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# Constitutional Restraints on Warrantless Cell Phone Searches

Leah Aaronson

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# Constitutional Restraints on Warrantless Cell Phone Searches

LEAH AARONSON\*

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## I. INTRODUCTION

David was pulled over for driving with an expired registration tag. After the officer asked for David's license and registration, the officer learned that David was also driving with a suspended license. The officer asked David to step out of the car so that it could be impounded. "Impounding a car," the officer remarked, "ensures that drivers with suspended licenses will not drive away once the officer leaves the scene."

David reached into his pocket as he got out of the car. The officer, nervous with the gesture, asked David not to reach into his pocket again. David replied that he was simply checking for his cell phone.

Before leaving the scene, the officer took inventory of the items in David's car. The City requires taking such inventory as a precondition to impounding, to eliminate its liability for any damage or missing parts. Upon checking under the hood, the officer discovered two hidden guns. David was placed under arrest and subsequently searched at the scene.

The officer, during the search, confiscated David's cell phone and

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scrolled through his contact list and text messages. Believing that certain contacts' names indicated gang affiliation, the officer brought David and his phone to the station. At the station, another officer looked through the phone much more intently, focusing on David's video and picture folders. Eventually, the officer found a photograph linking David to a shooting that took place nearly three weeks before his arrest. This photograph became the principal piece of evidence leading to guilty verdicts of attempted murder and assault with a semi-automatic firearm. David was sentenced to fifteen years to life in prison.<sup>1</sup>

Before the Supreme Court decided *Riley v. California*,<sup>2</sup> police officers were, in most jurisdictions, free to rummage through arrestees' cell phones without a warrant during a search incident to arrest. Now, after a much-anticipated pronouncement by the Court, the intimate information individuals store in modern-day cell phones is protected under the Fourth Amendment.<sup>3</sup> Police officers can no longer search a cell phone incident to arrest, absent exigent circumstances.<sup>4</sup>

Before *Riley* was decided, only a small minority of jurisdictions expressly forbade warrantless cell phone searches incident to arrest: the First Circuit<sup>5</sup> (Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island), Florida,<sup>6</sup> and Ohio.<sup>7</sup> All remaining states and federal circuits either found that the searches were constitutional or had not yet addressed the issue.<sup>8</sup> Consequently, the Supreme Court's decision in *Riley* resolved a distinct jurisdictional split in treatment of warrantless cell phone searches incident to arrest.<sup>9</sup>

This note explores the progression of Fourth Amendment jurisprudence that led to the Court's pronouncement in *Riley*. It also examines the different approaches jurisdictions took in tackling the constitutionality of these searches before *Riley* was decided, applying the same semi-

1. The above scenario is based on the facts of *People v. Riley*, No. D059840, 2013 WL 475242, at \*1-4 (Cal. Ct. App. Feb. 8, 2013), *rev'd sub nom.* *Riley v. California*, 134 S. Ct. 2473 (2014). The California Court of Appeal upheld the trial court's denial of David Riley's motion to suppress the evidence obtained from the search of his cell phone. *Id.*

2. 134 S. Ct. 2473.

3. *Id.* at 2495.

4. *Id.* at 2493 ("Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest.")

5. *See* *United States v. Wurie*, 728 F.3d 1, 14 (1st Cir. 2013), *aff'd sub nom.* *Riley v. California*, 134 S. Ct. 2473 (2014).

6. *See* *Smallwood v. State*, 113 So. 3d 724, 740 (Fla. 2013).

7. *See* *State v. Smith*, 920 N.E.2d 949, 956 (Ohio 2009).

8. Dana Liebelson, *Supreme Court to Cops Who Want to Search Your Cellphone: Get a Warrant*, MOTHER JONES (Sept. 17, 2013, 6:00 AM), <http://www.motherjones.com/politics/2013/09/police-cell-phone-search-warrant-supreme-court>.

9. *Riley*, 134 S. Ct. 2473.

nal cases that drove the *Riley* Court to ultimately find that warrantless searches incident to arrest are protected under the Fourth Amendment. This note then argues that the Court could have found the same protections under a First Amendment methodology.

This note begins with a background discussion of the Supreme Court's search-incident-to-arrest doctrine, starting with the seminal case of *Chimel v. United States*.<sup>10</sup> Part II seeks to lay the foundation for analysis of earlier cases, where lower courts grappled with the constitutionality of warrantless cell phone searches. Part III explores the conflicting approaches of various appellate courts that attempted to resolve the issue pursuant to established Fourth Amendment jurisprudence. Parts IV and V address the Fourth and First Amendments, their history, and what they seek to protect. These parts seek to demonstrate that the Founding Fathers would have authorized protection against warrantless cell phone searches. Part VI explains how, under both the First and Fourth Amendments, the Court could have found that warrantless cell phone searches incident to arrest are unconstitutional. Finally, Part VII looks closely at the *Riley* opinion and the Court's analysis of Fourth Amendment jurisprudence, which ultimately led to the Court's holding that warrantless cell phone searches incident to arrest are unconstitutional.

## II. SEARCHES INCIDENT TO ARREST

"It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment."<sup>11</sup> Searches of a cell phone, however, present a different slew of issues not easily comparable to those decided by the Court under its search-incident-to-arrest jurisprudence. The controversy surrounding warrantless searches of cell phones first gained traction after the Fifth Circuit decided *United States v. Finley* in 2007.<sup>12</sup> There, the court analyzed numerous Supreme Court cases, beginning with *United States v. Robinson*,<sup>13</sup> to ultimately decide that a warrantless search of a cell phone

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

11. *United States v. Robinson*, 414 U.S. 218, 224 (1973).

12. *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007). Because the Fifth Circuit was the first circuit court of appeals to decide the constitutionality of warrantless cell phone searches (where the issue regarded a search of text messages and call records), that court compared the search of the cell phone to that of a pager, which had been at issue in a Seventh Circuit case that held that "the information from the pager was properly seized incident to a valid arrest." *United States v. Ortiz*, 87 F.3d 977, 983 (7th Cir. 1996). This comparison is problematic. The private information that a pager is capable of storing—phone numbers—is nominal compared to the many forms of information—pictures, contacts, text messages, videos, location information, etc.—stored in large quantities on cell phones.

13. *Robinson*, 414 U.S. at 218.

incident to arrest was constitutional under the Fourth Amendment.<sup>14</sup> Below is an overview of the seminal Supreme Court cases that lower courts have used to, essentially, fit “a square peg in a round hole.”<sup>15</sup>

In *Weeks v. United States*, the Supreme Court first declared that evidence obtained in violation of the Fourth Amendment is inadmissible against a defendant.<sup>16</sup> Just eleven years later, the Court held that searches incident to arrest were constitutional when conducted in order to “find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody . . . .”<sup>17</sup> While this language seems like a comprehensible framework for determining which searches incident to arrest are proper, the Court has reevaluated the standard in more recent years, namely in 1969, in *Chimel v. California*.

*Chimel v. California* involved police officers searching a defendant’s entire home pursuant only to an arrest warrant.<sup>18</sup> There, after the defendant denied an officer’s request to “look around” the house, the officer explained that “‘on the basis of a lawful arrest,’ the officers would nonetheless conduct the search.”<sup>19</sup> The officers searched rooms beyond the room in which the defendant was located and, in doing so, uncovered inculpatory evidence that led to the defendant’s conviction.<sup>20</sup> The Court held that this type of search was unconstitutional when conducted solely under an arrest warrant:

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

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14. *Finley*, 477 F.3d at 250.

15. J. Patrick Warfield, Note, *Putting a Square Peg in a Round Hole: The Search-Incident-to-Arrest Exception and Cellular Phones*, 34 AM. J. TRIAL ADVOC. 165, 183 (2010). Just as a square peg will not fit into a round hole, Supreme Court reasoning for legalizing general searches incident to arrest does not neatly fit with reasoning to legalize warrantless cell phone searches incident to arrest. See generally *id.* “[T]he standards for a search of a cell phone need to be truly demarcated. . . . In order to confront the increasing use of such devices, the law needs to be clear on what the Fourth Amendment protects.” *Id.* at 192–93.

16. 232 U.S. 383, 398 (1914).

17. *Agnello v. United States*, 269 U.S. 20, 30 (1925).

18. 395 U.S. 752, 754–55 (1969).

19. *Id.* at 753–54.

20. *Id.*

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.<sup>21</sup>

In reasoning that the purpose of a search incident to arrest is to protect officer safety and prevent destruction of evidence,<sup>22</sup> the Court made clear that searches incident to arrest are permitted a much narrower physical scope than search warrants.<sup>23</sup> Because the search in *Chimel* went beyond the arrestee'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," the search was "'unreasonable' under the Fourth and Fourteenth Amendments."<sup>24</sup>

In 1973, the Court faced a new question regarding the scope of a search incident to arrest.<sup>25</sup> In *United States v. Robinson*, the defendant was arrested for "operating a motor vehicle after the revocation of his operator's permit."<sup>26</sup> Upon initially "patting down" the defendant, the officer felt an object in the breast pocket of the coat that the defendant was wearing.<sup>27</sup> The officer testified that "he 'couldn't tell what it was' and also that he 'couldn't actually tell the size of it.'"<sup>28</sup> Subsequently, the officer "pulled out the object, which turned out to be a 'crumpled up cigarette package.'"<sup>29</sup> In recognizing (by touch) that the package did not contain cigarettes, the officer opened it to find multiple capsules of heroin.<sup>30</sup>

The Court held that the heroin capsules were admissible and that the officer was entitled to inspect them as "fruits, instrumentalities, or contraband probative of criminal conduct."<sup>31</sup> Thus, under *Robinson*, police need not demonstrate, on a case-by-case basis, that there was a fear of weapons or destructible evidence every time they performed a

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21. *Id.* at 762–63.

