

Articles

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Cars, Cops, and Crooks: A Reexamination of *Belton* and *Carroll* with an Eye Toward Restoring Fourth Amendment Privacy Protection to Automobiles

It is difficult to imagine life without the automobile. In many parts of the country, it is our primary, if not sole, means of transporting ourselves and our property. It has also become the “personal effect” in which we have the least claim to an expectation of privacy under the Fourth Amendment. Pursuant to *Carroll v. United States*,¹ law enforcement officers may conduct a warrantless search of an automobile, including closed containers within,² whenever there is probable cause to believe that the vehicle contains contraband or evidence.³ *New York v. Belton*⁴ permits the police to conduct a warrantless search of the “passenger area” of the vehicle upon the arrest of a recent occupant of the vehicle, even in the absence of probable cause to believe that

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¹ 267 U.S. 132 (1925).

² See *California v. Acevedo*, 500 U.S. 565, 580 (1991) (authorizing a search of containers within an automobile if there is probable cause to believe that the automobile contains contraband or evidence of criminal activity and the container is capable of concealing the contraband or evidence).

³ See *Carroll*, 267 U.S. at 156.

⁴ 453 U.S. 454 (1981).

the car contains any contraband or evidence.⁵ It is not an oversimplification to state that *Belton* and *Carroll* have severely compromised the protections of the Fourth Amendment with respect to automobiles.

This Article will examine both the *Belton* and *Carroll* rules and will suggest a way to restore our Fourth Amendment privacy interest in our automobiles without compromising legitimate law enforcement interests. Part I will reexamine the *Belton* rule and consider the merits of abolishing it in favor of the more general rules governing searches incident to arrest and the *Carroll* automobile exception. Part II will urge a refinement to the *Carroll* rule that will favor the occupants' privacy interests while still respecting the legitimate needs of law enforcement. Part III will conclude by arguing that our expectation of privacy in our automobiles can be restored through abolishing the *Belton* rule and modifying *Carroll*.

I

WHY *BELTON* NEEDS TO RIDE INTO THE SUNSET

A well-recognized, although limited, exception to the search warrant requirement is the search incident to arrest. While initially more broadly construed,⁶ the Supreme Court narrowed the scope of this exception in *Chimel v. California* so that it was tailored to the twin rationales justifying the exception: officer safety and preservation of evidence.⁷ That is to say, a search incident to arrest without probable cause is allowed to protect the arresting officers from being harmed by the arrestee and to protect against the potential destruction of evidence by the arrestee.⁸ Because the search incident to arrest is justified by these twin needs, *Chimel* limited the scope of a search incident to arrest to the area within the "immediate control" of the arrestee—i.e., the area from which he could reach for a weapon or evidence of his criminal activity.⁹ This limitation on the scope of a search incident to arrest necessarily calls for a case-by-case factual determination, because it is dependent on several factors, including

⁵ *Id.* at 460.

⁶ *See, e.g.*, *United States v. Rabinowitz*, 339 U.S. 56, 65-66 (1950) (upholding search of arrestee's place of business when he was arrested therein), *overruled in part* by *Chimel v. California*, 395 U.S. 752, 768 (1969).

⁷ 395 U.S. at 762-63.

⁸ *Id.*

⁹ *Id.* at 763.

whether and how the arrestee is restrained, the nature of the area surrounding the arrestee, and the actual distance between the arrestee and the area to be searched.

In the 1981 case of *New York v. Belton*,¹⁰ the Court seized the opportunity to create a bright-line rule governing searches incident to arrest when it decided the legality of the search incident to the arrest of an occupant of a vehicle.¹¹ That decision has been the subject of much criticism by academics¹² and, recently, by members of the Court and other judges. In 2004, three Supreme Court Justices with decidedly different perspectives on the law of search and seizure suggested that the *Belton* rule is unsatisfactory,¹³ and two other Supreme Court Justices expressed disagreement with the expansion of the *Belton* rule.¹⁴ The unease that five members of the Court expressed concerning the *Belton* rule and its progeny is a strong signal that this is a rule whose days are numbered.

A. *The Belton Decision*

On April 9, 1978, a New York state trooper stopped a speeding vehicle with four men inside.¹⁵ In the course of the initial stop, the trooper detected the odor of burnt marijuana and saw an envelope labeled “Supergold” on the floor of the vehicle.¹⁶ After ordering the men out of the car, the trooper searched the passenger compartment as well as the zippered pockets of a jacket

¹⁰ 453 U.S. 454 (1981).

¹¹ *Id.* at 459-60 (establishing a “workable rule” for a category of cases where “courts have found no workable definition of ‘the area within the immediate control of the arrestee’”).

¹² *See, e.g.*, 3 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.1 (4th ed. 2004); Leslie A. Lunnery, *The (Inevitably Arbitrary) Placement of Bright Lines: Belton and Its Progeny*, 79 TUL. L. REV. 365, 390-97 (2004); Myron Moskowitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 WIS. L. REV. 657, 696-97; David S. Rudstein, *Belton Redux: Reevaluating Belton’s Per Se Rule Governing the Search of an Automobile Incident to Arrest*, 40 WAKE FOREST L. REV. 1287, 1312-22 (2005); David S. Rudstein, *The Search of an Automobile Incident to an Arrest: An Analysis of New York v. Belton*, 67 MARO. L. REV. 205, 244-47 (1984).

¹³ *See* Thornton v. United States, 541 U.S. 615, 624 (2004) (O’Connor, J., concurring in part) (expressing dissatisfaction with the *Belton* rule, noting *Belton*’s shaky foundation); *id.* at 625-33 (Scalia & Ginsburg, JJ., concurring in the judgment). These views are discussed in more detail *infra* notes 59-77 and accompanying text.

¹⁴ *See* Thornton, 541 U.S. at 633-36 (Stevens & Souter, JJ., dissenting).

¹⁵ *Belton*, 453 U.S. at 455.

¹⁶ *Id.* at 455-56.

found therein, which yielded cocaine.¹⁷ While adhering to the twin justifications for search incident to arrest articulated by *Chimel*—removal of any weapons accessible to the arrestee and prevention of the concealment or destruction of evidence¹⁸—the Court declared the need for a straightforward rule to decide “the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants.”¹⁹ Citing the need of the individual to know the scope of his constitutional protection, the need of the policeman to know the scope of his authority, and the difficulties faced by courts discerning what area is within the immediate control of an arrestee when an arrestee has been the recent occupant of an automobile, the *Belton* majority declared a bright-line rule that permitted the search of the passenger compartment of the automobile, as well as all containers therein, upon the arrest of an occupant.²⁰

Justice Brennan’s dissenting opinion, which was joined by Justice Marshall, recognized that the *Belton* majority, in creating a bright-line rule, had expanded searches incident to the arrest of a recent occupant of an automobile beyond what can be supported by the twin justifications underlying *Chimel*.²¹ Justice Brennan noted “that at the time *Belton* and his three companions were placed under custodial arrest—which was *after* they had been removed from the car, patted down, and separated—none of them could have reached the jackets that had been left on the back seat of the car.”²² The temporal and spatial limitations made important by the justifications for the *Chimel* rule were now cast off in favor of a bright-line rule entitling an officer to search the passenger compartment any time an officer arrests a recent occupant of a vehicle, irrespective of whether the arrestee had any part of the automobile’s passenger area within his immediate control at the time of the search.

Justice Stevens concurred in the result in *Belton*²³ and referred to his dissenting opinion in a companion case, *Robbins v. Califor-*

¹⁷ *Id.*

¹⁸ *Id.* at 457.

¹⁹ *Id.* at 459.

²⁰ *Id.* at 460.

²¹ *Id.* at 468 (Brennan, J., dissenting).

²² *Id.* at 466.

