Containing Cell Phones? Restoring the Balance Between Privacy and Government Interests in Fourth Amendment Cell Phone Searches and Seizures

"Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' The 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. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant."[1]

I. INTRODUCTION

The rise and expansion of technology has allowed cell phones and smart phones to store vast amounts of information.[2] The capacity of data and information contained within the cell phone provides citizens with great access to information all in one small, contained, and mobile place.[3] As technology continues to expand its boundaries, the expectation of privacy in the information stored within one's cell phone increases as well.[4] The protection

1. Riley v. California, 134 S. Ct. 2473, 2494-95 (2014) (citation omitted).

2. *See* Eunice Park, *Traffic Ticket Reasonable, Cell Phone Search Not: Applying the Search-Incident-To-Arrest Exception to the Cell Phone As "Hybrid,"* 60 DRAKE L. REV. 429, 431 (2012) (noting cell phone capacity to store large amounts of data).

> As technology continues to hurtle forward, the law also needs to move forward to ensure a balance between the individual and law enforcement. A rule governing cell phone searches must prevent either of two extremes: widespread invasions of individual privacy for any arrest or unduly tying the hands of law enforcement officers.

Id. at 495-96.; *see also* Mireille Dee, Note, *Getting Back to the Fourth Amendment: Warrantless Cell Phone Searches*, 56 N.Y.L. SCH. L. REV. 1129, 1130 (2012) (describing changes to cell phone technology).

3. *See* Samuel J. H. Beutler, Note, *The New World of Mobile Communication: Redefining the Scope of Warrantless Cell Phone Searches Incident to Arrest*, 15 VAND. J. ENT. & TECH. L. 375, 377 (2013) (noting large storage capabilities of cell phones); Dee, *supra* note 2, at 1130 (explaining cell phone capacity to store personal information); Chelsea Oxton, Note, *The Search Incident to Arrest Exception Plays Catch Up: Why Police May No Longer Search Cell Phones Incident to Arrest Without a Warrant*, 43 CREIGHTON L. REV. 1157, 1162 (2010) (discussing modern cell phone capabilities).

4. *See* Park, *supra* note 2, at 431 (noting expectation of privacy in cell phones); *see also Riley*, 134 S. Ct. at 2484 (describing expansive use of cell phones). Smart phones "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." *Riley*, 134 S. Ct. at 2484. Phones contain so much more than other physical objects could hope to contain; there are no limits of physical reality in cell phones as there are in physical containers. *See id.* at 2489.

of this privacy clashes with the Fourth Amendment's allowance of reasonable searches and seizures.[5]

The Fourth Amendment of the U.S. Constitution provides a right against unreasonable searches and seizures.[6] This amendment offers two counteracting provisions: people have the right to be free from unreasonable searches and seizures; and items may be searched and seized if there is probable cause to do so.[7] While warrantless searches are per se unreasonable, warrantless searches and seizures of a person's property are valid under certain exceptions of the Fourth Amendment's search and seizure jurisprudence.[8] A balance between the government's ability to conduct a valid search and seizure subject to the Fourth Amendment and the public's right and expectation of privacy must be maintained.[9]

An officer may search and seize an item without first obtaining a warrant if the search is incident to the arrest or conducted under exigent circumstances.[10] An officer may also search a person and any items found on that person.[11] Because cell phones contain information, several courts have viewed them as containers, and thus vulnerable to searches by officers.[12]

This Note aims to examine the interplay between the Fourth Amendment search and seizure doctrine and the right to privacy, and to analyze the

5. *See* Park, *supra* note 2, at 431 (highlighting tension between Fourth Amendment and right to privacy).

6. *See* U.S. CONST. amend. IV (granting protections against unreasonable searches and seizures). Specifically, the Fourth Amendment states:

> 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.

Id.

7. *See* Justin M. Wolcott, Comment, *Are Smartphones Like Footlockers or Crumpled Up Cigarette Packages? Applying the Search Incident to Arrest Doctrine to Smartphones in South Carolina Courts*, 61 S.C. L. REV. 843, 849 (2010) (commenting on Fourth Amendment's embedded privacy right).

8. *See* Katz v. United States, 389 U.S. 347, 357 (1967) (holding searches without judicial approval as per se unreasonable subject to few exceptions); Dee, *supra* note 2, at 1136 (defining exceptions to freedom from warrantless, unreasonable searches); Marjorie A. Shields, Annotation, *Validity of Search of Wireless Communication Devices*, 62 A.L.R. 6th 161 (2011) (describing warrantless searches as per se unreasonable).

9. *See* Park, *supra* note 2, at 495 (discussing need for balance between individual privacy right and law enforcement search and seizure).

10. *See* Dee, *supra* note 2, at 1136-37 (explaining Court's bright-line rule allowing for valid warrantless searches of closed containers); Mina Ford, Note, *The Whole World Contained: How the Ubiquitous Use of Mobile Phones Undermines Your Right To Be Free from Unreasonable Searches and Seizures*, 39 FLA. ST. U. L. REV. 1077, 1083 (2012) (justifying searches incident to arrest as protecting officer's safety); *see also* Margaret M. Lawton, *Warrantless Searches and Smartphones: Privacy in the Palm of Your Hand?*, 16 UDC/DCSL L. REV. 89, 95 (2012) (explaining containers searchable both when open or closed).

11. *See* Ford, *supra* note 10, at 1085-86 (explaining Court's allowance of search of containers in automobile).

12. *See* Lawton, *supra* note 10, at 104-05 (discussing courts' categorization of cell phones as containers).

approaches courts and legislatures have taken in evaluating how the Fourth Amendment should apply to smart phone searches and seizures. Part II looks at the historical background of these issues, specifically tracing the history of the Fourth Amendment; the exceptions that provide for valid, warrantless searches and seizures; and the evolving definition of the right to privacy.[13] Part III analyzes the different classifications of a cell phone with respect to warrantless searches and seizures and argues that a cell phone is not similar to traditional containers such as wallets or purses.[14] Part III also argues that a smart phone brings forth a heightened expectation of privacy that should be recognized.[15] Finally, this Note concludes by analyzing the recent U.S. Supreme Court decision involving cell phone searches and seizures.[16] The Supreme Court's reexamination of this issue will help restore equilibrium between the previously imbalanced right to privacy and Fourth Amendment searches and seizures.

II. HISTORY

A. Fourth Amendment Historical Background

The Fourth Amendment protects individuals from unreasonable searches and seizures.[17] Historically, this meant police officers could not search an individual's person or belongings, including the home, without first obtaining authority through a warrant.[18] The Framers constructed the Fourth Amendment to address the lack of limits on statutory authority for search warrants in homes and to protect individuals from too much intervention from officers.[19] While many scholars are in disagreement about the Framers' intent when enacting the Fourth Amendment, the basic purpose of the Fourth Amendment remains clear: to protect homes from unregulated and unreasonable searches.[20]

Scholars agree that the Fourth Amendment originally served to protect

13. *See infra* Part II (providing Fourth Amendment historical background and exceptions for warrantless searches).

14. *See infra* Part III.A (distinguishing cell phone classifications).

15. *See infra* Part III.B (explaining evolving expectations of privacy in cell phones).

16. *See infra* Part III.D (commenting on Supreme Court's recent decision regarding cell phone data searches).

17. *See* U.S. CONST. amend. IV (providing protections from unreasonable searches and seizures).

18. *See* David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. PA. J. CONST. L. 581, 583 (2008) (explaining Framers' rationale in creating Fourth Amendment). The Framers intended to address the issue of government trespass into individuals' homes through the creation of a bright-line rule. *See id.*

19. *See* Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law*,*"* 77 MISS. L.J. 1, 10 (2007) (describing basic function of Fourth Amendment); *see also* 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, 174 (2010) (defining Fourth Amendment as means of preventing federal government tyranny).