22. *Id.*

23. *Id.* at 763 (explaining that "[t]here is ample justification . . . 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 . . . for routinely searching any room other than that in which an arrest occurs—or . . . for searching through all the desk drawers or other closed or concealed areas in that room itself.").

24. *Id.* at 768.

25. See *United States v. Robinson*, 414 U.S. 218 (1973).

26. *Id.* at 220.

27. *Id.* at 222.

28. *Id.* at 223.

29. *Id.*

30. *Id.*

31. *Id.* at 236 (internal quotation marks omitted).

custodial search.<sup>32</sup> The Court reasoned that a full search of a person incident to a lawful arrest “is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.”<sup>33</sup>

*United States v. Chadwick*<sup>34</sup> demonstrated a conflicting rationale from that used in *Robinson* for determining when searches incident to arrest are constitutional.<sup>35</sup> In *Chadwick*, a “[police] dog signaled the presence of a controlled substance” in a locked footlocker that the defendants were attempting to load into a vehicle.<sup>36</sup> Upon arrest, the police allegedly took the keys to the footlocker from one of the defendants.<sup>37</sup> From that moment on, the footlocker was under the “exclusive control”<sup>38</sup> of the officers at all times; an officer testified that “there was no risk that whatever was contained in the footlocker trunk would be removed by the defendants or their associates.”<sup>39</sup> At the police station, ninety minutes after the arrest, officers opened the footlocker and found substantial amounts of marijuana inside.<sup>40</sup>

The *Chadwick* Court held that it was unreasonable for the officers to search the footlocker without a warrant.<sup>41</sup> The Court explained:

[T]he footlocker’s mobility [does not] justify dispensing with the added protections of the Warrant Clause. Once the federal agents had

32. *Id.* at 235 (“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 . . .”).

33. *Id.*

34. 433 U.S. 1 (1977). *Chadwick* has been abrogated by *California v. Acevedo* with respect to police authority to search containers in vehicles. See *California v. Acevedo*, 500 U.S. 565 (1982). In *Acevedo*, the Court held that when police have probable cause to suspect that a container inside of a vehicle has contraband, the officers may search the container without a warrant. *Id.* at 580. This rationale cannot apply, however, to cell phone searches. Even if a cell phone is considered a “container,” no police dog (or other mechanism for determining probable cause) could ever predict what the inside of a phone will hold. *Chadwick*’s reasoning is still necessarily important to this note’s analysis, and is good law, because it demonstrates that articles within police possession—where no danger or exigency exists—should not be searched without a warrant. See *Chadwick*, 433 U.S. at 1.

35. *Id.* at 1.

36. *Id.* at 4.

37. *Id.*

38. *Id.* at 15. The Court explains: “Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.” *Id.* Here, the Court is attempting to distinguish between “property not immediately associated with the person” (like a piece of luggage) and property (like the cigarette package in *Robinson*) that is under the immediate control of arrestees. *Id.*

39. *Id.* at 4 (internal quotation marks omitted).

40. *Id.* at 5.

41. *Id.* at 11.

seized [the footlocker] at the railroad station and had safely transferred it to the Boston Federal Building under their exclusive control, there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained.<sup>42</sup>

Because the footlocker presented no danger to the officers, the Court held that acquiring a search warrant was necessary in order to lawfully search for evidence.<sup>43</sup> Moreover, because the defendants locked the footlocker, they showed a clear intent to keep its contents private.<sup>44</sup>

Finally, *Arizona v. Gant* narrowed earlier case law<sup>45</sup> and clarified *Chimel*'s "immediate control" doctrine, under which a search incident to arrest can only occur in places within the arrestee's "immediate control."<sup>46</sup> Quoting *Chimel*, the Court explained that "immediate control" is "the area within which [the arrestee] might gain possession of a weapon or destructible evidence."<sup>47</sup> There, the Court held that because the arrestee was handcuffed in the back of a police car, "both justifications for the search-incident-to-arrest exception [were] absent," and the ensuing search of arrestee's vehicle was unreasonable without a warrant.<sup>48</sup> All of the evidence obtained from the arrestee's car, therefore, was inadmissible under the Fourth Amendment.<sup>49</sup>

The cases above played a central role in several appellate courts' and the Supreme Court's analyses of the constitutionality of cell phone searches incident to arrest.

### III. THE CONFLICT IN THE STATE AND FEDERAL APPELLATE COURTS<sup>50</sup>

Although the Supreme Court has now resolved the prior conflict

42. *Id.* at 13.

43. *Id.* ("With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant.")

44. *Id.* at 11 ("No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause; since there was no exigency calling for an immediate search, it was unreasonable for the Government to conduct the search without the safeguards a judicial warrant provides.")

45. See *Arizona v. Gant*, 556 U.S. 332 (2009) (narrowing the broad holding in *New York v. Belton*, 453 U.S. 454 (1981)). In *Belton*, the Court found that police may search the inside of a vehicle incident to arrest of a recent occupant, even if the inside of the car is physically outside of the arrestee's reach. *Belton*, 454 U.S. at 454. This principle from *Belton* is no longer good law. *Gant*, 566 U.S. at 335 ("*Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle.")

46. *Id.*

47. *Id.* (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)) (internal quotation marks omitted).

48. *Id.* at 339.

49. *Id.* at 350–51.

50. The nine cases described in this Part are outlined more compactly in the *Riley v. State*



surrounding differing jurisdictional treatment of warrantless cell phone searches, this Part analyzes the legal landscape before the *Riley* opinion was published.<sup>51</sup> These cases reveal a common theme: general difficulty realized by appellate courts attempting to extend Supreme Court precedent on searches incident to arrest—which do not address searches of advanced technology—to searches of cell phones incident to arrest (for instance, whether to analogize a cell phone to a “container”).<sup>52</sup>

Nine separate appellate courts, both state and federal, addressed the issue of warrantless cell phone searches incident to arrest prior to the Supreme Court’s decision in *Riley*, which ultimately ruled in favor of protecting individuals from these searches under the Fourth Amendment. The nine cases that shaped the environment for the Court’s decision are detailed below.

### A. Courts That Upheld the Constitutionality of Warrantless Cell Phone Searches Incident to Arrest

Three high-density jurisdictions—California, the Fourth Circuit, and the Fifth Circuit—flatly found that a warrantless search of an arrestee’s cell phone was constitutional.<sup>53</sup> First, in *People v. Diaz*, the California Supreme Court held that a warrantless cell phone search was constitutional where the arrestee’s phone was seized at the police station and searched nearly ninety minutes after the initial arrest.<sup>54</sup> There, the court explained that “unlike the footlocker in *Chadwick*, . . . the phone was ‘personal property . . . immediately associated with [his] person’ like the cigarette package in *Robinson*.”<sup>55</sup> The California Supreme Court reasoned that a cell phone is more like clothing<sup>56</sup> or cigarettes and not like a footlocker because “the footlocker . . . was separate from the

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petition for writ of certiorari. See Petition for Writ of Certiorari at 11–14, *Riley v. State*, 82 U.S.L.W. 3082 (2014) (No. 13-132), 2013 WL 3934033.

51. As explained *infra* Part III.B, some courts have attempted to stand on middle ground. These courts have not gone so far as to allow police officers full disclosure to look through an arrestee’s phone, but have nonetheless allowed the search in question.

52. See Warfield, *supra* note 15, at 183.

53. The relevant cases in these three jurisdictions are the following: *People v. Diaz*, 244 P.3d 501 (Cal. 2011); *United States v. Murphy*, 552 F.3d 405 (4th Cir. 2009); and *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007).

54. *Diaz*, 244 P.3d at 505. Relying on the Supreme Court of California’s decision in *Diaz*, the California Court of Appeal in *People v. Riley* held that a warrantless cell phone search incident to arrest was constitutional. *People v. Riley*, No. D059840, 2013 WL 475242, at \*1–4 (Cal. Ct. App. Feb. 8, 2013), *rev’d sub nom.* *Riley v. California*, 134 S. Ct. 2473 (2014).

55. *Diaz*, 244 P.3d at 505 (quoting *United States v. Chadwick*, 433 U.S. 1, 15 (1977)).

