed by the danger to an officer from a traffic stop of a vehicle containing more than one occupant.\textsuperscript{131}

Although the Supreme Court adopted a "bright-line rule"\textsuperscript{132} in both \textit{Mimms} and \textit{Wilson},\textsuperscript{133} the result in each of those cases is

\begin{thebibliography}{99}
\item[124.] Wilson, 519 U.S. at 413 ("In 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops.") (citing \textsc{Federal Bureau of Investigation, Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted} 71, 33 (1994)).
\item[125.] \textit{Id.} (emphasis added).
\item[126.] \textit{Id.}
\item[127.] \textit{Id.} at 413-14.
\item[128.] \textit{Id.} at 414.
\item[129.] \textit{Id.} The Court stated:
\begin{quote}
It would seem that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop. And the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.
\end{quote}
\item[130.] \textit{Id.} at 415.
\item[131.] \textit{Id.} at 414-15.
\item[132.] \textit{Id.} at 413 n.1.
\item[133.] \textit{See also} Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) (holding that the Fourth Amendment allows a police officer to arrest and take into custody a person whom the officer has probable cause to believe committed even a very minor criminal offense in the officer's presence); Wyoming v. Houghton, 526 U.S. 295, 305 (1999) (holding that a police officer with probable cause to search an automobile can search items belonging to a passenger even if there is no positive reason to believe that the passenger and the driver engaged in a common enterprise or that the driver had time and occasion to conceal items in the passenger's belongings); Florida v. Jimeno, 500 U.S. 248, 250-51
\end{thebibliography}
justifiable. A standardized procedure allowing a police officer to order the occupants to get out of a motor vehicle she stopped for a traffic violation is appropriate because the police action "involve[s] relatively minor intrusions into privacy, occur[s] with great frequency, and virtually def[ies] on-the-spot rationalization on the basis of the unique facts of the individual case." In addition, it will help protect police officers from assaults that might otherwise be launched upon them by drivers and passengers of stopped vehicles. Police officers across the country stop thousands of motorists each day for speeding, making an illegal turn, or some other minor traffic offense. As Belton itself illustrates, the driver and occupants involved in some of these traffic stops are committing (or have recently committed) a more serious crime, such as the possession of illegal drugs. When such people are stopped because of a traffic

(1991) (adopting a per se rule that consent to a general search of a motor vehicle for narcotics includes consent to search any containers within that vehicle that might contain drugs); Maryland v. Buie, 494 U.S. 325, 334 (1990) (holding that as an incident of the arrest of an individual within premises, police officers may, without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched); Oliver v. United States, 466 U.S. 170, 181-83 (1984) (rejecting a case-by-case analysis and adopting a per se rule that police officers do not conduct a "search" within the meaning of the Fourth Amendment when they enter upon "open fields").

134. LaFave, supra note 28, at 142-43.

135. See also Maryland v. Pringle, 540 U.S. 366, 368 (2003) (a police officer stopped an automobile being driven above the speed limit and discovered five glassine baggies of cocaine in the vehicle); Arkansas v. Sullivan, 532 U.S. 769, 769-70 (2001) (per curiam) (a police officer stopped an automobile being driven above the speed limit and with an improperly tinted windshield and discovered a hatchet, methamphetamine, and drug paraphernalia in the vehicle); Houghton, 526 U.S. at 297-98 (a police officer stopped an automobile being driven above the speed limit and with a faulty brake light and discovered drug paraphernalia and syringes with methamphetamine inside a passenger's purse); Knowles v. Iowa, 525 U.S. 113, 114 (1998) (a police officer stopped an automobile being driven above the speed limit and discovered marijuana and a "pot pipe" in the vehicle); Wilson, 519 U.S. at 410-11 (a police officer stopped an automobile being driven above the speed limit and discovered cocaine in the possession of a passenger); Ohio v. Robinette, 519 U.S. 33, 35-36 (1996) (police officers stopped an automobile being driven above the speed limit and discovered controlled substances in the vehicle); Whren v. United States, 517 U.S. 806, 808-09 (1996) (a police officer stopped an SUV after the driver turned without signaling and sped off at an "unreasonable" speed and discovered crack cocaine and other illegal drugs in the vehicle); Arizona v. Evans, 514 U.S. 1, 4 (1995) (a police officer stopped an automobile being driven the wrong way on a one-way street and discovered marijuana in the vehicle); New York v. Class, 475 U.S. 106, 107-08 (1986) (police officers stopped an automobile being driven above the speed limit and with a cracked windshield and discovered an illegal
violation, many of them may respond violently because of their fear that the police officer may discover evidence of their other crime.\(^{136}\) Certainly police officers should be allowed to take some measures to protect themselves from these dangerous individuals. However, there is virtually no way for a police officer to know in advance whether the occupants of a particular motor vehicle will become violent. A per se rule allowing police officers to order the occupants of every motor vehicle they stop for a minor traffic offense to get out of the vehicle because the occupants of some of these vehicles will react violently is certainly an over-inclusive rule. Most drivers and passengers who are ordered to exit a lawfully stopped vehicle pose no danger whatsoever to the police officer. Yet, in each case, the officer, by ordering the driver and any passengers to get out of the vehicle, will be afforded some measure of protection from an individual who might become violent. Equally as important, in those cases in which the per se rule leads to the theoretically “wrong” result—that is, the individuals ordered to exit the car did not in fact pose a danger to the officer—the harm to Fourth Amendment interests—that is, the intrusion upon the individual liberty of each of these people—will be “\textit{de minimis}”\(^{137}\) or “minimal.”\(^{138}\)


136. Wilson, 519 U.S. at 414.
137. Mimms, 434 U.S. at 111.
138. Wilson, 519 U.S. at 415. The same can be said about the per se rule the Supreme Court adopted in \textit{United States v. Robinson}, 414 U.S. 218, 233-35 (1973), allowing the full search of the person of the arrestee incident to his lawful custodial arrest. In light of the much more serious intrusion that will follow the custodial arrest—transportation to the station house for booking and the filing of criminal charges, a search of the arrestee’s person and effects prior to his being placed in a jail cell if he will be held in custody, see Illinois v. Lafayette, 462 U.S. 640, 645 (1983), and perhaps a criminal prosecution, which is “inevitably accompanied by future interference with the individual's freedom of movement,” Terry v. Ohio, 392 U.S. 1, 26 (1968)—a search of the arrestee’s person at the time of his arrest is a relatively minor intrusion. See LaFave, \textit{supra} note 28, at 144. I will leave it to others to consider whether the Supreme
In contrast to Mimms and Wilson stands Knowles v. Iowa. In that case, the Supreme Court unanimously rejected a “bright-line rule” that would have allowed police officers to conduct a full-blown search of an automobile and its driver incident to the issuance of a citation for a traffic offense. While acknowledging that the concern for the safety of a police officer during a routine traffic stop “justifies] the ‘minimal’ additional intrusion of ordering a driver and passengers out of the car,” the Court concluded that “it does not by itself justify the often considerably greater intrusion attending a full field-type search.” Indeed, the Court implied that even a per se rule allowing the police to “frisk” the driver and any passengers would be impermissible because of the degree of intrusion upon the individual’s privacy interests.

Although custodial arrests of occupants and recent occupants of automobiles, like traffic stops of motorists, occur quite frequently, the degree of intrusion upon privacy interests occasioned by a search of an automobile and containers therein is not relatively minor—even in light of the serious intrusion upon the individual’s liberty that will follow his custodial arrest. A person placed under custodial arrest will be transported to the station house for booking procedures and the filing of criminal charges and perhaps subjected to a criminal prosecution, which “is inevitably accompanied by future interference with the individual’s freedom of movement.” The police, of course, can search the arrestee’s person at the time of his arrest and can also search his person and effects before placing

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Court’s adoption of a per se rule in other areas governed by the Fourth Amendment was proper. See cases cited supra note 133.

140. Id. at 119 (internal quotation marks omitted).
141. Id. at 118-19.
142. Id. at 117.
143. Id. (emphasis added). The Court also concluded that the second justification for a search incident to arrest—the need to discover and preserve evidence—is absent when an officer stops a motorist for speeding and issues a citation. Id. at 118. As explained earlier, the search of an arrestee’s person incident to his custodial arrest can be deemed a relatively minor intrusion when measured against the more serious intrusion that will follow the custodial arrest. See supra note 138.
144. A “frisk” entails a patdown of an individual’s outer clothing in an attempt to discover weapons that could be used to assault the police officer. See Terry v. Ohio, 392 U.S. 1, 12 (1968).
145. Knowles v. Iowa, 525 U.S. 113, 118 (1998) (stating that upon stopping a vehicle to issue a traffic citation, a police officer may “perform a ‘patdown’ of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous”) (emphasis added) (citing Terry, 392 U.S. at 1).
146. Terry, 392 U.S. at 26.
him in a jail cell if he will be held in custody.\textsuperscript{148} But the search of the passenger compartment of a motor vehicle,\textsuperscript{149} and any containers therein, such as a purse,\textsuperscript{150} briefcase,\textsuperscript{151} or locked suitcase,\textsuperscript{152} is unrelated to, and differs in kind from, any interference with the arrestee’s liberty.\textsuperscript{153} It is true, of course, that an individual has a

\begin{itemize}
\item 149. In addition to searching the seats, \textit{e.g.}, United States v. Hensley, 469 U.S. 221, 224-25 (1985), and floorboards of the vehicle, \textit{e.g.}, Thornton v. United States, 541 U.S. 615, 618 (2004) (under the driver’s seat), including under the floor mats, \textit{e.g.}, United States v. Martin, 289 F.3d 392, 395 (6th Cir. 2002); Glasco v. Commonwealth, 513 S.E.2d 137, 139 (Va. 1999), police officers can, under \textit{Belton}, search, among other places, the dashboard, \textit{e.g.}, United States v. Willis, 37 F.3d 313, 315 (7th Cir. 1994); People v. Blakely, 663 N.E.2d 760, 762 (Ill. App. Ct. 1996) (the area behind the stereo, which was not attached with screws); State v. Lamar, 680 N.E.2d 540, 542 (Ind. Ct. App. 1997) (a panel in the dashboard), the sun visors, \textit{e.g.}, State v. Remrey, 824 S.W.2d 106, 108 (Mo. Ct. App. 1992); State v. Mercado, 944 S.W.2d 42, 43 (Tex. Ct. App. 1997), \textit{rev’d on other grounds}, 972 S.W.2d 75 (Tex. Crim. App. 1998), the steering column, \textit{e.g.}, Black v. State, 810 N.E.2d 713, 714-15 (Ind. 2004), and under the armrests, \textit{e.g.}, United States v. Cotten, 253 F. Supp. 2d 983, 985 (S.D. Ohio 2002); State v. Thomas, 2002-0471 (La. App. 3 Cir. 10/30/02), 829 So. 2d 1137, 1141 (La. Ct. App. 2002); see also United States v. Patrick, 3 F. Supp. 2d 95, 99 (D. Mass. 1998) (heating vent); State v. Homolka, 953 P.2d 612, 613 (Idaho 1998) (gear shift boot); White v. State, 772 N.E.2d 408, 411 (Ind. 2002) (fuse panel).
\item 150. \textit{E.g.}, United States v. Thomas, 11 F.3d 620, 628 (6th Cir. 1993); People v. Mitchell, 42 Cal. Rptr. 2d 537, 538 (Ct. App. 1995); State v. Moore, 619 So. 2d 376, 377 (Fla. Dist. Ct. App. 1993).
\item 152. Pack v. Commonwealth, 368 S.E.2d 921, 922 (Va. Ct. App. 1988). \textit{But see} Adams v. State, 634 S.W.2d 785, 789 n.2 (Tex. Crim. App. 1982) (dictum) (stating that \textit{Belton} authorizes police officers “to search the interior of the automobile and any containers which [are] not locked”); see also United States v. Wesley, 293 F.3d 541, 544 (D.C. Cir. 2002) (ashtray); United States v. Humphrey, 208 F.3d 1190, 1196 (10th Cir. 2000) (satchel); United States v. Tank, 200 F.3d 627, 631 n.6 (9th Cir. 2000) (backpack); United States v. Sholola, 124 F.3d 803, 808 (7th Cir. 1997) (unlocked glove compartment); United States v. Dorlouis, 107 F.3d 248, 256 (4th Cir. 1997) (console); United States v. Woody, 55 F.3d 1257, 1269 (7th Cir. 1995) (locked glove compartment); People v. Molina, 30 Cal. Rptr. 2d 805, 807 (Ct. App. 1994) (pouch on the back of the front seat; duffel bag); Glasco, 513 S.E.2d at 139 (door pocket).
\item 153. Cf. Mincey v. Arizona, 437 U.S. 385, 391 (1978) (“It is one thing to say that one who is legally taken into police custody has a lessened right of privacy in his person. It is quite another to argue that he also has a lessened right of privacy in his entire house.”) (citations omitted); United States v. Chadwick, 433 U.S. 1, 16 n.10 (1977) (“Unlike searches of the person, searches of possessions within an arrestee’s immediate control cannot be justified by any reduced expectations of privacy caused by the arrest. Respondents’ privacy interest in the contents of the footlocker was not eliminated simply because

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lesser expectation of privacy in his automobile than he does in his home or office; but "automobiles are 'effects' under the Fourth Amendment," and "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Indeed, "[w]hile the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police," and the search of an automobile entails "a substantial invasion of privacy." Similarly, containers such as purses, briefcases, suitcases, boxes, and paper bags are "effects" under the Fourth Amendment, and that Amendment "provides protection to the owner of every container that conceals its contents from plain view." For these purposes, the Fourth Amendment does not

they were under arrest.”) (citations omitted).


The Court in Class explained:

[T]he physical characteristics of an automobile and its use result in a lessened expectation of privacy therein:

One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one’s residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.

Moreover, automobiles are justifiably the subject of pervasive regulation by the State. Every operator of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator’s privacy:

Automobiles, unlike homes, are subject to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.

Class, 475 U.S. at 112-13 (citations omitted) (quoting Cardwell, 417 U.S. at 590 (plurality opinion) and Opperman, 428 U.S. at 368).

155. Chadwick, 433 U.S. at 12; accord Opperman, 428 U.S. at 367 (“[A]utomobiles are ‘effects’ and thus within the reach of the Fourth Amendment . . .”).

156. Coolidge v. New Hampshire, 403 U.S. 443, 461-62 (1971) (plurality opinion); accord Class, 475 U.S. at 112 (“A citizen does not surrender all the protections of the Fourth Amendment by entering an automobile.”).


distinguish between "worthy" and "unworthy" containers.\textsuperscript{160} As a result, the search of closed containers discovered inside an automobile during a search incident to an arrest constitutes an even greater invasion of privacy than the search of only the passenger compartment itself.

Moreover, unlike the situations in \textit{Mimms} and \textit{Wilson}, a police officer could—in the absence of a per se rule—determine with relative ease whether the Fourth Amendment would countenance her contemplated conduct—here, conducting a search of the passenger compartment of an automobile and any containers therein for weapons or evidentiary items—for that decision does not "virtually defy on-the-spot rationalization on the basis of the unique facts of the individual case."\textsuperscript{161} \textit{Chimel} allows a police officer who has arrested an individual to search "the area 'within [the arrestee's] immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."\textsuperscript{162}

Every time a police officer arrests an individual inside a house, an apartment, a hotel room, or a business office—or even outside on the street—and wants to search the area surrounding the arrestee, such as a dresser drawer, a kitchen cabinet, a briefcase on a bed, or a suitcase on the sidewalk, she must determine—\textit{on the facts of the particular case}—whether the arrestee could reach into the area in

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\textsuperscript{160} v. California, 453 U.S. 427 (1987) (plurality opinion)); \textit{see also} Horton v. California, 496 U.S. 128, 141 n.11 (1990) (The seizure of a container "does not compromise the interest in preserving the privacy of its contents because it may only be opened pursuant to either a search warrant or one of the well-delineated exceptions to the warrant requirement.") (citations omitted); Smith v. Ohio, 494 U.S. 541, 542 (1990)) (per curiam) ("Although the Fourth Amendment may permit a brief detention of property on the basis of only "reasonable, articulable suspicion" that it contains contraband or evidence of criminal activity, it proscribes—except in certain well-defined circumstances—the search of that property unless accomplished pursuant to judicial warrant issued upon probable cause.") (citation omitted); Robbins, 453 U.S. at 427 (plurality opinion) ("[U]nless [a] container is such that its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment."), \textit{overruled by} Ross, 456 U.S. at 798; Chadwick, 433 U.S. at 11 ("By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination . . . . [O]ne who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause."); \textit{id.} at 13 ("Luggage is intended as a repository of personal effects . . . . [A] person's expectations of privacy in personal luggage are substantially greater than in an automobile.").

