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A RULE IN SEARCH OF A REASON: AN EMPIRICAL REEXAMINATION OF *CHIMEL* AND *BELTON*

MYRON MOSKOVITZ*

INTRODUCTION

Suppose police officers obtain a warrant to arrest Dan for, say, an assault that occurred during a fistfight at a neighborhood bar. They go to Dan's home. His wife lets them in, and they find Dan in his bedroom, in bed. They arrest him, handcuff him behind his back, take him out of the room, and lock him in a police car. Then one of the officers searches the nightstand next to the bed, finding narcotics in the drawer. Dan is charged with possession of illegal narcotics. His lawyer moves to suppress the narcotics. She concedes that the arrest was valid but argues that the narcotics were obtained by an illegal search. The prosecutor makes no claim that the police had a warrant to search the premises, that the police had probable cause to believe that evidence of a crime would be found in the bedroom, that the police searched in order to protect themselves from weapons, or that Dan or his wife consented to the search.

Who wins?

Or suppose Dan was arrested (on the same warrant) while driving a car. He is removed from the car, handcuffed, and locked in a police car. The officer returns to Dan's car, searches the glove compartment, and finds narcotics. Dan's lawyer moves to suppress them.

Who wins?

According to many appellate decisions, both motions should be denied, on the ground that the searches were "incident" to the arrest, because the nightstand and the glove compartment were within Dan's reach when he was arrested—though not when the searches took place.

But why? The Fourth Amendment prohibits "unreasonable searches." Snooping through Dan's bedroom furniture and glove compartment are certainly "searches"—because Dan has a "justifiable"¹ "expectation of privacy"² in both places. Why does the fact that Dan was recently arrested near these places make the searches "reasonable"?

* Professor of Law, Golden Gate University. Many thanks to the following professors for their very helpful comments on an earlier draft of this Article: Sandy Kadish, Ron Allen, Dick Frase, George Thomas, Chris Slobogin, Craig Bradley, Bill Pizzi, Peter Keane, Bob Calhoun, and Charles Weisselberg.

1. United States v. White, 401 U.S. 745, 752 (1971).

2. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

The stress of the arrest might have caused Dan to reach into nearby areas for a weapon to attack the police, but that danger evaporated when Dan was removed from the scene of the arrest. So, why allow the police to search the area of the arrest after the arrestee is gone?

The source of this problem may be found in one of the most significant Fourth Amendment cases ever decided by the United States Supreme Court—a case well known for its *restriction* on the authority of police to search incident to an arrest. The problem lies with *Chimel v. California*.³

I. CHIMEL

Police officers obtained a warrant to arrest Chimel for burglarizing a coin shop.⁴ No search warrant was issued.⁵ They went to his home to arrest him.⁶ His wife let them in, and Chimel arrived a few minutes later.⁷ The officers arrested him when he “entered the house”—presumably near the front door.⁸ The officers then searched “the entire three-bedroom house, including the attic, the garage, and a small workshop.”⁹ The search of some rooms was “relatively cursory,” but when the officers searched the master bedroom and sewing room, they asked Chimel’s wife to open drawers and to move items within them.¹⁰ A number of stolen coins were seized in the course of the search of those rooms.¹¹

The Supreme Court held that Chimel’s motion to suppress the coins should have been granted. The Court began by quoting the fundamental principle it had established just a year earlier in *Terry v. Ohio*: “[t]he scope of [a] search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.”¹² Applying this principle, the Court held in *Chimel*:

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

3. 395 U.S. 752 (1969).

4. *Id.* at 753.

5. *Id.* at 754.

6. *Id.* at 753.

7. *Id.*

8. *See id.*

9. *Id.* at 754.

10. *Id.*

11. *Id.*

12. *Id.* at 762 (alteration in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

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 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. The "adherence to judicial processes" mandated by the Fourth Amendment requires no less.

....
Application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. The scope of the search was, therefore, "unreasonable" under the Fourth and Fourteenth Amendments, and the petitioner's conviction cannot stand.¹³

This language lays down two rules: a "negative" rule and a "positive" rule. The "negative" rule establishes where the police *may not* search, and the "positive" rule establishes where they *may* search.

The "negative" rule seems quite sensible. There is no good reason to allow the police to search areas *beyond* the arrestee's reach, simply because he was arrested; such a search is "unreasonable" under the

13. *Id.* at 762-63, 768.

Fourth Amendment.¹⁴ Since the police violated Chimel's rights under this "negative" rule, the search was illegal; the resulting evidence should have been suppressed, and the conviction should have been reversed—which it was. Thus, the "negative" rule was essentially the "holding" of the case.

The "positive" rule, however, was not essential to the Court's opinion. Arguably, it was mere dicta. The Court might have said, "there was no justifiable reason for the police to search the master bedroom and sewing room where the evidence was found. Therefore, that search was unreasonable. We leave for another day the question of where the police *are allowed* to search 'incident to an arrest.'" Unfortunately, the Court did not say this. Instead, the Court established a new rule with far-reaching consequences: the police *may* search "the arrestee's person and the area 'within his immediate control.'" ¹⁵

This was a mistake. The Court did not carefully examine whether this rule was consistent with the Court's own rationale (probably because the Court was more concerned with establishing its *negative* rule).¹⁶ The rule was not consistent—at least in part.

There are two halves to the "positive" rule: (1) the police may search "the arrestee's person," and (2) the police may search "the area within his immediate control." The first half is consistent with the Court's rationale. The arrestee might have a weapon hidden in his clothing, and the weapon might be too small (e.g., a razor blade or small knife) to be detected by a "frisk" (a patdown of the outer clothing). Even if the arrestee is handcuffed—including behind his back—he might be able to reach the weapon and use it to attack the police officers. The weapon and its user will be in close proximity to the police for an extended period of time: during escort to the police car, transportation in the police car to the police station, removal from the car, booking, etc. The weapon might be surreptitiously drawn and employed against the officers at any of these points because the weapon

14. In a particular case, there might be *other* reasons to allow such a search. Indeed, in *Chimel*, Justice White dissented, arguing that the police had *probable cause* to believe that Chimel had stolen property in his house, and that "exigent circumstances" prevented them from getting a search warrant before Chimel's wife might hide the evidence. *Id.* at 773-74 (White, J., dissenting).

15. *Id.* at 763.

16. In *Harris v. United States*, the Court validated the search of an entire apartment incident to an arrest in that apartment. 331 U.S. 145, 148 (1947); cf. *United States v. Rabinowitz*, 339 U.S. 56, 63 (1950) (validating the search of an office incident to the arrest of an employee in that office) (citing *Harris*, 331 U.S. 145). In *Chimel*, the Court spent a good part of its opinion explaining why *Harris* and *Rabinowitz* should have been overruled. See, e.g., *Chimel*, 752 U.S. at 757-61. For a summary of the Supreme Court cases leading up to *Chimel*, see *State v. Pierce*, 642 A.2d 947, 953 (N.J. 1994).

goes wherever the arrestee goes. So does evidence (a small amount of narcotics, perhaps) that might be destroyed en route to a police station. A search of the arrestee's person for evidence will cause only a small additional intrusion on his privacy; he is likely to be placed in a jail cell, at least temporarily, and his jailors are entitled to search him before jailing him. On the other hand, the danger to the police is high (serious injury or death) if the arrestee has a weapon. Therefore, the "search incident to arrest" doctrine should validate a search of the arrestee's person, even in the absence of information indicating that he, in fact, has a weapon or evidence on him. This is what the Supreme Court later held in *United States v. Robinson*.¹⁷

A search of the *area around* the arrestee at the time of the arrest—the area within his "wingspan" or "lunge area"—is quite another matter. That area does *not* go with him to the police station. If the arrestor can justify a search of that *area*, the justification cannot be the same as the one underlying the *person* search.

Chimel's justification for a search of that area appears to be based on two assumptions: (1) that the arrestee *might be inclined* to reach into that area for a weapon or evidence, and (2) that the arrestee *would be able* to reach into that area. The first assumption might be correct, but the second assumption is *not* correct. Because it is incorrect, a whole body of subsequent law has been built on a false foundation.

I am not a police officer. Nevertheless, from a lay perspective, I have always been puzzled by this second assumption. If I were a police officer and had even the slightest fear that the person I just arrested might reach into a nearby drawer, etc., for a weapon or piece of evidence, what would I do? Would I allow him to stand there unrestrained while I searched that area? Of course not. He might attack me or flee while I was searching. I would immediately restrain him and remove him from the area that might contain the reachable weapon or evidence. Since I would be taking him to the police station anyway, I might as well begin that "transportation" process right away. I can think of exceptions that might occasionally arise (e.g., where the arrestee is not dressed and needs to reach into a drawer to get some clothing),¹⁸ but this would not be the usual situation. And if in an unusual case I decided *not* to restrain him because he did not pose a

17. 414 U.S. 218, 235 (1973).

18. See *United States v. Mason*, 523 F.2d 1122, 1126 (D.C. Cir. 1975) ("Where a person in custody asks to be given access to an area, he has no basis to object that the arresting officers conducted a protective search to secure the area prior to granting his request."); see also *Watkins v. United States*, 564 F.2d 201, 205 (6th Cir. 1977); *United States v. Mulligan*, 488 F.2d 732, 734 (9th Cir. 1973); *Giacalone v. Lucas*, 445 F.2d 1238, 1247 (6th Cir. 1971); *People v. Jones*, 767 P.2d 236, 238 (Colo. 1989).

threat (e.g., because he was injured, feeble, or disabled), then that very reason would preclude him from reaching for a weapon or evidence.¹⁹

The Justices who decided *Chimel* were not police officers either, yet they also implicitly made an assumption: that the police need to search the area because the arrestee is usually present and unrestrained during the search. They cited no studies, expert testimony, or other evidence to support their assumption.²⁰

If the Court's assumption is wrong, then the entire foundation for the "area search incident to arrest" doctrine collapses. If the arrestee is normally *unable* to reach into the area around him, 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. If *Chimel* falls, then so does a large body of case law that built upon *Chimel*, and this case law is very important in the real world. The United States Customs Service has stated: "By far the most important and most extensively utilized exception to the search warrant requirement is the search incident to a lawful arrest."²¹

Who is right—the Court or me? I have tried to find out, but it has not been easy.

19. See *United States v. Wysocki*, 457 F.2d 1155, 1164 (5th Cir. 1972) (Tuttle, J., dissenting) ("[T]he agents neither drew their guns nor attempted to shackle appellant or render him immobile. Plainly the agents themselves must have believed that appellant was not in a position to grab a weapon or seize destructible evidence."); see also *United States v. Erwin*, 507 F.2d 937, 939 (5th Cir. 1975) ("They cannot allow the arrestee freedom of movement, and then later use that freedom to justify an exploratory search of the dwelling.").

20. Judge Posner has stated, "It is the lack of an empirical footing that is and always has been the Achilles heel of constitutional law, not the lack of a good constitutional theory." Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 21 (1998); see also David L. Faigman, "Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation, 139 U. PA. L. REV. 541 (1991); Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 736 (2000) ("The most current and reliable empirical and social scientific evidence must inform the normative judgments at the heart of constitutional criminal procedure.").