56. The case of *United States v. Edwards*, 415 U.S. 800 (1974), reasoned that no warrant was needed when the defendant’s clothing, stained with evidence that placed him at the crime scene, was taken from him roughly ten hours after his arrest. The *Diaz* court interpreted *Edwards* by explaining that because the clothing was “immediately associated” with the arrestee’s person, no warrant was required. *Diaz*, 244 P.3d at 506.

defendants' persons and was merely within the 'area' of their 'immediate control.'"<sup>57</sup>

The defendant argued that unlike clothing or crushed cigarettes, however, a cell phone has the capacity to hold an exorbitant amount of personal information that could never be found in other non-technological items in an arrestee's "immediate control."<sup>58</sup> In answering this argument, the court reasoned that small containers can carry private information as well, such as "photographs, letters, or diaries."<sup>59</sup> While true, the "sheer quantity"<sup>60</sup> of personal information on a modern cell phone cannot compare to even the bulkiest container. Nonetheless, the court explained:

[E]ven were it true that the amount of personal information *some* cell phones can store dwarfs that which can be carried on the person in a spatial container—and, again, the record contains no evidence on this question—defendant and the dissent fail to explain why this circumstance would justify exempting *all* cell phones, including those with limited storage capacity, from the rule of *Robinson, Edwards, and Chadwick*. A warrantless search, incident to a lawful arrest, of a cell phone with limited storage capacity does not become constitutionally unreasonable simply because other cell phones may have a significantly greater storage capacity.<sup>61</sup>

The court concluded by stating that it based its holding on binding Supreme Court precedent and that if, "in light of modern technology," the cases on which it relied must be reevaluated, it would be the Supreme Court's responsibility to do so.<sup>62</sup>

Next, the Fourth Circuit<sup>63</sup> held that a warrantless cell phone search was constitutional because the phone was on the defendant's person at the time of arrest, and that there was a need to preserve call records and text messages stored on the phone.<sup>64</sup> Continuing the analysis of the storage capacity issue that the California Supreme Court addressed in *Diaz*, the Fourth Circuit also dismissed the notion that a cell phone's capacity to hold information could be so large that it "would implicate a heightened expectation of privacy."<sup>65</sup> The court explained that because the

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57. *Diaz*, 244 P.3d at 506 (quoting *Chadwick*, 433 U.S. at 15).

58. *Id.*

59. *Id.* at 508.

60. *Id.* at 507.

61. *Id.* at 508 (internal citations and quotation marks omitted).

62. *Id.* at 511.

63. The Fourth Circuit hears appeals from federal district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina. *About the Court*, U.S. CT. APPEALS FOR FOURTH CIRCUIT, <http://www.ca4.uscourts.gov/about-the-court> (last visited Feb. 3, 2015).

64. *United States v. Murphy*, 552 F.3d 405, 411–13 (4th Cir. 2009).

65. *Id.* at 411.

defendant made no distinction between “large” and “small” storage capacities, there was no evidence presented to demonstrate that the defendant’s phone had a large storage capacity, and no evidence could ever demonstrate that information stored on a phone with a “large storage capacity would be any less volatile than the information stored on a cell phone with a small storage capacity.”<sup>66</sup> Thus, the Fourth Circuit found that the mere ability of a cell phone to hold massive amounts of information is not enough to afford it extra privacy protections.<sup>67</sup> Because “it is very likely that in the time it takes for officers to ascertain a cell phone’s particular storage capacity, the information stored therein could be permanently lost,” the officers needed no apparent justification to conduct a warrantless search of a cell phone incident to arrest.<sup>68</sup>

Finally, in the oft-cited Fifth Circuit<sup>69</sup> decision of *United States v. Finley*, the court held that text messages viewed pursuant to a warrantless cell phone search were admissible under the Fourth Amendment.<sup>70</sup> There, the defendant relied on Supreme Court precedent to argue that the phone is “analogous to a closed container” and could not be searched without a warrant.<sup>71</sup> In response, the Fifth Circuit explained that contrary to the defendant’s argument, no warrant was required for the search of the phone and that, therefore, “[t]he district court correctly denied [the defendant’s] motion to suppress the call records and text messages retrieved from his cell phone.”<sup>72</sup> Moreover, the court held that because

66. *Id.* (internal quotation marks omitted).

67. *Id.* The court also explained that forcing police to learn the storage capacity of cell phones before searching them would be unworkable. *Id.*

68. *Id.* The Fourth Circuit, however, did not explain *why* or *how* the knowledge of a phone’s capacity would somehow result in the “permanent loss” of all information on the phone. The court further explained: “It is unlikely that police officers would have any way of knowing whether the text messages and other information stored on a cell phone will be preserved or be automatically deleted *simply by looking at the cell phone.*” *Id.* (emphasis added). The Fourth Circuit seemed worried about information on a phone magically disappearing. Why, specifically, is the information on a cell phone so time-sensitive that it cannot be searched after a warrant was procured? The court does not answer this question.

69. The Fifth Circuit hears appeals from federal district courts in Texas, Louisiana, and Mississippi. *Court Locator*, U.S. COURTS, [http://www.uscourts.gov/court\\_locator](http://www.uscourts.gov/court_locator) (last visited Feb. 3, 2015).

70. 477 F.3d 250, 259–60 (5th Cir. 2007).

71. *Id.* at 260. The defendant cited to *Walter v. United States*, 447 U.S. 649 (1980), for this theory. In *Walter*, a mistaken delivery of obscene film led to a Federal Bureau of Investigation (“FBI”) investigation and warrantless search. *Walter*, 447 U.S. at 651–52. The *Walter* Court held that although the materials were lawfully in the hands of police, the police had no authority to search the contents without a warrant. *Id.* at 653–54. The Court additionally voiced First Amendment concerns, noting that “[w]hen the contents of the package are books or other materials arguably protected by the First Amendment, and when the basis for the seizure is disapproval of the message contained therein, it is especially important that this [warrant] requirement be scrupulously observed.” *Id.* at 655.

72. *Finley*, 477 F.3d at 260. Only four months after *Finley* was decided, the Northern District

officers can retrieve “evidence of the arrestee’s crime on his person in order to preserve it for use at trial,” the search of the defendant’s cell phone incident to his arrest was constitutionally permitted.<sup>73</sup>

The California Supreme Court, Fourth Circuit, and Fifth Circuit did not restrict warrantless searches of cell phones. Thus, the precedent established in these jurisdictions was simply that the search of a cell phone incident to arrest was constitutionally permitted. Some courts, as described below, allowed warrantless searches of cell phones that are limited in scope.

### B. *Courts That Restricted the Scope of the Search in Relation to the Alleged Crime*

In *United States v. Flores-Lopez*, the Seventh Circuit<sup>74</sup> held that the search of a phone for the sole purpose of finding a phone number was appropriate under the Fourth Amendment.<sup>75</sup> The court, however, recognized that “a modern cell phone *is* a computer”<sup>76</sup> and considerations for a more extensive search are “for another day.”<sup>77</sup> Further, the court took notice of the complications that accompany analogizing a cell phone to a container.<sup>78</sup> The court explained:

Even the dumbest of modern cell phones gives the user access to large stores of information. For example, the “TracFone Prepaid Cell Phone,” sold by Walgreens for \$14.99, includes a camera, MMS (multimedia messaging service) picture messaging for sending and receiving photos, video, etc., mobile web access, text messaging, voicemail, call waiting, a voice recorder, and a phonebook that can

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of California took a contrary position on the constitutionality of warrantless cell phone searches. *See United States v. Park*, No. 05-375, 2007 WL 1521573, at \*8 (N.D. Cal. May 23, 2007). In *Park*, the court explained that because “the line between cell phones and personal computers has grown increasingly blurry,” cell phones should be afforded stronger privacy protections than pagers or address books. *Id.* Because a warrantless cell phone search does not further the interests of police safety or preservation of evidence, the court found that a warrant must be procured for the fruits of the search to be admissible as evidence. *Id.* at \*9–10.

73. *Finley*, 477 F.3d at 260. The court cited to its own precedent, *United States v. Johnson*, to elucidate this point. *See id.* (citing *United States v. Johnson*, 846 F.2d 279, 282 (5th Cir. 1988)). The court also relied on *Belton*’s holding that “police may search containers, whether open or closed, located within arrestee’s reach.” *Finley*, 477 F.3d at 260 (citing *New York v. Belton*, 452 U.S. 454, 460–61 (1981)). This case, however, was decided before the Court narrowed *Belton*’s reach in *Arizona v. Gant*. *See Arizona v. Gant*, 556 U.S. 332, 344 (2009) (holding that a warrantless search is not permissible where the defendant is physically unable to destroy evidence or obtain a weapon, i.e., when he is locked in the back of a police vehicle).

74. The Seventh Circuit hears federal appeals in Indiana, Illinois, and Wisconsin. *Court Locator*, *supra* note 69.

75. 670 F.3d 803, 810 (7th Cir. 2012).

76. *Id.* at 804.

77. *Id.* at 810.