\textsuperscript{161} \textit{Ross}, 456 U.S. at 822; \textit{see also} \textit{Smith}, 494 U.S. at 542.

\textsuperscript{162} \textit{LaFave, supra} note 28, at 142-43.

question and grab a weapon or an item of evidence. Police officers face this question every day, and they answer it based upon their assessment of a variety of objective factors known to them at the time of the arrest.\textsuperscript{163} Among these factors are: the distance between the arrestee and the place or thing to be searched;\textsuperscript{164} whether the arrestee is handcuffed or otherwise restrained;\textsuperscript{165} the number of

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    \item E.g., United States v. Johnson, 16 F.3d 69, 73 (5th Cir. 1994), aff'd on reh'g, 18 F.3d 293, 294-95 n.3 (5th Cir. 1994) (holding invalid the warrantless search of a briefcase on a chair located about eight feet away from the arrestee); Bowman, 997 P.2d at 641 (upholding the warrantless search of a jacket being held by a person standing fifteen feet away from the arrestee); Davis v. Commonwealth, 120 S.W.3d 185, 195 (Ky. Ct. App. 2003) (upholding the warrantless search of a ceramic container on a kitchen counter located eight-to-ten feet away from the arrestee); State v. Taylor, 04-90 (La. App. 5 Cir. 5/26/04), 875 So. 2d 962, 968 (La. Ct. App. 2004) (upholding the warrantless search of a pair of pants located on the floor at the foot of the mattress on which the arrestee was lying); State v. Brasel, 538 S.W.2d 325, 332 (Mo. 1976) (upholding the warrantless search of an attaché case on a chair located about four feet away from the arrestee); State v. Galpin, 2003 MT 324, 80 P.3d 1207, 1217-18 (Mont. 2003) (upholding the warrantless search of a coat and duffel bag located on a hutch less than six feet away from the arrestee); People v. Thomas, 738 N.Y.S.2d 357, 358 (App. Div. 2002) (upholding the warrantless search of a brown paper shopping bag located within ten feet of the arrestee); People v. Vega, 682 N.Y.S.2d 261, 262 (App. Div. 1998) (holding invalid the warrantless search of a gym bag located about twenty-five yards away from the arrestee); Lancot, 587 N.W.2d at 572 (upholding the warrantless search of a billfold located about six feet away from the arrestee on the opposite end of a desk next to which the arrestee was standing); State v. Gallegos, 967 P.2d 973, 980 (Utah Ct. App. 1998) (holding invalid the warrantless search of a small tin container located in a closet in the bedroom in which the police arrested an individual because the prosecution failed to introduce evidence showing the distance between the closet and the arrestee).
    \item Compare, e.g., United States v. Myers, 308 F.3d 251, 267 (3d Cir. 2002) (holding that a school bag located about three feet away from the arrestee was not within his “immediate control” because his hands were cuffed behind his back and he was lying face down on the floor, “covered” by two armed police officers); United States v. Blue, 78 F.3d 56, 60 (2d Cir. 1996) (holding that the area in the middle of a box spring under the mattress of a bed in a small, one-room apartment was not within the “immediate control” of the arrestee and a detainee who were prone on the floor, about two feet away from the bed, with their hands cuffed behind their backs and guarded by four Drug Enforcement Administration agents); United States v. McConnell, 903 F.2d 566, 569-70 (8th Cir. 1990) (holding that the warrantless search of an unlocked briefcase in the arrestee’s hotel room could not be justified as a search incident to arrest because the arrestee was handcuffed and therefore unable to gain access to the
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police officers present at the scene of the arrest in relation to the number of arrestees and other people; the physical positioning of briefcase), and State v. Cook, 332 S.E.2d 147, 154-55 (W. Va. 1985) (holding that the top of a dresser located some distance away from the three arrestees, two of whom were handcuffed, was "outside the scope of the immediate geographic area under the physical control" of the arrestees), with, e.g., Holt v. United States, 675 A.2d 474, 481 (D.C. 1996) (holding that a plastic bag underneath the hospital gurney on which the arrestee was lying was within the arrestee’s "immediate control" because he "was neither handcuffed nor within the secure grip of a police officer, and his medical condition did not prevent him reaching the bag with a lunge if he had wanted to do so"); Lanctot, 587 N.W.2d at 572 (in holding that a billfold located about six feet away from the arrestee on the opposite end of a desk next to which the arrestee was standing was within the arrestee’s "immediate control," the court pointed out that the arresting officers did not handcuff the arrestee or display any weapons), and Commonwealth v. Griffin, 785 A.2d 501, 506 (Pa. Super. Ct. 2001) (holding that the area underneath the cushion of a couch on which one of two arrestees was sitting was within that arrestee’s "immediate control" and pointing out that the arrestee was not yet handcuffed). Nevertheless, many courts have upheld warrantless searches conducted after the police handcuffed the arrestee, e.g., Young v. United States, 670 A.2d 903, 907 (D.C. 1996) (upholding the warrantless search of a plastic shopping bag conducted after the police cuffed the two arrestees' hands behind their backs while they were lying on the floor on their stomachs); Commonwealth v. Netto, 783 N.E.2d 439, 446-47 (Mass. 2003) (upholding the warrantless search of a motel room conducted after the police handcuffed the two arrestees); see also United States v. Tarazon, 989 F.2d 1045, 1051 n.4 (9th Cir. 1993) (in upholding the warrantless search of desk drawers conducted after law enforcement officers moved the arrestees from behind the desk to the floor in front of the desk, stating that it did not matter whether the officers had handcuffed the arrestees), and even after they removed the arrestee from the area searched. E.g., Hudson, 100 F.3d at 1420 (upholding the warrantless search of a rifle case conducted by a Drug Enforcement Administration agent in a bedroom after agents had removed the arrestee from that room, handcuffed him, and taken him out of the house); State v. Roberts, 623 N.W.2d 298, 307 (Neb. 2001) (upholding the warrantless search of the arrestee's jacket and running pants conducted by a police officer in the bedroom of an apartment immediately after another officer handcuffed the arrestee and removed him from the room); Archer v. Commonwealth, 492 S.E.2d 826, 832-33 (Va. Ct. App. 1997) (upholding the warrantless search underneath the mattress of a bed in a motel room conducted after the police handcuffed the arrestee and removed him from the room).

166. E.g., Blue, 78 F.3d at 60 (holding that the area in the middle of a box spring under the mattress of an arrestee's bed in a small, one-room apartment was not within the "immediate control" of the two arrestees, who were prone on the floor, about two feet away from the bed, with their hands cuffed behind their backs and guarded by four Drug Enforcement Administration agents); Johnson, 16 F.3d at 73, aff'd on reh'g, 18 F.3d at 294-95 n.3 (holding that a briefcase on a chair located about eight feet away from the arrestee was not within the "immediate control" of the arrestee, who was sitting in a chair "with at least one police officer standing behind him and three other police officers
the arresting officer or officers vis-à-vis the arrestee and the area or thing to be searched, and the ease or difficulty the arrestee would have in gaining access to the area or thing in question.

167. E.g., Myers, 308 F.3d at 267, 273-74 (holding that a school bag located about three feet away from the arrestee was not within his “immediate control” because his hands were cuffed behind his back and he was lying face down on the floor, “covered” by two armed police officers); Johnson, 16 F.3d at 73, aff’d on reh’g, 18 F.3d at 294-95 n.3 (holding that a briefcase on a chair located about eight feet away from the arrestee was not within his “immediate control” because the arrestee was sitting in a chair “with at least one police officer standing behind him and three other police officers around him”); United States v. Parra, 2 F.3d 1058, 1066 (10th Cir. 1993) (holding that the area underneath a pillow on a bed in a motel room was within the “immediate control” of the two arrestees because both arrestees were seated next to the bed and none of the three police officers in the room was positioned between the arrestees and the pillow); United States v. Porter, 738 F.2d 622, 627 (4th Cir. 1984) (upholding the warrantless search of a carry-on bag that was within arm’s reach of the arrestee and between her and the arresting officer); United States v. Mapp, 476 F.2d 67, 80 (2d Cir. 1973) (holding that a closed closet in the bedroom in which the police effected the arrest was not within the arrestee’s “immediate control” because an armed police officer was standing between the arrestee and the closet); Brasel, 538 S.W.2d at 332 (holding that an attaché case on a chair located about four feet away from the arrestee was within the arrestee’s “immediate control,” stating that although there were other officers in the room, the evidence did not show “they were so placed that it was impossible for [the arrestee] to reach and enter the attache case”); State v. Rohalewski, 418 A.2d 817, 822-23 (R.I. 1980) (holding that the arrestee’s jacket, which was on a couch in the living room in the apartment in which he was arrested, was not within his “immediate control” because several police officers were positioned around him).

168. E.g., Parra, 2 F.3d at 1066 (in holding that the area underneath a pillow on a bed in a motel room was within the immediate “control” of the two arrestees, the court pointed out that both arrestees were seated next to the bed and “[t]he pillow . . . could have been swept away easily”); Brasel, 538 S.W.2d at 332 (in holding that an attaché case on a chair located about four feet away from the arrestee was within his “immediate control,” the court stated that the case was not locked and that the “catch . . . could be released by merely pushing
Deciding whether the passenger compartment of an automobile and containers therein are within the "immediate control" of an arrestee who is an occupant or recent occupant of that vehicle is merely a particularized version of the decision a police officer must make whenever she arrests an individual and wants to extend her search beyond the person of the arrestee. Moreover, the same objective factors that inform a police officer's decision about whether a desk drawer is within the "immediate control" of an individual arrested in his office can inform her decision about whether the passenger compartment of an automobile and its contents are within the "immediate control" of an individual arrested inside his automobile or shortly after he exited it. Is the arrestee still inside the vehicle or standing next to it, or is he sitting in the police officer's squad car ten feet away? Is the arrestee handcuffed or being held at gunpoint, or is he totally free of restraints? Is a single police officer confronting four arrestees, or are there four police officers and a single arrestee? Is the arrestee standing with a police officer by a squad car with two additional officers between the arrestee and his vehicle, or is the arresting officer positioned so that the arrestee has an unimpeded route of access to his vehicle? Does the police officer want to search a locked suitcase on the rear seat of the arrestee's car, or is she concerned about a paper grocery sack on the front passenger seat of the arrestee's vehicle?\footnote{169}

In sum, the search of an automobile incident to the arrest of one of its occupants or recent occupants is not the type of situation in a button"); Castleberry v. State, 678 P.2d 720, 723 (Okla. Crim. App. 1984) (holding that once a police officer gained possession of the keys to the arrestees' car, several suitcases inside the locked trunk of that car were not within the "immediate control" of the two arrestees, one of whom was handcuffed and the other of whom was on the ground with a police officer pointing a gun at him),\footnote{169} aff'd by an equally divided Court, 471 U.S. 146 (1985); see also Scott v. State, 256 A.2d 384, 389 n.6 (Md. Ct. Spec. App. 1969) ("It would seem that a seizure of a weapon or destructible evidence in a locked drawer in the immediate presence of the arrestee in the literal sense would be beyond the permissible scope of a search [incident to arrest].").

\footnote{169. In fact, under the proper interpretation of Chimel's "immediate control" rule, a police officer will rarely have to answer most of these questions. As I argue later in this Article, see infra text accompanying notes 342-43, whether an area is within an arrestee's immediate control should be determined as of the time of the contemplated search, not as of the time of the arrest. Because police officers virtually always restrain an individual immediately after placing him under arrest, as they are trained to do, an arrestee generally will be handcuffed or locked in a squad car, or both, before any search of his vehicle takes place, and it will therefore be clear to the arresting officer that the passenger compartment of the vehicle is not within the arrestee's immediate control and that he cannot search the interior of the vehicle as an incident of the arrest.}
which a standardized procedure, or bright-line rule, is necessary. Although arrests of occupants and recent occupants of an automobile occur quite frequently, a search of the interior of an automobile and containers therein constitutes more than a minor intrusion into an individual's privacy and is unrelated to the intrusion on the individual's liberty that flows from his custodial arrest. In addition, police officers could determine with relative ease whether, under the facts of the particular case, the passenger compartment of the arrestee's automobile and its contents are within the "immediate control" of the arrestee.

A major concern of the Supreme Court in Belton, however, was that lower courts had reached inconsistent results in applying Chimel's "immediate control" rule in this context. While somewhat disturbing, this fact did not require the Court to adopt a bright-line rule. The Court formulated its general rule governing the permissible scope of a search incident to arrest in a case concerning the validity of the search of an arrestee's home. It would have been unrealistic—and unwise—for the Court to have attempted to explain (in what necessarily would have been dictum) how that rule applied to the search of the person of the arrestee and the search of an automobile when the police arrested one of its occupants or recent occupants. As Professor Wayne R. LaFave commented, "[i]t is certainly asking too much to expect that the basic standard which is to serve as the starting point for analysis should from its inception provide a ready answer for every conceivable fact situation."

The Supreme Court's jurisprudence concerning the threshold Fourth Amendment question of what constitutes a "search" illustrates this point. In Katz v. United States, a case involving electronic eavesdropping, the Court held that the government conducts a "search" within the meaning of the Fourth Amendment when it invades an individual's legitimate expectation of privacy.

173. Id. at 353; see also id. at 360 (Harlan, J., concurring). In Smith v. Maryland, 442 U.S. 735 (1979), the Court explained its holding in Katz:

This Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable," a "reasonable," or a "legitimate expectation of privacy" that has been invaded by government action. This inquiry, as Mr. Justice Harlan aptly noted in his Katz concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy"—whether, in the words of the Katz majority, the individual
Over the years, the Court has given meaning to this general rule by applying it to particular types of police conduct. In Smith v. Maryland, the Court held that a person does not have a legitimate expectation of privacy in the telephone numbers he dials from his home telephone. Therefore, the police do not conduct a “search” when they install a pen register at the telephone company to record the numbers he dials. Subsequently, in California v. Ciraolo, the Court held that a homeowner’s legitimate expectation of privacy in the fenced-in backyard of his suburban home does not extend to aerial surveillance by police officers in a fixed-wing aircraft flying at an altitude of one thousand feet within navigable airspace. Thus, the Fourth Amendment does not protect a homeowner from such observations made without a warrant. And recently, in Kyllo v. United States, the Court held that the use of a thermal imager aimed at a private home to detect relative amounts of heat within that home violates a homeowner’s legitimate expectation of privacy and, therefore, constitutes a “search” for purposes of the Fourth Amendment.

Nonetheless, despite these decisions and others, the Supreme

has shown that “he seeks to preserve [something] as private.” The second question is whether the individual’s subjective expectation of privacy is “one that society is prepared to recognize as ‘reasonable’”—whether, in the words of the Katz majority, the individual’s expectation, viewed objectively, is “justifiable” under the circumstances.

Id. at 740 (citations omitted).
175. Id. at 745.
176. “A pen register is a mechanical device that records [or decodes] the numbers dialed on a particular telephone by monitoring the electrical impulses caused [when someone dials the telephone].” Id. at 736 n.1.
177. Id. at 745-46.
179. Id. at 213-14.
180. Id. at 215.
182. A thermal imager detects “infrared radiation, which virtually all objects emit but which is not visible to the naked eye.” The device “converts radiation into images based on relative warmth—black is cool, white is hot, and shades of gray connote relative differences.” Id. at 29-30.
183. Id. at 34-35, 40.
184. E.g., Illinois v. Caballes, 125 S. Ct. 834, 837-38 (2005) (holding that police officers do not conduct a “search” within the meaning of the Fourth Amendment when they use a trained narcotics-detection dog to sniff the exterior of a lawfully stopped automobile); California v. Greenwood, 486 U.S. 35, 40-41 (1988) (holding that because an individual does not have a legitimate expectation of privacy in trash placed inside an opaque plastic garbage bag and left on the curb in front of his home for collection by the trash collector, police
Court—more than a third of a century after its decision in *Katz*—has not stated how its “legitimate expectation of privacy” test applies to every conceivable type of police conduct. For instance, it has not decided whether police officers conduct a “search” within the meaning of the Fourth Amendment when they use binoculars or a telescope to enable them to observe individuals, objects, or activities taking place inside a private home or place of business.\(^{185}\) Nor has it decided whether the use of a trained narcotics-detection dog to sniff either a person or the outside of a dwelling\(^{186}\) or the insertion of a

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185. Although the Supreme Court has indicated on two occasions that the use of binoculars or a telescope by police officers to observe a distant object would not constitute a Fourth Amendment “search,” it did so in dictum, and more importantly, in cases decided before its watershed decision in *Katz*. On Lee v. United States, 343 U.S. 747, 754 (1952) (holding that federal drug agents did not violate the Fourth Amendment when they used an undercover agent equipped with a hidden microphone to transmit to them his conversation with an individual inside that individual’s place of business and stating: “The use of bifocals, field glasses or the telescope to magnify the object of a witness’ vision is not a forbidden search or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions”); United States v. Lee, 274 U.S. 559, 563 (1927) (concluding that a Coast Guard boatswain did not conduct a “search” for Fourth Amendment purposes when he used a searchlight to illuminate the deck of a motor boat he encountered on the high seas and stating: “Such use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution.”).