20. *See* Steinberg, *supra* note 18, at 596 (describing Framers' Fourth Amendment intent as inconsistent and unclear).

against unreasonable searches in individuals' homes, but it is not apparent whether and how the Fourth Amendment should be applied to action outside the context of homes.[21] There is little jurisprudence available on searches outside the home during the Framers' era; and it is therefore unclear whether the Framers intended to address a specific and defined issue or if they intended for the Fourth Amendment to apply beyond the home.[22] Presently, the Supreme Court takes a broader approach and generally interprets the Fourth Amendment as requiring officers to have a warrant before searching an individual.[23]

B. Warrantless Searches

While the Supreme Court has determined that an officer must obtain a search warrant before conducting a search of an individual's person, the Court has outlined a few exceptions.[24] One such exception is the exigent-circumstances exception, by which officers may search an individual in an effort to preserve evidence.[25] A second and more commonly-used exception is the search-incident-to-arrest exception, which allows officers to conduct a warrantless search to protect officer safety and prevent the destruction of evidence.[26]

21. *See id*. at 597 (noting change in law enforcement practices and social values). Today's circumstances vary greatly from circumstances during the enactment of the Fourth Amendment, and it is unclear how the Amendment should apply to changing circumstances. *See id*. at 597-98.

22. *See id*. at 599 (explaining absence of Fourth Amendment jurisprudence other than searches in homes).

23. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (outlining test for determining Fourth Amendment search). Justice Harlan's two-prong test establishes "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *See id*.; Dee, *supra* note 2, at 1136 (explaining current interpretation of Fourth Amendment search and seizure); *see also* Marty Koresawa, Note, *Pay Phone Protections in a Smartphone Society: The Need To Restrict Searches of Modern Technology Incident to Arrest*, 45 LOY. L.A. L. REV. 1351, 1360 (2012) (positing Framers did not foresee clash between Fourth Amendment and technology); Ashley B. Snyder, Comment, *The Fourth Amendment and Warrantless Cell Phone Searches: When Is Your Cell Phone Protected?*, 46 WAKE FOREST L. REV. 155, 160 (2011) (defining Fourth Amendment search).

24. *See* Dee, *supra* note 2, at 1136 (explaining few established exceptions to warrant requirement). These exceptions allow an officer to conduct a warrantless search when there is probable cause to believe that a crime has been or is being committed. *See id*.; *see also* Adam D. Searl, Comment, *Warrantless Searches of Cellular Phones: The Exigent Circumstances Exception Is the Right Fit*, 39 OHIO N.U. L. REV. 387, 388 (2012) (contrasting justifications for warrantless searches of cell phones). Some possible justifications for warrantless searches of cell phones include the search-incident-to-arrest exception, the exigent-circumstances exception, and classification of cell phones as a containers. *See* Searl, *supra*, at 388.

25. *See* Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 SANTA CLARA L. REV. 183, 197 (2010) (explaining "now or never" approach to searches to preserve evidence).

26. *See* Orso, *supra* note 25, at 200-01 (explaining dual justifications for searches incident to arrest); Warfield, *supra* note 19, at 179 (defining search incident to arrest as exception to warrant requirement); *see also* Adam M. Gershowitz, *Password Protected? Can a Password Save Your Cell Phone from a Search Incident to Arrest?*, 96 IOWA L. REV. 1125, 1131 (2011) (defining immediate, searchable area of arrestee's person as "grabbing space"). The term "grabbing space" refers to the area near the arrestee and can include any

1. Search-Incident-to-Arrest Exception

The Supreme Court created an exception to the Fourth Amendment protection against warrantless searches and seizures in *Chimel v. California*.[27] In *Chimel*, three police officers arrived at the petitioner's home with a warrant for his arrest and asked to look around his home.[28] The officers searched the home, including the attic and garage, and in many rooms, they asked the petitioner's wife to "open drawers and 'to physically move contents of the drawers from side to side so that (they) might view any items that would have come from (the) burglary.'"[29] The officers seized several items during the search, which lasted between forty-five minutes and one hour.[30] The Court determined that the search of the petitioner's house went beyond the scope of the search-incident-to-arrest exception, and the search and seizure of items, therefore, were unreasonable.[31]

The Court reasoned that when an arrest is made, it is reasonable for officers to search the arrestee and the area surrounding the arrestee to ensure that no weapons are present that might endanger officers or be used to resist arrest.[32] There was no need for the officers to search the petitioner's home to such a detailed extent, including drawers in his bedroom, because at the time of arrest there was no fear that the arrestee would be able to destroy evidence outside of

wallets, bags, or pockets that the arrestee may be able to access or grab. *See* Gershowitz, *supra*; Ben E. Stewart, Note, *Cell Phone Searches Incident to Arrest: A New Standard Based on* Arizona v. Gant, 99 KY. L.J. 579, 581 (2011) (describing search incident to arrest as justification for obtaining evidence without search warrant). A search incident to arrest differs from a stop and frisk, and the court distinguishes the two searches by looking at the underlying justifications for each search. *See* Stewart, *supra*, at 582. A search incident to arrest does not require particularized suspicion to search a person and the search itself can include not only the person but also the area immediately surrounding the person. *See id*.

27. *See* 395 U.S. 752, 756 (1969) (explaining exception to warrant requirement when searching persons committing crimes); *see also* Saby Ghoshray, *Doctrinal Stress or in Need of a Face Lift: Examining the Difficulty in Warrantless Searches of Smartphones Under the Fourth Amendment's Original Intent*, 33 WHITTIER L. REV. 571, 573 (2012) (noting creation of Fourth Amendment search-incident-to-lawful-arrest exception).

28. *See* 395 U.S. at 753-54 (explaining officers' use of arrest warrant but not search warrant). The petitioner objected to the search, but the officers searched anyway. *See id.*

29. *See id.* at 754 (noting extent of officers' search of petitioner's home and belongings).

30. *See id.* The Supreme Court had previously determined that "[w]hen a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized." Carroll v. United States, 267 U.S. 132, 158 (1925) (explaining extent of seized items as incident to arrest).

31. *See Chimel*, 395 U.S. at 768 (reasoning no justification for extending search beyond petitioner's immediate area); *see also* Charles E. MacLean, *But, Your Honor, a Cell Phone Is Not a Cigarette Pack: An Immodest Call for a Return to the* Chimel *Justifications for Cell Phone Memory Searches Incident to Lawful Arrest*, 6 FED. CTS. L. REV. 37, 46-47 (2012) (explaining *Chimel* focus on reasonableness). *Chimel* provided two justifications for the search-incident-to-arrest exception: "[A] search incident to lawful arrest must be supported by either officer safety, or the need to preserve evidence from being hidden or destroyed." MacLean, *supra*, at 47; *see also Chimel*, 395 U.S. at 762-63 (explaining exception's justifications).

32. *See Chimel*, 395 U.S. at 762-63 (reasoning officer's desire to ensure safe environment and successful arrest).

the room in which he was arrested.[33] The search-incident-to-arrest exception allows officers to conduct warrantless searches under two circumstances—to protect police from possible harm and to protect evidence from possible destruction—however neither circumstance could justify a search in *Chimel*.[34]

The Court further explained the idea of immediate control and the search-incident-to-arrest exception in *United States v. Robinson*.[35] In *Robinson*, an officer arrested the respondent and initiated a pat-down search.[36] The officer felt an object in the respondent's jacket pocket, which he pulled out and discovered to be a "crumpled up cigarette package."[37] Upon opening the package, the officer discovered capsules of white powder, which were later identified as heroin.[38] The Court described the permissible scope of the search-incident-to-arrest exception as a search of the arrestee's person and a search of the area within the arrestee's immediate control.[39] The Court held that the search and seizure in this case were reasonable under the Fourth Amendment.[40] Accordingly, *Robinson* expanded the search-incident-to-arrest exception by giving the police automatic authority to search a person after an arrest is

33. *See* Chimel v. California, 395 U.S. 752, 763 (1969) (explaining no justification for search outside immediate control of petitioner). The Court determined that this search of the home went beyond what was reasonable. *See id.* at 768; *see also* Gershowitz, *supra* note 26, at 1132 (explaining *Chimel* limited scope of search to person). The Court's limitation meant that the police could not go through the contents of Chimel's home, although they could search his person and the area immediately surrounding him. *See* Gershowtiz, *supra* note 26, at 1132.