21. U.S. CUSTOMS SERV., SPECIAL AGENT HANDBOOK: CHAPTER 42, SEARCH & SEIZURE 13 (n.d.); see also CITY OF CLEVELAND DEP'T. OF PUB. SAFETY, REGULATIONS PART IV: SEARCH INCIDENT TO LAWFUL ARREST 2 (n.d.) ("The search incident to arrest is one of the earliest recognized exceptions to the written requirement. More searches are carried out under this exception than any other."); David E. Aaronson & Rangeley Wallace, *A Reconsideration of the Fourth Amendment's Doctrine of Search Incident to Arrest*, 64 GEO. L.J. 53, 54 (1975) ("The finding of a 1967 study that more than 90 percent of all searches receiving court consideration were incident to an arrest indicates that the exception virtually has swallowed the warrant requirement of the fourth amendment.").

A. What the Police Do

I do, of course, know some police officers. Some have been students of mine. When I have asked them the first thing they do after arresting someone in a home, the answer has been unanimous: "Handcuff him, and get him out of there." An FBI agent told me the same thing.

This information is helpful, but not quite a scientific study. I asked our law librarian to send me some books about law enforcement techniques, materials used by police training academies, and the like, so I could read what police officers were instructed to do after an arrest. If our law school library did not have such materials (it did not), then the librarian could get them from other libraries. I had no such luck.

How can this be? A nation with thousands of law enforcement agencies and police officers would seem to be an excellent market for professional training guides. Someone must produce such materials, and someone must make money from them. Librarians, who fervently believe in sharing knowledge and know how to find available materials, should be able to find them if anyone can. Our librarian could get nothing—not even from libraries likely to have such materials (such as the library at the California Department of Justice).

The answer, it turns out, is that law enforcement agencies generally try to keep these materials secret. Their reason is, I suppose, reasonable: if crooks learn about police techniques, they might also learn to avoid or counteract them. Even book publishers will not make books on police techniques available to people outside of law enforcement.²²

I was pretty much stymied—until a colleague²³ suggested that I send requests under "freedom of information" and "public records" laws to various police agencies. I looked up the California and federal statutes that deal with this. Both, however, contain exemptions for documents revealing law enforcement techniques.²⁴ My experience with bureaucracies has taught me that if you simply ask for something you have no right to get, they *might* send it to you anyway. I decided that if I sent out enough requests, at least a few might slip through the cracks in the stone wall I'd been facing so far. All it would cost me was a bit of stationary, postage, and, perhaps, some copying costs.

22. Even at full price, one publisher refused to sell me its police books.

23. Professor Charles Weisselberg, at Boalt Hall.

24. 5 U.S.C. § 552(b)(7) (2000); CAL. GOV'T. CODE § 6254(f) (West. Supp. 2002). Other states have similar exemptions. *See, e.g.*, FLA. STAT. ANN. § 119.07(3)(d) (West 1996); OHIO REV. CODE ANN. § 149.43(A)(2)(c)-(d) (Anderson 2001).

I sent out requests. I wrote to the police departments of California's larger cities (about thirty), California sheriff's departments (about fifty), about a dozen federal law enforcement agencies, and some state and municipal police departments around the country (about thirty). Here is what I asked for:

I hereby request copies of all public records, writings, audiotapes, videotapes, and documents that are used to train law enforcement officers in how to perform a search incident to the arrest of a suspect. I am more interested in practical advice given to officers than in advice about the law. For example, should the officer handcuff the suspect and remove him from the area (for officer safety) before searching the area? I plan to use these materials for academic research.²⁵

From the fall of 2000 through the spring of 2001, I received timely and courteous responses from most (though not all) recipients. A few, although not as many as I had expected, invoked a statutory exemption and gave me nothing. Many gave me training materials about the *law* of search and seizure, despite my request for "practical advice" rather than legal advice. This might have been deliberate—a devious way of invoking the exemption by giving me harmless material—or perhaps when they saw a letter from a law professor they incorrectly assumed that I wanted law. Some sent me training materials that dealt with issues other than the one I cared about.

Several training officers phoned me to clarify what I wanted, and our conversations were often very helpful. I explained to them that the law *permitted* them to do any number of things during an arrest, and I wanted to know what they actually *did*. Many said they had little or nothing in writing, and that most training on the issues I mentioned was given orally by training officers. I was skeptical about this at first, but I was told this by so many independent sources that I came to believe it. One training officer told me, "the average cop doesn't like to read much. Give him a book and he'll put it on a shelf. They like to learn by listening to more experienced officers." What about the interrogation manuals that the Supreme Court assumed in *Miranda v. Arizona*²⁶ were generally used by the police? I was told: "Those were used by detectives, who do read. They are specialists, not beat cops, who are generalists and not academically inclined, usually."

25. Letter from Myron Moskowitz, Professor of Law, Golden Gate University, to California Chiefs of Police (Sept. 18, 2000) (on file with author).

26. 384 U.S. 436, 448-55 (1966).

A few departments did give me useful information, both orally and in writing. My strategy worked, in a sense. My hit rate was small, but by sending out a lot of letters, I received enough information to conclude that, in general, police officers are taught to handcuff an arrestee (preferably behind his back) before searching the area around him. Here is a sampling of the replies I received:

- "Handcuff the arrestee, regardless of the charge, hands behind the back, always. Apply handcuffs properly and not overly-tight. Always double-lock handcuffs Get the arrestee away from the scene as soon as possible."²⁷
- "An officer making an arrest while in a duty status shall: (A) Identify himself/herself as a police officer in a clear and understandable voice . . . (B) Advise the person that he/she is being arrested. The arrestee shall also be advised of the reason for the arrest as soon as possible. (C) Handcuff the arrestee as specified in General Order 3610 'Handcuffs/Flexi-cuffs. (D) Search the arrestee and the immediate area (within legal constraints) for evidence, weapons, or contraband."²⁸
- "Never allow a subject to reach into a drawer, closet, cupboard, etc., to produce valuables."²⁹
- "Thoroughly search the suspect after applying the handcuffs."³⁰
- "It is much safer to search a handcuffed prisoner. After the handcuffs have been applied whether from a standing, kneeling or prone position the person can be searched."³¹
- "A search is conducted after handcuffing an individual and the application of the double locking device. A search should not be initiated in arrest situations until the individual is handcuffed and incapacitated as much as possible. There are occasions when a search will be conducted without the use of

27. MD. POLICE & CORR. TRAINING COMM'N TRAINING UNIT 34: ARREST PROCEDURES 9 (rev. Dec. 13, 1999).

28. U.S. DEP'T OF INTERIOR, NAT'L PARK SERVICE, U.S. PARK POLICE, GENERAL ORDER 2103.04: ARREST PROCEDURES (as revised on Sept. 30, 1999). Note that the search takes place *after* the arrestee has been handcuffed. *See id.*

29. U.S. DEP'T OF JUSTICE, DRUG ENFORCEMENT ADMIN., AGENCY REGULATION § 6653.3: SEARCH PROCEDURES (n.d.).

30. BOSTON POLICE DEP'T, RULES AND PROCEDURES: RULE 315, SEC. 6 (n.d.).

31. BOSTON POLICE ACAD., TRAINING BULLETIN 26-89: SEARCHING PRISONERS (n.d.).

cuffs such as consent searches but, generally the individual is cuffed and double-locked and then searched."³²

- "An uncuffed or unrestrained person could launch an attack on the officer during a search of that person. Thus to minimize what could be a potentially deadly situation, the subject is cuffed or restrained before searching."³³
- "Always handcuff prior to searching."³⁴

Some of my correspondents noted that officers in the field must have the discretion to depart from these general rules when necessary. One stated:

The Sheriff's Office wants its officers to be independent thinkers and evaluate each situation independently, and not respond like robots following pre-printed commands. Thus, the enclosed materials may not contain the level of detail that you seek. To further the example proposed in your letter, each officer is given the freedom to independently decide if his or her safety demands that a suspect be handcuffed and removed, before conducting a search, depending upon the circumstances presented at the actual crime scene. The Sheriff's Office has found that such a policy allows it to better serve the public, both victim and suspect.³⁵

Some police departments appear to pay close attention to the *rationale* used by *Chimel*: if the arrestee has been incapacitated, any search of the area around him is not justified. They understand the *rule* that emanated from *Chimel* (the officers may search the area even after the arrestee has been incapacitated or even removed), but they don't really believe in it. As one training officer told me, "if an officer removes the suspect from the area of arrest, the officer should get a

32. BALT. COUNTY POLICE DEP'T, EMPLOYMENT & BASIC TRAINING DIV., LESSON PLAN: SELF DEFENSE TACTICS, SEARCHING AND PAT DOWNS 1 (2000).

33. MO. P.O.S.T. COMM'N, TRAINING MATERIALS 5 (n.d.) (provided by the Kansas City Police Department).

34. ILL. STATE POLICE ACAD., CONTROL AND ARREST TACTICS: LECTURE OUTLINE 71 (Mar. 1999).

35. Letter from Geoffrey S. Allen, Deputy County Counsel, Solano County, Cal., to Myron Moskowitz (Sept. 8, 2000) (on file with author). An Oakland, California, training officer said that he does not always remove the arrestee from the area of arrest, because the arrestee might say "that's mine" or the like when evidence is uncovered during a search of the area. *Id.* "It all depends on how many people are around, how many officers are present, and how big and potentially dangerous the arrestee is." Telephone Interview with Sgt. J. Israel, Oakland Police Dep't (Aug. 21, 2000).

search warrant before searching the area within the guy's wing span, because otherwise [the] search does not seem justified."³⁶

This sampling cannot compare, of course, with a systematic survey of materials used by all police agencies in America. I would love to see that done, but such a task will have to be performed by someone with access to privileged documents far superior than my very limited "outsider's" access. (Note, however, that even a complete study of such documents might not capture the full flavor of the information transmitted orally in a largely oral police culture.)

Yet two features of my sampling are notable.

First, the materials and oral information I received were more important for what they did *not* say than for what they *did* say. Not one regulation, training bulletin, or other piece of information indicated that officers were directed or advised to do, as a general practice, what the Court in *Chimel* assumed they would: allow the arrestee to stand unrestrained where he was when arrested while the officers conduct a search of the area around him. The reason for this is obvious. As one department put it, "[t]he safety of officers, citizens, and suspects shall be of primary consideration whenever entries, searches, or seizures are made or planned."³⁷

Second, while *Chimel*'s factual assumptions were based on no survey, no sample, and no evidence—nothing but the misguided intuition of a group of jurists—my sampling, even with its shortcomings, is better

36. Telephone Interview with Off. M. Echeverria, Kern County, Cal. Sheriff's Dep't (Aug. 28, 2000). Connecticut's Dep't of Public Safety Regulation 19.1.9(b) also provides that a search incident to arrest gives a trooper "authority to search an arrested person and any thing under his or her immediate control without a search warrant" and that "[t]his exception is based upon the need for a trooper to prevent destruction of evidence and to seize weapons and things which may aid an escape or which the suspect may use to endanger the trooper." See also ARK. STATE POLICE, FIELD OPERATIONS POLICY AND PROCEDURE MANUAL § 3.250: SEARCH INCIDENT TO ARREST/PROTECTIVE SWEEP, which provides: "When an arrest is made, it is reasonable for the arresting officer to conduct a *limited* search in order to remove any weapons that might be used to resist arrest, effect an escape or cause injury to the officer or others. It is likewise reasonable for the officer to conduct a *limited* search for evidence for the purpose of preventing its concealment or destruction. It is important that the Arkansas State Police Officer recognizes that the scope of the search authorized by this rule is substantially limited." (emphasis added). The training officer for the Massachusetts State Police noted that Massachusetts law is more restrictive than *Chimel*. He said: "I tell my officers that after the guy is arrested and removed from the place of arrest, do not go back in and search based on the search incident to arrest rule. I tell them to search within the lunge area only if he is unrestrained in order to retrieve personal belongings to take with him." Telephone Interview with Sgt. P. Didomenica, Mass. State Police (Dec. 14, 2000).