186. The Supreme Court concluded in *United States v. Place*, 462 U.S. 696, 707 (1983), that Drug Enforcement Administration agents at an airport did not conduct a “search” within the meaning of the Fourth Amendment when they exposed a suitcase to a trained narcotics-detection dog; and in *Illinois v. Caballes*, 125 S. Ct. 834, 838 (2005), the Court held that police officers do not conduct a “search” for purposes of the Fourth Amendment when they use a
key into a lock to see whether it fits constitutes a “search.” Rather, the Court has left to the lower courts the task of applying the general test it articulated in Katz to these specific types of police conduct, and not surprisingly, the lower courts have reached seemingly inconsistent results.\textsuperscript{187} Perhaps the Supreme Court will

drug-detection dog to sniff the exterior of a lawfully stopped automobile. See also City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000) (same).

187. Some lower courts have held that the use of binoculars by police officers to observe individuals, activities, or objects inside a dwelling or place of business does not constitute a “search.” See, e.g., United States v. Whaley, 779 F.2d 585, 590-92 (11th Cir. 1985); People v. Oynes, 920 P.2d 880, 883 (Colo. Ct. App. 1996) (holding that police officer's viewing a bedroom with binoculars did not constitute a search “absent evidence... that the... binoculars were extraordinarily powerful”); State v. Carter, 790 P.2d 1152, 1155 (Or. Ct. App. 1990), rev’d on other grounds, 848 P.2d 599 (Or. 1993); Commonwealth v. Hernley, 263 A.2d 904, 907 (Pa. Super. Ct. 1970); State v. Manly, 530 P.2d 306, 309 (Wash. 1975); see also United States v. Taborda, 635 F.2d 131, 141 (2d Cir. 1980) (Dumbauld, J., dissenting); People v. Arno, 153 Cal. Rptr. 624, 632-35 (Ct. App. 1979) (Hanson, J., dissenting). Other courts have reached the opposite conclusion. See, e.g., Taborda, 635 F.2d at 138-39; United States v. Kim, 415 F. Supp. 1252, 1255-57 (D. Haw. 1976); Arno, 153 Cal. Rptr. at 627-28; State v. Ward, 617 P.2d 568, 572-73 (Haw. 1980); State v. Blacker, 630 P.2d 413, 414-15 (Or. Ct. App. 1981); see also Whaley, 779 F.2d at 592 (Simpson, J., dissenting); Manly, 530 P.2d at 309 (Utter, J., concurring).

Similarly, some lower courts have concluded that a dog sniff at the door of an apartment constitutes a “search.” United States v. Thomas, 757 F.2d 1359, 1367 (2d Cir. 1985); State v. Ortiz, 600 N.W.2d 805, 817 (Neb. 1999) (by implication); see also United States v. Roby, 122 F.3d 1120, 1126-27 (8th Cir. 1997) (Heaney, J., dissenting) (concluding that a dog sniff at the door of a motel room from a common hallway constitutes a “search”). Others have held that a dog sniff outside a house or at the door of an apartment or a motel room does not constitute a “search.” See, e.g., Roby, 122 F.3d at 1124-25 (at a motel room door from a common hallway); United States v. Tarazon-Silva, 960 F. Supp. 1152, 1163 (W.D. Tex. 1997) (at a dryer vent on the exterior of a house); Fitzgerald v. State, 837 A.2d 989, 1035, 1039 (Md. Ct. Spec. App. 2003) (at the door of an apartment); People v. Dunn, 564 N.E.2d 1054, 1056-57 (N.Y. 1990) (same); Rodriguez v. State, 106 S.W.3d 224, 229 (Tex. App. 2003) (at the front door of a house).

With respect to whether the use of a narcotics-detection dog to sniff a person constitutes a “search,” compare United States v. Kelly, 302 F.3d 291, 293 n.1 (5th Cir. 2002) (holding that an up-close dog sniff of a pedestrian crossing the international border constitutes a “search”); B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1266 (9th Cir. 1999) (holding that the use of a dog to sniff high school students at close range constitutes a “search”); Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 478-79 (5th Cir. 1982) (per curiam) (holding that the use of a dog to sniff elementary, junior high, and high school students at close range constitutes a “search”), and Jones v. Latexo Indep. Sch. Dist., 499 F. Supp. 223, 232-33 (E.D. Tex. 1980) (holding that the use of a dog to sniff elementary and high school students constitutes a “search”), with United States v. Reyes, 349 F.3d 219, 223-24 (5th Cir. 2003) (holding that the unintentional dog-sniiff of a bus passenger from a distance of four-to-five feet does not constitute a “search”); Doe v. Renfrow, 631 F.2d 91, 92 (7th Cir. 1980)
resolve these issues in the future. Until it does, police officers, guided by the Katz test and these seemingly inconsistent lower court opinions, will have to decide for themselves whether they can use binoculars or a telescope to look inside a dwelling or place of business without first obtaining a search warrant, whether they must obtain a search warrant before they can use a trained narcotics-detection dog to sniff a person or the outside of a dwelling, or whether they need a search warrant to insert a key into a lock to see if it fits.

In addition to being unrealistic to have expected the Supreme Court in Chimel to have explained how its “immediate control” rule applied to the search of an automobile incident to the arrest of one of its occupants or recent occupants—a factual setting not present in that case—the rule formulated by the Court in Chimel to govern searches of the area surrounding an arrestee is, by its very nature, fact specific. One therefore could not expect the Court then, or even now, to state categorically how the rule applies in particular factual settings, such as when the police arrest an individual in his or her living room, ten feet away from a closed desk drawer. For the result in that situation depends upon the other circumstances present in

(per curiam) (holding that the use of a dog to sniff junior high and high school students does not constitute a “search”), adopting Doe v. Renfrow, 475 F. Supp. 1012, 1019, 1021-22 (N.D. Ind. 1979), and Rudolph ex rel. Williams v. Lowndes County Bd. of Educ., 242 F. Supp. 2d 1107, 1120 (M.D. Ala. 2003) (holding that the use of a drug-sniffing dog to walk up and down the aisles of a high school classroom does not constitute a “search”). See also Doe v. Renfrow, 451 U.S. 1022, 1025-26 & n.4 (1981) (Brennan, J., dissenting from the denial of certiorari) (using a dog to sniff junior high and high school students constitutes a “search”); B.C., 192 F.3d at 1271-72 (Brutteni, J., concurring in part) (using a dog to sniff high school students from a distance of three-to-four feet does not constitute a “search”); Doe v. Renfrow, 635 F.2d 582, 583 (7th Cir. 1980) (Swygert, J., dissenting from the denial of rehe'g en banc) (using a dog to sniff junior high and high school students constitutes a “search”).

As to whether the insertion of a key into a lock constitutes a “search,” compare United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991) (holding that the insertion of a key into the lock of an apartment door constitutes a “search”), and United States v. Portillo Reyes, 529 F.2d 844, 848 (9th Cir. 1975) (holding that the insertion of a key into the lock of an automobile door constitutes a “search”), with United States v. Salgado, 250 F.3d 438, 456-57 (6th Cir. 2001) (holding that the insertion of a key into the lock of an apartment door does not constitute a “search”; United States v. $109,179 in U.S. Currency, 228 F.3d 1080, 1087 (9th Cir. 2000) (holding that the insertion of a key into the lock of an automobile door does not constitute a “search”); United States v. Hawkins, 139 F.3d 29, 33 n.1 (1st Cir. 1998) (holding that the insertion of a key into the lock of a storage locker in the basement of an apartment building does not constitute a “search”), and State v. Weaver, 912 S.W.2d 499, 521 (Mo. 1995) (holding that the insertion of a key into the lock of an automobile door does not constitute a “search”). See also Portillo Reyes, 529 F.2d at 852 (Wright, J., dissenting) (concluding that the insertion of a key into the lock of an automobile door does not constitute a “search”).
the case. A police officer might be permitted to search the desk drawer if she arrested the homeowner and three other individuals for armed robbery, she is the only officer present and has not yet handcuffed the arrestees, and the arrestees are well-built, athletic, twenty-five-year-old males. On the other hand, that same police officer might not be allowed to search the same desk drawer if she and two other police officers arrested a seventy-five-year-old, wheelchair-bound woman for the crime of mail fraud. When dealing with a rule whose application depends upon the facts and circumstances of the particular case, the Court can merely set forth the general rule and its underlying rationale and then allow lower courts to apply that rule to specific fact situations. If necessary, the Court can provide further guidance to those courts in subsequent cases.

What, then, should the Supreme Court have done in Belton when faced with the apparently inconsistent results that lower courts had reached in applying Chimel's "immediate control" rule? The answer to this question is simple: instead of adopting a per se rule, the Court should have applied Chimel's "immediate control" rule to the particular facts in Belton. Had it done so, the Court could have provided guidance to the lower courts by further explaining the rule and articulating the factors that should be considered in determining the proper scope of a search of an automobile incident to the arrest of one of its occupants or recent occupants. This is precisely what the Court did with the "legitimate expectation of privacy" test in the years following its landmark decision in Katz v. United States,188 as well as with other broad principles it adopted in other areas of the law.189

188. 389 U.S. 347 (1967). See supra notes 172-77, 184 and accompanying text.

189. In Miranda v. Arizona, for example, the Supreme Court adopted procedural guidelines that law enforcement officers must follow before and during custodial interrogation of a suspect. 384 U.S. 436, 478-79 (1966). Over the years, the Court has fleshed out the general rule it adopted in Miranda, explaining, among other things, whether the required procedures apply to minor offenses, Berkemer v. McCarty, 468 U.S. 420, 429 n.11, 434 (1984) (holding that Miranda applies "regardless of the nature or severity of the offense of which [an individual] is suspected or for which he was arrested"); when an individual will be deemed to be in "custody," e.g., Stansbury v. California, 511 U.S. 318, 319 (1994) (per curiam) (holding that "an officer's subjective and undisclosed view concerning whether the person being interrogated is a suspect is irrelevant to the assessment whether the person is in custody"); Berkemer, 468 U.S. at 440 (holding that a person is "in custody" when his "freedom of action is curtailed to a 'degree associated with formal arrest'") (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam)); Oregon v. Mathison, 429 U.S. 492, 495 (1977) (per curiam) (holding
that *Miranda* warnings need not be given "simply because the questioning takes place in the station house" and that therefore the suspect, who voluntarily went to the police station in response to a request by a police officer, was told upon his arrival that he was not under arrest, and was allowed to leave after a brief interview with the officer, was not "in custody"; Orozco v. Texas, 394 U.S. 324, 326 (1969) (holding that a suspect being questioned in his own bedroom at 4:00 a.m. by four police officers was "in custody"); Mathis v. United States, 391 U.S. 1, 4-5 (1968) (holding that an individual in jail serving a sentence for a state crime was "in custody" when interrogated by IRS agents concerning a different offense); what constitutes "interrogation," e.g., Arizona v. Mauro, 481 U.S. 520, 527 (1987) (holding that the police did not interrogate a suspect when they allowed his wife, at her request, to talk to him in the presence of a police officer who tape-recorded the conversation); Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980) (holding that "interrogation" comprises not only express questioning, but also its functional equivalent, i.e., "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect"); whether the warnings required by *Miranda* must be given verbatim, e.g., Duckworth v. Eagan, 492 U.S. 195, 202-03 (1989) (stating that the Court had "never insisted that *Miranda* warnings be given in the exact form described in that decision" and holding that warnings that suggested that a person who cannot afford an attorney is entitled to one only "if and when [he] go[es] to court" "touched all the bases required by *Miranda*" and were sufficient); California v. Prysock, 453 U.S. 355, 359 (1981) (per curiam) (concluding that the "rigidity" of *Miranda* does not extend "to the precise formulation of the warnings given a [suspect]" and that "*Miranda* indicates that no talismanic incantation was required to satisfy its strictures"); what is necessary for a suspect to waive his rights, e.g., Colorado v. Spring, 479 U.S. 564, 577 (1987) (holding that "a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege [against self-incrimination]"); Connecticut v. Barrett, 479 U.S. 523, 524 (1987) (holding that a suspect validly waived his rights when, after being advised of those rights on three occasions, he indicated he would not make a written statement but was willing to talk about the incident that led to his arrest, and on the second and third occasions added that he would not make a written statement outside the presence of counsel and then orally admitted his involvement in the crime; rejecting "the contention that the distinction drawn by [the suspect] between oral and written statements indicates an understanding of the consequences so incomplete that... his limited invocation of the right to counsel [should be deemed] effective for all purposes"); North Carolina v. Butler, 441 U.S. 369, 373 (1979) (holding that a waiver need not be express, but rather can be "inferred from the actions and words of the person interrogated"); what law enforcement officers must do when a suspect invokes his right to remain silent, Michigan v. Mosley, 423 U.S. 96, 104 (1975) (holding that when a suspect invokes his right to remain silent, the police must "scrupulously honor[... his right to cut off questioning"] (internal quotation marks omitted) (quoting *Miranda*, 384 U.S. at 474, 479); or his right to counsel, e.g., Minnick v. Mississippi, 498 U.S. 146, 153 (1990) ("When counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted
For example, the Court in *Belton* cited seven lower court cases to illustrate the inconsistent results reached concerning the scope of a search of an automobile incident to an arrest when the police conducted the search after the arrestee was no longer in the vehicle. 190 An examination of these cases reveals that any inconsistency 191 stemmed primarily from confusion about four


191. In fact, some of the cases cited by the Court in *Belton* as examples of cases reaching inconsistent results may not have done so. For instance, in *United States v. Sanders*, 631 F.2d 1309 (8th Cir. 1980), two Drug Enforcement Administration agents arrested both the driver and passenger of an automobile and ordered them out of the car. One of the agents searched the passenger, who was standing with his hands on the roof of the vehicle just to the left of the open passenger-side door. From that position, the agent looked into the car and observed a small brown packet on the passenger-side floorboard. The agent reached into the car and opened the packet, finding twenty-two capsules of heroin. *Id.* at 1312-13. The court upheld the search of the packet as a valid search incident to arrest because “the floorboard of the car was potentially available to [the passenger-arrestee].” *Id.* at 1313.
specific issues: first, whether the search of certain types of containers, such as a purse, discovered inside the passenger

In United States v. Rigales, 630 F.2d 364 (5th Cir. 1980), a police officer stopped an automobile for a traffic violation and asked the driver and the four passengers to exit the vehicle. After learning that there were two outstanding traffic warrants for one of the passengers, the officer arrested that passenger and frisked him, finding several unspent bullets in his pocket. The officer then shined his flashlight into the automobile and observed on the floorboard of the front seat a zippered leather case with a bulge in it. Suspecting the case contained a gun, the officer picked it up and found it very heavy. He opened the case and discovered a loaded pistol. When the driver of the vehicle claimed ownership of the gun, the officer arrested him. Id. at 366. The court held that the gun should have been suppressed, reasoning that the search of the leather case could not be upheld under the so-called “automobile exception” to the warrant requirement. Id. at 367-68. See, e.g., California v. Acevedo, 500 U.S. 565 (1991); California v. Carney, 471 U.S. 386 (1985); Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925). In reaching this result, and without mentioning the search incident to arrest exception to the warrant requirement, the court stated that “there is no indication that the [leather] case was within the reach or control of [the driver] or any of the passengers.” Rigales, 630 F.2d at 367.

Assuming that the Rigales court implicitly held that the search of the leather case could not be justified as a search incident to the arrest of the passenger, the result in that case can be reconciled with the result in Sanders. In Sanders, the Government met its burden of proving that an exception to the warrant requirement justified the warrantless search of the brown packet on the floorboard of the passenger-side of the car, that is, it showed that because the arrestee was standing next to the open passenger-side door, the floorboard of the car was actually within his immediate control under Chimel, despite his hands being on the roof of the car at the time of the search. Sanders, 631 F.2d at 1313-15. In Rigales, however, the Government failed to meet its burden of showing that the warrantless search was justified by an exception to the warrant requirement because it did not show how far away from the vehicle the arrestees and passengers were standing and whether the zippered case on the floorboard in the passenger compartment of the vehicle was accessible to the them. Rigales, 630 F.2d at 367. Had the prosecution in Rigales introduced evidence showing that the arrestee was only a few feet away and could have readily gained access to the zippered case, it is quite possible that the court would have held that the search was a valid search incident to arrest, the same result as that reached by the court in Sanders. This is not to say, however, either that this would be the theoretically correct result under Chimel, or that Sanders correctly applied the Chimel rule. See infra notes 332-67 and accompanying text.