34. *See Chimel*, 395 U.S. at 768 (stating "no constitutional justification); Nicholas De Sena, Note and Comment, *Searches Incident to Arrest and the Aftermath of* Arizona v. Gant*—A Circuit Split as to* Gant*'s Applicability to Non-Vehicular Searches*, 33 PACE L. REV. 431, 434 (2013) (describing two justifications for searches incident to arrest). The justifications include officer's safety, which would allow an officer to remove any weapon that the arrestee might possess and use to cause harm to the officer, and prevention of destruction of evidence. *See id.* These justifications apply both to the person as well as "to any area where the arrestee is able to grab, reach, or lunge in order to gain access to a weapon or attempt to destroy evidence." *Id.*; *see also* Joshua Eames, Case Note, *Criminal Procedure—"Can You Hear Me Now?": Warrantless Cell Phone Searches and the Fourth Amendment;* People v. Diaz*, 244 P.3d 501 (Cal. 2011)*, 12 WYO. L. REV. 483, 487 (2012) (explaining search-incident-to-arrest exception); Warfield, *supra* note 19, at 180 (noting rationale behind search incident to arrest as two fold).

35. 414 U.S. 218 (1973); *see also* Ghoshray, *supra* note 27, at 573-74 (noting expansion of exception in *Robinson*).

36. *See* 414 U.S. at 220-23 (describing arrest and subsequent search of respondent).

37. *See id.* at 223 (noting officer's suspicion of crumpled package as not containing cigarettes).

38. *See id.* (explaining heroin seized from respondent following search).

39. *See id.* at 224 (noting search incident to arrest encompasses area beyond person).

40. *See Robinson*, 414 U.S. at 236 (qualifying search as permissible). The Court noted that a lawful arrest gives an officer the authority to conduct a full search of the arrestee, which is reasonable under the Fourth Amendment. *See id.* at 235. The search itself resulted in the officer's discovery of the crumpled package, and the officer was then permitted to look inside that package because the initial search was lawful. *See id.* at 236. The officer was justified in discovering the heroin capsules despite having no fear for his safety, and the fact that he was not initially looking for heroin does not dismiss the validity of the discovery. *See id.*; Sara M. Corradi, Comment, *Be Reasonable! Limit Warrantless Smart Phone Searches to* Gant*'s Justification for Searches Incident to Arrest*, 63 CASE W. RES. L. REV. 943, 946 (2013) (noting Court expanded rule from *Chimel* in *Robinson*); *see also* Eames, *supra* note 34, at 483 (observing police had authority to conduct search without probable cause arrestee possessed weapon).

made.[41]

Following *Robinson*, courts had to determine and define the scope of the arrestee's immediate control.[42] In *United States v. Chadwick*,[43] an officer suspected the respondent of transporting a footlocker containing an illegal substance and immediately arrested him.[44] The footlocker remained under the control of the officers, and there was no risk that the contents of the footlocker consisted of explosives or would be destroyed by the respondent.[45] An hour and a half after the arrest, the officers opened the footlocker without consent and without a search warrant.[46] The Supreme Court noted in its opinion that the warrant clause protects more than just homes, and it held that the search was unreasonable because there was no exigency at the time of the arrest once the footlocker was in the exclusive control of the officers.[47]

While the Court does recognize that a search of the immediate area surrounding the arrestee may be conducted following a legal arrest, here, the arrest and subsequent search were too far removed from one another.[48] The search was unreasonable because it was not incident to the arrest, and there was no exigency to support a need for an immediate search.[49] Following *Chadwick*,

41. *See* Eames, *supra* note 34, at 487-88 (noting after lawful arrest, police may search arrestee's person). The scope of a search conducted on the arrestee's person includes opening any containers the officer finds on the arrestee, regardless of whether or not the officer believes the containers hold evidence or weapons. *See id*. at 488; *see also* Gershowitz, *supra* note 26, at 1133 (declaring search-incident-to-arrest doctrine as automatic). The decision in *Robinson* established this bright-line rule of automaticity. *See* Gershowitz, *supra* note 26, at 1132. Following *Robinson*, courts need not conduct a case-by-case review of searches incident to arrest to determine if police had a reasonable suspicion of illegal evidence or if the search itself was necessary for officer protection; rather, the search-incident-to-arrest doctrine provides an automatic means for officers to search the arrestee's person and the contents of any containers on the person. *See id*. at 1133; *see also* Warfield, *supra* note 19, at 180 (noting expansion of search incident to arrest to include all closed containers found on person).

42. *See* Eames, *supra* note 34, at 488-89 (explaining difference between immediate control and immediately associated with arrestee).

43. 433 U.S. 1 (1977), *abrogated by* California v. Acevedo, 500 U.S. 565 (1991).

44. *See id.* at 4 (describing observation of respondent's unusual footlocker and subsequent arrest of respondent by law enforcement).

45. *See id.* at 4 (explaining footlocker as under control of officers).

46. *See id.* (discussing timeline between arrest and warrantless search).

47. *See Chadwick*, 433 U.S. at 7 ("[T]he Fourth Amendment 'protects people, not places.'") (quoting Katz v. United States, 389 U.S. 347, 351 (1967)). The Court posits that the Framers did not intend for the warrant clause to protect only searches within a home. *See id.* at 8. Thus, because there was no concern that the contents of the footlocker would be removed before a warranted search could be effected, the search of the footlocker was unreasonable. *See id.* at 13 (explaining no danger of content removal).

48. *See id*. at 15 (distinguishing no exigency at time of search). There was no fear that the arrestee could gain access to the footlocker at the time of the search because the footlocker was reduced to the officers' control following the arrest and the search took place more than an hour later. *See id.*

49. *See* United States v. Chadwick, 433 U.S. 1, 15-16 (1977) (explaining need for distinction between exigent and nonexigent), *abrogated by* California v. Acevedo, 500 U.S. 565 (1991). The Court further discussed the consequence of the unreasonable search as a privacy issue. *See id.* at 16. The owner of the footlocker had a privacy interest in the contents of the footlocker, which was violated when the search occurred. *See id.*

officers had to have an immediate or exigent need to conduct a search in order for the search and seizure of items found within an arrestee's immediate control to be reasonable and valid.[50]

2. Searches Incident to Arrest in Automobiles

While *Chimel*, *Robinson*, and *Chadwick* provided insight into searches incident to arrest of items within the immediate control of the person, these cases did not specifically address how to tackle a search incident to arrest in a vehicular situation.[51] In *New York v. Belton*,[52] the Supreme Court attempted to do so.[53] After the officer pulled over and arrested the respondent, he seized an envelope from the vehicle labeled "supergold," which contained marijuana.[54] The officer then searched the passengers and the vehicle, discovering a black leather jacket belonging to the respondent.[55] The officer found cocaine in the jacket pocket.[56] The Court held that when an officer has conducted a lawful arrest of a person in a vehicle he may search the passenger compartment of the vehicle as a search incident to arrest.[57] Once the lawful arrest is made, the officer need not offer any additional justification for searching the compartments within reach or the containers within those compartments.[58] The search was incident to arrest and was thus reasonable because the jacket was within the arrestee's immediate control at the time of the search.[59]

50. *See* De Sena, *supra* note 34, at 435 (describing inappropriate amount of time between arrest and search incident to arrest); Eames, *supra* note 34, at 483 (explaining scope of searchable items).

51. *See* De Sena, *supra* note 34, at 436 (noting analysis of search incident to arrest in home but not in vehicle).

52. 453 U.S. 454 (1981), *abrogated by* Arizona v. Gant, 556 U.S. 332 (2009), *as recognized in* Davis v. United States, 131 S. Ct. 2419 (2011).

53. *See id.* at 462-63 (defining search of jacket in car as incident to arrest); De Sena, *supra* note 34, at 436 (labeling *Belton* as first major case to address search incident to arrest in vehicle).

54. *See Belton*, 453 U.S. at 455-56 (noting officer's vehicular stop, subsequent arrest, and discovery of illegal drugs in vehicle).

55. *See id.* at 456 (noting search of respondent's jacket seized from vehicle).

56. *See id.* (describing discovery of cocaine in jacket pocket).