37. SACRAMENTO, CAL. POLICE DEP'T, SEARCH MANUAL: RM 526.01, at ii (n.d.).

than that. I find it troubling that courts have built up a large body of law regulating professional police officers without seeking information about what those officers actually do in the field. This is not always the case, of course. In *Miranda*, the Court carefully examined books that instruct officers on interrogation methods and then formulated rules designed to deal with those methods.³⁸ Similar efforts should be made when dealing with search and seizure issues, even though it might be more difficult to understand a disparate oral culture than a smaller, more concentrated group that relies on written materials.³⁹

The *Chimel* Court reasoned that the *scope* of a search incident to arrest must be determined by those *purposes that justify* such a search in the first place. As this warrantless search is justified *only* by the need to prevent the arrestee from reaching weapons or evidence, the *scope* is therefore limited to those areas accessible to the arrestee. This makes sense, but the Court's *application* of this reasoning does not. While the Court correctly held that the clothing the arrestee is wearing is accessible to him, the Court incorrectly held that the area around him at the time of arrest is usually accessible to him. In sum, *Chimel's* positive rule was inconsistent with the Court's own rationale.

Chimel's positive rule is especially hard to justify when the search takes place in a *home*. When applying other search doctrines, the Supreme Court has been very protective of the privacy of the home. In *Vale v. Louisiana*,⁴⁰ for example, police officers obtained warrants for Vale's arrest, saw him appear to complete a drug transaction in front of his home, and arrested him on the front steps of his home.⁴¹ As they were leading him away, they encountered Vale's mother and brother

38. 384 U.S. at 442-45.

39. How may a court obtain and evaluate scientific evidence when formulating rules of law (as contrasted with resolving individual cases)? Through amicus briefs? Its own research? Trial-like procedures? A tough question, but beyond the scope of this Article. Others, however, have addressed it. See, for example, James R. Acker, *Social Science in Supreme Court Criminal Cases and Briefs*, 14 LAW & HUM. BEHAV. 25, 26 (1990), where the author noted "the absence of formal procedures to assist the Court in locating or evaluating social science and other social fact information." He continued:

Legal fact-finding procedures have developed almost exclusively for use in trial courts, to help decide the historical, adjudicative facts that are specific to individual parties and cases. Consequently, the briefs filed with the Court may be the only practical way of calling social science findings to the justices' attention and helping to apprise them of the studies' weaknesses and limitations.

Id.; see also *supra* note 20. See generally John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CAL. L. REV. 877 (1988).

40. 399 U.S. 30 (1970).

41. *Id.* at 32.

about to enter the house.⁴² They then searched the house, finding narcotics.⁴³ The Court assumed that the police had probable cause to search the house, but held that a home may not be searched without a search warrant or “exigent circumstances” that prevent the police from obtaining and returning with a warrant in time to prevent destruction of evidence.⁴⁴ The Court held that the possibility that Vale’s mother or brother (who saw Vale being led away) would destroy evidence was not sufficiently “exigent,” because the police could have obtained a search warrant when they obtained the arrest warrant.⁴⁵ In his dissent, however, Justice Black noted that the arrest warrant was issued not because of any present misconduct by Vale, but because the bond on a prior narcotics charge had been increased.⁴⁶ The majority did not feel this was sufficient because “only in a ‘few specifically established and well-delmeated’ situations may a warrantless search of a dwelling withstand constitutional scrutiny, even though the authorities have probable cause to conduct it.”⁴⁷ If, however, the police have probable cause to believe there is evidence not in a home but in *an automobile*, they may search the car (including the glove compartment and the trunk) and all containers (purses, briefcases, etc.) in the car—with no need for either a search warrant or exigent circumstances.⁴⁸

Chimel’s positive rule is very difficult to reconcile with *Vale*’s very protective attitude towards the privacy of the home. It seems strange that if Vale had been arrested a few feet away—slightly inside the house instead of slightly outside—*Chimel*’s positive rule would have allowed the police to lead him away, then return and search that part of the house that Vale could have reached from the place of arrest, with no search warrant and no exigent circumstances. So much for the sanctity of the home!

Other examples of the Court’s concern for the privacy of the home abound. The Court has held that, while the police need neither an arrest warrant nor exigent circumstances to arrest someone in a public place,⁴⁹ they need one or the other to forcibly enter a home to arrest.⁵⁰ And while a police dog does not commit a “search” of luggage at an airport

42. *Id.* at 33.

43. *Id.*

44. *Id.* at 34.

45. *Id.* at 35.

46. *Id.* at 40 (Black, J., dissenting).

47. *Id.* at 34 (citation omitted).

48. *California v. Acevedo*, 500 U.S. 565 (1991); *United States v. Ross*, 456 U.S. 798 (1982).

49. *United States v. Watson*, 423 U.S. 411 (1976).

50. *Payton v. New York*, 445 U.S. 573 (1980).

by sniffing it,⁵¹ an officer's lifting of a turntable to see its serial number is a "search" where this occurs in a home,⁵² and use of a thermal imager to detect heat emanating from a home is a "search."⁵³ A forcible entry into a home is "unreasonable" under the Fourth Amendment unless the police first "knock and announce" their presence and authority (absent exigent circumstances),⁵⁴ though there is no requirement that they knock and announce before entering a car. Use of a beeper installed in a drum of chloroform to track the whereabouts of an automobile on a public road is not an intrusion on a "justifiable expectation of privacy,"⁵⁵ but use of such a beeper to track the movements of the container in a house is such an intrusion.⁵⁶ It is difficult to reconcile these cases with *Chimel's* "positive" rule.

B. Robinson

Chimel led to *United States v. Robinson*,⁵⁷ which involved a search of the arrestee himself rather than the area around him.⁵⁸ District of Columbia police officers arrested Robinson for driving on a revoked license.⁵⁹ Officer Jenks patted Robinson down, feeling an object in his breast pocket.⁶⁰ Jenks removed the object—"a 'crumpled up cigarette package'"—opened the package, and found heroin.⁶¹

The Court held that each intrusion (the patdown, the reaching into the pocket, and the looking into the cigarette package) was justified by the search incident to arrest doctrine.⁶² The Court noted "the extended exposure which follows the taking of a suspect into custody and transporting him to the police station."⁶³

Justice Marshall dissented. He agreed that the patdown was justified by the need to protect the officers from attack with a small weapon while transporting Robinson to the police station, and that the reach into the pocket *might* be justified by a similar rationale, but he felt

51. *United States v. Place*, 462 U.S. 696 (1983).

52. *Arizona v. Hicks*, 480 U.S. 321 (1987).

53. *Kyllo v. United States*, 533 U.S. 27 (2001).

54. *Wilson v. Arkansas*, 514 U.S. 927 (1995); *see also* *Richards v. Wisconsin*, 520 U.S. 385 (1997).

55. *United States v. Knotts*, 460 U.S. 276 (1983).

56. *United States v. Karo*, 468 U.S. 705 (1984).

57. 414 U.S. 218; *see supra* note 17 and accompanying text.

58. *Robinson*, 414 U.S. at 220.

59. *Id.*

60. *Id.* at 223.

61. *Id.*

62. *Id.* at 236.

63. *Id.* at 234-35.

that the look into the package was not justified.⁶⁴ Applying *Chimel*'s rationale for a search incident to arrest, Justice Marshall found no justification for this last search, because Jenks had possession of the package and could keep it from Robinson.⁶⁵

The majority disagreed with this "case-by-case" approach, ruling that the police need a "bright line" rule that permits them to search everything on the arrestee incident to the arrest:

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. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.⁶⁶

64. *Id.* at 250-55.

65. *Id.* at 255-56.

66. *Id.* at 235. My sampling indicates that the police have their own "bright line" rule for how to prevent an arrestee from attacking them *during* a search: handcuff him behind his back:

- Cincinnati Police Academy's ROLL CALL TRAINING: SCENARIO NUMBER 2000-78 (n.d.) states: "If the person is being placed under arrest handcuff first then search."

- California's Tuolumne County Sheriff's Department states: "For officer safety reasons the recruits are trained to handcuff all arrestees that are taken into custody and then conduct their search when their 'back-up' arrives." Letter from Lt. James L. Earll to Myron Moskovitz (Aug. 31, 2000) (on file with author). Another training officer told me that "searching the suspect before handcuffing him is a good way to get killed." Telephone Interview with Off. G. Powell, Sacramento Police Dep't (Aug. 28, 2000).

- California's Sonoma County Sheriff's Department guideline, H-2 HANDCUFFING OF PRISONERS (n.d.), provides: "Never handcuff in the front, unless extraordinary circumstances occur."

Unlike some others,⁶⁷ I have no serious quarrel with the *result* in *Robinson*. I suppose (though I have no studies to back me up) that in a great majority of cases, there is a possibility that the arrestee has a small weapon or evidence of a crime in the clothes he is wearing, and it might be possible for even a handcuffed arrestee to move his hands a short distance to his clothes to reach such an item. He has plenty of time to try, during his transportation to the police station, and if he were to succeed in obtaining a weapon, he could do a lot of damage when the police unlock the cuffs (if not before). Using a bright line here does not cost much in terms of privacy, because (as Justice Powell opined) even those few arrestees who are unlikely to be carrying a weapon or evidence do not have much privacy in either their persons or their belongings after they are arrested.⁶⁸ The search of the cigarette pack after it was taken from Robinson is a bit more troubling, but I believe that might be justified by the rationale of cases upholding inventory searches of automobiles and objects found in such inventory searches.⁶⁹ Even if Officer Jenks retained custody of the cigarette pack, he needed to search it to avoid later claims that he stole something from it (and, conceivably, to protect himself from any dangerous object that might be in the pack). While this notion might seem strained as to a crumpled cigarette pack, it seems sensible when applied to the usual "containers" that might be found in the clothing of an arrestee, e.g., a wallet, a coin purse, etc.

But the Court's assertion that the police need a "bright line" led to its most troubling extension of the search incident to arrest doctrine: *New York v. Belton*.⁷⁰

67. See, e.g., Craig M. Bradley, *The Court's "Two Model" Approach to the Fourth Amendment: Carpe Diem!*, 84 J. CRIM. L. & CRIMINOLOGY 429, 430-36 (1993); see also Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 258 (1984):

For a person under arrest to attack an armed officer with a safety pin or razor blade would be madness, and I am not persuaded that law enforcement officers need worry a great deal about the danger. Moreover, when an officer does remain apprehensive after a careful frisk, he can handcuff an arrestee and lock him in the sealed rear seat of a patrol car.

68. *Robinson*, 414 U.S. at 237 ("[A]n individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person.").

69. See *South Dakota v. Opperman*, 428 U.S. 364, 369-76 (1976). Later, however, the Court held that an inventory search is permitted only if the officer acts pursuant to a police department policy allowing such searches. *Florida v. Wells*, 495 U.S. 1, 4-5 (1990).