The Court in Belton also cited United States v. Frick, 490 F.2d 666 (5th Cir. 1973), to illustrate the inconsistent results reached by the lower courts in factually similar cases. Frick, however, did not even involve the factual situation the Court expressed concern about in Belton—namely, “the lawful custodial arrest of the occupants of an automobile,” Belton, 463 U.S. at 459 (emphasis added); rather, it involved a search incident to the arrest of an individual who was about to enter his vehicle. Nevertheless, even if the arrestee in Frick had been a recent occupant of the automobile, any inconsistency with other cases may have resulted from the court’s failure to consider factors showing that the passenger compartment and any containers therein were not actually within the arrestee’s immediate control. See infra note 195.
compartment of the vehicle should be deemed a search of the person of the arrestee (and thus governed by the per se rule adopted in United States v. Robinson\(^{192}\)) or a search of the area surrounding the arrestee (and thus subject to Chimel’s “immediate control” rule);\(^{193}\) second, whether the passenger compartment of the automobile and any containers therein had to be within the arrestee’s immediate control at the time of the search or merely at the time of the arrest;\(^{194}\) third, what factors were relevant in determining whether the passenger compartment and any containers therein were within the arrestee’s immediate control;\(^{195}\) and fourth, the circumstances under

\(^{192}\) 414 U.S. 218 (1973); see supra note 33 and accompanying text.

\(^{193}\) Compare Hinkel v. Anchorage, 618 P.2d 1069, 1071 (Alaska 1980) (holding that the search of the arrestee’s purse, which the police had taken from the front seat of her automobile after arresting her inside the vehicle and placing her in a squad car, was a valid search of the arrestee’s person incident to her arrest, because a purse is property “immediately associated with the person of the arrestee,” as it is “often worn on the person and generally serve[s] the same function as clothing pockets”) (internal quotation marks omitted) (quoting United States v. Chadwick, 433 U.S. 1, 15 (1977)), with Ulesky v. State, 379 So. 2d 121, 126 (Fla. Dist. Ct. App. 1979) (treating the search of the arrestee’s purse, which a police officer found inside the cab of the arrestee’s pickup truck after arresting her inside the vehicle and placing her in his squad car, as one of the area surrounding the arrestee and therefore governed by Chimel, and holding that the search could not be justified as one incident to the arrest because, at the time of the search, the purse was no longer within her “immediate control”).

\(^{194}\) Compare United States v. Benson, 631 F.2d 1336, 1340 (8th Cir. 1980) (holding that the search of a tote bag seized from the four-door compact station wagon in which the arrestee was a passenger was not a valid search incident to arrest because, “at the time [the police officer] opened and searched it, . . . there was no longer any danger that [the arrestee] might gain access to the bag to destroy evidence or grab a weapon”), vacated by 453 U.S. 918 (1981) and Ulesky, 379 So. 2d at 126 (holding that under Chimel, a search incident to an arrest is “limited to the area within the immediate control of the arrestee at the time of the search, not at the time of the arrest”), with Hinkel, 618 P.2d at 1071 (noting that in a previous case it had concluded that, with respect to the search of the person of an arrestee, “the exigencies of the search [are] to be judged at the time of the arrest rather than at the time the item is opened . . . ; ‘the search once justifiable, does not violate the [F]ourth [A]mendment remedy [sic] because the exigency is removed at the time the search is conducted’) (quoting McCoy v. State, 491 P.2d 127, 137 (Alaska 1971)); see also Benson, 631 F.2d at 1341 (Gibson, J., dissenting) (“This case involves a search incident to arrest wherein the tote bag was in the ‘immediate control’ of [the arrestee] at the time of his arrest. . . . Since the tote bag was within [the arrestee’s] immediate control at the time the officers approached him, both the seizure and subsequent search of the bag were proper.”).

\(^{195}\) In United States v. Frick, 490 F.2d 666, 669 (5th Cir. 1973), the court held that an attaché case on the back seat of an automobile, approximately two feet away from an individual who was arrested for fraud, was within the area of
which it could be said that the police had reduced a container “not
immediately associated with the person of the arrestee” to their
“exclusive control” so that under United States v. Chadwick its
search could not be justified as one incident to an arrest.

The Supreme Court partly resolved the last of these issues in
Belton. It noted that the New York Court of Appeals relied upon the
theory that the search of Roger Belton’s jacket and the seizure of its
contents could not have been incident to his arrest because the
trooper who arrested him, by the very act of searching the jacket
and seizing the contents of its pocket, had gained “exclusive control”
over them. The Supreme Court rejected this reasoning, stating
that “under this fallacious theory[,] no search or 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.”

This statement makes it clear that a police officer does not

the arrestee’s immediate control. In reaching this result, the court deemed it
irrelevant that the car door may have been closed at the time of the arrest and
of the subsequent search of the car. Id. at 669. Moreover, as pointed out by
Judge Goldberg in his separate opinion, the court failed to consider that “[a]t
the time of the search... [the arrestee] was in the custody of five federal agents
[and] he either had been, or was in the process of being, handcuffed... .” Id.
at 673 (Goldberg, J., concurring in part and dissenting in part). Judge Goldberg
continued: “[T]he [court’s] opinion is understandably devoid of any indication of
the manner in which [the arrestee], an individual with no previous record for
recklessness or violence, might have accomplished the rather extraordinary
feats of overpowering his trained captors, breaking his bonds, and destroying
crucial evidence.” Id.

196. Chadwick, 433 U.S. at 15.
197. The Court in Chadwick held that the search of a locked footlocker,
conducted by federal narcotics agents at the local federal building one-and-a-
half hours after arresting three individuals and seizing the footlocker from
them, could not be justified as a search incident to arrest. It reasoned:

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.

Id. at 15.
198. See Benson, 631 F.2d at 1340 (holding that at the time a police officer
searched a leather tote bag he seized from the back seat of the four-door
compact station wagon in which the arrestee was a passenger, he had exclusive
control over it because another officer had removed the arrestee from the
vehicle and placed him in a search position outside the vehicle).

Belton, 407 N.E.2d 420, 422 (N.Y. 1980)).
200. Id.
obtain "exclusive control" of an item simply by seizing it and holding it in her hand; however, it does not set forth any guideline for determining the circumstances under which an item seized by a police officer can be deemed to be under her "exclusive control." Justice Brennan, in his dissenting opinion in Belton, attempted to provide such a guideline. Relying upon Chadwick, he concluded that "exclusive control . . . means sufficient control such that there is no significant risk that the arrestee or his confederates 'might gain possession of a weapon or destructible evidence.'"

201 Had the Court in Belton provided such a guideline—instead of merely explaining when a police officer does not have an item under her "exclusive control"—it certainly would have provided some help to lower courts and police officers in the field. Moreover, there appears to be no reason why the Court in Belton could not have attempted to resolve the issue of "exclusive control."

Had the Supreme Court not adopted a per se rule in Belton, it also could have resolved the second issue that had caused confusion in the lower courts. According to the Court in Belton, the state trooper placed Belton and his companions under arrest just after he ordered them to get out of the car, but he did not search the vehicle until after he had patted them down and "split them up into four separate areas of the Thruway."203 In determining whether the passenger compartment of the automobile and the jackets on the back seat of that vehicle were within the "immediate control" of the arrestees, the Court could have explained whether, under Chimel, the area in question must have been within the arrestee's immediate control at the time the police conducted the search (in Belton, when the arrestees had been separated from each other on the Thruway), at the time the police arrested the individual (in Belton, immediately after the occupants of the automobile exited the vehicle), or, perhaps, at the time the police officer first came in contact with the individual (in Belton, when the arrestees were seated inside the passenger compartment of the automobile).

The Court in Belton also could have, in a large part, resolved the first issue that had caused confusion in the lower courts. The container the trooper searched in Belton was a jacket, which, like a purse, is an item normally worn on the person204 and, therefore,

201. Id. at 471 n.5 (Brennan, J., dissenting) (quoting Chimel v. California, 395 U.S. 752, 763 (1969)).

202. This is not to say that Justice Brennan's interpretation of "exclusive control" is the correct interpretation. Nonetheless, in light of the underlying policies, there is no reason to conclude it is not.


204. The search of a jacket or coat being worn by an arrestee is deemed a search of the arrestee's person. See United States v. Robinson, 414 U.S. 218,
arguably an item of personal property "immediately associated with the person of the arrestee," so that its search could be deemed a search of the person of the arrestee, even though the arrestee was not wearing it at the time.

Finally, by applying Chimel's "immediate control" rule to the facts and circumstances in Belton, the Court could have provided guidance to the lower courts and police officers in the field concerning the factors relevant in determining whether the passenger compartment of an automobile and containers therein were within an arrestee's immediate control at the relevant time. Belton involved a single police officer and four arrestees. The state trooper had not handcuffed any of the arrestees prior to searching their automobile, but he had "split them up into four separate areas of the Thruway" and presumably stood between them and the vehicle. Moreover, Roger Belton's jacket pocket was zippered shut, which presumably would have somewhat hampered his, or his companions', access to it. Depending upon when the passenger compartment had to be within the arrestee's immediate control, the Court could have considered the significance of some, or all, of these factors as well as others that may not have been mentioned in the opinion as written.

Had the Belton Court resolved these four specific issues, in whole or even in part, rather than adopting a per se rule, it would have eliminated some major sources of confusion in the lower courts.

236 (1973); see also Wyoming v. Houghton, 526 U.S. 295, 304 n.1 (1999) (making it clear that "pockets" and "clothing" being worn by an individual are considered "part of the person").


206. A number of courts have upheld the search of an arrestee's purse as a valid search of the person of the arrestee, at least when the arrestee was in physical possession of the purse at the time of the arrest. E.g., People v. Hoskins, 461 N.E.2d 941, 944-45 (Ill. 1984); State v. Hershey, 371 N.W.2d 190, 192 (Iowa Ct. App. 1985); State v. Sabater, 601 P.2d 11, 13-14 (Kan. Ct. App. 1979); Dawson v. State, 395 A.2d 160, 167 (Md. Ct. Spec. App. 1978); Tribble v. State, 792 S.W.2d 280, 285 (Tex. Ct. App. 1990); Stewart v. State, 611 S.W.2d 434, 438 (Tex. Crim. App. 1981); see also United States v. Graham, 638 F.2d 1111, 1114 (7th Cir. 1981) (holding that for purposes of a search warrant authorizing the search of the person of an individual, a shoulder purse being worn by that individual constitutes part of his person); United States v. Berry, 560 F.2d 861, 864 (7th Cir. 1977) (dictum) (distinguishing the defendant's attaché case from a purse because while a purse is carried by the person at all times, an attaché case is not, and is therefore more analogous to luggage), vacated on other grounds on reh'g, 571 F.2d 2 (7th Cir. 1978); People v. Harris, 164 Cal. Rptr. 296, 303 (Ct. App. 1980) (treating a purse as an extension of the person for purposes of a station house search).

207. Belton, 453 U.S. at 456. But see supra note 16.

208. Id.
and would have resulted in more consistent results in cases decided after that decision. Resolution of these issues also would have provided guidance to police officers in the field. It is true, of course, that it might have been “difficult in some cases to measure the exact scope of the arrestee’s immediate control,” and undoubtedly there would have been “some close cases,” but under a case-by-case approach, “when in doubt the police [could] always turn to the rationale underlying Chimel . . . before exercising their judgment.”

B. The Per Se Rule is Based Upon an Overgeneralization

A second criticism that can be leveled at the Supreme Court’s decision in *New York v. Belton* is that the particular per se rule it adopted is based upon a “considerable overgeneralization.” As a result, for over twenty years police officers have lawfully conducted thousands of searches of automobiles and their contents that cannot be justified by either of the twin rationales of *Chimel*—the need to prevent the arrestee from reaching a weapon or an item of evidence.

An examination of lower court cases decided shortly after the Supreme Court’s decision in *Belton* illustrates this point. Numerous cases can be found in which a court, relying upon *Belton*, upheld a search conducted by the police after the arrestee had been both handcuffed and placed in a squad car. In such circumstances, it

209. *Id.* at 471 (Brennan, J., dissenting).
210. *Id.* at 471-72.
211. 455 U.S. 454.
212. Richards v. Wisconsin, 520 U.S. 385, 393-94 (1997) (unanimously rejecting a per se rule that would have allowed police officers to dispense with the knock-and-announce requirement when executing a search warrant in a felony drug investigation, in part, because such an exception “contains considerable overgeneralization,” as not every drug investigation will pose substantial risks to officer safety and preservation of evidence).

Courts have upheld searches of vehicles or containers therein while the arrestee was standing (or lying on the ground) outside his vehicle handcuffed, e.g., United States v. Cotton, 751 F.2d 1146, 1149 (10th Cir. 1985); United States v. Collins, 668 F.2d 819, 820 (5th Cir. 1982) (per curiam); Virgin Islands v. Rasool, 657 F.2d 582, 585, 588-89 (3d Cir. 1981); State v. Sanders, 312 N.W.2d 534, 537, 539 (Iowa 1981); State v. Harvey, 648 S.W.2d 87, 89-90 (Mo. 1983); State v. Rice, 327 N.W.2d 128, 132 (S.D. 1982) (Fosheim, C.J.,
concurring); see also Traylor v. State, 458 A.2d 1170, 1173-75 (Del. 1983) (upholding a search conducted by one police officer while another officer was handcuffing the arrestee); otherwise restrained, e.g., Thomas v. State, 415 So. 2d 1246, 1249 (Ala. Crim. App. 1982) (upholding the search of the passenger compartment and stating that the Belton rule “applies even though the suspects have been removed from the automobile and restrained by other officers”), overruled on other grounds by Ex parte Boyd, 542 So. 2d 1276 (Ala. 1989); State v. Baruth, 691 P.2d 1266, 1269 (Idaho Ct. App. 1984) (upholding the search of the passenger compartment conducted while the arrestee and the other two occupants of his automobile were lying face down on the pavement at the rear of the car, presumably guarded by police officers); State v. Winston, 295 S.E.2d 46, 49 (W. Va. 1982) (upholding the search of a briefcase discovered in the passenger compartment and rejecting the argument that the Belton rule does not apply when the arrestee “is handcuffed or otherwise secured away from the inside of his vehicle”); or while the arrestee was in a squad car, e.g., Baxter v. State, 626 S.W.2d 935, 936-38 (Ark. 1982); State v. Brock, 426 So. 2d 1287, 1288-90 (Fla. Dist. Ct. App. 1983); State v. Valdes, 423 So. 2d 944 (Fla. Dist. Ct. App. 1982); State v. Holden, 290 S.E.2d 130, 130-31 (Ga. Ct. App. 1982); Doe v. State, 451 N.E.2d 1096, 1098 (Ind. Ct. App. 1983); Horton v. State, 408 So. 2d 1197, 1198-99 (Miss. 1982); State v. Cooper, 304 N.C. 701, 702, 704-05, 286 S.E.2d 102, 103-04 (1982) (in addition, the arrestee’s two companions were under the control of a police officer); State v. Reed, 634 S.W.2d 665, 666 (Tenn. Crim. App. 1982); State v. Callahan, 644 P.2d 735, 736-37 (Wash. Ct. App. 1982). See also McDowell v. State, 324 S.E.2d 211, 212 (Ga. Ct. App. 1984) (upholding a search conducted while the police were placing the arrestee in a squad car). These circumstances most likely render the passenger compartment beyond the arrestee’s “immediate control.”