57. *See id.* at 460 (explaining Court's decision allowing officers to search vehicle following arrest). The Court continued to state that the officer may search any containers found within the vehicle, reasoning that if the compartments are in reach, then the containers within the compartments in the vehicle are also within the arrestee's reach. *See id.* The containers may be open or closed and the right to privacy of those containers seems to dissipate once a lawful arrest is made. *See id.*; *see also* De Sena, *supra* note 34, at 437 (explaining no clear definition for immediate control of arrestee). The Court did not use the immediate control test from *Chimel*, but instead, determined that it is always reasonable to search an arrestee's vehicle when he or she had just been inside the vehicle. *See* De Sena, *supra* note 34, at 437.

58. *See* New York v. Belton, 453 U.S. 454, 461 (1981) (explaining containers need not hold evidence or weapons to be validly searched), *abrogated by* Arizona v. Gant, 556 U.S. 332 (2009), *as recognized in* Davis v. United States, 131 S. Ct. 2419 (2011); Gershowitz, *supra* note 26, at 1133 (noting expansion of bright-line rule in *Belton*). The expansion of the bright-line rule allowed automobiles to be included as a part of the arrestee's immediate area in a search incident to arrest. *See* Gershowitz, *supra* note 26, at 1133.

59. *See Belton*, 453 U.S. at 462-63 (explaining application of *Chimel* to present case); *see also* Kelly C. Quinn & Mark W. Allen, *Incident to Arrest: The U.S. Supreme Court Has Yet To Rule Conclusively on Police*

In 2009, the Supreme Court overturned the ruling that searches of vehicles will always be within the incident-to-arrest exception, twenty-eight years after *Belton*.[60] In *Arizona v. Gant*,[61] the respondent was arrested for driving with a suspended license.[62] The officers handcuffed the respondent, locked him in the backseat of a police vehicle, and proceeded to search his vehicle.[63] The officers discovered a gun and, in the backseat, a bag of cocaine in a jacket.[64] The Court rejected the *Belton* decision and instead applied the *Chimel* rationale to the case, looking at whether the items in the vehicle were in the immediate control of the arrestee at the time of the arrest.[65]

The principles from *Chimel* suggest that officers may search a vehicle incident to an occupant's arrest only when the arrestee is within the immediate reach of items that may be seized.[66] The Court also determined that a search may be conducted incident to arrest in the vehicular context when it is reasonable to believe that there is relevant evidence in the vehicle.[67] Applying the *Chimel* test, the Court found that the search was unreasonable because the officers could not reasonably believe that the respondent could have accessed evidence in his vehicle while he was detained in the police vehicle.[68] By rejecting the broad rule from *Belton*, the Court narrowed the scope of searches incident to arrest in vehicular contexts.[69] Going forward, the rule on vehicular searches incident to arrest is that officers "may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe

Searches of Cell Phones upon Arrest, L.A. LAW., June 2013, at 21, 24 (noting expansive reading of *Belton* with respect to automobile searches and seizures).

60. *See* De Sena, *supra* note 34, at 437-38 (explaining overturning of *Belton* rule for searches incident to arrest in vehicular stops).

61. 556 U.S. 332 (2009).

62. *See id.* at 335 (describing circumstances surrounding Gant's arrest).

63. *See id.* at 336 (illustrating events surrounding officer's search of respondent's vehicle).

64. *See id.* (describing discovered items in respondent's vehicle following search).

65. *See Gant*, 556 U.S. at 343 (rejecting *Belton* standard for vehicular search incident to arrest). The Court explained that under *Belton*, a vehicular search is always valid as a search incident to arrest. *See id.* This standard seems to undermine the justifications underlying the scope of searches in *Chimel*, and thus, the Court decided to reject *Belton* and endorsed the *Chimel* rationale. *See id.*

66. *See id*. at 335 (explaining officers may search when arrestee within reach of evidence at time of search).

67. *See* Arizona v. Gant, 556 U.S. 332, 343 (2009) (describing circumstances unique to vehicular arrest, which justify search of relevant evidence). The evidence must be relevant to the crime of the arrest to permit a reasonable search of the vehicle. *See id.*

68. *See id.* at 344 (reasoning likelihood of respondent accessing evidence low). Further, the Court concluded that because the Respondent's arrest was for driving without a license, the probability of discovering other evidence in the vehicle related to that offense was low. *See id.*

69. *See id.* at 347 (defining present test as narrower than *Belton* test). The exception from *Gant* allows officers to "search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search." *Id.*; *see also* De Sena, *supra* note 34, at 438 (explaining Court's rejection of *Belton* as rule for vehicular searches incident to arrest).

the vehicle contains evidence of the offense of arrest."[70]

C. Warrantless Searches of Cell Phones

1. The Container Doctrine

The Supreme Court has only recently determined whether a cell phone and its contents may be searched incident to arrest, and leading up to that decision, lower courts ruled on the issue in varying ways.[71] In *New York v. Belton*, the Court determined that officers may examine the contents of any containers found within the passenger compartment of the vehicle and attempted to define a container in the decision's footnotes.[72] The Court defined a container as "any object capable of holding another object."[73] Although *Gant* altered the search-incident-to-arrest doctrine in 2009, the container doctrine was not affected by the decision, and thus, *Belton*'s definition of a container still applies today.[74] Several items have been classified as containers in lower courts, including wallets, purses, locked briefcases, and address books.[75] With the rise of technology, it was necessary for courts to determine the constitutionality of warrantless searches of smart phones.[76]

70. *Gant*, 556 U.S. at 351 (explaining absent close proximity or potential for hidden evidence, search not reasonable); De Sena, *supra* note 34, at 438 (noting officers may search if area in immediate control of arrestee). If, at the time of the search, it is reasonable to believe that the arrestee may access the vehicle or possible evidence contained within the vehicle, then officers may search the vehicle, including the passenger compartment. *See* De Sena, *supra* note 34, at 438. One potential problem for officers arises: If the arrestee is secured at the time of the arrest, then any search of the vehicle fails to be a reasonable search incident to arrest. *See id*. at 439.

71. *See* United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007) ("The permissible scope of a search incident to a lawful arrest extends to containers found on the arrestee's person."); Jana L. Knott, Notes, *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, 449-51 (2010) (explaining several theories for validating search of cell phone as incident to arrest). Some courts look to the fear that electronic devices and data contained on these devices may be destroyed if not searched immediately following arrest. *See* Knott, *supra*, at 449. Other courts have validated the search of cell phones by classifying cell phones as containers. *See id*. at 450. Courts also look to previous cases involving searches and seizures by comparing cell phones to pagers, wallets, and address books. *See id.* Finally, courts look to the legality of the arrest and classify the search of the cell phone as incident to a lawful arrest. *See id.* at 451; *see also* Daniel Zamani, Note, *There's an Amendment for That: A Comprehensive Application of Fourth Amendment Jurisprudence to Smart Phones*, 38 HASTINGS CONST. L.Q. 169, 171 (2010) (describing different approaches to search-incident-to-arrest exceptions in cell phones).

72. *See* 453 U.S. 454, 460 (1981) (holding police may examine contents of containers found in vehicles), *abrogated by* Arizona v. Gant, 556 U.S. 332 (2009), *as recognized in* Davis v. United States, 131 S. Ct. 2419 (2011); Joshua A. Engel, *Doctrinal Collapse: Smart Phones Cause Courts To Reconsider Fourth Amendment Searches of Electronic Devices*, 41 U. MEM. L. REV. 233, 244 (2010) (describing definition of container in *Belton*).

73. *See Belton*, 453 U.S. at 460 n.4 (defining container for purposes of search incident to arrest in vehicles). Containers may be closed or open. *See id.*

74. *See* Engel, *supra* note 72, at 245-46 (noting *Gant* decision limited prior holding in *Belton* but has no effect on container doctrine).

75. *See id*. at 246-47 (explaining objects courts have determined as containers).