70. 453 U.S. 454 (1981).

C. Belton

Belton involved a search of an arrestee's car.⁷¹ Trooper Nicot stopped a car for speeding.⁷² While checking the driver's license and registration, Nicot smelled burnt marijuana and saw an envelope marked "Supergold" on the floor of the car.⁷³ He ordered the driver and three passengers (including Belton) out of the car and placed them on the Thruway.⁷⁴ He arrested them for possession of marijuana, patted them down, and separated them from each other.⁷⁵ He then opened the envelope—finding marijuana—and searched the passenger compartment, finding cocaine in the pocket of a black leather jacket on the back seat.⁷⁶ The jacket (and, presumably, the cocaine) belonged to Belton, who moved to suppress the cocaine.⁷⁷ The Court held that the search of the jacket was incident to the arrest and therefore valid.⁷⁸

In dissent, Justice Brennan saw this holding as a radical departure from the principles of *Chimel*: "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."⁷⁹

The majority, however, purported to adhere to *Chimel*'s rationale. Indeed, the majority insisted that "[o]ur holding today . . . in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests."⁸⁰ But the majority asserted 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."⁸¹ And what

71. *Id.* at 456.

72. *See id.* at 455.

73. *Id.* at 455-56.

74. *Id.* at 456.

75. *Id.*

76. *Id.*

77. *See id.*

78. *Id.* at 462-63.

79. *Id.* at 465-66; *see also* United States v. Chadwick, 433 U.S. 1, 15 (1977):

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.

80. *Belton*, 453 U.S. at 460 n.3.

81. *Id.* at 458 (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)).

“single familiar standard” should apply where the police arrest an automobile driver? Here is the Court’s answer:

When 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. While the *Chimel* case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have 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. Our 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, even if not inevitably, within “the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].” In order to establish the workable rule this category of cases requires, we read *Chimel*’s definition of the limits of the area that may be searched in light of that generalization. Accordingly, we hold 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.⁸²

Is it in fact true 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 ite[m]’”?⁸³ I don’t think so. No sensible police officer will allow an arrestee to remain within reach of any such area—he’ll get the arrestee out of the car immediately.⁸⁴

82. *Id.* at 459-60 (citation omitted).

83. *Id.* at 460.

84. *See* Alschuler, *supra* note 67, at 274:

If any bright line rule had been necessary to resolve the issue in *Belton*, it would have been the opposite of the rule that the Court announced. Indeed, the claim that “articles inside the relatively narrow compass of the passenger compartment . . . are . . . generally, even if not inevitably, within ‘the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]’” was almost as farfetched as the proposition that evidence might have been destroyed or a weapon secured on the facts of *Belton* itself. It is difficult to search an automobile while its occupants remain inside. An officer who attempts this task constantly must ask the occupants to slide over

The Court says that its "generalization" is "suggested" by "our reading of the cases."⁸⁵ But will any assortment of decided appellate cases give a fair sampling of how police operate on a day-to-day basis? The Court might have been better served by finding some means of determining what really happens when the police arrest the driver of an automobile.

My inquiries to various police departments produced some replies that bear on this question:

- "Vehicle searches account for a large number of arrests and can be planned and done systematically. Safety issues shall be the first priority. A vehicle search shall not be done until all occupants of the vehicle have been secured."⁸⁶
- "All occupants should be removed from a vehicle before searching it and they should not be permitted to stand near the vehicle while it is being searched."⁸⁷
- "With backup on the scene, remove all occupants from the vehicle before you put any part of your body into the car. (1) To conduct a proper search, you will have to put yourself in awkward positions. (2) Your sidearm may be exposed and your attention will be focused on the search of the vehicle. (3) Your defensive movements may be limited."⁸⁸

and move their feet. Accordingly, the occupants almost invariably are removed before an automobile is searched; and once they have been removed, there is no longer much chance that they can secure weapons from the automobile or destroy evidence there.

85. Professor LaFave disagreed with the majority's assertion of what "the cases" revealed:

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.

Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 329 (1982) (footnotes omitted); see also David S. Rudstein, *The Search of an Automobile Incident to an Arrest: An Analysis of New York v. Belton*, 67 MARQ. L. REV. 205, 226-29, 244-47 (1984) (summarizing facts of cases relied on by *Belton*).

86. SACRAMENTO, CAL. POLICE DEP'T, *supra* note 37, at 28.

87. MD. POLICE & CORR. TRAINING COMM'N TRAINING UNIT 34, *supra* note 27, at 22.

88. N.C. DEP'T OF CRIME CONTROL & PUB. SAFETY, BASIC LAW ENFORCEMENT TRAINING: TECHNIQUES OF TRAFFIC LAW ENFORCEMENT 37.

- “(a) Search the driver and occupants first. (b) Remove all occupants while the search is being conducted.”⁸⁹
- (1) “conduct a professional stop”; (2) “secure the scene, prevent interference from witnesses”; etc. (3) “remove the subject(s) from the vehicle”; (4) “request back-up if not already present”; (5) “direct the driver out of the vehicle first and secure him,” “[h]andcuff and search *only* if justifiable”; (6) “[d]o not place anyone in your patrol car if not handcuffed”; and (7) “conduct a systematic search of the vehicle—consent or search warrant.”⁹⁰
- “In removing one or more suspects from the suspect vehicle, the primary officer orders the suspects from the suspect vehicle, searches and handcuffs them, and secures them in the patrol car.” The last item in the sequence of prescribed events is “Search the suspect’s vehicle.”⁹¹
- “(a) Never search an occupied vehicle. (b) At night turn off your headlights, turn on your interior lights and turn your lighted spotlight toward suspect vehicle so that it illuminates the back seat of same. (c) With multiple suspects, wait for backup; when practical, do so with lone drivers. (d) Ask occupants to step to the curb, where they can be searched. (e) Group occupants and seat them on the curb. (f) Try to get them to spread their legs and place their palms on the pavement as a further precaution. (g) While you or backup officers conduct a search of the vehicle, the other officer maintains surveillance over these individuals.”⁹²

Not a single respondent said or even suggested that a police officer should search a vehicle while the arrestee is in the vehicle or unsecured. Thus, it appears that *Belton*’s “generalization 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 ite[m]’”⁹³ is—at least in general—false.

The Court in *Belton* went even further: “It follows from this conclusion that the police may also examine the contents of any

89. MICH. STATE POLICE, TRAINING DIV., ARRESTING, HANDCUFFING, SEARCHING, AND TRANSPORTING PRISONERS 93 (emphasis omitted) (n.d.).

90. N.M. DEP’T OF PUB. SAFETY TRAINING CTR., VEHICLE SEARCH TECHNIQUES: BLOCK 7.2.3 (n.d.).

91. OAKLAND, CAL. POLICE DEP’T, TRAINING BULLETIN III-B.2 (Dec. 10, 1996).

92. MISSOURI P.O.S.T. COMM’N, REGULATIONS, *supra* note 33, at 11.

93. 453 U.S. at 460.

containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach.”⁹⁴ This second generalization is even more inconsistent with what police officers actually do in the field. Because they are instructed to remove and secure the arrestee before searching the vehicle, it is highly unlikely (if not impossible) that an arrestee would be able to remove his handcuffs, escape from a police car and/or surveillance by a cover officer, run to the vehicle, enter it or reach into it, open a container, and remove a weapon or item of evidence—all before an officer could intervene and stop him. And yet this strange scenario would have to be *the norm* for *Belton* to mesh with *Chimel*’s rationales for a search incident to arrest.

The problem can be traced back to the flaw in *Chimel* itself. *Chimel*’s positive rule—allowing the police to search the area around the arrestee—did not square with *Chimel*’s own rationale, because a police officer who fears a reach for a weapon or evidence will incapacitate the arrestee. The Court in *Belton* could have corrected this mistake, disapproving the *Chimel* dicta. If the Court did this, it could not have extended the search incident to arrest doctrine to car searches, because officers do not search cars while the arrestee can reach into the car. But the Court did not disapprove (or even reexamine) the *Chimel* dicta. So the *Belton* Court confronted the question of how *Chimel* applies to this new situation: car searches. The Court answered it by ignoring *Chimel*’s rationale (the police may search in order to protect themselves from the arrestee and prevent the arrestee from destroying evidence), even though it said it was basing its decision on *Chimel*’s rationale.

Justice Brennan’s dissent in *Belton* argued that the majority strayed from *Chimel*, but he too overlooked *Chimel*’s fundamental flaw. *Chimel*’s positive rule was inconsistent with its rationale, though *Belton*’s rule was even more inconsistent.⁹⁵

94. *Id.*

95. LaFave, *supra* note 85, at 330:

Indeed, it is fair to say that applying the traditional search-incident-to-arrest rule, which would allow search of that area “from which [the arrestee] might gain possession of a weapon or destructible evidence,” is *easier* in automobile cases than in most other circumstances because the police can, and typically do, immediately remove the arrestee from the vehicle. Once that has been done, it is not difficult to take another step, such as moving him farther from the car, handcuffing him, or closing the car door, thus ensuring the nonexistence of circumstances in which the arrestee’s “control” of the car is in doubt. In other words, the “difficulty” and “disarray” the *Belton* majority alluded to has been more a product of the police seeing how much they could get away with (by not following the just-mentioned procedures) than of their being confronted with inherently ambiguous situations.

When a rule is not supported by its own rationale, this can lead to some very peculiar *subsidiary* rules.

One example can be found in a footnote in *Belton*: "Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk."⁹⁶ The Court did not give any reason for this distinction. Apparently, the Court did pretty much what *Chimel* implied: place the arrestee exactly where he was when he was arrested, draw a circle around him with his "wingspan" or "lunge area" as the radius, and allow the police to search within that area. If the suspect was arrested while in the car, he could then reach or lunge into any area of the passenger compartment, but could not reach the trunk. This is roughly true, of course, but why it should be *relevant* is a mystery, because when the *search* takes place, the arrestee will be *unable* to reach either the passenger compartment *or* the trunk. Nevertheless, the Court seems to adopt a judicial fiction—hypothetically placing the arrestee *back* in the car in order to determine the permissible scope of the search.

The *Belton* Court also added a supplement to this fiction: the officer may search the passenger compartment not only when the suspect was arrested while *in* the car, but also when the arrestee was a "recent occupant" of the car—so long as the search is "contemporaneous" with the arrest (which, of course, will almost always be *after* the arrest). This supplement extends the rule even farther from its rationale, because a "recent occupant" might be even further away from the car at the time of the search—or even at the time of the arrest! Why did the Court do this? No explanation is given, but perhaps the Court felt that this expansion of the rule would help furnish "a single familiar standard." However, as Justice Brennan noted in his dissent, the vagueness of the word "recent" detracts considerably from the sureness of the rule.⁹⁷

The "recent occupant" expansion might have been *essential* to the Court's holding that Trooper Nicot's search of Belton's jacket *was*

96. 453 U.S. at 461 n.4.

97. *Id.* at 469-70 (Brennan, J., dissenting):

Thus, although the Court concludes that a warrantless search of a car may take place even though the suspect was arrested outside the car, it does not indicate how long after the suspect's arrest that search may validly be conducted. Would a warrantless search incident to arrest be valid if conducted five minutes after the suspect left his car? Thirty minutes? Three hours? Does it matter whether the suspect is standing in close proximity to the car when the search is conducted?