Some courts even upheld a search conducted after the police had removed the arrestee or the vehicle, or both, from the scene of the arrest. E.g., United States v. McCrady, 774 F.2d 868, 871-72 (8th Cir. 1985) (upholding a search conducted after the police had removed the arrestee from the scene and before they turned the vehicle over to the arrestee’s passenger); State v. Nelson, 633 P.2d 391, 394-95 (Ariz. 1981) (upholding a search conducted after the police had taken the arrestees to the crime scene for identification); Williams v. State, 627 S.W.2d 28, 29 (Ark. Ct. App. 1982) (upholding a search conducted after the police had taken the arrestee into custody and towed his car to the police station). Other courts, however, held Belton inapplicable in such situations. E.g., State v. Badgett, 512 A.2d 160, 162, 169 (Conn. 1986) (holding that the search of a black bag discovered in the front seat of the arrestee’s automobile as another officer was taking the arrestee from the scene was not valid under Belton and reasoning that “the right of a police officer to search the vehicle ceases the instant the arrestee departs the scene because the arrestee’s removal forecloses any possibility that he could reach for an article within the vehicle”); State v. Licourt, 417 So. 2d 1051, 1052-53 (Fla. Dist. Ct. App. 1982) (holding that the search of an arrestee’s automobile conducted after the police had taken the arrestees and their automobile to the police station could not be justified under Belton); State v. Ritt, 710 P.2d 1197, 1201 (Haw. 1985) (holding that the search of an arrestee’s pickup truck could not be justified as a search incident to an arrest because the police had already removed the arrestees from the scene); State v. Hernandez, 410 So. 2d 1381, 1384-85 (La. 1982) (holding that the search of an arrestee’s automobile conducted after the police had taken the arrestee to the police station could not be justified under Belton); State v. Berkwit, 689 S.W.2d 763, 765-66 (Mo. Ct. App. 1985) (holding that a search conducted after the police had taken the arrestee into custody and had his car towed to a private lot could not be justified as a search incident to his arrest).
would have been virtually impossible for the arrestee to have escaped and retrieved a weapon or items of evidence from his vehicle or a container therein. As Justice Scalia put it in his separate opinion in Thornton v. United States, a case involving these precise facts, an arrestee would have to possess "the skill of Houdini and the strength of Hercules" to be able to do so.

Indeed, Justice Scalia pointed out that the government was unable "to come up with even a single example [during the previous thirteen years] of a handcuffed arrestee's retrieval of arms or evidence from his vehicle." The government's brief in Thornton pointed to a total of seven instances in the previous thirteen years in which handcuffed or formerly handcuffed arrestees used weapons to attack state or federal officers. Justice Scalia concluded, however, that these instances did not "justify the search authority claimed," because none of them involved the arrestee's obtaining a weapon from his vehicle. Justice Scalia pointed out that "[t]hree involved arrestees who retrieved weapons concealed on their own person": "[t]hree more involved arrestees who seized a weapon from the arresting officer"; and the remaining one involved a handcuffed arrestee who "jumped out of the squad car and 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." He concluded that

[t]he risk that a suspect handcuffed in the back of a squad car might escape and recover a weapon from his vehicle is surely no greater than the risk that a suspect handcuffed in his residence might escape and recover a weapon from the next room—a danger [the Court] held insufficient to justify a search in Chimel.

Of course, the cases in which a police officer searched an arrestee's motor vehicle only after handcuffing the arrestee and placing him in the back of her squad car may represent only a small fraction of these cases. The vast majority may have involved situations in which the police conducted the search before securing

215. Id. at 626 (Scalia, J., concurring) (internal quotation marks omitted) (quoting United States v. Frick, 490 F.2d 666, 673 (5th Cir. 1973) (Goldberg, J., concurring in part and dissenting in part)).
216. Thornton, 541 U.S. at 626-27.
218. Thornton, 541 U.S. at 626 (Scalia, J., concurring).
219. Id.
220. Id. at 627.
the arrestee, so that the interior of the arrestee’s automobile in fact remained within his immediate control at the time of the search. But as Justice Scalia pointed out in Thornton, “[r]eported cases involving . . . a motorist handcuffed and secured in the back of a squad car when the search takes place . . . are legion." He also noted that the Government admitted in its brief in Thornton that “the 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.” This led Justice Scalia to conclude that “[i]f it was ever true that the passenger compartment is ‘in fact generally, even if not inevitably,’ within the arrestee’s immediate control at the time of the search, it certainly is not true today.”

Professor Myron Moskovitz’s study of what police officers actually do after arresting someone strongly supports Justice Scalia’s conclusion. In his survey of police departments and law enforcement agencies throughout the country, Professor Moskovitz found that, “in general, police officers are taught to handcuff an arrestee (preferably behind the back) before searching the area

221. Id. at 628. Writing shortly after the Supreme Court’s decision in Belton, Professor LaFave disagreed with the Court’s assertion in Belton that a “reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally . . . within ‘the area into which an arrestee might reach in order to grab a weapon or evidentiary item.’” New York v. Belton, 453 U.S. 454, 460 (1981) (quoting Chimel v. California, 395 U.S. 752, 763 (1969)). He stated:

Any survey of the relevant cases will indicate a number of commonplace events which would put the passenger compartment beyond the arrestee’s control—immediate removal of him to a patrol car or some other place away from his own vehicle, handcuffing the arrestee, closure of the vehicle, and restraint of the arrestee by several officers, among others.


222. Thornton, 541 U.S. at 628 (Scalia, J., concurring in the judgment) (internal quotation marks omitted) (quoting Brief for the United States at 36-37) (quoting United States v. Wesley, 293 F.3d 541, 548 (D.C. Cir. 2002)).

223. Id. (quoting Belton, 453 U.S. at 460).

224. Professor Moskovitz sent requests for information to police departments in about thirty of California’s larger cities, about fifty California sheriff’s departments, approximately a dozen federal law enforcement agencies, and about thirty state and municipal police departments around the country. He received useful information from a few of the departments, which allowed him to reach his conclusions. Moskovitz, supra note 7, at 664-65.
around him."225 With respect to the arrest of an occupant of a motor vehicle, he reported that "[n]ot a single respondent said or even suggested that a police officer should search a vehicle while the arrestee is in the vehicle or unsecured."226

If, as Justice Scalia concludes from an examination of the cases and Professor Moskovitz's study shows, police officers routinely secure an arrestee outside his automobile before searching that vehicle, then in virtually every case involving the arrest of an occupant or recent occupant of a motor vehicle there exists no realistic possibility that the arrestee could gain access to the passenger compartment of his vehicle and obtain a weapon or an item of evidence. Thus, Belton's "generalization" that articles inside the passenger compartment of an automobile are within the immediate control of such an arrestee is not in accord with reality, and its per se rule therefore is based upon this "considerable overgeneralization."227

C. The Possibility for Abuse

The final criticism of the Supreme Court's decision in Belton is that the per se rule it adopted is subject to manipulation and abuse by police officers.228 Although that rule applies only when a police

225. Id. at 665.
226. Id. at 676.
228. When originally decided, Belton also could be criticized for failing to answer a number of important questions, such as whether the rule applied when police arrested an individual who recently occupied a motor vehicle but who had already exited the vehicle when police initially came in contact with him; whether police could search the vehicle after handcuffing the arrestee and placing him inside a squad car; how long after the suspect's arrest could police conduct the search; whether the rule applied to the rear area of station wagons, hatchbacks, vans, and sport-utility vehicles; and whether police could search locked containers. See Belton, 453 U.S. at 469-70 (Brennan, J., dissenting). See generally Rudstein, supra note 6, at 230-44. However, since Belton was decided, the Supreme Court has resolved some of these issues, Thornton, 541 U.S. at 615, 622-24 (holding that Belton applies when police first make contact with the individual after he has exited his vehicle; upholding a search conducted after the arrestee had been handcuffed and placed in a squad car), and the lower courts have reached general agreement on many of the others. E.g., United States v. Olguin-Rivera, 168 F.3d 1203, 1205-06 (10th Cir. 1999) (holding that police can search the cargo area of a sport-utility vehicle, even though it has a built-in vinyl cover pulled over the top); United States v. Caldwell, 97 F.3d 1063, 1067 (8th Cir. 1996) (holding that police can search the rear deck of a hatchback); United States v. Lacey, 86 F.3d 956, 971 (10th Cir. 1996) (upholding the search of the entire interior of a van); United States v. Woody, 55 F.3d 1257, 1269-70 (7th Cir. 1995) (holding that police can search a locked glove compartment); United States v. Doward, 41 F.3d 789, 794 (1st Cir. 1994)
officer makes a lawful custodial arrest,\textsuperscript{229} many states grant police officers discretion to make a custodial arrest for the violation of any motor vehicle law,\textsuperscript{230} while others permit police officers to take motorists into custody for some traffic offenses.\textsuperscript{231} In addition, some states authorize a police officer to take a motorist into custody if the motorist fails to produce a satisfactory bond.\textsuperscript{232} Moreover, the Supreme Court in \textit{Atwater v. City of Lago Vista}\textsuperscript{233} held that the Fourth Amendment does not prohibit a police officer from making a

(holding that police can search the rear deck of a hatchback); United States v. Pino, 855 F.2d 357, 364 (6th Cir. 1988) (holding that police can search the rear deck of a station wagon); United States v. Russell, 670 F.2d 323, 327 (D.C. Cir. 1982) (holding that police can search the rear deck of a hatchback); Stout v. State, 898 S.W.2d 457, 460 (Ark. 1995) (holding that police can search the spare-tire compartment under the rear deck of a station wagon); Shaw v. State, 449 So. 2d 976, 978-79 (Fla. Dist. Ct. App. 1984) (upholding the search of the rear deck of a station wagon); People v. Tripp, 715 N.E.2d 689, 692, 698 (Ill. App. Ct. 1999) (upholding the search of a locked footlocker); Commonwealth v. Alvarado, 651 N.E.2d 824, 833 (Mass. 1995) (holding that a search conducted more than two hours after police towed the vehicle to the police barracks was not “contemporaneous” with the arrest); Commonwealth v. Bongarzone, 455 N.E.2d 1183, 1198 (Mass. 1983) (holding that police can search the cargo area of a sport-utility vehicle); Pack v. Commonwealth, 368 S.E.2d 921, 923 (Va. Ct. App. 1988) (holding that police can search a locked suitcase); State v. Boswell, 294 S.E.2d 287, 290, 295 (W. Va. 1982) (upholding the search of the cargo area of a van); State v. Fry, 388 N.W.2d 556, 577 (Wis. 1986) (holding that police can search a locked glove compartment). \textit{But see Russell, supra}, at 326-27 (dictum) (stating that police cannot search the spare-tire compartment under the rear deck of a station wagon); Adams v. State, 634 S.W.2d 785, 789 n.2 (Tex. Ct. App. 1982) (dictum) (stating that Belton authorizes police officers “to search the interior of the automobile and any containers which [are] not locked” (emphasis added)).

229. \textit{Belton}, 453 U.S. at 460.


231. \textit{E.g.}, KAN. STAT. ANN. § 8-2104(b) (2001) (stating that a police officer may take a traffic offender into custody for an offense that is a misdemeanor); TEX. CODE ANN. §§ 543.001, 543.004 (Vernon 1999 & Supp. 2004) (stating that a police officer may take a traffic offender into custody for any offense other than speeding and violation of the open container law).

232. \textit{E.g.}, S.D. CODIFIED LAWS § 32-33-2 (West 2004) (stating that “[a]ny person [arrested for a traffic offense punishable as a misdemeanor] refusing to give a written promise to appear shall be taken immediately by the arresting officer before the nearest or most accessible magistrate”); People v. Mathis, 371 N.E.2d 245, 249 (Ill. App. Ct. 1977) (holding that a motorist is subject to custodial arrest if he fails to produce a valid driver’s license or bond card that can be surrendered in lieu of or in addition to bail).

warrantless custodial arrest "for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine." Justice Stevens made this point in his dissenting opinion in Robbins v. California when he stated: "As a matter of constitutional law, . . . any person lawfully arrested for the pettiest misdemeanor may be temporarily placed in custody." As a result, police officers frequently will have the discretion to make a custodial arrest of a motorist they stop for a minor traffic violation. "Such unbounded discretion carries with it grave potential for abuse." The danger exists that a police officer will decide to exercise her discretion and take a motorist into custody for a traffic offense "whenever [she] sees an interesting looking briefcase or package in a vehicle that has been stopped for a traffic violation"—not because there is any need to take the motorist into custody, but merely so she can conduct an otherwise prohibited search of the "interesting looking" container—and that decision will "provide the constitutional predicate for broader vehicle searches than any neutral magistrate could authorize by issuing a warrant."

234. Id. at 323; accord Arkansas v. Sullivan, 532 U.S. 769, 771 (2001) (per curiam) (noting that the state supreme court "never questioned [the arresting officer's] authority to arrest [the motorist] for a fine-only traffic violation (speeding), and rightly so"); see also Atwater, 532 U.S. at 345-54 (rejecting a "modern arrest rule," based upon the Fourth Amendment, "forbid[ing] custodial arrest, even upon probable cause, when conviction could not ultimately carry any jail time and when the government shows no compelling need for immediate detention"); id. at 354 (holding that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender").


238. Id.

239. Id. Indeed, the ramifications of the decision to make a custodial arrest are even broader. Justice O'Connor made this clear in her dissenting opinion in Atwater:

Under today's holding, when a police officer has probable cause to believe that . . . a traffic violation [has occurred], the officer may stop the car, arrest the driver, search the driver, see United States v. Robinson, 414 U.S. [218], 235 [(1973)], search the entire passenger compartment of the car including any purse or package inside, see New York v. Belton, 453 U.S. [454], 460 [(1981)], and impound the car and inventory all of its contents, see Colorado v. Bertine, 479 U.S. 367, 374 (1987); Florida v. Wells, 495 U.S. 1, 4-5 (1990).

Atwater, 532 U.S. at 372 (O'Connor, J., dissenting); cf. Sullivan, 532 U.S. at 773 (Ginsburg, J., concurring) (noting that the state supreme court "express[ed] unwillingness 'to sanction conduct where a police officer can trail a targeted
A motorist probably has no remedy for such abuse. First, it would be very difficult for the motorist to prove that the police officer acted from an improper motive. Second, and more importantly, the Supreme Court's decisions in *Scott v. United States*,240 *Whren v. United States*,241 and *Arkansas v. Sullivan*242 preclude any consideration of the arresting officer's actual state of mind. In *Scott*, the Court held that the validity of a search must be judged "under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved."243 And in *Whren*, the Court unanimously held that the constitutional reasonableness of a traffic stop does not depend "on the actual motivations of the individual officers involved,"244 because "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."245 It also rejected the argument that a stop for a purported traffic violation should be deemed unreasonable if "the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given."246 Then, in *Sullivan*, the Court reviewed the Arkansas Supreme Court's decision suppressing evidence discovered by a police officer during an inventory search of an arrested motorist's automobile. The Arkansas court had relied on the theory that the officer's arrest of the motorist, although supported by probable cause, nevertheless violated the Fourth Amendment because the officer had an improper subjective motivation for making the stop.247 The Supreme Court concluded that that holding "[could not] be squared with [its] decision in *Whren*,"248 stating that the fact "[t]hat *Whren* involved a traffic stop, rather than a custodial arrest, is of no

244. *Whren*, 517 U.S. at 813.
245. *Id.; accord Devenpeck v. Alford*, 125 S.Ct. 588, 593-94 (2004) ("Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.") (citations omitted).
248. *Id.*
particular moment.”\textsuperscript{249} Scott, Whren, and Sullivan thus indicate that so long as a police officer is authorized to take a traffic offender into custody for the particular traffic offense in question, it does not matter that the officer decides to exercise that authority only so that she can conduct a search of the offender’s vehicle and its contents under \textit{Belton}.

V. THE APPROPRIATE RULE

What, then, should be the rule governing the search of an automobile incident to the arrest of one of its occupants or recent occupants? Over the years, various Justices have expressed their views. Justices Stevens and Souter believe that the police should be allowed to search the passenger compartment of the automobile but not any separate containers found inside the passenger compartment (at least when the arrest is for a traffic violation).\textsuperscript{250} Justices White and Marshall took a similar position.\textsuperscript{251} Justices Scalia and Ginsburg propose that “\textit{Belton} searches [be limited] to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”\textsuperscript{252} Justice O’Connor believes that “the approach Justice Scalia proposes appears to be built on firmer ground [than \textit{Belton}].”\textsuperscript{253} Finally, Justice Brennan argued that the “immediate control” rule of \textit{Chimel v. California}\textsuperscript{254} should apply to all custodial arrests, including those involving the arrest of an occupant or recent occupant of an automobile.\textsuperscript{255} For the reasons that follow, I believe that Justice Brennan’s approach, as interpreted below, is the one most consistent with “the policies underlying the Fourth Amendment.”\textsuperscript{256}

A. Allow the Search of the Passenger Compartment but Not Any Separate Containers

In his dissenting opinion in \textit{Robbins v. California},\textsuperscript{257} Justice

\textsuperscript{249} Id. at 772 (emphasis added).
\textsuperscript{252} Thornton, 541 U.S. at 632 (Scalia & Ginsburg, J.J., concurring in the judgment).
\textsuperscript{253} Id. at 624-25 (O’Connor, J., concurring in part); see supra notes 69-74 and accompanying text.
\textsuperscript{254} 395 U.S. 752, 763 (1969).
\textsuperscript{255} Belton, 453 U.S. at 471-72 (Brennan, J., dissenting).
\textsuperscript{256} Id. at 469.
Stevens agreed with that portion of the Belton rule allowing the police to search the passenger compartment of the arrestee's vehicle. He parted company with the Court, however, with respect to the search of any separate containers found inside the passenger compartment. In his view, police should not be permitted to search as an incident of the arrest the containers they discover in the interior of the vehicle (at least when the arrest is for a traffic violation). Justice Stevens reiterated this view in Thornton v. United States, in a dissenting opinion joined by Justice Souter.