²³ *Id.* at 463 (Stevens, J., concurring in the judgment).

nia.²⁴ In his *Robbins* dissent, Justice Stevens noted that both *Robbins* and *Belton* involved searches of automobiles for which the officers conducting the search had probable cause to believe that the vehicles contained contraband.²⁵ Based upon this probable cause, he expressed his belief that the searches performed in *Robbins* and *Belton* should have been upheld under the automobile exception.²⁶ In stating his preference to decide *Belton* under the automobile exception (which requires probable cause to search) rather than as an automatic search incident to arrest (which does not require probable cause to search), Justice Stevens noted that *Belton*'s rule was achieved by "an extraordinarily dangerous detour" that creates a new rationale justifying automobile searches for every lawful custodial arrest of an automobile's occupant.²⁷ He added:

By taking the giant step of permitting searches in the absence of probable cause, the Court misses the shorter step of relying on the automobile exception to uphold the search. By taking this shorter step the Court could have adhered to the fundamental distinction between a search that a magistrate could authorize because it is based on probable cause and one that is not so justified under that standard. Although I am persuaded that the Court has reached the right result, its opinion misconstrues the Fourth Amendment.²⁸

Thus, the *Belton* bright-line rule was soundly criticized by the dissenting Justices and one concurring Justice—and the concerns underlying those criticisms have come home to roost.

²⁴ 453 U.S. 420, 444 (1981) (Stevens, J., dissenting), *overruled by* United States v. Ross, 456 U.S. 798, 825 (1982).

²⁵ *Id.* In *Robbins*, the search was conducted under the automobile exception and involved the opening of a container. The plurality in *Robbins* relied upon *Arkansas v. Sanders*, 442 U.S. 753 (1979), and *United States v. Chadwick*, 433 U.S. 1 (1977), which permitted the warrantless seizure of a container suspected to contain contraband but required a warrant to search the container, to invalidate the search of containers during the course of automobile exception search. *Robbins*, 453 U.S. at 424-25. *Chadwick* and *Sanders* have since been respectively abrogated and overruled by *California v. Acevedo*, 500 U.S. 565, 579-80 (1991). In *Acevedo*, the Court clarified that police may search an automobile and containers located within it where they have probable cause to believe the automobile or its containers contain evidence of criminal activity. *Acevedo*, 500 U.S. at 574.

²⁶ *Robbins*, 453 U.S. at 444 (Stevens, J., dissenting). It is now clear, in light of the holding in *Acevedo*, that the *Belton* search would be upheld today under the automobile exception. *See supra* note 25 and accompanying text.

²⁷ *Robbins*, 453 U.S. at 449-50 (Stevens, J., dissenting).

²⁸ *Id.* at 452-53 (footnote omitted).

B. *The Aftermath of Belton*

Despite the majority's claim to have drawn a bright line for law enforcement and citizens, *Belton* left a number of issues open. Several of these issues were foreseen in Justice Brennan's dissenting opinion.²⁹ The open questions arising from *Belton* that have challenged courts include: How much time after arrest may the search be conducted?³⁰ Must the suspect still be near the car,³¹ or even at the scene of arrest,³² when the actual search oc-

²⁹ See *New York v. Belton*, 453 U.S. 454, 469-70 (1981) (Brennan, J., dissenting) (questioning whether the car could be searched incident to arrest five minutes or three hours after the suspect had left the car, and whether the suspect needed to be standing in close proximity to the car during the search).

³⁰ While the Supreme Court has stated that a search is not incident to arrest "if the 'search is remote in time or place from the arrest,'" *United States v. Chadwick*, 433 U.S. 1, 15 (1977) (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)), lower courts have differed greatly in their application of this principle. Lower courts routinely approve automobile searches incident to arrest if they are conducted immediately after arrest. See *United States v. Barnes*, 374 F.3d 601, 603 (8th Cir. 2004) (upholding search conducted immediately after arrest); *United States v. Snook*, 88 F.3d 605, 606 (8th Cir. 1996) (upholding search conducted five minutes after arrest). Some courts have allowed searches incident to arrest after a significant amount of time has passed since the arrest. See *United States v. Hrasky*, 453 F.3d 1099, 1103 (8th Cir. 2006) (upholding search conduct conducted sixty minutes after arrest as contemporaneous because the search was the "culmination of a continuing series of events"), *petition for cert. filed*, 75 U.S.L.W. 3333 (U.S. Dec. 12, 2006) (No. 06-827); *United States v. Fiala*, 929 F.2d 285, 288 (7th Cir. 1991) (upholding search conducted ninety minutes after arrest where arrestee remained on the scene). But other courts have been stricter with respect to timing. See *United States v. \$639,558 in U.S. Currency*, 955 F.2d 712, 715-18 & n.7 (D.C. Cir. 1992) (determining that "thirty minutes" long was too "remote in time" to be incident to arrest) (quoting *Chimel v. California*, 395 U.S. 752, 764 (1969)); *United States v. Vasey*, 834 F.2d 782, 787-88 (9th Cir. 1987) (holding that search performed thirty to forty-five minutes after arrest was too remote in time).

³¹ Several courts have approved the search incident to arrest of an automobile notwithstanding that the suspect has been handcuffed and placed inside a police cruiser. See *Hrasky*, 453 F.3d at 1102 (upholding search incident to arrest where arrestee was handcuffed and placed in patrol car sixty minutes prior to search); *Barnes*, 374 F.3d at 604 (upholding search incident to arrest where arrestee was handcuffed and placed in patrol car prior to search); *United States v. Humphrey*, 208 F.3d 1190, 1202 (10th Cir. 2000) (holding search valid "without regard to the fact that the search occurred after [the arrestee] had been restrained"). Other courts have invalidated the search of a vehicle incident to arrest because the defendant had been handcuffed and placed in a patrol car prior to the search. See, e.g., *United States v. Edwards*, 242 F.3d 928, 938 (10th Cir. 2001) (holding warrantless search of vehicle invalid where suspect was arrested "100-150 feet away from the car, and he was handcuffed in the back of a police vehicle at the time of the search").

³² While some courts have invalidated *Belton* searches after the arrestee is no longer at the scene, see, e.g., *United States v. Lugo*, 978 F.2d 631, 635 (10th Cir. 1992) (holding warrantless search invalid where conducted after arrestee had been taken from the scene), others have upheld such searches, see, e.g., *United States v.*

curs? What is meant by the “passenger compartment” of the automobile, particularly when the automobile involved is a station wagon, minivan, hatchback, SUV, or other vehicle in which the “luggage area” is not physically distinct from the passenger area?³³ And does the bright-line rule permitting searches of “containers” within the “passenger area” include searches of locked luggage, a locked glove box, or the space within the door panels of the vehicle, notwithstanding that the interior of these containers may not be accessible to the arrestee?³⁴

In view of all of these unanswered questions, one might fairly ask whether the more flexible, albeit less definite, *Chimel* rule is actually easier for law enforcement officers to apply, particularly when its application is guided by the justifications for a search incident to arrest. Several commentators have so suggested.³⁵

1. *Belton Becomes More Dangerous*

A number of decisions in the wake of *Belton* have increased the rule’s capacity for mischief. One such decision, *Knowles v.*

McLaughlin, 170 F.3d 889, 890-91, 893 (9th Cir. 1999) (upholding search by one officer while another officer transported arrestee to jail); *accord* United States v. Johnson, 114 F.3d 435 (4th Cir. 1997).

³³ The rule that has emerged after numerous decisions concerning station wagons, minivans, SUVs, and hatchbacks is that areas accessible to occupants without exiting the vehicle are searchable as part of the passenger area within the meaning of *Belton*. See, e.g., United States v. Olguin-Rivera, 168 F.3d 1203, 1205-07 (10th Cir. 1999) (upholding search of SUV cargo area incident to arrest where cargo area was separated from passenger area by a “built-in, vinyl cover”); United States v. Lacey, 86 F.3d 956, 971 (10th Cir. 1996) (upholding search of entire van incident to arrest); United States v. Doward, 41 F.3d 789, 794 (1st Cir. 1994) (upholding search of uncovered hatchback incident to arrest); United States v. Pino, 855 F.2d 357, 364 (6th Cir. 1988) (upholding search of rear section of station wagon incident to arrest).

³⁴ While some courts permit *Belton* searches of locked containers, see, e.g., United States v. Thomas, 11 F.3d 620, 628 (6th Cir. 1993) (upholding search of locked firebox incident to arrest where firebox was found on front passenger seat), others have taken the opposite approach, see, e.g., State v. Stroud, 720 P.2d 436, 441 (Wash. 1986) (requiring warrant to unlock or search containers found in vehicles during search incident to arrest under WASH. CONST. art. 1, § 7). Most courts have permitted *Belton* searches of a locked glove box. See, e.g., United States v. Woody, 55 F.3d 1257, 1269 (7th Cir. 1995) (holding search of locked glove box to be reasonable); State v. Fry, 388 N.W.2d 565, 575 (Wis. 1986) (“We do not construe *Belton* as making a distinction between a locked glove compartment and an unlocked one.”). However, at least one court has refused to permit the search of a locked glove box as a matter of state law. See *Stroud*, 720 P.2d at 441. Further, the court in *Barnes* permitted officers to search the area immediately under the window seal, although it noted that *Belton* would not permit the removal of a door panel. *Barnes*, 374 F.3d at 604-05.