As might have been expected, lower court decisions seeking the extent of (and rationale for) the "recent occupant" doctrine have been confused and inconsistent. *See infra* notes 159-69. The Supreme Court showed some interest in resolving this issue, but thus far has failed to do so. *See Florida v. Thomas*, 532 U.S. 774, 776 (2001) (dismissing a case in which it had previously granted certiorari for lack of jurisdiction).

incident to the arrest, because it is not clear where Belton and the other men were when they were arrested. The Court explained that after Nicot smelled the burnt marijuana and saw the envelope, “[h]e therefore directed the men to get out of the car, and placed them under arrest for the unlawful possession of marihuana.”⁹⁸ Were they *in* the car or *out* of the car at the moment of arrest?⁹⁹ As they were at least “recent occupants,” it did not matter, under the Court’s new rule.

Why did the Court find it necessary to establish a “single, familiar standard”—a “bright line”—here? Most Fourth Amendment issues are resolved by general standards that are not at all “bright”: the police need “probable cause” to arrest,¹⁰⁰ they may search a home without a warrant only with “exigent circumstances,” consent to search must be “voluntary,” the police may conduct a *Terry* stop only with “reasonable suspicion.”

None of these standards is “bright.” Is there anything peculiar about an arrest in or near an automobile that gives rise to a greater need for a bright line? Once the arrestee is restrained and removed from the car—as he will be, almost every time—there is no urgency that prevents the officer from going through the same thought process he must go through in other search or seizure situations. Indeed, one would think that the fleeting nature of a *Terry* stop would make a bright line even more useful there, but the Court has never imposed one. Only on a case-by-case basis has the Court examined whether the officer had “reasonable suspicion” for a stop.

98. *Belton*, 453 U.S. at 456.

99. The New York Court of Appeals said that the men had already been taken *outside* the car before they were arrested: “After the marihuana was found, the individuals, still standing outside the car, were placed under arrest.” *People v. Belton*, 407 N.E.2d 420, 421 (1980), *quoted in Belton*, 453 U.S. at 467 (Brennan, J., dissenting). Justice Brennan felt the “bright line” was fuzzy for additional reasons:

Even assuming today’s rule is limited to searches of the “interior” of cars—an assumption not demanded by logic—what is meant by “interior”? Does it include locked glove compartments, the interior of door panels, or the area under the floorboards? Are special rules necessary for station wagons and hatchbacks, where the luggage compartment may be reached through the interior, or taxicabs, where a glass panel might separate the driver’s compartment from the rest of the car? Are the only containers that may be searched those that are large enough to be “capable of holding another object”? Or does the new rule apply to any container, even if it “could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested”? The Court does not give the police any “bright-line” answers to these questions.

Belton, 453 U.S. at 470 (Brennan, J., dissenting) (citation omitted).

100. See *Texas v. Brown*, 460 U.S. 730, 742 (1983) (“[P]robable cause is a flexible, common-sense standard.”).

In *Schneckloth v. Bustamonte*,¹⁰¹ the Court expressly rejected a defense proposal for a "bright line" test (no valid consent if the officer did not advise the suspect of his right not to consent) for the voluntariness of consent, preferring a case-by-case examination of voluntariness.¹⁰² There are no bright lines defining "probable cause" to arrest or search or the "justifiable expectation of privacy" whose intrusion creates a "search" in the first place.¹⁰³ What, if anything, makes the search-incident-to-arrest doctrine different? As Professor LaFave notes, "it is necessary for courts to resist the temptation to draw new, supposedly 'bright,' lines when in fact existing doctrine is not causing serious problems in day-to-day practice."¹⁰⁴

If a bright line is needed in the *Belton* situation, the following rule would seem to be at least as bright as the one adopted by the Court: "The police may search an automobile incident to an arrest only in extraordinary circumstances (for example, where an injured or disabled arrestee cannot be removed from the automobile immediately after the arrest¹⁰⁵ or where the arrestor needs to reach into the car in order to secure it).¹⁰⁶ They may then search the area within reach of the arrestee." This gives the police the guidance they need without undermining the rationale of *Chimel*, and it ensures that the police may use other doctrines (the automobile exception, consent, the inventory search, etc.) to search the car when appropriate.

Ironically, none of this was necessary. The Court could have used another doctrine to justify Trooper Nicot's search: the so-called "automobile" exception.¹⁰⁷ The "*Carroll*" doctrine allowed police to search an automobile when they had probable cause to believe there is evidence in an automobile—even without proof that "exigent circumstances" prevented them from obtaining a search warrant before the evidence might be removed or destroyed. During the term following

101. 412 U.S. 218 (1973).

102. *Id.* at 248-49.

103. *See Katz*, 389 U.S. at 350-51.

104. LaFave, *supra* note 85, at 333. *See generally* Alschuler, *supra* note 67.

105. *See, e.g., State v. Box*, 17 P.3d 386, 391 (Kan. Ct. App. 2000).

106. *See, e.g., State v. Tolsdorf*, 574 N.W.2d 290, 292 (Iowa 1998). *But see State v. Robb*, 605 N.W.2d 96, 102-03 (Minn. 2000) (finding that where police allow the arrestee to return to the car as "a courtesy, not an exigency," they may not search incident to the arrest; this rule "encourages officers to follow normal police protocol and to *not* allow vehicles, and the weapons or evidence they may contain, to come within the arrestee's immediate control during the arrest").

107. The Court was certainly aware of this. *See Belton*, 453 U.S. at 462 n.6 ("Because of this disposition of the case, there is no need here to consider whether the search and seizure were permissible under the so-called 'automobile exception.'") (citing *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925)).

Belton, the Court extended *Carroll* to allow searches of closed containers found in the car.¹⁰⁸ It would seem that, after smelling burnt marijuana and seeing the envelope marked "Supergold," the trooper had probable cause to believe there was marijuana in the car—anywhere in the car, including *Belton's* jacket (and, perhaps, even the trunk!).¹⁰⁹ Instead, the Court expanded the search incident to arrest doctrine far beyond its rationale, thereby breaking faith with the fundamental principle that "the scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement"¹¹⁰—and sowing a bit of havoc in the lower courts.¹¹¹

Now that *both* the "*Belton* car-search-incident-to-arrest" doctrine and the "automobile exception" are the law, the resulting combined rule a police officer must follow is this: "If I lawfully arrest a 'recent' occupant of a car, I may 'contemporaneously' search the passenger compartment—but not the trunk, unless I have 'probable cause' to believe there is evidence or contraband in the trunk, in which case I may search the trunk even if no arrestee 'recently' occupied the car." After getting over his bewilderment as to what valid interests are protected by such a strange, complex rule, the officer then must guess at what "recent," "contemporaneous," and "probable" mean—and then apply the correct rule to the correct part of the automobile. And this rule was imposed by a Supreme Court that was supposedly trying to help the police by establishing a "bright line"!¹¹²

II. LOWER COURT REACTIONS

When lower courts believe that they are bound by a rule that does not hold up to its own rationale, one can expect conflict and confusion.

108. *Ross*, 456 U.S. at 825; see also *Acevedo*, 500 U.S. at 579-80; Rudstein, *supra* note 85, at 261:

The Court's holding in *United States v. Ross* grants law enforcement personnel significant authority to conduct warrantless searches of automobiles and their contents upon probable cause, thereby undermining what was perhaps the true reason for its holding in *Belton*. Because of this, the Court should now reconsider its decision in *Belton*.

109. On remand, this is just what the New York Court of Appeals held: "[I]n light of the discovery of the marijuana-filled envelope on the car floor and the odor of the substance, there clearly was reason to believe that the automobile might contain other drugs." *People v. Belton*, 432 N.E.2d 745, 748 (1982).

110. *Cupp v. Murphy*, 412 U.S. 291, 295 (1973).

111. See *infra* text accompanying notes 155-77.

112. See *supra* note 95; see also Robert A. Stern, Comment, *Robbins v. California and New York v. Belton: The Supreme Court Opens Car Doors to Container Searches*, 31 AM. U. L. REV. 291, 313 (1982) ("The 'bright line' rule merely substitutes new problems for old ones.").

This is just what has happened in cases applying the search incident to arrest doctrine to areas in the home and to areas in a car.

A. Home Searches

When the arrest has taken place in a home or hotel, many courts take a "time of the arrest" approach, holding that *Chimel* permits a search of the area within the arrestee's reach at the time of the arrest—even if, at the time of the *search*, the arrestee had been restrained or even removed from the area. But a few other courts take a "realistic" approach, carefully examining whether the arrestee could in fact have reached into the area at the time of the search.

A leading example of the "time of the arrest" group is *United States v. Turner*.¹¹³ Police obtained a warrant to arrest Turner for distributing cocaine and for a firearms offense.¹¹⁴ They found him in an apartment, in bed.¹¹⁵ They arrested him, finding a gun under the sheets.¹¹⁶ Next, they handcuffed him and took him to a second room.¹¹⁷ Then they searched the first room, finding some baggies of cocaine.¹¹⁸ Finding the search was valid, the court applied a two-part test: (1) was the searched area within the arrestee's control when he was arrested, and (2) did events occurring thereafter make the search unreasonable?¹¹⁹ The answer to the first question was clearly yes.¹²⁰ The *Turner* court's answer to the second question is thus:

Next we consider whether subsequent events made the search unreasonable. The officers handcuffed Turner and took him into the next room out of a concern for safety. We cannot say that these concerns were unfounded, for they had already discovered a concealed weapon beneath the bedding. They did not take him far away or delay for long before conducting the search. Under the circumstances, we cannot find the search that revealed the baggies of cocaine inconsistent with *Chimel*.¹²¹

113. 926 F.2d 883 (9th Cir. 1991).

114. *See id.* at 885.

115. *Id.* at 885-86.

116. *Id.* at 886.

117. *Id.*

118. *Id.*

119. *Id.* at 887-88.

120. *Id.* at 888.

121. *Id.*

This reasoning is troubling. The court correctly held that it was reasonable for the police to handcuff Turner and remove him from the room to prevent him from reaching another weapon he might use to attack the police, but why does this make the subsequent *search* of that room “reasonable”? Is the *Chimel* doctrine part of a *game*—by validly arresting Turner in a room, the police “won the right” to search the room, and they shouldn’t “lose that right” because they removed Turner from the room for a good reason?¹²² This overlooks the fact that once Turner was removed from the room there was no *need* to search the room without a warrant.

The notion that the Fourth Amendment merely establishes the rules of a game seemed to underlie the holding in *United States v. Abdul-Saboor*,¹²³ where the court upheld a search in the defendant’s apartment, agreeing with the government’s contention that “the determination of immediate control must be made when the arrest occurs.”¹²⁴

[I]f the courts were to focus exclusively upon the moment of the search, we might create a perverse incentive for an arresting officer to prolong the period during which the arrestee is kept in an area where he could pose a danger to the officer. That danger is not necessarily terminated by the arrest. As the Supreme Court pointed out in *Belton* responding to an analogous argument, “no search or seizure incident to a lawful custodial arrest would ever be valid [if] by seizing an article . . . an officer may be said to have reduced that article to his ‘exclusive control’”—and thus to have ended the defendant’s control. Likewise if by arresting and securing the defendant, an officer may be said to have put the area where the arrest took place under his own control—and thus outside the arrestee’s “exclusive control”—then, the law would truly be, as Mr. Bumble said, “a ass.”¹²⁵

122. See *State v. Shane*, 255 N.W.2d 324, 328 (Iowa 1977):

There is no rule which demands the suspect be given a sporting chance to get to destructible evidence or deadly weapons before the officer is able to find them. We hold the police may see to the safe custody and security of suspects first and then make the limited search which the circumstances of the particular case permit.