76. *See* Ghoshray, *supra* note 27, at 572-73 (noting Framers' lack of consideration of cell phones when

The Seventh Circuit addressed the issue of technology and the search incident to arrest in *United States v. Ortiz*.[77] Officers arrested the respondent, seized his digital pager, and accessed the messages previously sent to the pager.[78] The search was based on probable cause that the respondent was a heroin supplier and that the electronic pager was linked to drug transactions.[79] Recognizing the officer's need to preserve evidence, the court found the search and retrieval of the pager's contents were valid and reasonable as a search incident to arrest.[80]

Courts in the past have struggled to determine if a cell phone should be classified as a container for the purposes of a search incident to arrest.[81] In *United States v. Finley*,[82] officers arrested and searched appellant and seized a cell phone from his pocket.[83] The cell phone was primarily used as a work phone, and the government argued that the appellant did not have a reasonable expectation of privacy in the cell phone because it was given to him by his business.[84] The court determined that while the appellant had a reasonable expectation of privacy in his cell phone, the search itself was reasonable and valid as a search incident to arrest.[85] In this case, the court determined the cell phone was analogous to a container that could be reasonably searched because it was on the arrestee's person and incident to the lawful arrest.[86]

State v. Smith[87] saw a shift away from classifying cell phones as

writing Fourth Amendment).

77. 84 F.3d 977 (7th Cir. 1996); *see also* Knott, *supra* note 71, at 449 (identifying *Ortiz* as case dealing with search incident to arrest of electronic device).

78. *See Ortiz*, 84 F.3d at 983 (explaining seizure and subsequent search of electronic pager).

79. *See id*. at 983-84 (describing search of pager as connected to reason for arrest).

80. *See id.* at 984 (recognizing need to preserve evidence as justification for search incident to arrest). Here, the pager was connected to the reason for arrest, and the officer searched it incident to the arrest. *See id.*; *see also* United States v. Chan, 830 F. Supp. 531, 535 (N.D. Cal. 1993) (explaining retrieval of numbers in pager constitutes search incident to arrest).

81. *See* Knott, *supra* note 71, at 449-51 (discussing how courts reason whether cell phone classified as container or not). Prior to the Supreme Court's ruling on the issue of whether cell phones may be searched incident to arrest, circuit and state courts provided different justifications for allowing it or not. *See id.*; Warfield, *supra* note 19, at 175 (recognizing struggle to uniformly classify privacy rights in cell phones).

82. 477 F.3d 250 (5th Cir. 2007).

83. *See id.* at 254 (describing search and seizure of appellant's cell phone). A Drug Enforcement Administration special agent searched through the cell phone's call records and text messages and found messages that referenced possible distribution of illegal substances. *See id.*

84. *See id.* at 258 (explaining government's argument of no expectation of privacy). The court rejected this argument, saying that despite being a business phone, the appellant still had an expectation of privacy as a possessor of the phone. *See id*. at 258-59.

85. *See id.* at 259 (explaining court's recognition of expectation of privacy in cell phone). The court concluded that the search was incident to arrest because the officer searched the phone in an attempt to preserve evidence. *See id.* at 259-60.

86. *See Finley*, 477 F.3d at 260 (describing justification for cell phone as container and search incident to arrest); *see also* Engel, *supra* note 72, at 254-55 (defining cell phone as searchable incident to arrest).

87. 920 N.E.2d 949 (Ohio 2009).

containers.[88] Officers arrested the appellant and seized a cell phone from his person during the arrest.[89] The court recognized that it is difficult to properly classify a cell phone and that the Supreme Court had not yet ruled on the issue of warrantless cell phone searches.[90] While acknowledging that other courts have classified electronic devices as closed containers, the court in *Smith* noted that the definition of container in *Belton* seems to only encompass those objects that can hold a physical object within themselves.[91] Thus, the court held a cell phone is not a closed container.[92]

Today, courts recognize that the Fourth Amendment serves to protect an individual's reasonable expectation of privacy, and thus, as a part of its analysis, the *Smith* court considered whether the arrestee had a reasonable expectation of privacy in his cell phone at the time of his arrest.[93] The *Smith* court additionally concluded there was no evidence to validate either of the two justifications for the search-incident-to-arrest exception because there was neither a threat to officer safety nor a threat of destruction of evidence once the cell phone was in the officer's possession following arrest.[94]

88. *See* Engel, *supra* note 72, at 261 (recognizing *Smith* as shift away from container doctrine).

89. *See Smith*, 920 N.E.2d at 950 (describing search and seizure of appellant's cell phone). The officer put the cell phone in his pocket, placed the arrestee in the police car, and searched the scene for evidence. *See id.* After the arrestee was secure in the police vehicle, the officer searched the cell phone, discovering call records and phone numbers. *See id.*

90. *See id.* at 952 (declaring classifying cell phone as first step in determining validity of warrantless search). The court recognized the Fifth Circuit's ruling in *Finley* that a cell phone is analogous to a closed container, which may be searched if found on the arrestee's person. *See id.* at 953. The court also recognized, as other courts have, that cell phones can store vast amounts of private information; thus, the privacy interest in a cell phone is significantly different than the interest in a pager or address book. *See id.*

91. *See id.* at 954 (explaining *Belton*'s container definition as object encompassing another physical object). While a cell phone does store information, it arguably does not enclose another physical object. *See id.*

92. *See id.* (reasoning information stored in cell phone unlike objects found in closed containers); *see also* Warfield, *supra* note 19, at 188 (stating cell phones not containers). While the court determined that the search-incident-to-arrest exception does not apply to cell phones because cell phones are not containers, it also determined that there was no exigency under the circumstances to uphold the warrantless search. *See Smith*, 920 N.E.2d at 955.

93. *See* State v. Smith, 920 N.E.2d 949, 954-55 (Ohio 2009) (articulating potential privacy interest in cell phones). The court notes that cell phones are difficult to classify: While a cell phone is a phone, it has the capacity to contain a wide array of information and data, similar to a laptop computer. *See id.* at 955; *see also* Shields, *supra* note 8, § 2 (explaining interest in determining expectation of privacy). "If a person has a legitimate expectation of privacy with respect to a certain area, the reasonableness of a search depends on whether or not the State unreasonably invaded that protected interest." Shields, *supra* note 8, § 2. The courts examine several factors when attempting to determine whether the search unreasonably invades an individual's privacy. *See id*. These include "(1) the individual's interest, (2) the government's interest, (3) the necessity for the intrusion, and (4) the procedure used in conducting the search." *Id*.

94. *See Smith*, 920 N.E.2d at 955 (reasoning neither threat to officer safety nor imminent destruction present at time of arrest). The court concluded that,

> [B]ecause a cell phone is not a closed container, 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, an officer may not conduct a search of a cell phone's contents incident to a lawful arrest without first

2. Jurisdictions Split

Before the Supreme Court issued its decision on whether warrantless searches of cell phones are unreasonable, several state and circuit courts struggled with the decision, resulting in a split.[95] Three jurisdictions—the First Circuit, the State of Florida, and the State of Ohio—determined a warrant is required before a search of a cell phone could take place.[96] Prior to the Supreme Court's decision, there were nine jurisdictions in which a cell phone could be searched without a warrant.[97] These jurisdictional differences are presented in an interactive map, which illustrates the trend towards allowing warrantless searches of cell phones incident to arrest.[98] The federal circuit split alone, however, demonstrated that this issue was not completely resolved and required further consideration from our highest Court.[99]

Jurisdictions deeming cell phone searches invalid without a warrant look at the capacity of information provided in a modern cell phone as well as the owner's expectation of privacy in that information.[100] In *United States v. Wurie*,[101] police officers witnessed what they believed was a drug transaction.[102] The officers stopped and arrested the defendant for distributing crack cocaine.[103] While the defendant was at the police station, one of his cell

obtaining a warrant.

Id.; *see also* Brief of Amici Curiae Criminal Law Professors in Support of Petitioner Riley and Respondent Wurie at 2, Riley v. California, 134 S. Ct. 2473 (2014) (Nos. 13-132, 13-212), 2014 WL 931832, at *2 [hereinafter Amicus Brief] (arguing cell phone contains high risk of government intrusion).