³⁵ See sources cited *supra* note 12.

Iowa,³⁶ initially appeared to limit the use of *Belton* in automobile stops. However, its actual effect may be to encourage *Belton* searches.

At issue in *Knowles* was the constitutional validity of a “search incident to citation,” a procedure authorized by Iowa law.³⁷ The petitioner had been stopped for speeding, after which an Iowa police officer issued a citation rather than arresting him.³⁸ The officer then conducted a search of the vehicle and discovered a “pot pipe” and bag of marijuana under the driver’s seat.³⁹ Noting that the twin justifications for a search incident to arrest—officer safety and preservation of evidence—were absent in this scenario,⁴⁰ the Court invalidated the search.⁴¹ Thus, the line was drawn: an officer lacks authority to search a vehicle incident to arrest in the absence of an actual arrest.

But is it all that difficult to justify arresting an occupant of an automobile? The Court answered that question in the negative three years after *Knowles* was decided when it was called upon in *Atwater v. City of Lago Vista*⁴² to consider the validity of an arrest for a minor infraction. The petitioner, Gail Atwater, was pulled over for driving in violation of Texas seatbelt laws; neither Ms. Atwater nor her young children were restrained as required by law.⁴³ Notwithstanding that the maximum punishment for that offense was a mere \$50 fine, the officer arrested Ms. Atwater.⁴⁴ Although noting that the arrest and its attendant incidents, which apparently did not include a vehicle search, “were merely gratuitous humiliations imposed by a police officer who

³⁶ 525 U.S. 113 (1998).

³⁷ *Id.* at 114-15. Iowa’s statute granted officers the ability to either arrest or issue a citation following a traffic violation. *Id.* at 115. The statute specifically stated that the officer’s decision to cite rather than to arrest did not affect the officer’s authority to conduct an otherwise lawful search, which the Iowa Supreme Court concluded included a full-blown search incident to arrest. *Id.*

³⁸ *Id.* at 114.

³⁹ *Id.*

⁴⁰ *Id.* at 116-17. The Court emphasized that the fleeting contact between officer and passenger did not justify a full-blown search incident to arrest, although it could justify ordering the suspect out of the vehicle, which might lead to reasonable suspicion to justify a frisk. *Id.* at 117-18. Further, the Court stressed that the need to preserve evidence cannot justify the search incident to a speeding citation because there would not be any additional evidence of the traffic offense. *Id.* at 118.

⁴¹ *Id.* at 119.

⁴² 532 U.S. 318 (2001).

⁴³ *Id.* at 323-24.

⁴⁴ *Id.*

was (at best) exercising extremely poor judgment,”⁴⁵ the Court nonetheless held that “[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”⁴⁶ *Atwater*, read in conjunction with *Knowles*, informs law enforcement authorities that, should they want to search the passenger area of a vehicle relying on the search incident to arrest doctrine, they must actually make a custodial arrest, but they may make that custodial arrest even for very minor offenses committed in their presence.

But does the Fourth Amendment provide any check on pretextual arrests made because an officer is really just interested in searching the vehicle? Unfortunately, the answer appears to be no. In *Whren v. United States*,⁴⁷ the Court made it clear that the actual subjective intentions of a police officer in seizing an individual play no role in probable cause analysis under the Fourth Amendment.⁴⁸ Therefore, since the *Belton* rule was first articulated in 1981, the Court has adopted rules that will now permit an officer seeking to search a vehicle—but lacking the probable cause needed to justify an automobile search—to arrest an occupant, even for a minor traffic offense, after which he may make a warrantless search of the interior of the vehicle. While it would be irrational to think that law enforcement personnel will begin to routinely arrest drivers for minor traffic offenses merely because they are interested in searching the interior of a car but lack probable cause to do so, it would also be naive to assume that this never occurs. Moreover, certain ethnic groups, along with drivers of vehicles in the “wrong” part of town, will likely bear a disproportionately greater likelihood of this occurring.

2. Thornton’s Tentative Call for Reform

In 2004, the Supreme Court tackled one of the more difficult issues that courts had grappled with in the wake of *Belton*: whether the *Belton* search applies to situations in which the officer first makes contact with the arrestee after the arrestee has

⁴⁵ *Id.* at 346-47.

⁴⁶ *Id.* at 354.

⁴⁷ 517 U.S. 806 (1996).

⁴⁸ *Id.* at 814 (“[T]he Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.”).

stepped out of his vehicle.⁴⁹ In *Thornton*, an officer's suspicions were aroused when the petitioner seemed to be slowing down to avoid the officer.⁵⁰ Upon running a check of the petitioner's license plates, the officer determined that the plates had been issued for a vehicle other than the car on which they were located.⁵¹ However, before the officer could pull him over, petitioner drove into a parking lot and got out of his car.⁵² The officer pulled his patrol car behind the petitioner, accosted him, and asked for his driver's license.⁵³ Petitioner appeared nervous, but granted permission for the officer to pat him down, at which point the officer felt a bulge in petitioner's pocket.⁵⁴ Petitioner admitted to possessing illegal drugs and reached into his pocket and removed several bags of illegal drugs.⁵⁵ After the officer handcuffed petitioner and placed him in the backseat of the patrol car, the officer searched petitioner's car and discovered a handgun.⁵⁶

Chief Justice Rehnquist, writing for a majority including Justices Kennedy, Thomas, Breyer, and, in pertinent part, O'Connor, held that "[s]o long as an arrestee is the sort of 'recent occupant' of a vehicle such as petitioner was here, officers may search that vehicle incident to the arrest."⁵⁷ Justice Stevens, joined by Justice Souter, dissented, noting that "[t]he bright-line rule crafted in *Belton* is not needed for cases in which the arrestee is first accosted when he is a pedestrian, because *Chimel* itself provides all the guidance that is necessary."⁵⁸ Far more interesting, however, are the concurring opinions of Justice Scalia, joined by Justice Ginsburg, and of Justice O'Connor. These three justices—one reputedly a conservative (Scalia), one reputedly a liberal (Ginsburg), and one usually considered to be a moderate (O'Connor)—each expressed dissatisfaction with the *Belton* rule

⁴⁹ *Thornton v. United States*, 541 U.S. 615, 617 (2004).

⁵⁰ *Id.* The officer suspected that the petitioner knew he was a police officer even though the officer drove an unmarked police car. *Id.*

⁵¹ *Id.* at 618.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 623-24.

⁵⁸ *Id.* at 636 (Stevens, J., dissenting).

as it has evolved.⁵⁹

Justice Scalia, joined by Justice Ginsburg, called for a radical revision to the *Belton* rule governing automobile searches. His opinion first pointed out that the twin justifications for searches incident to arrest—“to find weapons the arrestee might use or evidence he might conceal or destroy”⁶⁰—will almost never be a genuine concern because of the prevalent practice of restraining an arrestee prior to searching the automobile recently vacated by the arrestee.⁶¹ Quoting Ninth Circuit Judge Stephen Trott, Justice Scalia strongly repudiated the *Belton* rule and its progeny:

In our search for clarity, we have now abandoned our constitutional moorings and floated to a place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find.⁶²

A fairly typical example of police rummaging in a car to see what they may find is seen in the fact pattern of *Knowles v. Iowa*.⁶³ The search in that case, which was later invalidated because there had not been an actual arrest,⁶⁴ was preceded by a speeding citation: the driver was clocked driving forty-three mph in a twenty-five mph zone.⁶⁵ The opinion offers no indication that the police officer had any reason to believe that a search of the vehicle would uncover anything lawfully seizable. But after a rather thorough search to see what he might find, the officer got lucky and found a bag of marijuana and a “pot pipe” stashed under the driver’s seat.⁶⁶

In *Thornton*, Justice Scalia proposed to limit *Belton* searches by reviving a rule that had been expressly repudiated by the Court, but limiting this “revival” to situations involving automobiles.⁶⁷ Specifically, Justice Scalia urged a return to the rationale

⁵⁹ *Id.* at 624 (O’Connor, J., concurring in part); *id.* at 625-32 (Scalia, J., concurring in the judgment).