123. 85 F.3d 664 (D.C. Cir. 1996).

124. *Id.* at 668.

125. *Id.* at 669 (citation omitted). This approach might have been unnecessary. On the peculiar facts of *Abdul-Saboor*, the court might have held that this was one of those unusual situations where the arrestee might have been able to reach a weapon at the time of the search: “Abdul-Saboor had specifically requested entry to the area searched [to get some clothes]; once there, he seized and attempted to hide a loaded handgun.” *Id.* at 670.

Peculiar reasoning. Because the court does not trust the good faith of the police officer, it gives the officer authority to search *more* of the arrestee's home than he needs to in order to protect himself. (What do you make of *that*, Mr. Bumble?) In addition, the court relies on a quote from *Belton* (a car case, not a home case) that has always puzzled me. The quoted language seems to say that if a rule does not comport with its rationale, then the rationale—not the rule—must be wrong!

Belton was invoked again in *State v. Murdock*,¹²⁶ where the defendant was arrested in his apartment.¹²⁷ The majority allowed a search of the area around him at the time of the arrest—relying in part on *Belton*'s quest for "bright lines":

Accordingly, we conclude that the *Chimel* standard authorizes a contemporaneous, limited search of the area immediately surrounding the arrestee measured at the time of the arrest without consideration to actual accessibility to the area searched. This is a simple, practical rule. Its sanction of a contemporaneous, limited search protects the individual's privacy interests in areas outside his or her immediate control and also serves valid societal interests in protecting officer safety and preserving evidence.¹²⁸

A dissenting justice disagreed: "I do not believe a car and a home can be equated in search and seizure law."¹²⁹ As I indicated earlier, this statement is certainly supported by the Supreme Court's consistent disparate treatment of cars and homes.

In *United States v. Tavolacci*,¹³⁰ the court adhered to prior decisions adopting the "time of arrest" approach, noting: "This is one area of criminal procedure in which the courts have achieved some degree of clarity, refraining from any slippery test of actual necessity. We see no need to introduce new confusion."¹³¹ This sounds like a "bright-line" justification, but it really isn't. The "time of arrest" approach does not eliminate the often-difficult task (mandated by *Chimel*) of determining how far the arrestee could reach—it simply poses that question at the time of arrest rather than the time of the search. It is no more clear and no less "slippery" than a "time of search" approach, but it is less

126. 155 Wis. 2d 217, 455 N.W.2d 618 (1990).

127. *Id.* at 222, 455 N.W.2d at 619.

128. *Id.* at 236, 455 N.W.2d at 626.

129. *Id.* at 238, 455 N.W.2d at 627 (Abrahamson, J., dissenting).

130. 895 F.2d 1423 (D.C. Cir. 1990).

131. *Id.* at 1429.

consistent with the rationale for allowing a search incident to arrest at all.

Some courts have allowed the police to search the area around a handcuffed arrestee who has *not* been removed from the place of arrest. In *People v. Hufnagel*,¹³² the court justified such a ruling: “[S]ince handcuffs can fail, it is reasonable for the arresting officer to search the area the arrestee could reach after breaking free from them.”¹³³ The court cited no studies showing that handcuffs fail with any frequency, and the literature I received from various police departments suggests that officers take careful precautions to ensure that they do *not* fail.¹³⁴ The possibility of handcuffs failing seems a thin reed on which to rest a general rule allowing a warrantless search of a home—particularly since the police can (and usually do) remove the arrestee from the area after handcuffing him.

Normally, if the police choose not to remove a handcuffed arrestee from the area of arrest, they demonstrate their own belief that the handcuffs and presence of officers will prevent the arrestee from reaching into the area. I can, I suppose, think of situations where this might not be so. Perhaps a single officer has arrested several suspects and feels that it is not safe to remove the suspects until back-up officers arrive (though one wonders why it would be safer for the officer to search the area instead of keeping his eye on the suspects). Or perhaps the officer has reason to fear that friends of the arrestee might reach for a weapon while the officer is securing the arrestee.¹³⁵ Or maybe the arrestee is struggling and resisting application of handcuffs.¹³⁶ If a court is persuaded that one of these unusual situations is present, then the area search should be allowed.

While many courts rule as *Turner* and *Abdul-Saboor* did,¹³⁷ a few courts take a more “realistic” approach. In *People v. Summers*,¹³⁸ the

132. 745 P.2d 242 (Colo. 1987).

133. *Id.* at 247.

134. *See supra* Part I.A.

135. *See, e.g.*, *United States v. Bennett*, 908 F.2d 189, 193 (7th Cir. 1990).

136. *See, e.g.*, *United States v. Becker*, 485 F.2d 51, 55 (6th Cir. 1973); *United States v. Patterson*, 447 F.2d 424, 427 (10th Cir. 1971).

137. *E.g.*, *Watkins*, 564 F.2d at 205:

It is true, as Appellant contends, that Appellant had been subdued and presented no danger to the police at the time the suitcase was opened. Nor was there the possibility that the evidence in the suitcase would be destroyed as the suitcase was under the control of the police. However, the authority to conduct a search incident to an arrest, once established, still exists even after the need to disarm and prevent the destruction of evidence have been dispelled.

id.; *see also In re Sealed Case* 96-3167, 153 F.3d 759, 767 (D.C. Cir. 1998) (“The critical time for analysis, however, is the time of the arrest and not the time of the

majority stated: "where there is no threat to the officers because the suspect has been immobilized, removed, and no one else is present, it makes no sense that the place he was removed from remains subject to search merely because he was previously there."¹³⁹ A concurring opinion disagreed: "The right to search attaches at the moment of arrest. I am not offended, the federal courts are not offended, and most importantly the Constitution is not offended by allowing police to delay exercise of that right until they can do so safely."¹⁴⁰ Others, however, might well be "offended" by a rule that fails to conform to its own rationale.

In *Stackhouse v. State*,¹⁴¹ a police officer arrested Stackhouse in the attic of his home, then took him down to the second floor and handcuffed him.¹⁴² The officer then returned to the attic and searched it, finding a shotgun barrel.¹⁴³ The court held that the search was not justified by the search incident to arrest doctrine:

First is the question of whether the search is justified under *Chimel* as within the area of appellant's reach or grasp.

search."); *United States v. Lucas*, 898 F.2d 606, 609-10 (8th Cir. 1990); *Davis v. Robbs*, 794 F.2d 1129, 1131 (6th Cir. 1986) ("Under the circumstances prevailing at the time of the plaintiff's arrest, including Davis' immediate proximity to the loaded rifle which was in clear view and easily accessible to him, the police were lawfully entitled to seize the rifle after having placed the plaintiff into the squad car."); *United States v. Fleming*, 677 F.2d 602, 607-08 (7th Cir. 1982); *United States v. Wright*, 577 F.2d 378, 380 (6th Cir. 1978); *United States v. Kaye*, 492 F.2d 744, 746 (6th Cir. 1974):

Appellant's suitcase was within that area at the time of his arrest. It is true, as Appellant contends, that Appellant had been subdued and presented no danger to the police at the time the suitcase was opened. Nor was there the possibility that the evidence in the suitcase would be destroyed as the suitcase was under the control of the police. However, the authority to conduct a search incident to an arrest, once established, still exists even after the need to disarm and prevent the destruction of evidence have been dispelled.

id.; *State v. Noles*, 546 P.2d 814, 817-18 (Ariz. 1976); *People v. Fitzpatrick*, 300 N.E.2d 499, 508 (N.Y. 1973) ("[T]he fact that the police had handcuffed the defendant did not render the closet search unauthorized . . . it is not at all clear that the 'grabbing distance' authorized in the *Chimel* case is conditioned upon the arrested person's continued capacity 'to grab'."). In addition, several other Ninth Circuit cases have followed *Turner*. See *United States v. Hudson*, 100 F.3d 1409, 1419 (9th Cir. 1996); *United States v. Nohara*, 3 F.3d 1239, 1243 (9th Cir. 1993); *United States v. Tarazon*, 989 F.2d 1045, 1051 (9th Cir. 1993).

138. 86 Cal. Rptr. 2d 388 (Ct. App. 1999).

139. *Id.* at 390.

140. *Id.* at 393 (Bedsworth, J., concurring).

141. 468 A.2d 333 (Md. 1983).

142. *Id.* at 336.

143. *Id.*

We hold that it was not. Appellant was out of the attic and handcuffed; therefore, it cannot be argued that, from the floor below, the area of the attic was within his grasp.¹⁴⁴

A number of other cases agree with this approach, examining whether the searched area was within the arrestee's reach at the time of the search rather than at the time of arrest.¹⁴⁵ Courts using this approach almost *never* uphold the search under the search incident to arrest doctrine.¹⁴⁶ This is to be expected, of course, because police officers are not fools. As the answers to my inquiries revealed, they will normally restrain and remove the arrestee from the scene of arrest as soon as possible in order to protect themselves.

144. *Id.* at 342.

145. *See, e.g.*, *United States v. McConnell*, 903 F.2d 566, 570 (8th Cir. 1990); *United States v. Lyons*, 706 F.2d 321, 330 (D.C. Cir. 1983):

The search of the closet in the instant case clearly was beyond the pale demarcated by *Chimel* and its progeny. At the time of the search, Lyons was sitting, handcuffed, on a chair near the doorway. Inside the room were six police officers, at least four of whom presumably were armed. The closet was located at the far end of the wall adjacent to that in which the doorway was located—several yards away from Lyons. Under these circumstances, it is inconceivable that Lyons could have gained access to the area.

id.; *United States v. Cueto*, 611 F.2d 1056, 1062 (5th Cir. 1980):

At the time the search was made Cueto and Bavosa were both handcuffed and subdued; the record suggests that they had already been removed from the room. The defendants were certainly in no position to reach concealed weapons or to grab and destroy evidence in the suitcase or between the mattresses.

id.; *United States v. Berenguer*, 562 F.2d 206, 210 (2d Cir. 1977) ("[T]he seizure cannot be sanctioned as a search incident to arrest. Appellant was shackled to Sansone on a bed and the billfold was clearly out of his reach or immediate control."); *United States v. Mapp*, 476 F.2d 67, 80 (2d Cir. 1973) ("The record in this case reveals that the closet in which the heroin packages were found was closed at the time of search."); *United States v. Baca*, 417 F.2d 103, 105 (10th Cir. 1969) ("[I]t cannot be said that the inside of his bureau drawers, night stand, under the bed or any similar area was under any type of control by Baca inasmuch as he was handcuffed with his hands behind his back and was unable even to dress himself."); *State v. Cook*, 332 S.E.2d 147, 155 (W. Va. 1985):

[W]here the three arrestees, two of them handcuffed, were apparently seated on a bed with one or more shotguns pointed at them, the arresting officer's search of the top of the dresser outside of the area of their physical control was clearly unnecessary under either the law enforcement safety or protection of evidence rationales for both the "incident to a valid arrest" and "plain view" doctrines.