95. *See* Matthew I. Lahana, Note, *Destined To Collide: Modern Protests and Warrantless Cell Phone Search Exceptions*, 22 S. CAL. REV. L. & SOC. JUST. 55, 61 (2012) (highlighting split in California and Ohio courts). The California Supreme Court has considered cell phones to be containers and therefore searchable incident to arrest, while the Ohio courts have determined that warrantless searches of cell phones are per se unreasonable. *See id*. at 61; Kashmir Hill, *Where Police Can & Can't Snoop Through Your Phone*, FORBES (July 31, 2013), http://www.forbes.com/sites/kashmirhill/2013/07/31/a-map-of-where-police-can-search-your-phone-when-they-arrest-you/, *archived at* http://perma.cc/TP7W-NU8Q (explaining lack of Supreme Court precedent through use of interactive map). The interactive map presents a visual display of the different conclusions of state and circuit courts, highlighting states which allow cell phone searches to occur without a warrant in red and states which require a warrant before a cell phone search is permitted in blue. *See* Hill, *supra*. The map also notes several states and circuits which have yet to set a precedent on the matter. *See id.*

96. *See* Hill, *supra* note 95 (pinpointing First Circuit, Florida, and Ohio as areas requiring warrant). *See generally* United States v. Wurie, 728 F.3d 1 (1st Cir. 2013), *aff'd sub nom.* Riley v. California, 134 S. Ct. 2473 (2014); Smallwood v. State, 113 So. 3d 724 (Fla. 2013); *Smith*, 920 N.E.2d 949.

97. *See* Hill, *supra* note 95 (highlighting nine areas not requiring warrant for cell phone search). Those areas include the Fourth, Fifth, Seventh, and Tenth circuits, as well as the states of Georgia, Alabama, Kansas, Colorado, and California. *See id.*

98. *See id.* (acknowledging trend towards cell phone searches valid without warrant).

99. *See id.* (noting circuit split).

100. *See* State v. Smith, 920 N.E.2d 949, 953 (Ohio 2009) (noting court's rationale behind warrant requirement).

101. 728 F.3d 1 (1st Cir. 2013), *aff'd sub nom.* Riley v. California, 134 S. Ct. 2473 (2014).

102. *See id*. at 2 (explaining officer's observation of defendant during drug transaction).

103. *See id*. (describing arrest and subsequent booking of defendant). The defendant had in his possession two cell phones, a set of keys, and cash at the time of his booking. *See id.*

phones received several calls from a number identified as "my house."[104] After determining the phone number of "my house" using the defendant's call log, the officers used the number to determine the associated address and name of the homeowner.[105] The officers obtained a warrant to search the apartment and seized several items from the apartment, including crack cocaine, a firearm, ammunition, marijuana, and drug paraphernalia.[106]

The court considered the Fourth Amendment jurisprudence in *Robinson*, *Gant*, and *Chimel* in its analysis.[107] Specifically, the court asked whether a warrantless search of data within a cell phone could ever be justified under *Chimel*.[108] The court speculated that there are different levels of invasiveness in cell phone searches, and here, the search of a call log was less invasive than a search of a cell phone's pictures or text messages.[109] The court nonetheless held that the search-incident-to arrest exception does not apply to this case and does not authorize the warrantless search of cell phone data.[110]

The court acknowledged that the exigent circumstances exception exists, but it was not invoked in this case.[111] Recognizing that a modern cell phone contains personal and private information, the court determined that "[a]llowing the police to search that data without a warrant any time they conduct a lawful arrest would . . . create 'a serious and recurring threat to the

104. *See id*. (noting officer's recognition of incoming cell phone calls). The cell phone was a flip phone, which had an external caller ID screen. *See id*. The officers were able to see that "my house" was calling, and five minutes later, the officers opened the phone and looked through the defendant's call log. *See id*.

105. *See Wurie*, 728 F.3d at 2 (explaining officer's use of phone number to determine "my house" address and owner).

106. *See id*. (describing officer's search and subsequent seizure of several items in the apartment).

107. *See* United States v. Wurie, 728 F.3d 1, 3-7 (1st Cir. 2013), *aff'd sub nom.* Riley v. California, 134 S. Ct. 2473 (2014) (explaining Fourth Amendment history).

108. *See id*. at 10 (asking whether warrantless search of cell phone data valid under *Chimel*). The court posited that while officer safety can be a concern generally when it comes to cell phones, such as if the defendant had a stun gun that looked like a cell phone, looking into the cell phone's *contents* cannot be rooted in any safety concern. *See id*. at 10. Although there could be an argument for the need to preserve evidence and protect against the destruction of data, the defendant did not have access to his phone at the time the officers were looking through his call log. *See id.* at 10-11. The court noted this factor "[w]eighed against the significant privacy implications inherent in cell phone data searches, [such that] we view such a slight and truly theoretical risk of evidence destruction as insufficient." *Id.* at 11.

109. *See id.* at 12-13 (noting different levels of invasiveness in cell phone searches). The court recognized that it could consider different levels of invasion when making a decision but doing so would create a fact-specific and subjective test. *See id.* Instead, the court noted the importance of a bright-line rule, which would govern all warrantless searches of cell phone data. *See id.*

110. *See id.* at 13 (explaining court's holding invalidating warrantless search of cell phone data). The court denied the existence of a "general evidence-gathering search" in search-incident-to-arrest jurisprudence. *See id.*

111. *See Wurie*, 728 F.3d. at 13 (recognizing exigent-circumstances exception allows warrantless search of cell phone if probable cause exists). The exception would apply if officers had "probable cause to believe that the phone contains evidence of a crime, as well as a compelling need to act quickly that makes it impracticable for them to obtain a warrant." *See id.* If this were the case, officers could conduct a warrantless search of cell phone data. *See id.*

privacy of countless individuals.'"[112]

The courts that determined a cell phone search is valid without a warrant considered the searches covered by the incident-to–arrest exception.[113] For example, in *United States v. Flores-Lopez*,[114] officers had reason to believe the defendant was a drug supplier.[115] An officer seized a cell phone from the defendant's person and two other cell phones from the trunk of his car.[116] The court recognized that the modern cell phone can contain and provide access to vast quantities of information.[117] Here, however, the officers were only trying to verify the name and number of the cell phone to connect it to the defendant.[118] The court determined this was an acceptable search incident to arrest, and thus, the search was valid.[119]

3. Legislative Involvement

Before the Supreme Court's involvement, one possible solution to this issue could have been to have individual state legislatures create laws regarding cell phone searches; one example of this occurred in California, which attempted to pass a bill that would require officers to obtain a search warrant before searching the contents of an arrestee's phone.[120] While this bill did not ultimately pass, it presents an interesting solution to the issue, which could have spurred other states to create legislation on the matter.[121] As this is a

112. *See id.* at 14 (quoting Arizona v. Gant, 556 U.S. 332, 345 (2009)); *see also* Smallwood v. State, 113 So. 3d 724, 740 (Fla. 2013) (holding warrantless search of cell phone data invalid). The court determined that the officers properly separated the cell phone from the defendant's person, but the search of the cell phone's data required a warrant and thus was not valid. *See Smallwood*, 113 So. 3d at 740. The court then analogized a warrantless search of cell phone data to a search of a home. *See id.* at 738. A warrant must be obtained before the cell phone's contents may be searched because of the amount of information contained within a cell phone. *See id.*; *see also* Greg Stohr, *Mobile-Phone Searches by Police Get Top U.S. Court Review*, BLOOMBERG (Jan. 18, 2014), http://www.bloomberg.com/news/2014-01-17/mobile-phone-searches-by-police-get-top-u-s-court-review.html, *archived at* https://perma.cc/GXM4-6ME6 (discussing pending Supreme Court review of *Wurie*).

113. *See* United States v. Murphy, 552 F.3d 405, 410 (4th Cir. 2009) (holding cell phone seized and searched incident to arrest).

114. 670 F.3d 803 (7th Cir. 2012).

115. *See id.* at 804 (noting officer's suspicion of defendant drug supplier). The officers were able to set up an undercover deal, which resulted in the defendant's arrest. *See id.*

116. *See id.* (explaining seizure of defendant's cell phones). An officer searched each cell phone for its telephone number and call history. *See id.*

117. *See id.* at 805 (analogizing modern cell phone to diary). The court further explains the potential for invasion of privacy in a search of a modern cell phone. *See id.* The level of intrusiveness in a search of a cell phone is possibly even greater than that of a typical container, based on the amount and kind of information it can store and distribute. *See id.*

118. *See Flores-Lopez*, 670 F.3d at 807 (explaining validity of checking for cell phone number). In doing so, the officer was determining whether the cell phone was relevant to the arrest and crime at issue. *See id.*

119. *See id.* (noting validity of search as incident to arrest).