⁶⁰ *Id.* at 625 (Scalia, J., concurring in the judgment).

⁶¹ *Id.* at 628.

⁶² *Id.* (quoting *United States v. McLaughlin*, 170 F.3d 889, 894 (9th Cir. 1999) (Trott, J., concurring)).

⁶³ 525 U.S. 113 (1998).

⁶⁴ *Id.* at 117-19.

⁶⁵ *Id.* at 114.

⁶⁶ *Id.*

⁶⁷ *Thornton*, 541 U.S. at 631-32 (Scalia, J., concurring in the judgment).

of *United States v. Rabinowitz*,⁶⁸ which permitted an automatic search incident to arrest of the premises in which the suspect had been arrested, justifying the search as in furtherance of the government's interest in gathering evidence relevant to the crime for which the suspect was arrested.⁶⁹ Under Justice Scalia's formulation, if *Belton* searches are justifiable, it is only because the vehicle might contain evidence relevant to the crime for which the occupant was arrested.

In 1969, the Court expressly repudiated the rule of *Rabinowitz* when it decided *Chimel v. California*.⁷⁰ After spelling out that a search incident to arrest is justified to prevent the arrestee from gaining access to evidence that could be destroyed or a weapon that could be used against the officer, the Court limited the search incident to arrest to the area within the suspect's immediate control.⁷¹ In ruling as it did, the Court made clear that it was rejecting the rule articulated in *Rabinowitz*:

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.⁷²

The message of *Chimel* is clear: the search incident to arrest is not justifiable merely because the premises might contain evidence relevant to the crime for which the suspect was arrested. If that is the reason for the search, rather than concerns about whether the suspect can gain access to a weapon or evidence that he could then destroy, the right to lawfully search requires probable cause and a warrant or an exception to the warrant requirement other than the search incident to arrest. Thus, contrary to Justice Scalia's assertion that "both *Rabinowitz* and *Chimel* are plausible accounts of what the Constitution requires,"⁷³ *Chimel* directly repudiated the rule in *Rabinowitz*.

To be fair, Justice Scalia does not advocate in his concurrence that the Court replace *Chimel* with a return to the *Rabinowitz*

⁶⁸ 339 U.S. 56 (1950).

⁶⁹ *Id.* at 60-61.

⁷⁰ 395 U.S. 752, 768 (1969).

⁷¹ *Id.*

⁷² *Id.* at 763.

⁷³ *Thornton v. United States*, 541 U.S. 615, 631 (2004) (Scalia, J., concurring in the judgment).

rule. Instead, his opinion urges that *Belton* be recast as a proper search incident to arrest tied to the *Rabinowitz* rule rather than to the *Chimel* rule.⁷⁴ In support of this approach, he refers to motor vehicles as a type of “effect” that gives rise to a reduced expectation of privacy and heightened law enforcement needs.⁷⁵ He does not, however, explain why this special status of automobiles justifies applying to automobiles the *Rabinowitz* analysis that the Court has expressly rejected.

Despite its shortcomings, the approach proposed by Justice Scalia does at least have the merit of limiting unjustifiable “rum-maging” through automobiles under the auspices of *Belton*. For example, it would disallow the search of a vehicle in the absence of a possibility of finding evidence relevant to the crime for which the vehicle’s occupant was arrested. Thus, an arrest for speeding or driving without a license would not permit a search of an automobile. Justice Scalia’s approach therefore restricts an officer inclined to make an arrest for a traffic offense as a pretext to gain authority to search a vehicle.

Justice O’Connor, in her concurring opinion in *Thornton*, expressed her dissatisfaction with the state of the law surrounding *Belton* searches and noted in particular that the search of a vehicle incident to the arrest of its occupant has become a police entitlement rather than an exception justified by the twin rationales of *Chimel*.⁷⁶ Although she expressed her view that the approach taken by Justice Scalia seemed to be on firmer ground than *Belton*’s shaky foundation, she declined to adopt that approach in the absence of argument thereon by the parties.⁷⁷

Judges on other courts have expressed dissatisfaction with *Belton*, including several federal judges in post-*Thornton* cases.⁷⁸ In addition, even prior to *Thornton*, several states had rejected or

⁷⁴ See *id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 624 (O’Connor, J., concurring in part).

⁷⁷ *Id.* at 624-25.

⁷⁸ See *United States v. Weaver*, 433 F.3d 1104, 1107 (9th Cir. 2006) (“[W]here the arrestee was handcuffed and secured in a patrol car before police conducted the search, the rational underpinnings of *Belton*—officer safety and preservation of evidence—are not implicated. . . . We respectfully suggest that the Supreme Court may wish to re-examine this issue. Yet, we are bound by *Belton*.”), *cert. denied*, 126 S. Ct. 2053 (2006); *United States v. Osife*, 398 F.3d 1143, 1147-48 (9th Cir. 2005) (“Justice Scalia’s view is more analytically sound than the prevailing approach” but that “[r]egardless of the wisdom of Justice Scalia’s view, we must continue to follow the Supreme Court’s holdings until they are overruled.”).

modified the *Belton* rule as a matter of state law.⁷⁹ Those rejecting *Belton* in favor of *Chimel*'s fact-specific inquiry include Pennsylvania,⁸⁰ New Mexico,⁸¹ Nevada,⁸² and Wyoming.⁸³ Other states have placed some limits on searches of automobiles incident to arrest. For example, New Jersey does not permit *Belton* searches following arrests for traffic offenses⁸⁴ or after the arrestee has been removed from the vehicle and secured elsewhere.⁸⁵ Massachusetts likewise refuses to permit a *Belton* search where the arrestee has been secured away from the vehicle at the time the search is conducted.⁸⁶ And Oregon, while not limiting automobile searches incident to arrest in order to achieve the twin goals of preservation of evidence and protection of the officer, requires that a search within the scope of those justifications "must be related to the crime for which the person was arrested

⁷⁹ See Eugene L. Shapiro, *New York v. Belton and State Constitutional Doctrine*, 105 W. VA. L. REV. 131, 141 (2002).

⁸⁰ See *Commonwealth v. White*, 669 A.2d 896, 902 (Pa. 1995) (noting that privacy interests inherent in the Pennsylvania Constitution limit warrantless automobile searches incident to arrest "to areas and clothing immediately accessible to the person arrested").

⁸¹ See *State v. Gomez*, 932 P.2d 1, 13 (N.M. 1997) (restricting searches of automobiles incident to arrest to areas accessible to arrestee in accordance with *Chimel*). The *Gomez* court stated: "[I]f there is no reasonable basis for believing an automobile will be moved or its search will otherwise be compromised by delay, then a warrant is required. . . . [W]e do not accept the federal bright-line automobile exception." *Id.*

⁸² See *Camacho v. State*, 75 P.3d 370, 373-74 (Nev. 2003) (electing "to follow our previous cases where we rejected *Belton*'s reasoning and followed the earlier United States Supreme Court case of *Chimel v. California*") (footnote omitted); *State v. Harnisch*, 931 P.2d 1359, 1365-66 (Nev. 1997) (holding that the search incident to arrest of an automobile is inapplicable where a person is in custody and removed from the vehicle, because the exception evolves "from the need to disarm and prevent any evidence from being concealed or destroyed").

⁸³ *Vasquez v. State*, 990 P.2d 476, 489 (Wyo. 1999) (rejecting *Belton*'s bright-line approach in favor of a fact-specific *Chimel* approach, but expanding the permissible search to include a search for evidence relevant to the arrestee's arrest even if the evidence is not in danger of destruction by the arrestee).

⁸⁴ *State v. Pierce*, 642 A.2d 947, 961 (N.J. 1994) (observing "that the *Belton* rule, as applied to arrests for traffic offenses, creates an unwarranted incentive for police officers to 'make custodial arrests which they otherwise would not make as a cover for a search which the Fourth Amendment otherwise prohibits'" (quoting 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE §7.1(c), at 21 (2d ed. 1987)).

⁸⁵ *State v. Eckel*, 888 A.2d 1266, 1277 (N.J. 2006) ("Once the occupant of a vehicle has been arrested, removed and secured elsewhere, the considerations informing the search incident to arrest exception are absent and the exception is inapplicable.").