In Belton, Justices White and Marshall articulated a similar view to that espoused by Justice Stevens. They concluded that Belton's per se rule, when applied to luggage, briefcases, and other containers, constitutes an "extreme extension" of the holding in Chimel because it allows searches of such items "in the absence of any suspicion whatsoever that they contain anything in which the police have a legitimate interest." (1982).

258. A warrantless search of an arrestee's automobile and its contents may be permissible under the so-called "automobile exception" to the warrant requirement of the Fourth Amendment. Indeed, Justice Stevens concluded that the Court should have upheld the search in Belton on this theory. He reasoned that "[a]fter the vehicle in which [Belton] was riding was stopped, the officer smelled marijuana and thereby acquired probable cause to believe that the vehicle contained contraband," Robbins, 453 U.S. at 451 (Stevens, J., dissenting), so that the "automobile exception" "provided [him] the authority to make a thorough search of the vehicle—including the glove compartment, the trunk, and any containers in the vehicle that might reasonably have contained the contraband." Id. at 444. For a statement of the so-called "automobile exception" to the warrant requirement, see infra text accompanying note 321.

259. Id. at 451-52 (Stevens, J., dissenting).


261. Id. at 634 (Stevens & Souter, JJ., dissenting).


263. Id. Justice White's reference to the "absence of any suspicion" that items inside the vehicle contain "anything in which the police have a legitimate interest" could be read to mean that he would have allowed the police to search a container they discovered while searching the passenger compartment of the arrestee's vehicle if they possessed "reasonable suspicion" that it contained contraband or evidence of a crime. Such a rule would be a hybrid, taking elements of Belton's per se rule, which allows the police to search the passenger compartment and any containers therein without any justification whatsoever (other than a lawful custodial arrest), and of Justice Scalia's proposed rule, see supra notes 75-79, infra notes 271-86 and accompanying text, which would allow police to search the passenger compartment and any containers therein only when it is reasonable for the police to believe that evidence relevant to the crime of arrest might be found inside the vehicle. I will not discuss this possible
A search-incident-to-arrest rule allowing the police to search the passenger compartment of an automobile but not any separate containers discovered therein possesses at least two advantages over the broader Belton rule. First, it protects an individual's privacy interest in closed containers he is transporting with him inside the motor vehicle. Second, it removes the incentive for a police officer to effect a custodial arrest of a motorist for a minor traffic offense so that she can conduct an otherwise impermissible search of an "interesting looking briefcase or package" she observes inside the traffic offender's vehicle. Nevertheless, despite these advantages, such a rule must be rejected. It still suffers from the same basic flaw as the Belton rule itself: it allows a police officer to conduct a search of the passenger compartment of a motor vehicle and thereby intrude upon the owner's or possessor's legitimate (albeit reduced) expectation of privacy in the interior of the vehicle without any justifiable reason. Moreover, because it permits a police officer to look, among other places, underneath the seats and armrests and to open the glove compartment and console, considerable incentive remains for an officer to use a custodial arrest as a pretext to search the interior of a lawfully stopped vehicle in the hope that she might

interpretation of Justice White's view because, to the extent it allows the automatic search of the interior of the arrestee's automobile, it suffers from the same flaws as Belton's per se rule, see supra notes 103-04, 146-69, 171, 211-12, 228 and accompanying text, and to the extent it allows the search of items inside the passenger compartment on less than probable cause, it suffers from the same defects as Justice Scalia's proposed rule. See infra notes 292-331 and accompanying text.

264. See supra notes 146-60 and accompanying text.
266. See supra notes 154-58 and accompanying text.
267. See supra notes 211-27 and accompanying text.
268. See supra note 149.
269. Although the Supreme Court in Belton characterized the glove compartment and the console of an automobile as "container[s]," New York v. Belton, 453 U.S. 454, 460 n.4 (1981), Justice Stevens appears to consider them part of the interior of the vehicle for purposes of his proposed rule. Robbins, 453 U.S. at 451-52 (Stevens, J., dissenting) (objecting to the holding in Belton because it allows a police officer to "require the driver of a car to open his briefcase or his luggage for inspection" and because it may encourage the officer to effect a custodial arrest "whenever he sees an interesting looking briefcase or package" in a lawfully stopped vehicle) (emphasis added). Though somewhat less clear, it seems as if Justice White took the same position as Justice Stevens. Belton, 453 U.S. at 472 (White, J., dissenting) (objecting to the Court's holding because it authorizes "searches of luggage, briefcases, and other containers in the interior of an auto" without any suspicion that they contain seizable items) (emphasis added).
come across a weapon, drugs, or evidence of a crime.\textsuperscript{270}

B. \textit{Limit Searches to Cases in Which It Is Reasonable to Believe Evidence Relevant to the Crime of Arrest Might be Found in the Vehicle}

In his separate opinion in \textit{Thornton v. United States},\textsuperscript{271} Justice Scalia, joined by Justice Ginsburg, urged that searches of an automobile incident to the arrest of one of its occupants or recent occupants be permitted only when "it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."\textsuperscript{272} Justice Scalia asserted that permitting a "more general sort of evidence-gathering search"\textsuperscript{273} than that recognized in \textit{Chimel v. California} \textsuperscript{274} "is not without antecedent."\textsuperscript{275} He pointed to \textit{United States v. Rabinowitz},\textsuperscript{276} a pre-\textit{Chimel} case decided in 1950, as an example, stating that in \textit{Rabinowitz}, the Court upheld a search of the suspect's place of business after he was arrested there. [The Court] did not restrict the officers' search authority to "the area into which [the] arrestee might reach in order to grab a weapon or evidentiary ite[m]," and [it] did not justify the search as a means to prevent concealment or destruction of evidence. Rather, [the Court] relied on a more general interest in gathering evidence relevant to the crime for which the suspect had been arrested.\textsuperscript{277}

In addition, Justice Scalia noted that "[n]umerous earlier

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{270} See supra notes 228-49 and accompanying text.
\item \textsuperscript{271} 541 U.S. 615, 625 (2004).
\item \textsuperscript{272} Id. at 632 (Scalia, J., concurring in the judgment). Applying this rule in \textit{Thornton}, Justice Scalia concluded that the search of Thornton's car was valid because the police officer lawfully arrested him for a drug offense and therefore could reasonably believe that additional contraband or similar evidence relevant to the drug offense might be found in the automobile from which he had just alighted and which was still within his vicinity at the time of his arrest. Id.
\item \textsuperscript{273} Id. at 629.
\item \textsuperscript{274} 395 U.S. 752 (1969).
\item \textsuperscript{275} \textit{Thornton}, 541 U.S. at 629 (Scalia, J., concurring in the judgment).
\item \textsuperscript{276} 339 U.S. 56 (1950), overruled by \textit{Chimel} v. California, 395 U.S. 752 (1969); see supra note 8.
\end{enumerate}
\end{footnotesize}
authorities support this approach and cited a federal case from the beginning of the twentieth century and several state cases decided between 1887 and 1905 as well as two criminal law texts, 1 Francis Wharton, Criminal Procedure § 97, at 136-37 (10th ed. 1918), and 1 Joel Bishop, Criminal Procedure § 211, at 127 (2d ed. 1872). Using the signal cf., he also cited a number of cases decided in the first half of the nineteenth century, primarily in England, dealing with the authority of a police officer to seize items incident to an arrest. Justice Scalia then stated:

There is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested. The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of his crime from general rummaging. Moreover, it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.

Nonetheless, Justice Scalia acknowledged that “Chimel’s narrower focus on concealment or destruction of evidence also has historical support” and that “some of the authorities supporting the broader rule address only searches of the arrestee’s person, as to which Chimel’s limitation might fairly be implicit.” He also recognized that “carried to its logical end, the broader rule is hard to reconcile with the influential [English] case of Entick v. Carrington,” which disapproved of a search of an individual’s private papers under a general warrant, despite the individual’s arrest.

Justice Scalia concluded that “both Rabinowitz and Chimel are plausible accounts of what the Constitution requires, and neither is so persuasive as to justify departing from settled law.” He believed, however, that in allowing the search of an automobile incident to the arrest of one of its occupants or recent occupants, the Court should “be honest about why [it is] doing so” and should admit that the purpose of such a search is to allow the police to look for evidence of the crime for which they arrested the individual.

278. Thornton, 541 U.S. at 629.
279. Id. at 630.
280. Id.
281. Id.
282. Id. at 631.
283. Id. (referring to Entick v. Carrington, 95 Eng. Rep. 807, 817-18 (K.B. 1765)).
284. Id.
285. Id.
286. Id. at 631-32.
Justice Scalia's proposed rule is certainly "built on firmer ground" than the per se rule adopted by the Court in Belton. As shown earlier, a search of an automobile and containers therein, incident to the arrest of one of its occupants or recent occupants, rarely, if ever, can be justified on the ground that the arrestee could obtain a weapon from the vehicle or destroy or conceal evidence inside the vehicle. Moreover, the proposed rule would nearly eliminate the incentive for police officers to use a custodial arrest for a minor traffic offense as a pretext to conduct an otherwise impermissible search of an automobile and its contents. In the overwhelming majority of cases involving traffic violations, such as speeding, making a prohibited left turn, neglecting to signal a lane change, or failing to wear a seat belt, "there is no reasonable basis to believe relevant evidence might be found in the car," so that even if the officer making the traffic stop effected a custodial arrest, she would not be permitted to search the arrestee's vehicle or its contents.

Despite the advantages it possesses over the per se rule adopted in Belton, Justice Scalia's proposed rule suffers from two serious flaws. First, it would conflict with the Chimel rule governing the search of a home or office incident to the arrest of an individual therein. Justice Scalia recognized this but argued that the two situations can be distinguished because motor vehicles constitute "a category of 'effects' which give rise to a reduced expectation of privacy and heightened law enforcement needs." While this

287. Id. at 625 (O'Connor, J., concurring in part).
288. See supra notes 211-27 and accompanying text.
289. Knowles v. Iowa, 525 U.S. 113, 118 (1998) ("Once Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car.").
291. Thornton, 541 U.S. at 632 (Scalia, J., concurring in the judgment).
292. One could persuasively argue that Belton itself created such a conflict. See New York v. Belton, 453 U.S. 454, 463-66, 468 (1981) (Brennan, J., dissenting). Nevertheless, the Court in Belton insisted that its holding did "no more than determine the meaning of Chimel's principles in [the] particular and problematic context" of the arrest of an occupant or recent occupant of an automobile, and that its holding "in no way alter[ed] the fundamental principles established in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests." Id. at 460 n.3 (opinion of the Court).
purported distinction between the two situations has surface appeal, it cannot withstand analysis, for it proves too much. Justice Scalia apparently would limit the search of the automobile to the passenger compartment and any containers therein. However, if the "reduced expectation of privacy and heightened law enforcement needs" that exist with respect to a motor vehicle justify a broader evidence-gathering rule when the police arrest an occupant or recent occupant of an automobile, why should that same rationale not also justify a search of the vehicle's trunk? Justice Scalia would also limit his rule (as the Court did in Belton) to situations in which the arrestee was an occupant or recent occupant of the vehicle. But, once again, if the lesser expectation of privacy an individual has in his automobile and the mobility of that vehicle justify a broader evidence-gathering search-incident-to-arrest rule when the arrestee is an occupant or recent occupant of the automobile, 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? In each of these

(1976); Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion).

294. Justice Scalia did not expressly state this limitation of his proposed rule, but on several occasions in his opinion in Thornton, he refers to the searches in question as "Belton searches." Thornton, 541 U.S. at 627, 629, 631-32 (Scalia, J., concurring in the judgment). Belton, of course, limited its searches to the passenger compartment of the vehicle and any containers therein. Belton, 453 U.S. at 460.

295. Thornton, 541 U.S. at 631 (Scalia, J., concurring in the judgment) (citations omitted).


297. That Justice Scalia limits his proposed rule to such situations is obvious. He called the searches in question "Belton searches," Thornton, 541 U.S. at 627, 629, 631-32 (Scalia, J., concurring in the judgment), talked about "[r]ecasting Belton" in terms of his proposed rule, id. at 631, and, in arguing that his proposed rule would be less overbroad than Belton, stated that "[a] motorist may be arrested for a wide variety of offenses." Id. at 632 (emphasis added). Belton, of course, applies only when the police arrest the occupant or recent occupant of a motor vehicle. Belton, 453 U.S. at 460; accord Thornton, 541 U.S. at 620 (opinion of the Court).


299. Similarly, Justice Scalia's rationale would also seem to justify the
situations, though, Justice Scalia would apply Chimel's "immediate control" rule, rather than his proposed rule, despite the "reduced expectation of privacy and heightened law enforcement needs" that exist with respect to an automobile.

Be that as it may, Justice Scalia's proposed rule suffers from a more serious flaw. Unlike "the so-called 'automobile exception' to the warrant requirement of the Fourth Amendment," it would allow the police to conduct a warrantless search of an automobile and its contents on less than probable cause. The probable cause standard "seek[s] to safeguard citizens from rash and unreasonable interferences with privacy" by requiring that the police, before conducting a nonconsensual search for evidence, have "a fair probability that contraband or evidence of a crime will be found in [the] particular place" to be searched. Under Justice Scalia's proposed rule, however, a search would be permissible if it were merely "reasonable for [the] officer ... to believe" that evidence relevant to the crime for which the police arrested the individual "might be found in the [vehicle]." This less-than-probable-cause standard proposed by Justice Scalia does not adequately protect

search of an automobile when the police arrest its owner inside his business premises and the car is parked a few feet away, just outside the front door, and when the police arrest an individual finishing his lunch inside a diner and his car is parked a few feet away in the diner's parking lot.

300. *Thornton*, 541 U.S. at 631 (Scalia, J., concurring in the judgment) (citations omitted).

301. *Acevedo*, 500 U.S. at 566. The so-called "automobile exception" to the warrant requirement permits a police officer to conduct a warrantless search of a motor vehicle if she has probable cause to believe that the vehicle contains seizable items; it also allows a police officer to search any container within the vehicle that could contain the item being sought. *Id.* at 579-80; *Ross*, 456 U.S. at 800, 825.


303. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) ("[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.").


305. *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment) (emphasis added).

306. *Id.* at 633 (emphasis added); *see id.* at 629 ("If Belton searches are justifiable, it is not because the arrestee might grab a weapon or evidentiary item from his car, but simply because the car might contain evidence relevant to the crime for which he was arrested.") (emphasis added).

307. Nowhere in his opinion in *Thornton* does Justice Scalia equate his
the driver's legitimate expectation of privacy in his automobile or the legitimate expectation of privacy the driver and any passengers have in luggage, briefcases, parcels, jackets, and the like that they are transporting with them inside the passenger compartment of the vehicle. It is true, of course, that because motor vehicles are subject to significant government regulation, an individual possesses a lesser expectation of privacy in his automobile than in his home or office. But while such a reduced expectation of privacy might well justify dispensing with the requirement of a warrant to search an automobile, there is no valid reason to eliminate the requirement of probable cause merely because the police arrested the driver or passenger of the vehicle.

Justice Scalia asserted in Thornton that it makes sense to grant police officers broader authority to conduct an evidentiary search “when and where the perpetrator of a crime is lawfully arrested,” because the fact of the lawful arrest distinguishes the individual from society at large and “distinguishes a search for evidence of his crime from general rummaging.” He also claimed that it makes sense to assume “that evidence of a crime is most likely to be found” where the police arrested the suspected perpetrator.