146. Well, hardly ever. *See Voelkel v. State*, 629 S.W.2d 243, 246 (Tex. Ct. App. 1982) ("It is not unreasonable to expect that Ms. Voelkel, although frontally handcuffed, could have obtained a weapon or destroyed evidence in the clothing bag and cigarette case.").

In *United States v. Griffith*,¹⁴⁷ officers arrested Griffith in his room but did *not* restrain him: "They did not handcuff him, and they allowed him to walk about the room to get dressed instead of bringing his clothes to him."¹⁴⁸ The court apparently suspected that the officers had the "perverse motive" alluded to above in *United States v. Abdul-Saboor*, but this led to the opposite conclusion:

If the freedom thus permitted defendant created the danger that he would walk within reach of the brown paper sack—and the record does not even show that it did—the danger was of the officers' own making. Just as "*Chimel* does not permit the arresting officers to lead the accused from place to place and use his presence in each location to justify a 'search incident to the arrest,'" it does not permit the officers to achieve the same result by ordering the accused to dress and then not bringing him his clothes, thus requiring him to move about the room in order to comply with their directions. The officers' only legitimate purpose in being in the room was to make an arrest. They did not have the right to create a situation which gave them a pretext for searching beyond the area of defendant's immediate control. The officers could have handed him whatever clothes he needed in order to dress. They could then have posted a guard on the room, obtained a search warrant, and later returned to search the room pursuant to the warrant.¹⁴⁹

Somehow, I doubt that Mr. Bumble would characterize this sensible reasoning as "a ass."

Occasionally, of course, the police may have good reason not to restrain or remove the arrestee immediately (e.g., where the arrestee needs to obtain some clothes), and here the police should be allowed to search the area he might reach into.¹⁵⁰ But this exceptional situation should not be the basis for a general rule allowing the search of an area of the home incident to the arrest. On occasion, the police might not restrain the arrestee simply because they do *not* fear him for some reason (e.g., reputation, age, or disability). If they do not fear that he might reach into an area for a weapon or evidence, it makes little sense to allow them to search that area anyway.

147. 537 F.2d 900 (7th Cir. 1976).

148. *Id.* at 904.

149. *Id.* (citation omitted).

150. Courts have had no trouble allowing a search in this situation. See, e.g., *Watkins*, 564 F.2d at 205; *Jones*, 767 P.2d at 238.

Which approach—the “time of arrest” approach or the “time of search” approach—is correct? As I’ve indicated above, 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. But which approach is the “correct” interpretation of *Chimel*? Are the “time of arrest” cases aberrations that do not really understand *Chimel* (or are deliberately trying to extend it past its rationale)? It might be hard to call them “aberrations,” as they seem to make up the majority approach in the lower courts (though I haven’t done a complete count). But do they correctly interpret *Chimel*? This is a difficult question.

The language used in *Chimel* is not clear on this point. Immediately after saying that the police may search the *person* of the arrestee, the Court stated:

[T]he 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.¹⁵¹

On the one hand, one could say that this language supports the “time of search” approach. Because it permits searches into “the area into which an arrestee might reach,” an area search is permitted only when the “gun on a table or in a drawer” is “dangerous to the arresting officer,” and only if the arrestee can in fact reach it at the time of the search.¹⁵²

But on the other hand, because in the real world this is hardly ever a serious possibility at the time of the search, such an interpretation would effectively eviscerate *Chimel*’s positive rule (insofar as it applies to area searches). Arguably, the Supreme Court did not intend to

151. *Chimel*, 395 U.S. at 763.

152. This is not the only way to read *Chimel*. Professor Bradley apparently read it to support the “time of arrest” approach:

[T]he *Chimel* Court also allows warrantless, no-probable-cause searches for evidence of areas within the “immediate control” of the arrestee, apparently without regard to whether the arrest is for an offense that *could* produce evidence or whether the arrestee in the instant case actually has a capacity to grab for anything.

Bradley, *supra* note 67, at 451. Professor Bradley went on to criticize *Chimel*:

[T]he 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, and warrantless searches for evidence should be forbidden absent both probable cause and exigent circumstances.

Id. at 452.

announce a rule only to have lower courts hold that it rarely applies.¹⁵³ Arguably, the Supreme Court did not intend its ruling to be meaningless, and lower courts are not empowered to undercut such a ruling in a way that makes it meaningless. Arguably, like it or not, to be faithful to *Chimel*, lower courts *must* adopt the "time-of-arrest" approach. And it now seems clear that many lower courts will continue to do just that—until the Supreme Court cures this problem by clarifying (or disapproving) *Chimel*'s positive rule insofar as it applies to area searches.

B. Car Searches

If *Chimel* created confusion, *Belton* begat bedlam. Here is the difficulty. While suspects arrested at home are occasionally allowed to remain in the place of arrest during the search, this almost *never* happens to suspects arrested in a car. I have read many reported decisions on car searches, and I have yet to see a case where this has happened.¹⁵⁴ This is understandable. As one court acknowledged, "[i]t seems quite likely that, in instances where occupants of a car are arrested, they will be outside the car and will have been placed under some measure of security before the car is searched."¹⁵⁵ The materials sent to me by various police departments show that it would be quite dangerous for an officer to assume the awkward positions needed to search a car while an unrestrained suspect is close by. Officers are instructed to remove the suspect from the car before beginning the search. Thus, in virtually every case, a search of a car incident to an arrest will involve an arrest of a *former* occupant of the car. As one court put it, after the arrest of an occupant of a car, "his wingspan had been clipped and his grabbable area was a police cruiser rather than his

153. As noted above, the majority in *Belton* said something very similar in rejecting defendant's argument that the police may not use the search incident to arrest doctrine to justify the search of an object they have seized from the grabbable area: "[N]o 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' [—and thus to have ended the defendant's control]." 453 U.S. at 462 n.5.

154. There are, however, a handful of cases where the officer might have planned to allow the arrestee to *return* to the car. See, e.g., *United States v. Holifield*, 956 F.2d 665, 668-69 (7th Cir. 1992); see also *supra* note 107 and accompanying text.

155. *United States v. Karlin*, 852 F.2d 968, 971 (7th Cir. 1988); see also *United States v. Sholola*, 124 F.3d 803, 817-18 (7th Cir. 1997). Following *Belton*, however, the *Karlin* and *Sholola* courts went on to hold that the search of the car of the restrained and removed arrestee was justified by the search incident to arrest doctrine. *Karlin*, 852 F.2d at 971-72; *Sholola*, 124 F.3d at 818.

own vehicle.”¹⁵⁶ Nevertheless, lower courts have rather consistently ruled that *Belton* allows a search of the car incident to the arrest of an occupant who was not in or near the car at the time of the search.¹⁵⁷

Belton allowed a search of the car “contemporaneous” with the arrest of a “recent occupant” of the car. But what do “contemporaneous” and “recent” mean? These terms are vague, but lawyers, judges, and police officers applying the Fourth Amendment are used to dealing with vague terms: “probable cause,” “reasonable suspicion,” “justifiable expectation of privacy,” and “voluntary consent,” to name a few. These terms can be interpreted by applying the *policy* behind them. “Probable cause” is the balance point between the individual’s need for privacy and the government’s need to find evidence relating to crime. “Reasonable suspicion” is the balance point between the individual’s liberty of movement and the government’s need to investigate people who might have committed, or who will commit, a crime. Tough to do, but doable. But what is the policy behind “contemporaneous” and “recent occupant”? With no guidance from the Supreme Court, lower courts have been left to their own devices to find one.

In *United States v. Cotton*,¹⁵⁸ the court came up with this rationale for allowing the search of a car after the arrestee has been removed and restrained:

The facts surrounding each arrest are unique and it is not by any means inconceivable under those various possibilities that an arrestee could gain control of some item within the automobile. The law simply does not require the arresting officer to mentally sift through all these possibilities during an

156. *State v. Gonzalez*, 487 N.W.2d 567, 570 (Neb. Ct. App. 1992).

157. See, e.g., Rudstein, *supra* note 80, at 246:

In a significant number of cases courts have upheld searches on the basis of *Belton* even though the arrestee was sitting in a police cruiser—in some cases even handcuffed—when the police searched the passenger compartment of his vehicle or a container found therein. Courts have reached the same result in cases in which the arrestee, although not in a squad car, was either handcuffed or restrained in some other manner by police officers at the time of the search. Yet, in none of these cases can it realistically be said that the arrestee could have reached into the passenger compartment, or a container located therein, in order to grab a weapon or to destroy or conceal evidence.

To argue otherwise is to engage upon a flight of fancy.

More recent cases have done the same. See *State v. Greenwald*, 858 P.2d 36, 41-42 (Nev. 1993) (Steffen, J., dissenting) (summarizing cases); see also *United States v. Gonzalez*, 71 F.3d 819, 825-26 (11th Cir. 1996); *Gonzalez*, 487 N.W.2d at 571; *Pack v. Commonwealth*, 368 S.E.2d 921, 922-23 (Va. Ct. App. 1988).

158. 751 F.2d 1146 (10th Cir. 1985).

arrest, before deciding whether he may lawfully search within the vehicle.

The evolution of the law regarding the warrantless searches of automobiles has of necessity followed a different path than that of searches incident to lawful arrest in general. The arrestee may have hidden, within the close proximity of the car interior, either weapons or contraband which are easily obtainable. He also has a significantly lessened privacy interest in the objects found within the car than he would in objects found within his home.¹⁵⁹

True, it is not "inconceivable" that an arrestee could gain access to the car at the time of the search, but these would be very unusual circumstances.¹⁶⁰ Certainly they would not be the norm, as the materials sent to me by various police departments (as well as common sense) show: for officer safety, get the guy away from the car before you search it! It seems strange to create a general rule applicable to all arrests of car occupants based on a situation that one may "conceive" only with substantial effort. This is not how the law operates in an analogous area: courts do not permit a frisk for weapons during a *Terry* stop where the officer has no reasonable suspicion that the suspect is armed and dangerous—even though it is "conceivable" that such a suspect might carry a weapon.¹⁶¹

Cotton's second rationale, the "lessened privacy interest" in a car, is relevant, but as the Supreme Court held in *Ross* and *Acevedo*, it is not sufficient by itself to justify the search of a car. "Lessened" is not the same as "none"—one does retain some privacy interest in a car and the objects one places in it, and for this reason the "automobile exception" requires the officer to have probable cause to believe there is evidence of a crime in the car in order to search it (though he does not need exigent circumstances preventing him from getting a search warrant).

Some courts have held that an arrestee was a "recent occupant" of a car if he was in the car when the police first "initiated contact" with him.¹⁶² In *People v. Savedra*,¹⁶³ the Supreme Court of Colorado proposed a rationale for this distinction:

159. *Id.* at 1148.

160. *But see supra* notes 106-07.

161. *Terry*, 392 U.S. at 27; *see also* *Sibron v. New York*, 392 U.S. 40, 64 (1968); *People v. Rivera*, 650 N.E.2d 1084, 1087 (Ill. App. Ct. 1995); *People v. Morgan*, 484 N.E.2d 1292, 1293 (Ill. App. Ct. 1985); *Simpler v. State*, 568 A.2d 22, 27 (Md. 1990).