⁸⁶ See *Commonwealth v. Toole*, 448 N.E.2d 1264, 1267-68 (Mass. 1983) (invalidating search of truck's passenger compartment incident to arrest on state statutory grounds where the arrestee had been handcuffed, arrested, and was in the custody of troopers at the time the search was conducted).

and must be reasonable in scope, time and intensity.”⁸⁷

C. *What to Do About Belton*

In light of the *Thornton* concurring opinions, the decisions by several state courts, and the criticism of scholars, it appears safe to say that the *Belton* rule is under attack and its days are numbered. Given the vast number of reported cases involving *Belton* searches that occur after the motorist is arrested, handcuffed, and in the officer’s custody,⁸⁸ it is increasingly difficult to justify the wholesale invasion of a motorist’s privacy interest in the interior of his automobile merely because he has been arrested when the twin justifications for a search incident to arrest are utterly absent. Furthermore, continued in its current form, *Belton* not only impacts the automobile occupants’ privacy interests, but, as one judge has recognized, it also creates an incentive on the part of officers to make an arrest for even minor traffic offenses as a pretext to justify a search which the Fourth Amendment otherwise prohibits.⁸⁹ The potential for abuse is staggering.

But what should be done about *Belton*? The proposal by Justice Scalia, joined by Justice Ginsburg, is interesting but, as noted above,⁹⁰ would revive the *Rabinowitz* approach to searches incident to arrest that the Court specifically rejected in *Chimel*. Granted, since it recasts only the justification for *Belton*, which is a bright-line rule for automobile searches incident to arrest, the proposal would apply only to automobile searches. In addition, it would have the beneficial effect of eliminating searches that

⁸⁷ *State v. Brody*, 686 P.2d 451, 453 (Or. Ct. App. 1984); *see also State v. Kirsch*, 686 P.2d 446, 448 (Or. Ct. App. 1984) (“*Belton* is not the law of Oregon.”).

⁸⁸ *Thornton v. United States*, 541 U.S. 615, 628 (2004) (Scalia, J., concurring in the judgment) (noting that *Belton* searches occurring after the motorist has been arrested “are legion”). For a sampling of reported federal cases involving this precise scenario, see *United States v. Wesley*, 293 F.3d 541, 544 (D.C. Cir. 2002); *United States v. Humphrey*, 208 F.3d 1190, 1202 (10th Cir. 2000); *United States v. Mitchell*, 82 F.3d 146, 152 (7th Cir. 1996); *United States v. Moorehead*, 57 F.3d 875, 878 (9th Cir. 1995); *Richardson v. Bd. of Police Comm’rs*, No. 04-0351-CV-W-RED, 2006 U.S. Dist. LEXIS 576, at *3-4 (W.D. Mo. Jan. 10, 2006); *United States v. Brown*, 261 F. Supp. 2d 1, 6 (D.D.C. 2003), *rev’d*, 374 F.3d 1326 (D.C. Cir. 2004); and *United States v. Patrick*, No. 02-20099-01-JWL, 2003 U.S. Dist. LEXIS 9228, at *2-4 (D. Kan. May 30, 2003). Many state court decisions are in accord. *See, e.g.*, *State v. Haight*, 831 P.2d 946, 947 (Idaho Ct. App. 1992); *State v. Edgington*, 487 N.W.2d 675, 676 (Iowa 1992); *State v. White*, 489 N.W.2d 792, 793 (Minn. 1992); *State v. Hensel*, 417 N.W.2d 849, 853 (N.D. 1988).

⁸⁹ *Pierce*, 642 A.2d at 961.

⁹⁰ *See supra* notes 67-75 and accompanying text.

lack probable cause but are incident to an arrest when it is unlikely that evidence related to the arrest will be discovered by the search, such as where a motorist has been arrested for a traffic violation. But in view of the clear message in *Chimel* that an arrest does not justify searching an area beyond the immediate control of the arrestee and that “[s]uch searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant,”⁹¹ an attempt to recast *Belton* as grounded upon the rejected *Rabinowitz* rationale rather than upon *Chimel* would permit searches of automobiles in the absence of either probable cause or the twin justifications underlying *Chimel*. It is hard to support this approach to *Belton* when there is a much more straightforward way to restore privacy interests to automobiles and still safeguard legitimate law enforcement interests.

As a first step, *Belton* must go rather than be recast with a different rationale in support thereof. *Belton*’s purpose was to create a bright-line rule to more easily apply *Chimel* in the context of an arrest of an automobile occupant.⁹² It is not clear that it is any more difficult to apply the “immediate control area” test of *Chimel* to an arrest of an automobile occupant than to an arrestee in any other context. But it is clear that the *Belton* case itself stretched the search incident to arrest justifications beyond where they were plausible: the vehicle’s occupants were outside the vehicle at the time of the search, and the “container” searched was the zippered pocket of a jacket on the backseat of a car,⁹³ an area clearly beyond the control of the car’s former occupants. The fact that several state courts expressly reject *Belton* and instead apply *Chimel* to automobile searches incident to arrest⁹⁴ belies the contention that the *Chimel* rule is particularly difficult to apply in the context of arrests of automobile occupants. There just does not seem to be any reason to permit an unnecessary rule to continue to erode our Fourth Amendment interests.

Having demonstrated that automobile searches incident to arrest under *Belton* are rarely, if ever, sustainable under the twin rationales of *Chimel*, Justice Scalia notes that if they are justifi-

⁹¹ *Chimel v. California*, 395 U.S. 752, 763 (1969).

⁹² *New York v. Belton*, 453 U.S. 454, 460 (1981).

⁹³ *Id.* at 456.

⁹⁴ *See supra* notes 79-87 and accompanying text.

ble at all, it is “because the car might contain evidence relevant to the crime for which he was arrested.”⁹⁵ The mere remote possibility that the car might contain evidence relevant to a crime would justify neither the issuance of a warrant nor the use of the automobile exception, because both require probable cause. However, it is often the case that the facts giving rise to probable cause to arrest may also provide probable cause to believe that the automobile contains evidence related to the occupant’s criminal activity. In that situation, *Belton* is not needed at all. A separate exception to the Fourth Amendment warrant requirement, the *Carroll* doctrine, is well suited to govern that situation. As we shall see, however, that too is a doctrine in need of reexamination and modification to fit changing technologies and circumstances if the Fourth Amendment is to continue to provide any expectation of privacy in the context of automobiles.⁹⁶

In summary, the Fourth Amendment can more faithfully be observed in the context of automobiles if *Belton*’s bright-line rule is eliminated in favor of the straightforward application of *Chimel*’s search-incident-to-arrest rule. Because the facts giving rise to probable cause to arrest a vehicle’s occupant will often give rise to probable cause to believe that the car contains contraband or fruits, instrumentalities, or evidence of the criminal activity for which the arrest was made, the officers may be justified in searching under the automobile exception of *Carroll*. But should *Carroll* continue to stand as it now does?

II

REWORKING THE *CARROLL* RULE TO RESTORE FOURTH AMENDMENT PROTECTION FOR AUTOMOBILES

Even older than the *Belton* rule is the *Carroll* doctrine, which permits warrantless searches of automobiles based upon probable cause to believe the car contains contraband or fruits, instrumentalities, or evidence of criminal activity. This rule was first articulated by the Supreme Court in 1925 in *Carroll v. United States*.⁹⁷ In that case, the Court’s approval of the immediate warrantless search of an automobile rested on the exigent circum-

⁹⁵ *Thornton v. United States*, 541 U.S. 615, 629 (Scalia, J., concurring in the judgment).

⁹⁶ See *infra* Part II.

⁹⁷ 267 U.S. 132 (1925).

stance that “it [was] not practicable to secure a warrant because the vehicle [could] be quickly moved out of the locality or jurisdiction in which the warrant [was] sought.”⁹⁸ The Court thus created a bright-line rule presuming an exigency because of the automobile’s mobility.⁹⁹

A. *The Expanded “Justification” for the Carroll Doctrine*

Although the *Carroll* automobile exception began as a bright-line application of the exigent circumstances exception to the warrant requirement, roughly half a century later the Court articulated a second justification for the rule: people have a diminished expectation of privacy in their automobiles.¹⁰⁰ In announcing the reduced expectation of privacy in automobiles, the Court cited several considerations: automobiles are operated on the open highway,¹⁰¹ they must be licensed,¹⁰² and they are periodically required to undergo official inspections and are sometimes “taken into police custody in the interests of public safety.”¹⁰³

The conclusion that people have a reduced expectation of privacy in their automobiles, and that this somehow makes an immediate warrantless search of the automobile reasonable, is based upon flawed logic. While the fact that automobiles are operated on the open highway may diminish the privacy interest in areas that are exposed to public view—such as the interior of a passenger compartment, which may be viewed through a window—the mere operation of the automobile on a public highway cannot reduce one’s expectation of privacy in portions of the vehicle or closed containers therein that are not exposed to the public view, such as the automobile trunk, closed glove box, or area under the seats. Nor does the fact that automobiles must be licensed, are regulated, are subject to periodic inspections, and are occasionally taken into police custody for safety reasons support an assertion that the expectation of privacy one has in one’s

⁹⁸ *Id.* at 153.