120. *See* Amy Gahran, *California Bill Would Ban Warrantless Cell Phone Searches*, CNN (Sept. 21, 2011), http://www.cnn.com/2011/09/20/tech/mobile/california-phone-search-law/, *archived at* http://perma.cc/8HGQ-5SLA (explaining California State Legislature's plan for ban of cell phone searches).

121. *See id.* (discussing state interest in cell phone searches); *see also* Russell Cooper, Comment, *A*

nationwide problem, however, the constitutionality of cell phone searches and seizures is better suited for the Supreme Court.[122] Cell phones, with the capacity to store vast quantities of personal and private information, are much different from the footlocker or cigarette pack cases that formally came to the Supreme Court and are even distinguishable from other forms of technology that have surfaced in recent decades.[123] The modern smart phone must be examined knowing its owner has a sense and expectation of privacy in the phone's contents; the Supreme Court recently evaluated the matter in this regard.[124]

4. Supreme Court Involvement

In 2014, in *Riley v. California*,[125] the Supreme Court issued a decision consolidating two cases for appeal examining the issue of cell phone data searches.[126] In the first case, petitioner, David Riley, was arrested for possession of concealed and loaded firearms.[127] He was searched upon arrest and officers seized a smart phone that was on his person.[128] The officer retrieved information from the phone and noticed some words began with the gang-affiliated code "CK."[129] The officer took the phone to a detective who

Smarter Rule for Smarter Phones: Why SILA Does Not Protect Our Smartphones and Why the California Legislature Should, 44 MCGEORGE L. REV. 363, 364 (2013) (explaining Governor Jerry Brown's veto of proposed legislation). The Senate Bill would have prevented police officers from conducting a search of a cell phone without first obtaining a search warrant. *See* Cooper, *supra*, at 364. In a statement, Governor Brown explained, "This measure would overturn a California Supreme Court decision that held that police officers can lawfully search the cell phones of people who they arrest. Courts are better suited to resolve the complex and case specific issues relating to constitutional search-and-seizures protections." Orin Kerr, *Governor Brown Vetoes Bill on Searching Cell Phones Incident to Arrest*, VOLOKH CONSPIRACY (Oct. 10, 2011), http://www.volokh.com/2011/10/10/governor-brown-vetoes-bill-on-searching-cell-phones-incident-to-arrest/, *archived at* http://perma.cc/WAM4-DKRX (quoting Governor Brown); *see also* Lahana, *supra* note 95, at 67 (discussing Governor Brown's veto of bill).

122. *See* David Kravets, *Calif. Governor Veto Allows Warrantless Cellphone Searches*, WIRED (Oct. 10, 2011), http://www.wired.com/threatlevel/2011/10/warrantless-phone-searches/, *archived at* http://perma.cc/63PD-64S9 (explaining complexity of nationwide problem).

123. *See* Park, *supra* note 2, at 431 (emphasizing modern cell phone's sophisticated and vast capabilities).

124. Riley v. California, 134 S. Ct. 2473, 2494-95 (2014) (holding warrantless searches of cell phone data unconstitutional); Dee, *supra* note 2, at 1131 (explaining privacy concerns and capacities of modern cell phone).

125. 134 S. Ct. 2473 (2014).

126. *See id.* at 2480 ("[Addressing] whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested."). The opinion combines two cases, both involving searches of cell phones incident to arrest. *See id.* at 2480-81; Adam Liptak, *Major Ruling Shields Privacy of Cellphones*, N.Y. TIMES (June 25, 2014), http://www.nytimes.com/2014/06/26/us/supreme-court-cellphones-search-privacy.html?_r=0, *archived at* http://perma.cc/GXX4-6FQQ (describing Supreme Court holding).

127. *See Riley*, 134 S. Ct. at 2480 (describing facts of *Riley*).

128. *See id.* (explaining search incident to arrest). Officers also found items associated with the "Bloods" gang and believed Riley to be a member of that gang. *See id.*

129. *See id.* (inferring search of contents of phone included text messages and contacts list). The officer believed the "CK" before the words stood for "Crip Killers," slang for members of the Bloods gang. *See id.*

searched the contents of the phone for evidence of gang activity.[130] The second case decided in this recent opinion was *United States v. Wurie.*[131]

The Supreme Court found the warrantless searches of cell phone data unjustified and unconstitutional in both instances.[132] In its analysis, the Court used the rationales from *Chimel*, *Robinson*, and *Gant* before determining how the search-incident-to-arrest doctrine applies to a modern cell phone.[133] Recognizing both the qualitative and quantitative differences between a modern cell phone and an object on an arrestee's person, the Court determined that the privacy interests of the individual outweighed the government's concern for safety.[134]

III. ANALYSIS

Putting the recent opinion aside, there were several issues lower courts or legislatures could have addressed regarding searches and seizures of cell phones.[135] Examples of potential issues include the purpose and scope of the search-incident-to-arrest exception, the classification of a cell phone as a container, and the level of privacy interests in a cell phone.[136] Another interesting consideration relates to the scope and intrusiveness of the search itself.[137] A better understanding of the nature of a cell phone's capabilities will help courts unravel the recent opinion and determine on a case-specific basis whether the search of a cell phone and its contents is valid under the Fourth Amendment.[138]

130. *See id.* at 2480-81 (describing detective's search of cell phone's contents).

131. *See* Riley v. California, 134 S. Ct. 2473, 2481-82 (2014) (discussing context of *Wurie*); *see also supra* notes 101-12 (discussing *Wurie*).

132. *See Riley*, 134 S. Ct. at 2493 (holding warrant generally required before search of cell phone data).

133. *See id.* at 2484 (applying "[t]he search incident to arrest trilogy" to present issue).

134. *See id.* at 2489. "Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Id.* at 2488-89. The Court recognized that the data contained within the cell phone cannot be used as a weapon that would endanger an officer. *See id.* at 2485. While a cell phone may pose an immediate threat—perhaps if a razor blade is attached to the outside of the phone—"[o]nce an officer has secured a phone and eliminated any potential physical threats," data cannot cause harm to anyone. *See id.* The threat to officer safety, therefore, is a brief and easily identifiable threat. *See id.*

135. *See* Quinn & Allen, *supra* note 59, at 26 (commenting on issues court might address).

136. *See id.* (describing potential issues for Supreme Court to address).

137. *See* United States v. Wurie, 728 F.3d 1, 13 (1st Cir. 2013), *aff'd sub nom.* Riley v. California, 134 S. Ct. 2473 (2014) (suggesting search of cell phone's contents involve varying levels of intrusion). The court in *Wurie* determined that "the search of Wurie's call log was less invasive than a search of text messages, emails, or photographs." *See id.* Ultimately, the court decided that a bright-line rule was necessary for all warrantless cell phone data searches and that the degree of invasion should not be taken into account. *See id.* Justice Howard disagreed with the need for a bright-line rule. *See id.* at 21 (Howard, J., dissenting) (arguing for balanced application). Justice Howard compares a cell phone search to a regular body search and comments that "[a] frisk can lead to a strip search, which can lead to a cavity search, which can lead to x-ray scanning. But this parade of horribles has not come to pass because we have established the constitutional line, and conscientious law enforcement officers have largely adhered to it." *See id.*

138. *See* Quinn & Allen, *supra* note 59, at 27 (recognizing need for Justices to understand and appreciate

A. Cell Phone Classification

Modern cell phones, often called smart phones, go beyond the simple tasks of making and receiving phone calls.[139] Cell phones encompass a wide variety of necessities including: address books, calendars, text messages, email exchanges, pictures, social network applications, internet browsers and browsing history, credit card and banking information, and word-processing files.[140] It is difficult to determine whether a cell phone fits into the category of a container when compared to the definition the courts have provided.[141] In *Belton*, a container was defined as "any object capable of holding another object."[142] This definition encompasses objects that physically hold another object.[143] Courts were previously divided as to whether a cell phone is a container because of the physical component associated with the definition of container.[144]

The Supreme Court commented on whether or not a cell phone is a container for the purposes of cell phone searches.[145] This classification, however, was difficult because cell phones do not fit neatly into any one category.[146] Acknowledging that some federal courts have compared electronic devices to closed containers, the court in *Smith* instead held that a cell phone is not a closed container.[147] The Supreme Court followed *Smith* and ruled that a cell

technological capabilities of cell phones).