While it may be true that the police would be seeking evidence of the arrestee's crime, they would still have to rummage through the arrestee's automobile for such evidence. Also, because evidence of most crimes can be concealed inside a suitcase, briefcase, or cardboard box, under Justice Scalia's proposed rule, the police

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308. A passenger qua passenger does not have a legitimate expectation of privacy in the passenger compartment of the motor vehicle in which he is riding. Rakas v. Illinois, 439 U.S. 128, 148-49 (1978).
309. See supra notes 154-58 and accompanying text.
310. See supra note 159 and accompanying text.
312. Thornton, 541 U.S. at 630 (Scalia, J., concurring in the judgment).
313. Id.
314. Id.
315. For example, if the police arrested the individual for possession of a controlled substance, that substance could be concealed inside even the smallest container, such as a matchbox or film canister, and certainly could be hidden inside a suitcase or briefcase. Similarly, evidence of an armed robbery could include the wallet stolen from the victim and the weapon used by the perpetrator, both of which could be concealed inside all but the smallest containers. Even if the police arrested the individual for a burglary in which the burglar stole large electronic equipment, evidence of that crime could include the gloves worn by the burglar or the screwdriver or credit card he used to gain entry to the burglarized premises. Such items, of course, could be inside
would be allowed to rummage through such containers trying to find evidence of the arrestee's crime. Even though evidence of the crime of arrest is "most likely to be found where the suspect was apprehended," this does not explain why the police should be permitted to conduct a warrantless search without probable cause. After all, if a police officer merely possesses a "reasonable suspicion" that a suspect's automobile contains evidence of a particular crime, she cannot search that car without valid consent—even though the vehicle may be the "most likely" place to find the sought-after evidence and even though the officer would be seeking evidence of a specific crime. Moreover, if the police officer lawfully arrested the suspect inside his home or office or on the street after he exited a movie theater, the officer still could not search the suspect's automobile on the basis of her reasonable suspicion even though the fact of the arrest "distinguishes the arrestee from society at large."

Of course, if the police have probable cause to believe the arrestee's vehicle contains evidence of the crime for which he was arrested, the so-called "automobile exception" to the warrant requirement allows them to search anywhere in the vehicle that the evidence might be, including the trunk and any containers inside the vehicle. In many cases, the same probable cause supporting the arrest of an occupant or recent occupant of an automobile will provide probable cause to search the arrestee's vehicle and containers therein. For example, if a police officer smells the odor of marijuana emanating from a vehicle she has lawfully stopped for a traffic offense, she will have not only probable cause to arrest the individuals in the vehicle for possession of drugs (as in Belton) but virtually any container located in the passenger compartment of the arrestee's automobile. See Thornton, 541 U.S. at 633 nn.1-2; New York v. Belton, 453 U.S. 454, 460-62 (1981).

316. Thornton, 541 U.S. at 630 (Scalia, J., concurring in the judgment).
317. Id.
319. See cases cited supra note 318.
320. Thornton, 541 U.S. at 630 (Scalia, J., concurring in the judgment).
322. E.g., United States v. Sharpe, 470 U.S. 675, 699 (1985) (Marshall, J., concurring) ("Had [the driver] pulled over when signaled [sic] to . . . [he] would have been subjected to only a permissibly brief Terry stop before the odor of the marihuana would have given the officers probable cause to arrest."); New York
also probable cause to search the vehicle and any containers inside
the vehicle for those drugs. 323 Similarly, when a police officer
observes in the vicinity of a recent armed robbery an automobile
matching the description of the getaway vehicle and sees that the
occupants of the vehicle match the description of the armed robbers,
the officer certainly has probable cause to arrest the occupants of
the vehicle as well as probable cause to believe the vehicle contains
the fruits, instrumentalities, or other evidence of the armed
robbery. 324 In such circumstances, the officer can effect a custodial
arrest and then search the vehicle (and any containers within the
vehicle) for evidence of the crime for which she arrested the
occupants of the vehicle.

On the other hand, if the probable cause to arrest does not also
establish probable cause to believe the arrestee’s vehicle contains
evidence of the crime of arrest—and the police otherwise lack
probable cause to search the vehicle—why should they be allowed to
conduct a search merely because the arrestee occupied the vehicle at
the time of, or shortly before, his arrest? Suppose, for example, the
police have probable cause to believe a particular individual

v. Belton, 453 U.S. 454, 455-56, 462 (1981); see also Maryland v. Pringle, 540
(1999)) (holding that the police had probable cause to arrest a passenger in a
car for possession of drugs after discovering a large amount of cash and drugs in
the vehicle and receiving no information regarding the ownership of the drugs
or money from any of the three occupants of the vehicle; reasoning, in part, that
“a car passenger . . . will often be engaged in a common enterprise with the
driver”).

(stating that the police discovered two wrapped bricks of marihuana “during a
lawful search of the [motorist’s] car,” a search conducted after the officers
smelled marihuana smoke when the motorist, whom the police had stopped for
erratic driving, opened the door of his car to get out the vehicle’s registration
papers) (emphasis added), overruled by United States v. Ross, 456 U.S. 798,
800, 825 (1982); id. at 451 (Stevens, J., dissenting) (“After the vehicle in which
defendant was riding was stopped [for speeding], the officer smelled
marihuana and thereby acquired probable cause to believe that the vehicle
contained contraband.”). In California v. Acevedo, 500 U.S. 565 (1991), the
Court stated that “the same probable cause to believe that a container [inside
an automobile] holds drugs will allow the police to arrest the person
transporting the container.” Id. at 576. Logically, the reverse must be true: if
the police have probable cause to arrest a motorist for transporting a container
holding drugs, they also have probable cause to search the vehicle for that
container (as well as probable cause to search the container itself). And, of
course, if the police have probable cause to arrest an individual for transporting
drugs somewhere inside his vehicle, they also have probable cause to search the
entire vehicle, including any containers that could hold those drugs.

committed armed robbery of a bank. Suppose further that the police 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”\textsuperscript{325} that the suspect’s automobile “might”\textsuperscript{326} contain evidence of the bank robbery. If the police go to the suspect’s home and see his car parked on the street in front of his house, they cannot conduct a warrantless search of that vehicle for evidence of the bank robbery without violating the Fourth Amendment,\textsuperscript{327} despite their reasonable belief that the car contains evidence relevant to the bank robbery.\textsuperscript{328} The Fourth Amendment protects the suspect’s legitimate (albeit reduced) expectation of privacy in his automobile. But suppose that the police, knowing they cannot constitutionally search the suspect’s automobile, either lawfully enter the suspect’s house and arrest him inside\textsuperscript{329} or wait outside until the suspect leaves his house and arrest him as he is walking from his front door towards his car.\textsuperscript{330} Would the Fourth Amendment now allow the police to conduct a

\begin{itemize}
\item \textsuperscript{325} Thornton, 541 U.S. at 632 (Scalia, J., concurring in the judgment).
\item \textsuperscript{326} Id.
\item \textsuperscript{327} Needless to say, in the absence of probable cause to search, they could not have obtained a search warrant for the car. U.S. Const. amend. IV (“[N]o Warrants shall issue, but upon probable cause . . . .”).
\item \textsuperscript{328} Carroll v. United States, 267 U.S. 132, 154 (1925) (holding that probable cause is required to conduct a warrantless evidentiary search of a motor vehicle under the so-called “automobile exception” to the warrant requirement); accord California v. Carney, 471 U.S. 386, 395 (1985); Chambers, 399 U.S. at 51.
\item \textsuperscript{329} We can assume for present purposes that the police either have a warrant to arrest the individual, which allows them to enter the premises to effect the arrest, see Payton v. New York, 445 U.S. 573, 603 (1980) (“[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.”), or obtain valid consent to enter the suspect’s home. See Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (“[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.”); United States v. Matlock, 415 U.S. 164, 171 (1974) (holding that valid consent to search can be obtained “from a third party who possesse[s] common authority over or other sufficient relationship to the premises . . . . sought to be inspected”); see also Illinois v. Rodriguez, 497 U.S. 177, 186 (1990) (holding that the Fourth Amendment is not violated when police “officers enter [premises] without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry” has authority to consent).
\item \textsuperscript{330} See United States v. Watson, 423 U.S. 411, 423-24 (1976) (holding that the Fourth Amendment does not require an arrest warrant in order for police to arrest an individual in a public place).
\end{itemize}
warrantless search of the suspect's automobile for evidence relevant to the bank robbery? Certainly not! The police still lack probable cause to believe the vehicle contains such evidence, and the Fourth Amendment continues to protect the suspect against a warrantless evidentiary search of his automobile, even though the police arrested him in close proximity to the vehicle. Why then should the probable cause requirement be abandoned when the police arrest an individual either inside his automobile or shortly after he exited it? The answer is clear: It should not.

C. Apply Chimel's "Immediate Control" Rule

In his dissenting opinion in New York v. Belton, Justice Brennan argued that the "immediate control" rule adopted by the Court in Chimel v. California should apply to custodial arrests of an occupant or recent occupant of an automobile. He believed that "Chimel provides a sound, workable rule for determining the constitutionality of a warrantless search incident to arrest." Justice Brennan acknowledged that "it may be difficult in some cases to measure the exact scope of the arrestee's immediate control" but suggested a number of factors a police officer could consider in making that decision: "the relative number of police officers and arrestees, the manner of restraint placed on the arrestee, and the ability of the arrestee to gain access to a particular area or container." "When in doubt," he pointed out, "the police can always turn to the rationale underlying Chimel—the need to prevent the arrestee from reaching weapons or contraband—before exercising their judgment.

The approach taken by Justice Brennan has several advantages over the other possible approaches. By applying the same rule to all custodial arrests—irrespective of where the arrest took place—it avoids the theoretical pitfall in Justice Scalia's proposed rule; there

331. Assuming that in the second of the hypothetical situations presented in the text the automobile was not within the area of the individual's immediate control, the police could not even search the vehicle under Chimel v. California, 395 U.S. 752, 763 (1969). Similarly, a plurality of the Court in Coolidge v. New Hampshire stated in dictum that Chimel would not allow a search of the automobile under the circumstances presented in the first hypothetical situation. 403 U.S. 443, 456-57 n.11 (1971).
335. Id. at 471.
336. Id.
337. Id.
338. Id. at 471-72.
is no need to concoct a justification for distinguishing between searches conducted incident to the arrest of an occupant or recent occupant of an automobile and searches conducted incident to the arrest of someone in a home or office. In addition, when properly interpreted and applied, Chimel's "immediate control" rule avoids the major flaw in Belton's per se rule; it ensures that whenever a police officer searches the passenger compartment of an automobile incident to the arrest of one of the vehicle's occupants or recent occupants, the search will in fact be justified by the need to protect officer safety and perhaps also by the need to prevent the destruction or removal of evidence. As a result, it safeguards a motorist's legitimate (albeit reduced) expectation of privacy in his automobile, as well as the privacy interest the driver and any passengers have in closed containers they are transporting with them inside the passenger compartment of the vehicle to a greater extent than either Belton's per se rule or the rules suggested by Justice Stevens and Justice Scalia. Those privacy interests must give way only when the police have a legitimate need to protect themselves or to prevent the destruction or concealment of evidence. Finally, applying the Chimel rule (as properly interpreted) in this context will remove virtually all incentive for a police officer to effect a custodial arrest of a motorist for a minor traffic offense as a pretext to search the passenger compartment of the motorist's vehicle and containers therein.

According to Chimel, the purpose of a search incident to an arrest is to "remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape [and] to prevent [the] concealment or destruction [of evidence]." For the search of a particular area or container to serve this purpose, the area or container must be within the immediate control of the arrest at the time of the search. Searching a place or thing that the arrestee could have reached at the time the police arrested him or at the time they initially came into contact with him—but which he can no longer reach—in no way protects the police from the arrestee or prevents

339. See supra notes 154-58 and accompanying text.
340. See supra note 159 and accompanying text.
341. Of course, I am referring to a search conducted as an incident of an arrest. The privacy interests at issue must give way in other situations, such as when the police are acting pursuant to a valid search warrant, when they have probable cause to believe that seizable items are inside the vehicle, see supra note 321 and accompanying text, and when they are conducting a valid inventory search of the vehicle and its contents. See Colorado v. Bertine, 479 U.S. 367, 373-76 (1987); South Dakota v. Opperman, 428 U.S. 364, 375-76 (1976).
the arrestee from destroying or concealing evidence. *Chimel*, therefore, must be interpreted to allow searches of *only* those areas and containers that are within the arrestee’s immediate control at the time of the contemplated search.\(^{343}\)

343. It is unclear whether the Supreme Court in *Chimel* intended to adopt this “time of search” approach. Professor Moskovitz argued that it is quite possible that the *Chimel* Court intended to adopt the “time of arrest” approach. Moskovitz, *supra* note 7, at 689-90. Professor Craig M. Bradley seemed to believe *Chimel* adopted this latter view. Craig M. Bradley, *The Court’s “Two Model” Approach to the Fourth Amendment: Carpe Diem!*, 84 J. CRIM. L. & CRIMINOLOGY 429, 451 (1993). Both scholars, however, criticized the “time of arrest” approach. Professor Moskovitz stated that “[i]f the arrestee is normally *unable* to reach into the area around him [because he is restrained], then there should be no general rule allowing the police to search that area after the arrest—even if the search is ‘contemporaneous’ with the arrest.” Moskovitz, *supra* note 7, at 662; *see also* id. at 668 (“[T]he Court [in *Chimel*] incorrectly held that the area around [the arrestee] at the time of arrest is usually accessible to him.”); id. at 689 (“I believe that the ‘time of search’ approach more correctly follows the traditional principle that a doctrine that permits warrantless searches must be based on a sound rationale.”). Professor Bradley wrote that “the Court should not permit a search for weapons unless there is an immediate danger that cannot be diffused by less intrusive means, such as handcuffing the suspect . . . .” Bradley, *supra*, at 452.

Justice Brennan apparently subscribed to the “time of search” approach. In *Belton*, he first made it clear that the relevant time to determine whether an area or container is within an arrestee’s immediate control under *Chimel* is not the time the police initially came in contact with the arrestee. The state trooper in *Belton* first came in contact with the arrestees while they occupied the automobile the trooper had stopped for speeding. *Belton*, 453 U.S. at 455. Certainly, the passenger compartment of that vehicle and the five jackets on the back seat were within the immediate control of the occupants of the vehicle at that time. Yet, Justice Brennan concluded that the search of the passenger compartment and the jackets could not be justified by *Chimel*, because “[a]t the time *Belton* and his three companions were placed under custodial arrest—which was after they had been removed from the car, patted down, and separated—none of them could have reached the jackets that had been left on the back seat of the car.” *Id.* at 466 (Brennan, J., dissenting) (first emphasis added). Just prior to this statement, Justice Brennan criticized the majority’s per se rule on the ground that it “substantially expands the permissible scope of searches incident to arrest by permitting police officers to search areas and containers the arrestee could not possibly reach at the time of arrest.” *Id.* (emphasis added).

While these statements indicate that Justice Brennan deemed the time of the arrest to be the relevant time to determine whether the area to be searched is within the arrestee’s immediate control, the facts in *Belton* and Justice Brennan’s other statements in his dissenting opinion raise considerable doubt about whether this in fact was his view. The search in *Belton* took place almost immediately after the trooper placed the occupants of the automobile under arrest. *Id.* at 456. Justice Brennan, therefore, may not have distinguished between the time of the arrest and the time of the search because there was no need for him to do so. Indeed, at one point in his opinion, Justice Brennan asserted that “the crucial question under *Chimel* is not whether the arrestee could *ever* have reached the area that was searched, but whether he could have
Under this interpretation of Chimel, the search of an automobile incident to the arrest of one of its occupants or recent occupants might sometimes be permissible, but such cases would be exceedingly rare. As Justice Powell pointed out when discussing Belton, “[i]mmediately preceding the arrest [of an occupant or recent occupant of an automobile], the [driver and any] passengers have complete control over the entire interior of the automobile, and can place weapons or contraband into pockets or other containers as the officer approaches.”

If the police arrest an individual while he is reached it at the time of arrest and search.” Id. at 469 (second emphasis added). That he would have made such a distinction if the arrest and search did not take place almost simultaneously becomes clear upon reading the remainder of his opinion in Belton. In the first part of that opinion, Justice Brennan stated: “When the arrest has been consummated and the arrestee safely taken into custody, the justifications underlying Chimel’s limited exception to the warrant requirement cease to apply: at that point there is no possibility that the arrestee could reach weapons or contraband.” Id. at 465-66. This statement implies that a search conducted after the arrestee is safely in custody cannot be justified as one incident to an arrest even if the area searched was within the arrestee’s control at the time the police arrested him. Justice Brennan seemed to be saying that had the trooper in Belton arrested the occupants of the automobile while they sat in that vehicle—a time at which the passenger compartment and any unlocked containers therein were within their immediate control—and conducted the search only after handcuffing them and placing them in his patrol car, the search could not be justified under Chimel because at the time of the search, the passenger compartment and its contents were no longer in the immediate control of the arrestees. Justice Brennan did not expressly discuss this factual situation. He did, however, criticize the majority’s per se rule by stating that under that rule, “the result would presumably be the same even if [the officer] had handcuffed Belton and his companions in the patrol car before placing them under arrest. . . .” Id. at 468 (emphasis added).