⁹⁹ *See id.*; *see also* Carol A. Chase, *Privacy Takes a Back Seat: Putting the Automobile Exception Back on Track After Several Wrong Turns*, 41 B.C. L. REV. 71, 73-74 (1999).

¹⁰⁰ *See* United States v. Chadwick, 433 U.S. 1, 12-13 (1977); *see also* Chase, *supra* note 99, at 75-77.

¹⁰¹ *Chadwick*, 433 U.S. at 12 (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion)).

¹⁰² *Id.* at 12-13.

¹⁰³ *Id.* at 13.

automobile is reduced. It is a tremendous stretch to base a reduced expectation of privacy on vehicle licensing requirements, which consist of registering it to an owner and payment of a fee.¹⁰⁴ Further, the types of regulations commonly placed upon automobiles, such as speed limits, driver qualifications, safety standards, or emissions standards, do not have any rational bearing upon the privacy of, for example, the automobile's trunk or any closed containers found in the vehicle.¹⁰⁵ And, while it is true that automobiles may be required to undergo periodic official inspections, these inspections are not wholesale searches of the automobile and its contents but rather are narrowly tailored to non-law-enforcement purposes, such as to ensure the proper functioning of automobile emissions equipment¹⁰⁶ or certain automobile safety equipment.¹⁰⁷ Finally, although the Court cited the fact that automobiles can be taken "into police custody in the interests of public safety" as a justification for announcing that people enjoy a reduced expectation of privacy in their automobiles,¹⁰⁸ the same can be said of virtually any moveable property. Indeed, it is sometimes necessary for reasons of public safety for government agents to secure and inspect even residential property, as in the immediate aftermath of an earthquake or fire.¹⁰⁹ But the mere *possibility* that this may occur should not diminish an expectation of privacy in an automobile any more than it would do so with respect to a residence. Thus, the factors cited in support of the Court's pronouncement that we have a reduced expectation of privacy in automobiles simply do not justify that conclusion.

Nonetheless, it must be recognized that the mere declaration by the Court that we have a reduced expectation of privacy in

¹⁰⁴ See, e.g., CAL. VEH. CODE § 4150 (West 2000); 625 ILL. COMP. STAT. ANN. 5/3-415 (West Supp. 2006); MO. ANN. STAT. § 301.020 (West Supp. 2006); N.Y. VEH. & TRAF. LAW § 401 (McKinney Supp. 2007); see also Chase, *supra* note 99, at 89-93.

¹⁰⁵ See Chase, *supra* note 99 at 90-91.

¹⁰⁶ See, e.g., CAL. HEALTH & SAFETY CODE § 44011 (West 2006); N.Y. VEH. & TRAF. LAW § 301 (McKinney Supp. 2007); see also Chase, *supra* note 99, at 90-91.

¹⁰⁷ See, e.g., CAL. VEH. CODE § 2814 (West 2000); N.Y. VEH. & TRAF. LAW § 375 (McKinney Supp. 2007); see also Chase, *supra* note 99, at 91-92.

¹⁰⁸ See *Chadwick*, 433 U.S. at 13.

¹⁰⁹ See *Michigan v. Clifford*, 464 U.S. 287, 293 (1984) (noting that a burning building "creates an exigency that justifies a warrantless entry"); *Michigan v. Tyler*, 436 U.S. 499, 509-12, (1978) (upholding warrantless search of burned building shortly after fire and invalidating subsequent searches "detached from the initial exigency and warrantless entry"); *United States v. Parr*, 716 F.2d 796, 812-13 (11th Cir. 1983); see also Chase, *supra* note 99, at 92.

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our automobiles has an undeniable cyclical effect: if the highest Court tells us that we cannot expect privacy in our automobiles, then we cannot reasonably claim to have an expectation of privacy in our automobiles. The legal pronouncement itself affects the reasonableness of our expectations, which, in turn, affects the permissible scope of governmental intrusions. Thus, rather than measuring our expectation of privacy, the Court is determining it.

*Katz v. United States*¹¹⁰ redefined the scope of protection conferred by the Fourth Amendment to that which an individual seeks to preserve as private.¹¹¹ But it was Justice Harlan's articulated view in his concurring opinion that has become the legal standard.¹¹² According to Justice Harlan, the Fourth Amendment confers a constitutionally protected reasonable expectation of privacy if two requirements are met. First, the individual must have an actual, subjective expectation of privacy,¹¹³ which many people likely have in their automobiles. Second, the expectation of privacy must be one that society recognizes as reasonable,¹¹⁴ which is something that can hardly be claimed once the Court has declared otherwise. The effect of the Court declaring a reduced expectation in automobiles is that the mere declaration reduces the expectation of privacy that society recognizes as reasonable. The reduced expectation of privacy can then be used as one basis for holding it is reasonable to perform an immediate warrantless search.¹¹⁵

Where might this road take us? Can the Court, in, say, a five-to-four decision, announce that we have *no* expectation of privacy in our automobiles so that, just as it is reasonable for cus-

¹¹⁰ 389 U.S. 347 (1967).

¹¹¹ *Id.* at 351.

¹¹² See *Kyllo v. United States*, 533 U.S. 27, 33 (2001); *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (noting that the *Katz* test "has come to mean the test enunciated by Justice Harlan's separate concurrence in *Katz*"); *Florida v. Riley*, 488 U.S. 445, 456 (1989) (Brennan, J., dissenting) (quoting Justice Harlan in *Katz*); *United States v. Knotts*, 460 U.S. 276, 280-81 (1983) (citing *Rakas v. Illinois*, 439 U.S. 128, 143-44 & n.12 (1978) (Powell, J., concurring)).

¹¹³ *Katz*, 389 U.S. at 361.

¹¹⁴ *Id.*

¹¹⁵ See, e.g., *United States v. Matthews*, 32 F.3d 294, 299 (7th Cir. 1994) (determining that under the automobile exception "the diminished expectation of privacy alone is sufficient to conduct a search on probable cause"); see also *California v. Carney*, 471 U.S. 386, 391 (1985) (applying the automobile exception to search a mobile home and declaring that "[e]ven in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception").

toms officials to make warrantless, suspicionless searches at a border,¹¹⁶ officers can make warrantless, suspicionless searches of automobiles? Or might this road lead us to a decision by the Court that the diminished expectation of privacy, coupled with a “special need”¹¹⁷ of law enforcement—such as the need to enhance public safety prompted by the dangers presented by drive-by shootings or other automobile-related misconduct—will justify a search based on less than probable cause, as is permitted in the context of public schoolchildren based upon reasonable suspicion¹¹⁸ or even without regard to suspicion?¹¹⁹ It may seem far-fetched, but once we are on a road that diminishes our expectation of privacy in a certain thing or place, there may be no convenient stopping point short of the complete elimination of our expectation of privacy in that thing or place. Then our automobiles may be subject to a search at any time for no reason at all, much as we are subject to searches when we seek to board commercial flights.

Undoubtedly more crime would be discovered and criminals apprehended if police are given unfettered discretion to search automobiles without any particularized suspicion. The same would be true if police could search our homes without any particularized suspicion. Criminals often use automobiles as well as their residences as repositories for instrumentalities, fruits, and evidence of crime. Indeed, automobiles and residences may even be instrumentalities of crime. But permitting warrantless, suspicionless searches in either instance runs counter to our long-held understanding of what is reasonable under the Fourth Amendment. And the invitation to engage in abusive, discriminatory policing practices that would result presents a strong argument against traveling down this road.

It is therefore evident that the more recent “reduced expectation of privacy” justification cited in support of *Carroll* has

¹¹⁶ See *United States v. Ramsey*, 431 U.S. 606, 617 (1977) (acknowledging that a border search is reasonable in the absence of a warrant and probable cause).