78. *Id.* at 805–06.

hold 1000 entries.<sup>79</sup>

The Seventh Circuit further discussed possible exigency issues stemming from searches conducted pursuant to a warrant.<sup>80</sup> “[R]emote wiping,” as the court explained, is the ability of third parties, from a remote location, to wipe away all information stored on a cell phone.<sup>81</sup> The court, however, conceded that the likelihood of such a “remote wipe” is conceivable, but improbable.<sup>82</sup> To be sure, there are mechanisms police can institute to assure that seized phones are not wiped clean.<sup>83</sup> Nonetheless, the court held that “[l]ooking in a cell phone for just the cell phone’s phone number does not exceed what decisions like *Robinson* . . . allow.”<sup>84</sup>

The Supreme Judicial Court of Massachusetts also held that a limited search of a defendant’s recent call list was constitutional under the Fourth Amendment.<sup>85</sup> In *Commonwealth v. Phifer*, the court explained that because neither it nor the Supreme Court had addressed issues of warrantless cell phone searches incident to arrest, it “decline[d] the invitation to venture very far into this thicket” of whether the contents of cellular telephones may be searched in whole or in part incident to a lawful arrest because doing so was unnecessary to decide the case.<sup>86</sup> The court agreed with the “cell phones are computers” notion from *United States v. Flores-Lopez*:

[Cell phones] present novel and important questions about the relationship between the modern doctrine of search incident to arrest and individual privacy rights. Although an individual’s reasonable expectation of privacy is diminished concerning his or her physical person when subject to a lawful arrest and taken into custody, the same may not necessarily be true with respect to the privacy of the myriad types of information stored in a cellular telephone that he or she is carrying at the time of arrest.<sup>87</sup>

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79. *Id.* at 806 (discussing *TracFone Prepaid Cell Phone*, WALGREENS, <http://www.walgreens.com/store/c/tracfone-prepaid-cell-phone/ID=prod6162901-product> (last visited Feb. 6, 2015)).

80. *Id.* at 808. Such issues include the delay involved with attempting to recover wiped data in a laboratory. *Id.*

81. *Id.* The court further noted that “remote-wiping capability is available on all major cell-phone platforms; if the phone’s manufacturer doesn’t offer it, it can be bought from a mobile-security company.” *Id.*

82. *Id.* (“‘Conceivably’ is not ‘probably.’”).

83. *Id.* at 809 (discussing the option to turn the phone off or place the phone in a “Faraday bag” or “Faraday cage” to isolate the phone from wireless networks, thereby preventing a wipe).

84. *Id.* (reasoning that a warrantless search of a cell phone solely to find its phone number is not more invasive than the search of the cigarette pack in *United States v. Robinson*, 414 U.S. 218 (1973)).

85. *Commonwealth v. Phifer*, 979 N.E.2d 210, 214 (Mass. 2012).

86. *Id.*

87. *Id.* at 216.

The court limited its holding to the facts of the case, however, reasoning that because “the officers . . . had probable cause to believe the telephone’s recent call list would contain evidence relating to the crime for which [the defendant] was arrested,” the search was constitutional.<sup>88</sup> The probable cause stemmed from an officer’s observation of the defendant using the phone immediately before the drug transaction.<sup>89</sup>

Finally, the Supreme Court of Georgia held that warrantless searches of cell phones are constitutional so long as they are appropriate in scope and “reasonably practicable by the object of the search.”<sup>90</sup> There, an undercover police officer posed as an individual attempting to purchase drugs from the defendant.<sup>91</sup> At the scene where the defendant and the officer arranged to meet, the officer witnessed the defendant entering information into her cell phone.<sup>92</sup> Almost simultaneously, the officer received a text from the defendant, stating that she was at the scene.<sup>93</sup> The officer promptly arrested the defendant, seized her phone, and searched her text messages for a record of communications between himself and the defendant.<sup>94</sup>

In holding that the search of the defendant’s cell phone was constitutional, the court indicated that a limitless search of the phone would not have produced the same result: “[W]hen the object of the search is to discover certain text messages, for instance, there is no need for the officer to sift through photos or audio files or Internet browsing history data stored in the phone.”<sup>95</sup> Thus, like the Seventh Circuit<sup>96</sup> and the Supreme Judicial Court of Massachusetts,<sup>97</sup> the Georgia Supreme Court held that the constitutionality of warrantless cell phone searches largely depends on a “fact-specific inquiry.”<sup>98</sup>

The three cases above illustrate a distinct line of reasoning that courts have followed in determining the constitutionality of warrantless cell phone searches. These jurisdictions, contrary to those discussed above,<sup>99</sup> did not authorize a limitless search of all information stored on arrestee’s cell phones. To the contrary, these courts held that the search must relate to the crime for which the defendant was arrested.

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88. *Id.* at 215.

89. *Id.* at 215–16.

90. *Hawkins v. State*, 723 S.E.2d 924, 926 (Ga. 2012) (internal citations omitted).

91. *Id.* at 925.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 926 (internal quotation marks omitted).

96. *See United States v. Flores-Lopez*, 670 F.3d 803 (7th Cir. 2012).

97. *See Commonwealth v. Phifer*, 979 N.E.2d 210 (Mass. 2012).

98. *Hawkins*, 723 S.E.2d at 926.

99. *See supra* Part III.A.

### C. Courts That Prohibit Any Search of a Cell Phone Without a Warrant

Finally, only three jurisdictions held that a warrantless cell phone search was unconstitutional under the Fourth Amendment. *United States v. Wurie*, which was consolidated with *People v. Riley* by the Supreme Court,<sup>100</sup> flatly rejected the notion that any cell phone search—limited or limitless—may be procured without a warrant.<sup>101</sup> The First Circuit<sup>102</sup> developed a cogent exposition of Fourth Amendment search-incident-to-arrest doctrine regarding warrantless cell phone searches when it concluded that these searches are “inherently unreasonable because they are never justified by one of the *Chimel* rationales: protecting arresting officers or preserving destructible evidence.”<sup>103</sup> The First Circuit explained that expectations of privacy in cell phones warrant far different considerations than other items frequently searched without a warrant:

We suspect that the eighty-five percent of Americans who own cell phones and use the devices to do much more than make phone calls . . . would have some difficulty with the government’s view that *Wurie*’s cell phone was indistinguishable from other kinds of personal possessions, like a cigarette package, wallet, pager, or address book, that fall within the search incident to arrest exception to the Fourth Amendment’s warrant requirement. In reality, a modern cell phone is a computer, and a computer . . . is not just another purse or address book. The storage capacity of today’s cell phones is immense.<sup>104</sup>

Thus, the court reasoned that because phones contain substantially large quantities of private information, and because no safety concerns or fear of destroyed evidence arises in conjunction with waiting for a warrant, it is proper for police officers to wait to search a phone until a neutral magistrate issues a warrant.<sup>105</sup>

Accordingly, the First Circuit concluded by explaining that even though the search in *Wurie* concerned only the defendant’s call log, all

100. The Court consolidated *United States v. Wurie*, 728 F.3d 1 (1st Cir. 2013), *cert. granted*, 82 U.S.L.W. 3104 (U.S. Jan. 17, 2014) (No. 13-212), with *People v. Riley*, No. D059840, 2013 WL 475242 (Cal. Ct. App. Feb. 8, 2013), where the California Court of Appeal allowed a picture from the defendant’s phone into evidence even though the crime that the picture depicted was separate from that for which the defendant was arrested.

101. *Wurie*, 728 F.3d at 14.

102. The First Circuit hears federal appeals from federal district courts in Maine, New Hampshire, Rhode Island, Massachusetts, and Puerto Rico. *Court Locator*, *supra* note 69.

103. *Wurie*, 728 F.3d at 7.

104. *Id.* at 8 (internal citations and quotation marks omitted).

105. *Id.* at 10–11.

warrantless cell phone searches must be “governed by the same rule.”<sup>106</sup> The First Circuit reached its conclusion by reasoning that a rule premised on specifics in individual cases “would prove impotent” if police had “unlimited potential” to search in some instances and no ability to search in others.<sup>107</sup> Thus, the First Circuit denied police the ability to conduct warrantless cell phone searches absent exigent circumstances.<sup>108</sup>

Similarly, the Supreme Court of Florida found that warrantless searches of cell phones were unconstitutional.<sup>109</sup> In *Smallwood*, the Supreme Court of Florida distinguished *Robinson* by explaining that *Robinson* plainly did not contemplate electronic devices with immense storage capabilities when holding that the search of a cigarette package was permissible without a warrant.<sup>110</sup> The court took issue with the serious privacy concerns prevalent when police can methodically search a cell phone incident to arrest.<sup>111</sup> The court explained:

[I]n recent years, the capabilities of these small electronic devices have expanded to the extent that most types are now interactive, computer-like devices. Vast amounts of private, personal information can be stored and accessed in or through these small electronic devices, including not just phone numbers and call history, but also photos, videos, bank records, medical information, daily planners, and even correspondence between individuals through applications such as Facebook and Twitter. The most private and secret personal information and data is contained in or accessed through small portable electronic devices and, indeed, many people now store documents on their equipment that also operates as a phone that, twenty years ago, were stored and located only in home offices, in safes, or on home computers.<sup>112</sup>

Further, the court analogized warrantless cell phone searches to “providing law enforcement with a key to access the home of the arrestee,” enabling officers to search through all of the arrestee’s records, documents, and other personal information previously obtainable only by “[p]hysically entering the arrestee’s home office.”<sup>113</sup> Both the search of the phone and the search of the home, according to the Supreme Court of Florida, are “essentially the same for many people in today’s techno-

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106. *Id.* at 13.