162. *See, e.g., United States v. Hudgins*, 52 F.3d 115, 119 (6th Cir. 1995); *United States v. Strahan*, 984 F.2d 155, 159 (6th Cir. 1993); *Thomas v. State*, 761 So.

Prior to police contact, one of the occupants could have chosen to hide something in the vehicle to avoid discovery by the police. If *Belton* were read to preclude a search in this situation where police contact occurred just after the suspect exited his vehicle, then knowledgeable suspects could effectively conceal evidence by stepping outside of their vehicle whenever they saw a police officer approaching.¹⁶⁴

An admirable effort, but the court asks us to accept a general rule by assuming that the average criminal would be “knowledgeable” about *Belton*, and about lower court cases interpreting it, and also “knowledgeable” about the “automobile exception,” inventory searches, and other legal doctrines that might permit a search of the car whether he exited the car or not. Quite a stretch. I can’t assume that my law students are “knowledgeable” about all of this after a full semester of studying these cases!

Other courts hold that *Belton* allows the search of a car even when police did not “initiate contact” until *after* the suspect left the car.¹⁶⁵ In *Glasco v. Commonwealth*, police arrested Glasco (for driving with a suspended license) after he had parked the car and began walking away.¹⁶⁶ Police then searched the car, and the court upheld the search:

2d 1010, 1013 (Fla. 1999); *State v. Foster*, 905 P.2d 1032, 1037-38 (Idaho Ct. App. 1995) (discussing cases related to a search incident to arrest).

163. 907 P.2d 596 (Colo. 1995).

164. *Id.* at 600. The court then quoted a Nebraska opinion:

In order to conduct a valid search, police officers should not have to race from their vehicles to the arrestee’s vehicle to prevent the arrestee from getting out of his or her vehicle. If this were the rule, the quick and the speedy suspect could always create a sanctuary for weapons or contraband by getting out of the vehicle and surrendering to the officer first.

Id. (citing *Gonzalez*, 487 N.W.2d at 572). A recent Colorado case viewed the situation more realistically—but nevertheless felt bound to do the wrong thing (holding that a search of the car incident to the arrest of the driver was valid even though the driver was handcuffed and being driven to the police station in a patrol car when the search began):

Here, . . . there was no possibility that defendant could obtain a weapon or destroy evidence once he was in the police car, and thus, the very bases for a search incident to arrest appear not to have been present. Nevertheless, as noted, the [Colorado] [S]upreme [C]ourt cases have emphasized the importance of the temporal proximity between the police encounter and the defendant’s presence in the vehicle, irrespective of the defendant’s location at the time of the vehicle search.

People v. Graham, No. 99CA2314, 2001 Colo. App. LEXIS 1610, at *8 (Colo. Ct. App. Sept. 27, 2001).

165. *See, e.g.*, *United States v. Snook*, 88 F.3d 605, 608 (8th Cir. 1996).

166. 513 S.E.2d 137, 140 (Va. 1999).

[W]e are not persuaded by the authorities that have decided that an arrestee is an occupant or recent occupant of an automobile only if the police officer initiates contact with the arrestee before that person exits the vehicle. That kind of limitation assumes that an individual, who voluntarily gets out of an automobile, is not aware of the presence of a police officer, or having such knowledge, it did not prompt the person to exit the vehicle. We do not believe that those assumptions are always warranted. Moreover, a knowledgeable suspect has the same motive and opportunity to destroy evidence or obtain a weapon as the arrestee with whom a police officer has initiated contact. That suspect could also conceal evidence in the vehicle and effectively prevent an officer from discovering it by getting out of his or her automobile.¹⁶⁷

Granted, those assumptions might not "always" be warranted, but it seems odd to allow a warrantless search in many cases merely because it might be justified in a few. As a concurring judge reasoned in *Glasco*, "the mere ability of a citizen to put evidence out of the reach of law enforcement by placing it within an area protected by the right to privacy is not sufficient to justify a warrantless search."¹⁶⁸

Belton's requirement that the search be "contemporaneous" with the arrest also seems to have baffled the lower federal courts. In *United States v. Vasey*,¹⁶⁹ the Ninth Circuit held that thirty to forty-five minutes was too long to be "contemporaneous,"¹⁷⁰ while in *United States v.*

167. *Id.* at 141-42; see also *State v. Wanzek*, 598 N.W.2d 811, 815 (N.D. 1999). [T]hese decisions raise grave public policy issues because they create serious concerns for the safety of officers and others. By drawing a distinction between an occupant and a recent occupant of a vehicle, we would encourage individuals to avoid lawful searches of their vehicles by rapidly exiting or moving away from the vehicle as officers approached. Police officers should not have to race from their vehicles to the arrestee's vehicle to prevent the arrestee from getting out of the vehicle in order to conduct a valid search. If *Belton* is read to preclude searches where police contact occurs after the suspect exits the vehicle, suspects could conceal evidence and weapons by merely stepping outside the vehicle whenever they saw an officer approaching.

Id. (citations omitted).

168. 513 S.E.2d at 145 (Lacy, J., concurring). Justice Lacy also argued: "If there is no connection shown between a person's occupancy of a vehicle and his arrest, then extending the scope of the search incident to arrest to the vehicle is neither 'tied to' nor 'justified by' circumstances of the arrest." *Id.* at 144.

169. 834 F.2d 782 (9th Cir. 1987).

170. *Id.* at 787.

McLaughlin,¹⁷¹ the Ninth Circuit held that five minutes was fine—because the officer used that five minutes to complete paperwork relating to impounding defendant's car, and thus "the search in this case occurred during a continuous series of events closely connected in time to the arrest."¹⁷² But why should this matter? Whether forty-five minutes, five minutes, or one minute, if the arrestee has been restrained and moved to a place where he can no longer reach the car before the search, what justifies the search? If the rationale for allowing the search is a mystery, then defining "contemporaneous"—as a matter of Fourth Amendment policy—is a futile quest. Concurring in *McLaughlin*, Judge Trott voiced his frustration:

So the law regarding searches incident to arrest now reads something like, "well, thirty-minutes is too long, but five minutes is okay and you can delay if you are filling out paperwork but not if you are interrogating or transporting the defendant." So much for bright lines.

The tragedy is not just that the rule is now so unclear that it provides little guidance to law enforcement. Of greater concern is the reality that the search incident to arrest exception has been completely severed from the historic rationales of officer safety and preservation of evidence. The questions now revolve around when and how, not *why*.

The case before us illustrates this perfectly. *McLaughlin* was pulled over for having an illegally tinted rear window. He was then arrested because the police discovered there was an outstanding warrant for failure to appear. The search in no way furthered officer safety [sic]: *McLaughlin* was handcuffed and taken away. There was no evidence to preserve. Analytically—given the evaporation of the inventory search basis—the search was a fishing expedition—a purely exploratory search—plain and simple.¹⁷³

Judge Trott concluded by noting "the absurdity associated with allowing purely exploratory searches incident to arrest. *Cessante ratione legis cessat et ipsa lex*. ['The reason for the law ceasing, the law also ceases.']"¹⁷⁴ I could not have put it better myself.

I don't mean to sound unduly critical of lower federal court opinions. These judges are doing the best they can to make lemonade

171. 170 F.3d 889 (9th Cir. 1999).

172. *Id.* at 891.

173. *Id.* at 895 (Trott, J., concurring).

174. *Id.*

out of a real lemon. They have no choice but to follow *Belton*,¹⁷⁵ and they are trying to make some sense of it. As Judge Trott explained so eloquently, however, it just can't be done.¹⁷⁶

III. CONCLUSION

In 1971, the Supreme Court summarized its prior Fourth Amendment rulings as follows:

Thus the most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it."¹⁷⁷

175. Some state courts have simply refused to follow *Belton*, holding that their state constitutions or statutes protect privacy more than the Fourth Amendment (as interpreted by *Belton*) does. See, e.g., *State v. Anderson*, 910 P.2d 180, 184 (Kan. 1996); *State v. Hernandez*, 410 So. 2d 1381, 1385 (La. 1982); *State v. Brown*, 588 N.E.2d 113, 115 (Ohio 1992); *State v. Kirsch*, 686 P.2d 446, 448 (Or. Ct. App. 1984). Some courts appeared to ignore *Belton* rather than expressly disapprove it. See, e.g., *Commonwealth v. Toole*, 448 N.E.2d 1264 (Mass. 1983); *Greenwald*, 858 P.2d at 36. The New Jersey Supreme Court refused to apply *Belton* to warrantless arrests for motor vehicle offenses. *Pierce*, 642 A.2d at 959. See generally Catherine Hancock, *State Court Activism and Searches Incident to Arrest*, 68 VA. L. REV. 1085 (1982); J. Tim Thomas, Note, *Belton Is Not Welcome: Idaho's Rejection and Subsequent Adoption of the Belton Rule in State v. Charpentier*, 35 IDAHO L. REV. 125 (1998).

176. As Professor Alschuler put it, "when the rule is artificial, delimiting its boundary becomes a matter of guesswork." Alschuler, *supra* note 62, at 231; see also *id.* at 285 ("[N]onsense is likely to yield nonsense, and nonsense rules are likely to prove difficult to apply."). In his dissent in *People v. Brosnan*, 298 N.E.2d 78, 86 (N.Y. 1973), Judge Wachtler stated: "[S]earch and seizure law [becomes] uncontrollable when the rubric [is] adopted and the rationale discarded."

For a summary of the confusion among lower courts applying *Belton* before 1987, see David M. Silk, Comment, *When Bright Lines Break Down: Limiting New York v. Belton*, 136 U. PA. L. REV. 281 (1987). The comment concludes:

These decisions, of course, demonstrate a fundamental failure of the *Belton* rule. Different courts have used the reasoning of the *Belton* decision—the need to create a workable bright line rule—to find support for directly conflicting results. In this area, *Belton* fails to guide police conduct, fails to provide citizens with an idea of the scope of their rights, and fails to ensure consistent results.

Id. at 300.

177. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (footnotes omitted).

It may well be that the force of this statement has been diluted somewhat by decisions rendered by the Court since 1971. Nevertheless, the Court has remained faithful to its essence. Therefore, any "exception" to the "warrant requirement" should at least not be arbitrary. It should be based on some real need to search.

Is there anything about the fact of an arrest qua arrest that tends to justify a search? Well, yes. An arrest is often a traumatic event for a suspect. One moment he is free, and the next moment he is in the custody of the police. And he might realize that this custody can turn into a lengthy prison term if the police obtain more evidence to convict or add further charges. In this emotional state, the arrestee might seek to harm the arresting officers in order to escape, and he might try to dispose of any evidence that might enhance this likelihood of conviction or lead to further charges. But the police are neither stupid nor helpless. They can and will prevent these actions—first and foremost by restraining and removing the suspect from any area that might contain a weapon or evidence. If they arrest him in his home, they will handcuff him and remove him from the home. If they arrest him in a car, they will remove him from the car and then handcuff him. Common sense tells us this, and the police themselves tell us that this is what they in fact do. There might be occasional exceptions.¹⁷⁸ But if the Court honors its purported commitment to the Fourth Amendment even slightly, it should form its general rule based on what the police normally do, not on the exceptions.

In sum, the fact of custodial arrest should allow the police to search the clothing the arrestee is wearing, but not the area around him, unless particular and unusual facts justify such a search. The Court should reexamine *Chimel* and *Belton*.

178. See *supra* notes 18, 106-07, 155.