¹¹⁷ The special needs doctrine permits police to conduct a search on less than probable cause to further an important interest, or “special need” beyond ordinary criminal law enforcement. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 332 n.2, 341 (1985).

¹¹⁸ *Id.* at 341-43 (permitting search of student’s purse based on reasonable suspicion due to student’s reduced expectation of privacy in school and the special need to assure a safe and healthy learning environment).

¹¹⁹ *Bd. of Educ. v. Earls*, 536 U.S. 822, 837-38 (2002) (permitting suspicionless random drug testing of schoolchildren involved in extracurricular activities).

placed us on a dangerous road. A much safer route can be achieved by returning to *Carroll*'s origins. Apart from the aspects of an automobile that are exposed to the public by virtue of its operation in public areas and which would be subject to the plain view doctrine in any event, there appears to be no good justification for basing an immediate warrantless search of an automobile on probable cause in combination with a claimed reduced expectation of privacy. The *only* appropriate justification for an immediate warrantless search of an automobile, when there is probable cause to believe that the automobile contains contraband or fruits, instrumentalities, or evidence of criminal activity, is found in the original rationale articulated by the Court in *Carroll*: that the exigency presented by mobility justifies an immediate warrantless search.¹²⁰

*B. An Immediate Warrantless Search May Not Always
Be Necessary*

Armed with probable cause to believe that a vehicle contained alcoholic beverages illegal in the Prohibition era, the officers in *Carroll* faced a situation that presented only two alternatives: obtain a search warrant, which would run a near-certain risk that the automobile would have been moved in the time it would take to obtain a search warrant,¹²¹ or perform an immediate warrantless search of the vehicle.¹²² The holding in *Carroll* specifically notes the risk that the vehicle could be moved from the jurisdiction before a warrant could be obtained.¹²³ This implies that the prolonged seizure, which would have been required in the early years of the twentieth century to immobilize the vehicle and its occupants pending the issuance of a warrant, would not have been considered a reasonable alternative under the Fourth Amendment.

With the passage of time, however, new technologies have developed, which changes the range of options available in a *Carroll*-type situation. Today, telephonic search warrants are available federally¹²⁴ and in a growing number of states.¹²⁵ The

¹²⁰ See *Carroll v. United States*, 267 U.S. 132, 153 (1925).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See FED. R. CRIM. P. 41(d)(3)(A).

¹²⁵ See, e.g., CAL. PENAL CODE § 1526 (West 2000); IDAHO CODE ANN. § 19-4404 (2004); IND. CODE ANN. § 35-33-5-8 (West 2004); MONT. CODE ANN. § 46-5-221

availability of cellular telephones and portable fax machines in patrol vehicles now means that search warrants can be obtained in jurisdictions that authorize telephonic search warrants much more quickly than was possible in the early twentieth century, when *Carroll* was decided. Although the need for immediate action may preclude seeking even a telephonic search warrant, where telephonic search warrants are authorized they may be obtained quickly, sometimes in less than an hour.¹²⁶ This changes the range and balance of options available to officers who come upon an automobile for which they have probable cause to search. If telephonic search warrants are available in the jurisdiction, it may be more reasonable to briefly seize the automobile pending the issuance of a search warrant than to perform an immediate warrantless search. And if this is the case, then the exigency presented by the mobility of the automobile should not justify an immediate warrantless search of the automobile.

Not only has technology diminished the time needed to obtain a search warrant, but the law has developed in a direction favoring a brief seizure to maintain the status quo pending the arrival of a search warrant. In *Illinois v. McArthur*,¹²⁷ the Supreme Court approved the seizure of a residence for approximately two hours pending the arrival of a search warrant.¹²⁸ In *McArthur*, the police had probable cause to believe there were drugs inside a residence.¹²⁹ They also had reason to fear that the drugs would be destroyed before they could return with a warrant; moreover, the owner had refused to consent to a search of his home.¹³⁰ In those circumstances, the Court approved the police officers' tem-

(2005); NEV. REV. STAT. ANN. § 179.045(2) (LexisNexis 2006); N.Y. CRIM. PROC. LAW § 690.36 (McKinney 1995); OR. REV. STAT. § 133.545(6) (2005); S.D. CODIFIED LAWS § 23A-35-4 (2004); UTAH CODE ANN. § 77-23-204 (2003); WASH. SUP. CT. CRIM. R. 2.3(c); WIS. STAT. ANN. § 968.12(3) (West 2007). *But see* *White v. State*, 842 So. 2d 565, 569-70 (Miss. 2003) (holding search to be construed as a warrantless search because "Mississippi has yet to recognize the viability of telephonic warrants").

¹²⁶ *See* *United States v. Morgan*, 744 F.2d 1215, 1222 (6th Cir. 1984) (recognizing telephonic search warrants but holding that exigent circumstances existed to allow a reasonable search when government agents had only a half hour to an hour to conduct a search); *United States v. Baker*, 520 F. Supp. 1080, 1084 (S.D. Iowa 1981) (stating that telephonic search warrants are obtainable in twenty to thirty minutes); *see also* *Chase*, *supra* note 99, at 88.

¹²⁷ 531 U.S. 326 (2001).

¹²⁸ *Id.* at 332-33.

¹²⁹ *Id.* at 331-32.

¹³⁰ *Id.* at 332.

porary restraint on the home and its occupant, which required the occupant to remain outside his home unless a police officer accompanied him inside.¹³¹ The Court held that the restraint imposed by the officers “was both limited and tailored reasonably to secure law enforcement needs while protecting privacy interests. In [the Court’s] view, the restraint met the Fourth Amendment’s demands.”¹³²

These developments make it possible to limit *Carroll*, but why is it necessary to do so? The short answer is that *Carroll* needs to be limited, in addition to *Belton* being eliminated, in order to restore Fourth Amendment protections to the automobile, as well as to other moveable property, and to minimize the potential for abusive police practices.

While the Fourth Amendment itself is silent concerning the circumstances under which a search warrant is required before government officials have authority to search, the Supreme Court has had much to say about that issue. The Court has long interpreted the Fourth Amendment to require that a valid search warrant issued by a judge or magistrate is a requisite to a lawful search, subject to a few exceptions.¹³³ The Court has recognized the warrant requirement to be an essential part of the protection of individual privacy conferred by the Fourth Amendment, a protection that the Court has stated “consists in requiring that those inferences [supporting probable cause] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.”¹³⁴ The exceptions applicable to criminal law enforcement activity¹³⁵ require “exceptional circumstances”¹³⁶ in which

¹³¹ *Id.*

¹³² *Id.* at 337.

¹³³ *Katz v. United States*, 389 U.S. 347, 357 (1967) (“[S]earches 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.”) (footnote omitted).

¹³⁴ *Johnson v. United States*, 333 U.S. 10, 14 (1948).

¹³⁵ The Fourth Amendment protections against unreasonable searches extend beyond the context of criminal law enforcement, which is outside the scope of this Article. See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 837-38 (2002) (regarding drug testing of students involved in extracurricular activity to further student health and school discipline concerns); *New York v. Burger*, 482 U.S. 691, 699-700 (1987) (regarding inspection of business records and inventory pursuant to administrative scheme); *Camara v. Mun. Court*, 387 U.S. 523, 534 (1967) (regarding Fourth Amendment limits on health- and safety-related inspections of a residence).

¹³⁶ *Johnson*, 333 U.S. at 14.

the balance of the need for effective law enforcement against the right of privacy dictates that the warrant requirement may be dispensed with.¹³⁷ But the Court has never accepted a case-by-case, ad hoc balance of law enforcement interests against the suspect's right of privacy; rather it has recognized "a few specifically established and well-delineated exceptions."¹³⁸ In the context of criminal law enforcement, these exceptions to the search warrant requirement are based upon concerns about safety, as in a search incident to arrest authorizing an officer to search for weapons that can be used against the officer,¹³⁹ or concerns that the amount of time needed to obtain a warrant will result in frustrating the purpose of the search by permitting the destruction of evidence¹⁴⁰ or fugitivity of a suspect.¹⁴¹ This became known as the "exigent circumstances" exception to the warrant requirement.