107. *Id.*

108. *Id.*

109. *Smallwood v. State*, 113 So. 3d 724, 740 (Fla. 2013).

110. *Id.* at 732.

111. *Id.* at 731–32.

112. *Id.*

113. *Id.* at 738 (“Physically entering the arrestee’s home office without a search warrant to look in his file cabinets or desk, or remotely accessing his bank accounts and medical records without a search warrant through an electronic cell phone, is essentially the same for many people in today’s technologically advanced society.”).



logically advanced society.”<sup>114</sup>

Like the First Circuit and the Supreme Court of Florida, the Ohio Supreme Court also held that warrantless cell phone searches were unconstitutional.<sup>115</sup> The court declined to apply the Fifth Circuit’s reasoning in *United States v. Finley*<sup>116</sup> and held that a warrantless cell phone search was unconstitutional under the Fourth Amendment.<sup>117</sup> In *State v. Smith*, the defendant was arrested at home for allegedly dealing drugs.<sup>118</sup> During the course of a search incident to the defendant’s arrest, the officer located the defendant’s cell phone and subsequently placed the phone in his pocket, put the defendant in the patrol car, and continued to search for evidence.<sup>119</sup> Without a warrant and without the defendant’s consent, officers searched the phone, and “[t]here was testimony that at least a portion of the search took place when officers returned to the police station and were booking into evidence the items seized from the crime scene.”<sup>120</sup> Call records and phone numbers found within the defendant’s cell phone during the search led to the defendant’s conviction.<sup>121</sup>

The court reversed the trial court’s determination and, for numerous reasons, expressly denied the state’s contention that a cell phone was analogous to a closed container.<sup>122</sup> First, *New York v. Belton* defined a “container” as “any object capable of holding another object.”<sup>123</sup> Therefore, the court concluded that because a cell phone physically cannot have another object inside of it, a cell phone is not a container.<sup>124</sup> Next, because “modern cell phones are capable of storing a wealth of digitized information wholly unlike any physical object found within a closed container,” the court held that a cell phone is not a closed container for Fourth Amendment purposes.<sup>125</sup> Furthermore, the court explained that the “intricate” nature of cell phones necessitates a higher expectation of

114. *Id.*

115. *State v. Smith*, 920 N.E.2d 949, 956 (Ohio 2009).

116. The Ohio Supreme Court declined to apply the holding from *United States v. Finley*, the most relevant authority regarding warrantless cell phone searches at the time *Smith* was decided, because the defendant in *Smith* did not concede that a closed container and a cell phone are comparable. *See Smith*, 920 N.E.2d at 953–54 (discussing *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007)).

117. *Smith*, 920 N.E.2d at 956. The court was careful to note that Fourth Amendment doctrine is particular to the facts of each case. In this situation, extracting the text messaging record and phone numbers from defendant’s phone was unconstitutional. *Id.*

118. *Id.* at 950.

119. *Id.*

120. *Id.*

121. *Id.* at 951.

122. *Id.* at 953–54.

123. *Id.* at 954 (citing *New York v. Belton*, 452 U.S. 454, 460 n.4 (1981)).

124. *Id.*

125. *Id.*

privacy.<sup>126</sup> Because a warrantless cell phone search does not ensure officer safety or protect against “imminent destruction” of the phone’s call records and phone numbers, and because an “individual has a privacy interest in the contents of a cell phone that goes beyond the privacy interest in an address book or pager,”<sup>127</sup> the Ohio Supreme Court found that a warrant is required for a lawful cell phone search.<sup>128</sup>

Accordingly, nine different courts weighed in on this remarkable constitutional conflict.<sup>129</sup> Three courts were steadfast that cell phone searches incident to arrest were constitutional under the Fourth Amendment.<sup>130</sup> Another three courts required fact-specific analyses to determine whether such searches were constitutional, but nonetheless found that searches may be constitutional so long as they were related to the alleged crime.<sup>131</sup> Finally, three additional courts held that the Fourth Amendment affords individuals a high expectation of privacy in the contents of their cell phones; warrantless cell phone searches do not implicate concerns of officer safety or preservation of evidence, and thus the searches fall beyond the scope of permitted searches incident to arrest.<sup>132</sup>

#### IV. THE FOURTH AMENDMENT<sup>133</sup> AND THE WARRANT REQUIREMENT

There now exists Supreme Court precedent examining the constitutionality of warrantless cell phone searches incident to arrest within the context of the Fourth Amendment.<sup>134</sup> The history of the Fourth Amendment reveals that the Founding Fathers envisioned a country with legitimate expectations of privacy for “papers” and “effects” to “circumscribe government discretion.”<sup>135</sup> Of course, cell phones did not exist in the late 1700s. A material and modern interpretation of the Fourth Amend-

126. *Id.* at 955.

127. *Id.*

128. *Id.*

129. Petition for Writ of Certiorari, *supra* note 50.

130. See *People v. Diaz*, 244 P.3d 501, 505 (Cal. 2011); *United States v. Murphy*, 552 F.3d 405, 411–13 (4th Cir. 2009); *United States v. Finley*, 477 F.3d 250, 259–60 (5th Cir. 2007).

131. See *United States v. Flores-Lopez*, 670 F.3d 803, 810 (7th Cir. 2012); *Hawkins v. State*, 723 S.E.2d 924, 926 (Ga. 2012); *Commonwealth v. Phifer*, 979 N.E.2d 210, 214 (Mass. 2012).

132. See *United States v. Wurie*, 728 F.3d 1, 14 (1st Cir. 2013), *aff’d sub nom.* *Riley v. California*, 134 S. Ct. 2473 (2014); *Smallwood v. State*, 113 So. 3d 724, 740 (Fla. 2013); *Smith*, 920 N.E.2d at 956.

133. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

134. See *supra* Part III.

135. See M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave It Birth*, 85 N.Y.U. L. REV. 905, 906 (2010) (discussing the need to adapt the Framers’ intent behind Fourth Amendment protections to modern technology).

ment, however, mandates that it protect the equivalent of “papers” and “effects”—in the modern sense, technology—that also carries intimate, private information.<sup>136</sup>

### A. *Historical Overview of the Fourth Amendment*

The Fourth Amendment was born out of American colonialists’ seething opposition to the British practice of unlimited searches and seizures.<sup>137</sup> Under English law, the 1662 Act of Frauds gave rise to court-issued writs of assistance, which “though not technically a warrant . . . empowered a customs officer to search any place on nothing more than his own (subjective) suspicion.”<sup>138</sup> The 1696 Act of Frauds “extended the broad enforcement powers in the 1662 Act to customs officers in the colonies, authorizing the officers to conduct warrantless searches at their discretion.”<sup>139</sup> These warrants expired only upon the death of the King or Queen; each search did not mandate the issuance of a new writ of assistance.<sup>140</sup> In 1761, James Otis, an esteemed lawyer in Massachusetts, challenged the use of writs in Boston, where the economy largely “depended on trade in smuggled goods.”<sup>141</sup> Otis contended “that the writ of assistance was illegal, calling it an ‘instrument[ ] of slavery on the one hand, and villainy on the other.’”<sup>142</sup> While Otis did not prevail on this argument to the Massachusetts Superior Court, he “galvanized support for what [would become] the Fourth Amendment.”<sup>143</sup>

The use of general warrants provoked harsher aversion to England’s search and seizure practices and “[f]urther inspiration for the Fourth Amendment”:<sup>144</sup>

The general warrant . . . authorized an officer to search unspecified places or to seize unspecified persons . . . , but in England the Crown turned to the use of general warrants as a means of silencing its critics. Specifically, general warrants were used to gather evidence for seditious libel prosecutions against the King’s detractors.<sup>145</sup>

Use of the general warrants evoked momentous action in court cases

136. *Id.* at 925 (“[T]oday’s emails and electronic documents are no less dear because they are stored on electronic servers rather than in the secret cabinets and bureaus they have replaced.”).

137. *Id.* at 907.

138. *Id.* at 907–08.

139. *Id.* at 907.

140. *Id.* at 908.

141. *Id.*

142. *Id.*

143. *Id.* Future president John Adams “was moved to action” after attending Otis’s hearings. *Id.* at 909.

144. *Id.*

145. *Id.*

against the Crown.<sup>146</sup> Although some cases proved victorious for those challenging the Crown, the British officers in both England and the American colonies did not stop using the general warrants and writs of assistance.<sup>147</sup> This practice left “citizens of the new American states with a deep-dyed fear of discretionary searches permitted by general warrants and writs of assistance.”<sup>148</sup>

Before the passage of the Bill of Rights, seven of the thirteen states had developed their own versions of laws aimed at search and seizure protection.<sup>149</sup> “Thus, the principles that Otis expounded—the fundamental ‘Privilege of House’ and private papers, and the right to be free from discretionary search at ‘the hands of every petty officer’—profoundly influenced how the Fourth Amendment was understood at the time of its adoption.”<sup>150</sup>

### B. *The Warrant Requirement and Expectations of Privacy*

For a principle of the Constitution “to be vital[, it] must be capable of wider application than the mischief which gave it birth.”<sup>151</sup> Thus, a widely applicable rule is necessary for determining the types of searches that enjoy Fourth Amendment protections. In *Katz v. United States*, Justice Harlan created a widely applicable two-part rule that has been adopted by the Court for determining the scope of Fourth Amendment protections.<sup>152</sup> First, the defendant must have a subjective expectation of privacy to that being searched.<sup>153</sup> Next, society must, objectively, recognize that expectation as reasonable.<sup>154</sup>

“[B]ecause the ultimate touchstone of the Fourth Amendment is ‘reasonableness,’”<sup>155</sup> there are certain situations where a warrant is not required. For instance, no warrant is necessary for a government agent to search information voluntarily conveyed to a third party.<sup>156</sup> Further,

146. *See id.* at 909–11.