By positing a situation in which the police officer did not arrest the recent occupants of the automobile until after they were securely locked in the patrol car, Justice Brennan once again focused upon a situation in which the arrest and search occurred virtually simultaneously.

Justice Scalia also believes that the relevant time to determine whether a particular area or item is within the arrestee’s immediate control is the time of the contemplated search. In his separate opinion in Thornton v. United States, 541 U.S. 615 (2004), he concluded that the search of the arrestee’s automobile in that case could not be justified on the ground that it “protect[ed] officer safety or prevent[ed] concealment or destruction of evidence.” Id. at 625 (Scalia, J., concurring in the judgment). In doing so, he stated that “[i]f it was ever true that the passenger compartment is ‘in fact generally, even if not inevitably,’ within the arrestee’s immediate control at the time of the search, it certainly is not true today.” Id. at 628 (emphasis added) (quoting Belton, 453 U.S. at 460; see also id. at 625-26 (reasoning that because the arrestee was “handcuffed and secured in the back of a squad car,” it was highly unlikely that he could have “escaped and retrieved a weapon or evidence from his vehicle”); id. at 627 (rejecting the argument that, “since the officer could have conducted the search at the time of arrest (when the suspect was still near the car), he should not be penalized for having taken the sensible precaution of securing the suspect in the squad car first”).

inside the vehicle or after he leaves the vehicle but is in close proximity to it, any such weapons or contraband, or even evidence of a crime, might in fact be within the arrestee's reach at that moment, depending upon such factors as the arrestee's distance from the vehicle (if he is not inside it); the total number of arrestees and other occupants or recent occupants of the vehicle vis-à-vis the number of police officers; whether the arrestee is handcuffed or otherwise restrained; and the arrestee's ability to gain access to the vehicle or a container therein.\textsuperscript{345} A search of the vehicle \textit{at that time} therefore \textit{might} be justified by one, or both, of the twin rationales of \textit{Chimel}.

On the other hand, if the police do not conduct an immediate search but rather handcuff the arrestee and lock him in a squad car or take similar measures to restrain him outside his automobile, a search of the vehicle is no longer necessary to protect the police officer or to preserve any evidence that might be inside the vehicle, and thus any search of the vehicle would not be permissible under \textit{Chimel}. Justice Brennan made this point in \textit{Belton}: "When the arrest has been consummated and the arrestee safely taken into custody, the justifications underlying \textit{Chimel}'s limited exception to the warrant requirement cease to apply: at that point there is no possibility that the arrestee could reach weapons or contraband."\textsuperscript{346}

Professor Moskovitz's empirical research reveals that police officers are trained to handcuff an arrestee and remove him from the place of the arrest \textit{before} conducting a search of the surrounding area.\textsuperscript{347} When Professor Moskovitz asked law enforcement agencies about the arrest of an occupant of a motor vehicle, "[n]ot a single respondent said or even suggested that a police officer should search a vehicle while the arrestee is in the vehicle or unsecured."\textsuperscript{348} We can assume that police officers do what they are taught to do, especially when their personal safety is involved.\textsuperscript{349} This means that police officers would rarely be justified in conducting a search of an

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\textsuperscript{345} See supra notes 163-68, 337 and accompanying text.

\textsuperscript{346} \textit{Belton}, 453 U.S. at 465-66 (Brennan, J., dissenting).

\textsuperscript{347} Moskovitz, supra note 7, at 665, 697.

\textsuperscript{348} Id. at 676.

\textsuperscript{349} In his separate opinion in \textit{Thornton v. United States}, Justice Scalia wrote that "[r]eported cases involving [the] factual scenario [in which] a motorist [is] handcuffed and secured in the back of a squad car when the search takes place . . . are legion." 541 U.S. 615, 628 (2004) (Scalia, J., concurring in the judgment) (emphasis added).
automobile incident to an arrest.\textsuperscript{350} Only a few situations come to mind in which a police officer might not restrain an arrestee and therefore need to search the passenger compartment of the arrestee’s vehicle to protect herself or to prevent the destruction or concealment of evidence. For example, if “an injured or disabled arrestee cannot be removed from the automobile immediately after the arrest,”\textsuperscript{351} but can still reach areas or containers inside the vehicle, a police officer should be allowed to search those areas and containers for protective purposes.\textsuperscript{352} Similarly, a search of the passenger compartment and its contents might be permissible when “the officer has reason to fear that friends of the arrestee might reach for a weapon while the officer is securing the arrestee”\textsuperscript{353} or when “the arrestee is struggling and resisting application of handcuffs.”\textsuperscript{354} A search should not be allowed, however, when police

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\item The United States admitted as much in its brief in \textit{Thornton} when it stated 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 \textit{Belton} does not apply in that setting would . . . largely render \textit{Belton} a dead letter.” Brief for the United States at 36-37, Thornton v. United States, 124 S. Ct. 2127 (2004) (No. 03-5165) (emphasis added) (quoting United States v. Wesley, 293 F.3d 541, 548 (D.C. Cir. 2002)).
\item See \textit{State v. Box}, 17 P.3d 386, 391 (Kan. Ct. App. 2000) (holding that \textit{Chimel} allowed a police officer to search the passenger compartment of the arrestees’ automobile, including the locked glove compartment, because a non-arrested front-seat passenger who was paralyzed from the waist down and who did not have his wheelchair with him remained inside the vehicle and in close proximity to the glove compartment).
\item Moskovitz, \textit{supra} note 7, at 685; \textit{e.g.}, \textit{Box}, 17 P.3d at 391; \textit{cf.} United States v. Bennett, 908 F.2d 189, 193-94 (7th Cir. 1990) (holding that \textit{Chimel} allowed police officers to search luggage inside the arrestees’ motel room, even though the officers had handcuffed the arrestees and placed them against the wall of the room, because, inter alia, the arrestees had used several different weapons during their crimes, the room was small and had multiple entrances, and the police feared that friends of the arrestees who knew where weapons were hidden might burst into the room to try to help the arrestees).
\item Moskovitz, \textit{supra} note 7, at 685; \textit{cf.} United States v. Becker, 485 F.2d 51, 53, 55 (6th Cir. 1973) (holding that \textit{Chimel} allowed a narcotics agent to search the drawers of a desk-type table in the arrestee’s apartment, three-to-five feet away from the arrestee, because the arrestee “kept turning around” and was not cooperating with a second agent and had not been handcuffed or bound at the time of the search).
\item Professor Moskovitz noted another situation in which the police arguably might be unable to secure an arrestee immediately following his arrest: when “a single officer has arrested several suspects and feels that it is not safe to remove the suspects until back-up officers arrive.” Moskovitz, \textit{supra} note 7, at 685. But Professor Moskovitz appropriately “wondered why it would be safer
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officers do not restrain an arrestee simply because they do not fear him for some reason, such as his reputation or age, or because he is disabled.\textsuperscript{355} As Professor Moskovitz points out, "[i]f they do not fear that [the arrestee] might reach into [the vehicle] for a weapon or evidence, it makes little sense to allow them to search that [vehicle] anyway."

Would applying \textit{Chimel}, as interpreted above, to the arrest of an occupant or recent occupant of an automobile create an incentive for police officers to refrain from securing an arrestee so they could search the arrestee’s vehicle incident to his arrest? Probably not. As shown earlier, in many cases (\textit{Belton} itself being one), a warrantless search of the entire automobile (including the trunk)\textsuperscript{357}

for the officer to search the area [surrounding the arrestees] instead of keeping his eye on [them]." \textit{Id.}

Professor Moskovitz also suggested that the police might be able to search an arrestee’s vehicle when, after initially restraining the arrestee, the police allow him to return to his vehicle so he can lock it before the police take him (but not his car) to the police station. \textit{Id.} at 680 n.106; e.g., United States v. Riedesel, 987 F.2d 1383, 1389 (8th Cir. 1993); State v. Tolsdorf, 574 N.W.2d 290, 292 (Iowa 1998). Professor LaFave indicated that \textit{Chimel} allows a search under these circumstances. He stated:

[A] defendant who was not occupying his vehicle but was arrested near it might then obtain permission from the police to secure the car and its contents. His movements in closer proximity to the car or into the vehicle, it would seem will provide a basis for a search of part of the auto which otherwise could not be subjected to search under \textit{Chimel}.

3 LaFAVE, supra note 171, § 7.1(b), at 509. Professor LaFave cautioned, however, that in such circumstances "[c]ourts must be alert . . . to the possibility that the police caused the defendant to move toward or into the vehicle so that they could rely upon that movement to justify what would otherwise be an unreasonable search of the car." \textit{Id.} (emphasis added). Indeed, in \textit{State v. Robb}, 605 N.W.2d 96, 102 (Minn. 2000), the court held that "\textit{Chimel} is inapplicable when the arrestee’s proximity to the vehicle is fully controlled by the arresting officers . . . and not necessary to the safe and orderly processing of the arrest." The court stated that "allowing [the arrestee] access to the vehicle as a courtesy . . . cannot be used to justify a search of it," and its "concern for officer safety [led it] to conclude that the better rule encourages officers to follow normal police protocol and to not allow vehicles, and the weapons or evidence they may contain, to come within an arrestee’s immediate control during the arrest." \textit{Id.} at 102-03.

355. Moskovitz, supra note 7, at 688.

356. \textit{Id.}

357. Because it would be virtually impossible for an arrestee to elude his captors, unlock the trunk of his automobile, and reach inside to obtain a weapon or evidentiary item, it is unlikely that the search of the locked trunk of an automobile could ever be justified under \textit{Chimel}. See Castleberry v. State, 678 P.2d 720, 723 (Okla. Crim. App. 1984) (holding that once a police officer gained possession of the keys to the arrestees’ car, several suitcases inside the locked trunk of that car were not within the "immediate control" of the two arrestees,
will be justified under the so-called “automobile exception” to the warrant requirement. In those situations, a police officer would have no incentive to conduct an immediate search of the vehicle without securing the arrestee (and thereby creating a risk to herself) if she could instead first secure the arrestee and then, perhaps after the arrival of a backup unit, search the arrestee’s entire vehicle in complete safety. Even if the “automobile exception” did not apply in a particular case, what sensible police officer would risk her life merely to conduct a search of an automobile, especially when she has already arrested an occupant or recent occupant of that vehicle? Indeed, in many of these cases, the police will impound the arrestee’s vehicle and eventually conduct an inventory search of the entire vehicle, including the trunk and closed containers located inside the vehicle. Moreover, as Justice Scalia asserted in one of whom was handcuffed and the other of whom was lying on the ground with a police officer pointing a gun at him), aff’d by an equally divided Court, 471 U.S. 146 (1985).

358. See supra notes 321-24 and accompanying text.


361. E.g., United States v. Wallace, 102 F.3d 346, 349 (8th Cir. 1996); United States v. Como, 53 F.3d 87, 92 (5th Cir. 1995); Idaho Dep’t. of Law Enforcement v. $34,000 U.S. Currency, 824 P.2d 142, 146 (Idaho Ct. App. 1991); State v. Nysus, 2001-NMCA-102, 35 P.3d 993, 1000 (N.M. Ct. App. 2001); see also Opperman, 428 U.S. at 380 & n.6 (Powell, J., concurring).

362. See Bertine, 479 U.S. at 374-76 (upholding the opening of a closed backpack and metal canisters therein found by police during an inventory search of an arrestee’s van). But see Florida v. Wells, 496 U.S. 1, 4-5 (1990) (holding invalid the opening of a locked suitcase discovered by police during an inventory search of an arrestee’s automobile because the police department did not have any policy regarding the opening of closed containers found during an inventory search).

363. Although an inventory search is not as intensive a search as a search for evidence, police often discover a weapon, contraband, or evidence of a crime inside the passenger compartment or trunk of an automobile during such a search. E.g., Wells, 495 U.S. at 2 (during an inventory search of a lawfully impounded automobile, the police found two marijuana cigarette butts in an ashtray); Opperman, 428 U.S. at 366 (during an inventory search of a lawfully impounded automobile, a police officer found marijuana in the glove compartment). Depending upon the particular police department’s regulations governing an inventory search, police officers might also lawfully come across such items when inventorying containers being transported somewhere in the vehicle. Compare Bertine, 479 U.S. at 369, 374-76 (upholding the opening of a
his separate opinion in *Thornton v. United States*, 364 “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.” 365

In *Thornton*, Justice Scalia also responded to the argument that, because the police officer could have conducted a search at the time she arrested the occupant or recent occupant of a motor vehicle (when the passenger compartment and its contents were within the immediate control of the arrestee because he was either inside his vehicle or near enough to it to reach inside), the officer should not be penalized for having first taken the “sensible precaution” 366 of securing the arrestee in a patrol car. Justice Scalia explained:

> 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. 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. 367

Finally, applying the *Chimel* rule, as interpreted above, to the search of an automobile incident to the arrest of one of its occupants or recent occupants would also virtually eliminate the incentive for a police officer to effect a custodial arrest of a motorist for a minor traffic violation as a pretext to conduct an otherwise impermissible search of the motorist’s vehicle and its contents. If a police officer stops an individual after observing him commit a minor traffic offense and sees “an interesting looking briefcase or package” 368 inside the vehicle, she would have nothing to gain from making a custodial arrest of that individual, even though local law gives her

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365. *Id.* at 627 (Scalia, J., concurring in the judgment).
366. *Id.*
367. *Id.; see also id.* at 624 (O’Connor, J., concurring in part) (“[L]ower 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* . . . .”)
discretion to do so. Once she effected a custodial arrest, she would be expected to act in accordance with “safe and sensible police procedures.” This means that she would normally have to remove the individual from the vehicle (if she had not already done so) and secure him, perhaps by handcuffing him and placing him in the rear seat of her squad car. Once the officer secured the arrestee, however, Chimel would not permit her to search the arrestee’s vehicle and its contents, because the vehicle would no longer be within the arrestee’s immediate control. If, in a particular case, she did not immediately secure the arrestee but instead left him unrestrained while she searched his car and its contents, the search, in the absence of exceptional circumstances, might well be deemed unreasonable because the “dangerous conditions” justifying the search under Chimel existed only because the officer “fail[ed] to follow sensible procedures.”

VI. CONCLUSION

The Supreme Court took a wrong turn in 1981 when it held in New York v. Belton that a police officer can conduct a warrantless search the passenger compartment of an automobile and any containers therein as an incident of the lawful custodial arrest of an occupant or recent occupant of that vehicle. By adopting a per se rule, rather than requiring the police officer to determine in each particular case whether the interior of the vehicle is actually within the immediate control of the arrestee at the time of the contemplated search, the Court “cut the [search incident to arrest] doctrine loose from its theoretical and practical moorings—the need to protect police officers and to preserve easily concealed or destructible evidence.” As a result, for nearly a quarter of a century now, police officers have been allowed to engage in “purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage

369. Thornton, 541 U.S. at 627 (Scalia, J., concurring in the judgment) (internal quotation marks omitted) (quoting United States v. Mitchell, 82 F.3d 146, 152 (7th Cir. 1996) (quoting United States v. Karlin, 852 F.2d 968, 971 (7th Cir. 1988)).
371. See supra notes 351-54 and accompanying text.
372. Thornton, 541 U.S. at 627 (Scalia, J., concurring in the judgment).
374. Id. at 460-61.
around in a car to see what they might find. Although the Court in *Thornton v. United States* reaffirmed the per se rule of *Belton*, a majority of the Court expressed dissatisfaction with that rule. Given this dissatisfaction, the Court should reconsider the *Belton* rule in light of the underlying justifications for allowing a warrantless search incident to an arrest and in light of the procedures actually followed by police officers in the field. It should make a U-turn and hold that a search of an automobile incident to the arrest of one of its occupants or recent occupants, like a search incident to an arrest of an individual inside his home or office, is governed by the “immediate control” rule of *Chimel v. California*. Under this rule, a search of the passenger compartment of the automobile and its contents would be permissible only in those cases in which the interior of the vehicle is actually within the immediate control of the arrestee at the time of the search. Such cases will be rare because police officers would normally be expected to follow routine procedures to protect their safety and secure the arrestee—for example, by handcuffing him and placing him inside a locked squad car—immediately after effecting the arrest.

377. *Thornton*, 541 U.S. at 629 (Scalia, J., concurring in the judgment) (internal quotation marks omitted) (quoting United States v. McLaughlin, 170 F.3d 889, 894 (9th Cir. 1999) (Trott, J., concurring)).
378. 541 U.S. at 622-24.
379. See supra notes 68-95 and accompanying text.