The *Carroll* doctrine began as a specialized application of the exigent circumstances notion, in which the Court recognized a presumption of exigency based upon the mobility of the automobile.¹⁴² However, technological developments have reduced the amount of time it takes to obtain a search warrant. In addition, the Court's endorsement in *Illinois v. McArthur* of the reasonableness of a brief seizure pending the issuance of a warrant¹⁴³ suggests that the balance of law enforcement interests against the individual's privacy interest may no longer justify the unlimited automobile exception to the Fourth Amendment warrant requirement articulated in *Carroll*.

C. *Carroll's Invitation to Abusive Police Practices*

Much has been written about the use of racial profiling in deciding whether to make traffic stops.¹⁴⁴ However, racial profiling may play a role in whether a vehicle is searched, and the relative ease with which police are permitted to search an automobile under both *Carroll* and *Belton* may be a factor in encouraging

¹³⁷ *Id.* at 14-15.

¹³⁸ *Katz v. United States*, 389 U.S. 347, 357 (1967).

¹³⁹ *Chimel v. California*, 395 U.S. 752, 763 (1969).

¹⁴⁰ *See, e.g., id.; see also United States v. MacDonald*, 916 F.2d 766, 770 (2d Cir. 1990).

¹⁴¹ *Warden v. Hayden*, 387 U.S. 294, 299 (1967).

¹⁴² *Carroll v. United States*, 267 U.S. 132, 153 (1925).

¹⁴³ 531 U.S. 326, 331-33 (2001).

¹⁴⁴ *See, e.g., Tracey Maclin, Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 334-54 (1998); Gary Webb, *DWB**, ESQUIRE, Apr. 1999, at 118, 126.

pretextual stops made for the purpose of justifying a search. The Rand Corporation¹⁴⁵ found that in a study of 7607 police stops in Oakland, California, black drivers, who comprised 50% of all stopped drivers during the day and 54% of all stopped drivers during the night, accounted for 75% of all searches performed during a stop, 85% of which were “low-discretion” searches such as searches incident to arrest.¹⁴⁶

Carroll, which permits warrantless searches based upon probable cause, also provides an incentive to search on a hunch. If an officer searches a vehicle under *Carroll* and finds nothing, it is unlikely that the driver will have a forum in which to protest his treatment. However, if the search does yield contraband, then it will be easier to convince a judge that probable cause existed to support the search than it may have been to convince a judge before the search that an officer’s hunch amounted to probable cause. Thus, like *Belton*, *Carroll* permits and possibly even encourages abusive police practices.

Accepting that it is necessary to modify the *Carroll* doctrine, what changes need to be made?

D. *Recasting Carroll to Restore Privacy*

Given the changes in law and technology that undermine the justifications for *Carroll*, and the potential for abuse that *Carroll* has created, we must now consider how *Carroll* may be modified to protect the privacy interests of automobile occupants while furthering legitimate law enforcement interests. Returning to the language of the Fourth Amendment, which prohibits unreasonable searches and seizures,¹⁴⁷ one must ask whether, in view of the current ability in many jurisdictions to obtain search warrants relatively quickly (as compared with 1925 when *Carroll* was decided), it will always be reasonable for police to conduct an immediate warrantless search rather than to briefly seize an automobile pending the issuance of a search warrant. In most circumstances the answer will be “no.” A brief seizure of an automobile does not compromise any privacy interest beyond any that may have been compromised by the stop itself—that is,

¹⁴⁵ *Assessing Racial Profiling More Credibly: A Case Study of Oakland, California*, PUB. SAFETY & JUST. BRIEF (Rand Corp., Santa Monica, Cal.), 2004, at 1-2, available at http://www.rand.org/pubs/research_briefs/RB9070/RAND_RB9070.pdf.

¹⁴⁶ *Id.*

¹⁴⁷ U.S. CONST. amend. IV.

bringing a greater part of the automobile within the plain view of the officers. To be sure, the possessory interest of the operator of the vehicle is compromised, as he may not freely use his automobile while it is seized. And his personal liberty is also interfered with, because a seizure of an automobile necessarily seizes its occupants. Yet those interests can be fully restored to the operator of the automobile upon the termination of the seizure. On the other hand, once the occupant's expectation of privacy has been compromised by the search of the vehicle, that privacy interest cannot be restored. The police cannot "unlearn" what they have learned during the course of the search; the privacy interests that had existed are now irrevocably violated.

Similar to a search, an infringement of the possessory and liberty interests of the automobile's occupants caused by a seizure of an automobile is also protected against by the Fourth Amendment.¹⁴⁸ But a rule permitting a brief seizure pending the arrival of a search warrant increases Fourth Amendment protections to the vehicle occupants in the following way: if the occupant values her possessory and liberty interests in the vehicle more than she does her privacy interest, that occupant remains free to consent to an immediate search, which will lessen the duration of the seizure to that which already exists under the current *Carroll* rule—that is, the time it takes to search the vehicle. If, on the other hand, the individual values her privacy interests in the vehicle more highly than she does her right to use her vehicle to be on her way, then the occupant can await the result of the application for a search warrant.

Carroll should be modified to permit a brief warrantless seizure of an automobile based upon probable cause to believe that the automobile contains contraband or fruits, instrumentalities, or evidence of criminal activity. This restores the protection of the Fourth Amendment to automobiles by observing the standard demanded by the Amendment as construed by the Court: that the decision as to whether probable cause to search exists be made by a neutral and detached magistrate rather than by an officer who is "engaged in the often competitive enterprise of ferreting out crime."¹⁴⁹ It also permits the individual operating the vehicle—one of "the people" protected by the Fourth Amendment—to consent to an immediate search of the automo-

¹⁴⁸ *Id.*

¹⁴⁹ *United States v. Johnson*, 333 U.S. 10, 14 (1948).

bile if he values his right to use his vehicle more highly than his expectation of privacy in the automobile. After all, the Fourth Amendment was intended to confer protections on “the people,” and so it seems more reasonable to permit those people, rather than the police, to decide which rights they hold paramount.

It must be recognized that, even if *Carroll* is modified to permit a brief seizure rather than an immediate warrantless search, circumstances may exist which nevertheless *require* an immediate search. This would be the case, for example, if officers have probable cause to believe the vehicle contains an armed explosive device or if a kidnapping victim is believed to be concealed in the trunk of an automobile. It may also be justifiable to perform an immediate search if officers are in an area in which they cannot secure the automobile and are facing the likelihood of criminal force being used against them. Clearly, these situations present examples of exigent circumstances that would permit an immediate search of the vehicle.¹⁵⁰ The distinction is that, under *Carroll*, the right to an immediate warrantless search of an automobile would no longer be automatically presumed upon the existence of probable cause. Rather, specific facts shown to exist on a case-by-case basis would permit an immediate search pursuant to the exigent circumstances exception to the warrant requirement.

CONCLUSION

The roadmap to restoring our expectation of privacy in our automobiles will require two changes to existing legal doctrine. First, the bright-line rule of *New York v. Belton*, permitting the warrantless search of the passenger area of an automobile incident to the arrest of a recent occupant, must be abandoned in favor of a case-by-case application of *Chimel v. California*. This will restrict the search incident to arrest of the automobile to those areas from which, at the time of the search, the arrestee could gain access to a weapon or to evidence of criminal activity. No longer would there be any lawful justification for conducting a search of the passenger area while the arrestee is handcuffed

¹⁵⁰ And, in some jurisdictions that do not authorize telephonic or facsimile search warrants, the time needed to obtain a warrant may be so great as to render the prolonged seizure unreasonable. In this situation, the immediate warrantless search may be preferable, at least until a procedure for telephonic or facsimile search warrants is in place.

and seated in a police cruiser or after the arrestee has been removed from the area where the automobile is located.

Second, the automatic rule of *United States v. Carroll* granting law enforcement officers the right to perform an immediate warrantless search of an automobile based upon probable cause must be revised to permit the seizure of the automobile pending arrival of a search warrant. This supports the automobile operator's privacy interest in his vehicle and allows him to choose to consent to an immediate warrantless search if, from his point of view, his right to drive away trumps his expectation of privacy in his vehicle. Under this modification to *Carroll*, police would still be able to perform an immediate warrantless search when an actual exigency so requires, but it would no longer be an automatic part of the *Carroll* automobile exception.

Both *Belton* and *Carroll* have created detours that have diminished the Fourth Amendment protection for one of our "effects" under the Fourth Amendment: our automobiles. By taking the steps outlined in this Article, the Court can work toward restoring that privacy interest while still respecting the legitimate needs of law enforcement.