147. *Id.* at 911 n.44 (citing the passage of the Townshend Act of 1767 that “reauthorized writs of assistance for customs searches in colonies”).

148. *Id.* at 911–12.

149. *Id.* at 912.

150. *Id.*

151. *Olmstead v. United States*, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting). Consequently, Judge Michael’s article is named after this quotation. *See Michael, supra* note 135, at 905.

152. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The majority in *Smith v. Maryland* adopted Justice Harlan’s two-part test from *Katz* to hold that a warrantless search of records given to a bank is neither private nor protected by the Fourth Amendment. *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

153. *Katz*, 389 U.S. at 361.

154. *Id.*

155. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

156. *Smith*, 442 U.S. at 743–44.

where destruction of evidence is imminent or a person is in danger, exigent circumstances dispose of the warrant requirement.<sup>157</sup> Nonetheless, “[s]earches conducted without warrants have been held unlawful notwithstanding facts unquestionably showing probable cause, for the Constitution requires that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police.”<sup>158</sup> Accordingly, unless there is an abundantly clear reason to conduct a search without a warrant, government agents must procure a warrant before they can conduct a search.

In the context of warrantless searches of cell phones, as discussed *infra*,<sup>159</sup> the United States Supreme Court has finally answered “whether the potentially vast amounts of data held on smartphones warrant a different approach under the Fourth Amendment, which bars unreasonable searches.”<sup>160</sup> In determining that warrantless cell phone searches are unconstitutional, however, the Court could have gone beyond Fourth Amendment doctrine. The First Amendment, additionally, provides protections that can be asserted against warrantless cell phone searches.

## V. THE FIRST AMENDMENT<sup>161</sup>

As is evidenced above, courts struggled to discern whether vast quantities of personal information stored on cell phones should be protected under the Fourth Amendment from warrantless searches incident to arrest.<sup>162</sup> Cell phones contain more than just phone numbers—they are the modern-day repository for personal thoughts, religion, business plans, and private dealings.<sup>163</sup> Thus, the history and purpose of the First Amendment is of consequence because the First Amendment, together with the Fourth Amendment, show that the Founding Fathers undoubtedly intended to protect intimate information, like that in cell phones.

### A. *Background*

“Persons attempting to find a motive in this narrative will be prose-

157. *Stuart*, 547 U.S. at 399.

158. *Katz*, 389 U.S. at 357 (internal citations and quotation marks omitted).

159. *See infra* Part VI.

160. Adam Liptak, *Supreme Court Will Consider Whether Police Need Warrants to Search Cellphones*, N.Y. TIMES (Jan. 17, 2014), <http://www.nytimes.com/2014/01/18/us/supreme-court-to-consider-limits-of-cellphone-searches.html>.

161. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

162. *See supra* Parts II–III.

163. *Riley v. California*, 134 S. Ct. 2473, 2485 (2014) (“Cell phones, however, place vast quantities of personal information literally in the hands of individuals.”).

cuted; persons attempting to find a moral in it will be banished; persons attempting to find a plot in it will be shot.”<sup>164</sup>

Mark Twain began one of the most acclaimed novels in American history with this notice to his readers.<sup>165</sup> What most readers do not know, however, is that Mark Twain was not the actual name of the author of *The Adventures of Huckleberry Finn*—Samuel Clemens was.<sup>166</sup> Throughout history, Americans commonly used pseudonyms to publish powerful, influential literary works.<sup>167</sup>

The importance of anonymity has strong, patriotic roots.<sup>168</sup> “Our history as a republic was shaped by essays written by anonymous authors.”<sup>169</sup> Notably, *The Federalist Papers* were circulated under the fictitious name “Publius,” to promote the ratification of the Constitution.<sup>170</sup> Prior to and during the American Revolutionary War, anonymity was critical in concealing a writer’s name so that he could escape punishment.<sup>171</sup>

The new American settlers brought with them a desire for democracy and openness. They left behind a history of tyranny and official control of information. Using this experience as their guide, the constitutional fathers wrote into their new Constitution a Bill of Rights, which contained the First Amendment.<sup>172</sup>

The First Amendment’s protections, therefore, are an explicit reaction by the Founding Fathers to break away from oppressive government.<sup>173</sup> The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . .”<sup>174</sup> History demonstrates that,

164. MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* (1917).

165. *Id.*

166. Jonathan Turley, *Registering Publius: The Supreme Court and the Right to Anonymity*, 2002 CATO SUP. CT. REV. 57, 57 (2002) (discussing that, like Mark Twain, several American authors used pseudonyms “for a variety of reasons ranging from persecution to prejudice to privacy”).

167. *Id.*

168. *See id.*

169. *Id.* at 59 (explaining that “the use of anonymity was firmly ingrained in American society and, as noted by the Supreme Court, . . . ‘an honorable tradition of advocacy and of dissent.’”) (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995)).

170. *Id.*

171. *Id.* at 58 (“Obviously, before and during the war, anonymity was used to disguise the identity of a writer who might be subject to British punishment.”).

172. *The History of the First Amendment*, ILL. PRESS ASS’N, <http://www.illinoispress.org/Foundation/1stAmendmentCenter/Research/TheFirstAmendment/InHistory.aspx> (last visited Mar. 12, 2015).

173. *United States v. Stevens*, 559 U.S. 460, 480 (2009) (explaining that in the context of declaring a statute regarding depictions of animal cruelty facially invalid, “the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*”).

174. U.S. CONST. amend. I.

unequivocally, the First Amendment is grounded on principles respecting the individual right to express oneself without fear of punishment.<sup>175</sup>

### B. *The First Amendment's Protection of Thought and Speech*

The Supreme Court has held that the “right to receive information and ideas, regardless of their social worth, is fundamental to our free society.”<sup>176</sup> In *Stanley v. Georgia*, the Court declared that a Georgia law banning private possession of obscene materials was unconstitutional.<sup>177</sup> The Court found that the First Amendment guarantees a person freedom from “invasion of personal liberties” and “the right to read or observe what [an individual] pleases—the right to satisfy his *intellectual* and *emotional* needs in the privacy of his own home.”<sup>178</sup> Moreover, even though the states retained the power to maintain obscenity laws, the Court found that an individual’s possession of obscene material in his home is an undeniable right secured by the First Amendment.<sup>179</sup>

Thus, over time, the Court has modernized and expanded the First Amendment’s protections beyond the intentions of the Founding Fathers to guarantee a broader freedom of expression.<sup>180</sup> Renowned First Amendment scholar and Yale professor Thomas Emerson has remarked, “As the guarantee of freedom of conscience, also incorporated in the [F]irst [A]mendment, reveals, the scope of the constitutional protection was intended to extend to religion, art, science, and all areas of human learning and knowledge.”<sup>181</sup> The First Amendment’s freedoms, as a result, comprise a fundamental constitutional right against government intrusion.<sup>182</sup>

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175. See Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 737 (1977) (“The First Amendment was clearly intended . . . as a prohibition of any system of control over the process of printing, any advance censorship of publication, and the like.”).

176. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (internal citation omitted).

177. *Id.* at 559.

178. *Id.* at 565 (emphasis added).

179. *Id.* at 568 (“[T]he States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home.”).

180. Emerson, *supra* note 175, at 741–42 (discussing how “[f]reedom of expression is necessary to a democratic political process,” and that “the freedom of expression was not meant to be confined to the political realm”).

181. *Id.* at 742.

182. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 780 (1978) (“Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause . . . .”); see also *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 67 (1976) (“The essence of [the First Amendment] is the need for absolute neutrality by the government.”).

VI. THE FIRST AND FOURTH AMENDMENTS MANDATE THAT ALL  
 “PAPERS” AND “EFFECTS” ARE PROTECTED AGAINST  
 WARRANTLESS SEARCHES

The First and Fourth Amendments can work in tandem.<sup>183</sup> In 1961, the Court interpreted the historical interplay between the First and Fourth Amendments: “This history was, of course, part of the intellectual matrix within which our own constitutional fabric was shaped. The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.”<sup>184</sup> In *Frank v. Maryland*, Justice Douglas opined that the Fourth Amendment does not principally regard searches and seizures in the context of criminal cases: “The commands of our First Amendment (as well as the prohibitions of the Fourth and the Fifth) . . . are indeed closely related, safeguarding not only privacy and protection against self-incrimination but conscience and human dignity and freedom of expression as well.”<sup>185</sup>

The Fourth Amendment’s privacy protections and the First Amendment’s freedom of speech and expression are similar principles.<sup>186</sup> While both are clearly separate doctrines of law, First Amendment analysis often speaks of “privacy” when justifying the unconstitutionality of some type of government action.<sup>187</sup> For instance, in the First Amendment analysis in *Stanley v. Georgia*, the Court explained, “for also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s *privacy*.”<sup>188</sup> In fact, to illustrate the importance of the right to be free from governmental intrusion, *Stanley* cited Justice Brandeis’ acclaimed dissent in *Olmstead v. United States*, a case regarding the Fourth Amendment and property rights:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect.

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183. See, e.g., *Marcus v. Search Warrants*, 367 U.S. 717, 729–31 (1961) (“The question here is whether the use by Missouri in this case of the search and seizure power to suppress obscene publications involved abuses inimical to protected expression.”).

184. *Id.* at 729.

185. *Frank v. Maryland*, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting) (internal quotation marks omitted). In *Frank*, the Court upheld a conviction against a homeowner for refusing to allow a municipal health inspector into his home for inspection purposes. *Camara v. Mun. Court of City & Cnty. of S.F.*, 387 U.S. 523, 525 (1967) (explaining the facts in *Frank*, 359 U.S. at 808). *Frank* was overruled just eight years after it was decided when the Court, in *Camara*, explained that even an inspection search must be reasonably justified with a warrant. *Id.* at 538.

186. See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

187. *Id.*

188. *Id.* (emphasis added).



They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.<sup>189</sup>

Hence, the First and Fourth Amendments oftentimes operate in harmony, albeit silently, because both protect forms of privacy.<sup>190</sup> Inherent in the history of both amendments is the fundamental motive to end British oppression and shape America into a free country.<sup>191</sup> In furtherance of this goal, the First and Fourth Amendments were designed to protect society from unjust governmental action.<sup>192</sup>

### A. *Thoughts, Speech, and Private Information Are Stored on Cell Phones*

An average cell phone is capable of holding a profusion of personal information. With smartphones full of “apps,”<sup>193</sup> cell phone users can do almost anything on their phones—from preserving medical records<sup>194</sup> to scribbling in a diary.<sup>195</sup> Furthermore, most (if not all) smartphones have built-in apps including a camera with videotaping capability, picture storage, calendar, music storage, text messaging, note-taking capability, alarm clock, personalized stock profiles, Facebook, and Twitter.<sup>196</sup> There are, also, limitless options for apps available for download, including apps for banking, traveling, and shopping.<sup>197</sup> The rapid increase in popularity in smartphones suggests that the traditional meth-

189. *Id.* (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

190. See *Maryland v. Macon*, 472 U.S. 463, 468 (1985) (“The First Amendment imposes special constraints on searches for and seizures of presumptively protected material and requires that the Fourth Amendment be applied with scrupulous exactitude in such circumstances.”) (internal citations and quotation marks omitted).

191. See Turley, *supra* note 166, at 57; Michael, *supra* note 135, at 906.

192. Michael, *supra* note 135, at 906.

193. Short for “application,” an “app” is a software program on computers or smartphones that is typically specific to one purpose. Anita Campbell, *What the Heck Is an “App”?*, SMALL BUS. TRENDS (May 7, 2011), <http://smallbiztrends.com/2011/03/what-is-an-app.html>.

194. MY MEDICAL, <http://mymedicalapp.com/> (last visited Feb. 10, 2014) (allowing users to save, manage, and examine personal medical records on their cell phones).

195. DAY ONE, <http://dayoneapp.com/> (last visited Feb. 10, 2014) (allowing users to save journal entries, messages, pictures, and more onto cell phone diary app).

196. See *iPhone 5s*, APPLE, <https://www.apple.com/iphone-5s/built-in-apps/> (last visited Feb. 10, 2014) (describing the built-in apps on all new iPhones); see also Farhan Z. Shah, *Top Android Apps for Samsung Galaxy S4 with Built In Apps Review*, NEWS TRIBE (Mar. 16, 2013), <http://www.thenewstribes.com/2013/03/16/top-android-apps-for-samsung-galaxy-s4-with-built-in-apps-review/> (discussing new built-in apps on the Android smartphone).

197. See *iTunes Preview*, APPLE, <https://itunes.apple.com/us/genre/ios/id36?mt=8> (last visited Feb. 10, 2014) (displaying the plethora of app genres offered by Apple).

ods of, for example, writing in a diary, will be replaced by typing personal thoughts into a smartphone app.<sup>198</sup> Thus, it is evident that cell phones have the capacity to hold extremely private, personal information.

A warrantless cell phone search incident to arrest can implicate First Amendment protections. When police officers search through modern cell phones incident to arrest, the quantity of accessible private information is staggering. Furthermore, information stored in a cell phone is likely to contain thoughts, which the Court has recognized as protected under the First Amendment.<sup>199</sup> Just as anonymity was highly regarded by the writers of the *Federalist Papers* and other great authors throughout American history,<sup>200</sup> authors (or owners) of any private information contained in a smartphone should be protected from unwanted government intrusions.<sup>201</sup> Warrantless cell phone searches, therefore, impede on First Amendment protections because people are free to think, write, and read without fear of punishment.

### B. A Cell Phone Is Equivalent to a “Paper” or “Effect”

Finally, as the Ohio Supreme Court, Florida Supreme Court, First Circuit, and most importantly, the United States Supreme Court reasoned, smartphone searches necessitate protection under the Fourth Amendment. A search of a cell phone uncovers far more than what a warrantless search incident to arrest is intended to reveal.<sup>202</sup> Thus, a cell phone is analogous to a “paper” or “effect” and cannot be searched without a warrant.<sup>203</sup>

Warrantless cell phone searches incident to arrest do not comply

198. See Henry Blodget, *Actually, the US Smartphone Revolution Has Entered the Late Innings*, BUSINESS INSIDER (Sept. 13, 2012, 9:23 AM), <http://www.businessinsider.com/us-smartphone-market-2012-9> (“[T]here are at least 165 million active Android and Apple iOS devices in the U.S. and . . . they are used by 78% of the adult population (age 15–64).”).

199. See *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (explaining that the Fourth Amendment gives a person “the right to satisfy his *intellectual* and *emotional* needs in the privacy of his own home”) (emphasis added); see also *Fed. Election Comm’n v. Mass Citizens for Life, Inc.*, 479 U.S. 238, 164 (1986) (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)) (describing the freedom of speech and thought as “the matrix, the indispensable condition, of nearly every other form of freedom”).

200. See Turley, *supra* note 166, at 57–59 (discussing how the practice of anonymity for authors like George Elliot and the Framers was once normal).

201. See Emerson, *supra* note 175, at 747.

202. *United States v. Wurie*, 728 F.3d 1, 14 (1st Cir. 2013), *cert. granted*, 82 U.S.L.W. 3104 (U.S. Jan. 17, 2014) (No. 13-212); *Smallwood v. State*, 113 So. 3d 724, 740 (Fla. 2013); *State v. Smith*, 920 N.E.2d 949, 956 (Ohio 2009).

203. See Michael, *supra* note 135, at 912 (explaining that the Fourth Amendment’s “immediate aim . . . was to ban general warrants and writs of assistance.”).

with the Court's decision in *Chimel*.<sup>204</sup> Contrary to the two justifications for constitutional searches incident to arrest that the Court articulated in *Chimel*, scrolling through the electronic contents of a cell phone could not possibly expose a weapon threatening an officer's immediate safety.<sup>205</sup> Furthermore, waiting to acquire a warrant before searching through a cell phone will not result in its contents being destroyed, as officers can take specific precautions such as placing the phone in a Faraday bag while waiting for the issuance of a warrant.<sup>206</sup> Unlike the California Supreme Court's finding in *People v. Diaz*, the *Chadwick* case was instructive because a cell phone is closer to a footlocker than a crumpled-up package of cigarettes.<sup>207</sup> However, neither a cigarette box nor a footlocker is truly appropriate to compare to a cell phone; it is impossible to compare a cell phone's enormous storage capacities and numerous uses to these basic objects.<sup>208</sup> Nonetheless, courts no longer have to "fit a square peg into a round hole,"<sup>209</sup> as clarity on the issue now exists.<sup>210</sup>

The history and progression of Fourth Amendment jurisprudence guides analysis for treatment of smartphones "in our increasingly interconnected world."<sup>211</sup> Because cell phones have quickly become "containers" for massive amounts of personal information, unwarranted searches of these containers are just the sort of activity that the Founding Fathers so vehemently opposed. Further, classifying cell phones as "papers" is significant because it "raises not only Fourth Amendment issues, but also implicates serious First Amendment concerns . . . further emphasiz[ing] the need for special protection of cell phones to prevent the warrantless searches of cell phones incident to lawful arrest."<sup>212</sup>

204. *Chimel v. California*, 395 U.S. 752, 762–63 (1969) (allowing searches incident to arrest so that officer safety is not compromised and evidence is not destroyed).

205. *See id.*; *see, e.g., Wurie*, 728 F.3d at 14, *aff'd sub nom. Riley v. California*, 134 S. Ct. 2473 (2014); *Smallwood*, 113 So. 3d at 740; *Smith*, 920 N.E.2d at 956.

206. "Faraday bags," as explained in *United States v. Flores-Lopez*, can prevent "remote wipes" of cell phones by "isolat[ing] the cell phone from the phone network and from Bluetooth or wireless Internet signals." *United States v. Flores-Lopez*, 670 F.3d 803, 809 (2012).

207. *See People v. Diaz*, 244 P.3d 501, 511 (Cal. 2011) (holding that warrantless cell phone searches incident to arrest are constitutional). *Compare United States v. Chadwick*, 433 U.S. 1, 11 (1977) (holding that a search of a footlocker incident to arrest was unconstitutional), *with United States v. Robinson*, 414 U.S. 218, 224 (1973) (finding that a search incident to arrest of a crumpled cigarette package was constitutional).

208. *See Warfield*, *supra* note 15, at 185.

209. *Id.*

210. The Supreme Court resolved the issue in *Riley v. California*, 134 S. Ct. 2473, 2494–95 (2014).

211. *See Michael*, *supra* note 135, at 922.

212. Jana L. Knott, Note, *Is There an App for That? Reexamining the Doctrine of Search Incident to Lawful Arrest in the Context of Cell Phones*, 35 OKLA. CITY U. L. REV. 445, 457 (2010).

## VII. THE END OF WARRANTLESS CELL PHONE SEARCHES

Chief Justice Roberts authored the Court's unanimous decision finding that warrantless searches of cell phones incident to arrest are unconstitutional under the Fourth Amendment.<sup>213</sup> In affirming the First Circuit's decision in *Wurie* and reversing the California Court of Appeal's holding in *Riley*, the Court engaged in an analysis of Fourth Amendment jurisprudence similar to that of the lower courts that grappled with the issue.<sup>214</sup>

In *Riley v. California*, the Court came to its conclusion pursuant to three cases discussed above: *Chimel*,<sup>215</sup> *Robinson*,<sup>216</sup> and *Gant*.<sup>217</sup> The Court first explained that *Chimel* "laid the groundwork for most of the existing search incident to arrest doctrine."<sup>218</sup> It discussed the categorical rule that *Chimel* established: searches of the arrestee, and the area within the arrestee's immediate control, are reasonable in order to remove weapons or evidence that the arrestee could later use, conceal, or destroy.<sup>219</sup>

The Court then engaged in a detailed explanation of *Robinson*.<sup>220</sup> Chief Justice Roberts explained that although the *Robinson* Court found that a search of a cigarette package inside of an arrestee's pocket "was reasonable even though there was no concern about the loss of evidence, and the arresting officer had no specific concern that Robinson might be armed,"<sup>221</sup> it "did not draw a line between a search of Robinson's person and a further examination of the cigarette pack found during that search."<sup>222</sup> The Chief Justice stated that only when *Chadwick* was decided a few years later did the Court draw this line by limiting the *Robinson* exception to "personal property . . . immediately associated with the person of the arrestee."<sup>223</sup>

Further, the Court discussed *Gant* and the added "independent exception for a warrantless search" that it authorizes.<sup>224</sup> In *Gant*, the Court approved of a warrantless search of the passenger compartment inside of a car when an officer reasonably believed "evidence relevant to

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213. *Riley*, 134 S. Ct. at 2494–95.

214. *Id.* at 2482–84.

215. 395 U.S. 752 (1969).

216. 414 U.S. 218 (1973).

217. 556 U.S. 332 (2009).

218. *Riley*, 134 S. Ct. at 2483.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 2484.

223. *Id.* (quoting *United States v. Chadwick*, 433 U.S. 1, 15 (1977)).

224. *Id.*

the crime of arrest might be found in the vehicle.”<sup>225</sup> This exception does not stem from *Chimel*, but instead from “circumstances unique to the vehicle context.”<sup>226</sup>

Before applying these cases to searches incident to arrest of smartphones, “which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy,” the Court noted that smartphone technology was inconceivable when *Chimel* and *Robinson* were decided.<sup>227</sup> Consequently, the Court found that neither of the rationales in *Chimel* “has much force with respect to digital content on cell phones,” and further, a cell phone search “bears little resemblance to the type of brief physical search considered in *Robinson*.”<sup>228</sup>

The Court, then, delved into the two *Chimel* rationales, disposing of various arguments in favor of constitutionalizing warrantless cell phone searches incident to arrest.<sup>229</sup> First, “digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee’s escape.”<sup>230</sup> The Court clarified that requiring a warrant to search a cell phone does not preclude an officer from ensuring that a weapon is not hidden *within* a cell phone, i.e., “to determine whether there is a razor blade hidden between the phone and its case.”<sup>231</sup> However, in comparing a search of a cell phone to the search of the cigarette pack in *Robinson*, the Court explained that because the officer in *Robinson* could not identify what was inside of the cigarette pack, its in-depth search was reasonable.<sup>232</sup> In contrast, “[n]o such unknowns exist with respect to digital data.”<sup>233</sup>

Permitting warrantless searches of cell phones incident to arrest does not further the second *Chimel* rationale, preventing destruction of evidence. The government argued that cell phones are prone to remote wiping or data encryption, methods used to eliminate or restrict accessibility of data on a cell phone.<sup>234</sup> First, the Court explained that under *Chimel*, the concern for preventing destruction of evidence occurs at the scene of the arrest, not in separate locations by third parties presumably conducting a remote wipe.<sup>235</sup> Further, the Court found that the govern-

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225. *Id.* (quoting *Arizona v. Gant*, 556 U.S. 332, 343 (2009)).

226. *Gant*, 556 U.S. at 343.

227. *Riley*, 134 S. Ct. at 2484.

228. *Id.* at 2484–85.

229. *Id.* at 2483.

230. *Id.* at 2485.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 2486.

235. *Id.*

ment's focus on data encryption involves "operation of a phone's security features" and is "apart from *any* active attempt by a defendant or his associates to conceal or destroy evidence upon arrest."<sup>236</sup>

Regardless, the Court explained, police officers have access to methods to prevent cell phones from remote wipes.<sup>237</sup> Using Faraday bags, made of aluminum foil that isolates a phone from radio waves, or removing a phone's battery, will prevent destruction of evidence.<sup>238</sup> Further, if police are confronted with a situation where the need for an immediate search of a cell phone is evident, the exigent circumstances exception to the warrant requirement can apply.<sup>239</sup>

Finally, the Court considered the unique nature of cell phones in comparison to "other objects that might be kept on an arrestee's person" and can be searched.<sup>240</sup> The Court discussed the vast storage capacity in modern cell phones: "[A] cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record."<sup>241</sup> Consequently, simply browsing through an arrestee's smartphone can reveal "the sum of an individual's private life . . . through a thousand photographs labeled with dates, locations, and descriptions."<sup>242</sup> Hence, with more than ninety percent of Americans owning cell phones, a digital record of private information is readily available on most people at all times.<sup>243</sup> "Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case."<sup>244</sup>

While the Court concluded that warrantless cell phone searches were unconstitutional under the Fourth Amendment, Chief Justice Roberts' opinion implicated, albeit indistinctly, First Amendment concerns.<sup>245</sup> The *Riley* Court compared the extensive and readily available data on a cell phone to a pre-smartphone era diary that is hardly readily available, to demonstrate how rare a scenario it was for police officers to perform a search incident to arrest and stumble upon truly private information.<sup>246</sup> The Court explained that "there is an element of pervasive-

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236. *Id.*

237. *Id.* at 2487.

238. *Id.*

239. *Id.*

240. *Id.* at 2489.

241. *Id.*

242. *Id.*

243. *See id.* at 2490.

244. *Id.*

245. *See id.* (discussing the discoveries of items containing personal thoughts, like diaries, as "few and far between").

246. *Id.*

ness that characterizes cell phones but not physical records,” implicating that it disfavored authorizing police officers to freely browse private ideas, thoughts, and information stored on a cell phone.<sup>247</sup> In keeping with the Court’s established rights under the First Amendment—the right to privacy<sup>248</sup> and the right to receive information and ideas<sup>249</sup>—the Court took issue with permitting warrantless searches of cell phones incident to arrest.<sup>250</sup>

The amount of private information found in a modern cell phone dwarfs any non-digitized item that can be hidden in a cigarette package. In concluding, Chief Justice Roberts stated that “[t]he fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.”<sup>251</sup>

The Supreme Court plainly answered the question that many state and federal courts have wrestled with since 2007:<sup>252</sup> What, if anything, must police do before searching a cell phone? The answer “is accordingly simple—get a warrant.”<sup>253</sup>

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247. *See id.*

248. *Griswold v. Connecticut*, 381 U.S. 479, 484–88 (1965) (finding a fundamental right to privacy under the “penumbras” and “emanations” of various amendments, including the First Amendment; “the First Amendment has a penumbra where privacy is protected from governmental intrusion.”).

249. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

250. *Riley*, 134 S. Ct. at 2488 (“[W]hen privacy-related concerns are weighty enough a search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.”) (internal quotations omitted).

251. *Riley*, 134 S. Ct. at 2495.

252. *See United States v. Finley*, 477 F.3d 250, 258 (5th Cir. 2007).

253. *Riley*, 134 S. Ct. at 2495.