139. *See* Knott, *supra* note 71, at 454-55 (commenting on immense capabilities of cell phones).

140. *See id.* at 455 (describing cell phone capabilities). Information stored on the modern cell phone can be extremely private and personal—the very same information found in one's home or office. *See id.* at 456.

141. *See id.* at 459 (suggesting modern technology reaches beyond established categories of constitutional doctrine).

142. *See* New York v. Belton, 453 U.S. 454, 460 n.4 (1981) (defining container; abrogation did not impact definition), *abrogated by* Arizona v. Gant, 556 U.S. 332 (2009), *as recognized in* Davis v. United States, 131 S. Ct. 2419 (2011). The footnote lists examples of containers found in cars, which include "closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like." *See id.*

143. *See* Knott, *supra* note 71, at 457 (commenting on physical aspect of container definition). A cell phone arguably does not physically contain those pictures, messages, and emails that an arrestee has a privacy interest in; rather, a cell phone contains data. *See id.*

144. *See, e.g.*, United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007); United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996); State v. Smith, 920 N.E.2d 949, 952-53 (Ohio 2009) (demonstrating disagreement amongst courts on defining electronic devices as containers).

145. *See* Riley v. California, 134 S. Ct. 2473, 2491 (2014); *see also* Quinn & Allen, *supra* note 59, at 26 (suggesting Supreme Court should rule on container issue). The actual categorization of a cell phone as a container would not preclude cell phone searches from the search-incident-to-arrest exception, but having a defined categorization would be helpful for future cases. *See* Quinn & Allen, *supra* note 59, at 26.

146. *See* Zamani, *supra* note 71, at 171-72 (noting intricate aspects of cell phone capabilities). Many scholars try to compare modern cell phones to address books and files cabinets, but cell phones "contain information beyond the actual content of the file . . . [and have] the ability to access distant computers remotely from smart phones." *See id*. There is nothing quite analogous to a cell phone, and thus, it is difficult to categorize a cell phone as either a container or not a container. *See id.* at 172.

147. *See Smith*, 920 N.E.2d at 954 (holding cell phone not closed container for purposes of Fourth Amendment). Traditionally, containers have been defined as physical objects capable of holding other physical objects. *See id.* Here, the court recognized that cell phones fall outside this definition and noted that "[e]ven

phone is not a closed container; unlike a cigarette package, it does not physically hold another physical item.[148]

The question that naturally follows is: What are cell phones, if not containers?[149] The court attempted to answer this question in *Smith*, deciding that a cell phone should be categorized, simply, as a cell phone.[150] There are both physical and nonphysical differences between a cell phone and a conventional container.[151] Today's cell phones are different from a package of cigarettes, a footlocker, or a purse and should not be forced into those categories.[152] The privacy interest in one's cell phone goes beyond the privacy interest in one's purse, and a cell phone should not be treated as a purse or a computer.[153] By moving away from the categorization of a cell phone as a container, the courts can come to terms with what a cell phone is and the privacy interests a cell phone encompasses.[154] The court in *Smith* made the correct first step in moving away from the container classification, and the Supreme Court's recent ruling that a cell phone is not a container correctly follows that progression.[155]

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the more basic models of modern cell phones are capable of storing a wealth of digitized information wholly unlike any physical object found within a closed container." *See id.*

148. *See Riley*, 134 S. Ct. at 2491; *Smith*, 920 N.E.2d at 955 (distinguishing cell phones from address books). The storage capabilities of cell phones make them different from an address book, yet the basic purpose of the cell phone—to make and receive calls—distinguishes cell phones from a computer. *See Smith*, 920 N.E.2d at 955. The Supreme Court commented, "[t]reating a cell phone as a container whose contents may be searched incident to an arrest is a bit strained as an initial matter." *See Riley*, 134 S. Ct. at 2491 (acknowledging cell phone's capacity to store information elsewhere). External data capacities, such as "the cloud," make it difficult to classify a cell phone as a container because some data is not actually stored within the cell phone—it is held elsewhere. *See id*. Further, "[a] search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*." *Id.* at 2485.

149. *See* Warfield, *supra* note 19, at 190 (considering how best to classify cell phones).

150. *See* State v. Smith, 920 N.E.2d 949, 955 (Ohio 2009) (explaining difficulty in fitting cell phone into another category). Cell phones, like computers, can store and transfer information. *See id.* Like address books, cell phones contain personal contact information. *See id.* While cell phones and address books share some similarities, cell phones are first and foremost portable telephones and not address books or computers, and thus, it is difficult to determine what level of privacy cell phones should encompass as compared to other items. *See id.*

151. *See* Orso, *supra* note 25, at 204 (describing amount of information contained within cell phone). Cell phones are less like the cigarette box in *Robinson* and perhaps more similar to the footlocker in *Chadwick*, due to the large amount of information that cell phones can contain. *See id*. at 204-05.

152. *See* Riley v. California, 134 S. Ct. 2473, 2489 (2014) (arguing search of cell phone data not similar to search of physical items). In his opinion, Chief Justice Roberts made the analogy between searching data of a cell phone and searching physical objects found on a person to be "like saying a ride on horseback is materially indistinguishable from a flight to the moon." *See id*. at 2488.

153. *See* Park, *supra* note 2, at 472-73 (noting heightened expectation of privacy in cell phones). While the cell phone is similar to a footlocker or a computer in that it contains other information beyond the physical phone, "[t]he cell phone's ability to hold large amounts of private data gives its users a higher expectation of privacy in the information it contains." *Id*.

154. *See* Orso, *supra* note 25, at 209 (distinguishing cell phone "container" from purse or wallet "container").

155. *See Smith*, 920 N.E.2d at 954 (acknowledging factors taken into account when classifying cell phones); *see also Riley*, 134 S. Ct. at 2491 ("Treating a cell phone as a container . . . is a bit strained . . . .").

B. Evolving Expectations of Privacy

Although nothing in the Constitution directly states that individuals have an expectation of privacy in their persons or possessions, the Fourth Amendment's protection against unreasonable searches and seizures encompasses this expectation.[156] Courts have recognized this expectation of privacy in previous cases involving the search and seizure of personal possessions.[157] There is a legitimate concern with the invasion of privacy in a cell phone because of the vast amounts of information it contains.[158] In *Finley*, the court rightly concluded that the arrestee had a reasonable expectation of privacy in his cell phone, despite the phone being primarily used for business purposes.[159] Courts should make decisions in light of the recognition that an arrestee has an expectation of privacy in his cell phone.[160]

It is important to consider exactly how courts should factor in privacy interests in determining whether cell phone searches are valid under the Fourth Amendment.[161] Scholars have suggested that courts should consider the holder's expectation of privacy in the cell phone's contents as well as the scope of that privacy interest.[162] Following *Smith*, however, it is unlikely that a court

156. *See* Park, *supra* note 2, at 433 (suggesting Fourth Amendment includes expectation of privacy); *see also* Wolcott, *supra* note 7, at 849 (defining expectation of privacy implicit in Fourth Amendment).

157. *See* United States v. Chadwick, 433 U.S. 1, 13 (1977) (identifying expectation of privacy in footlocker), *abrogated by* California v. Acevedo, 500 U.S. 565 (1991). By searching the footlocker, the Court determined that the arrestee's "privacy interests in the contents of the footlocker were invaded," thus recognizing a privacy interest in a person's belongings. *See id.* at 16.

158. *See* State v. Smith, 920 N.E.2d 949, 954 (Ohio 2009) (acknowledging privacy concerns in cell phone searches). The court discusses the difference between smart phones and conventional phones, but notes that all modern cell phones have more than just phone calling capabilities. *See id.* It would be unduly burdensome for police officers to have to determine what "type" of cell phone they are dealing with before understanding if and at what level they are allowed to reach into the cell phone's contents. *See id.*

159. *See* United States v. Finley, 477 F.3d 250, 259 (5th Cir. 2007) (finding reasonable expectation of privacy in cell phone); Warfield, *supra* note 19, at 175 (discussing reasonable expectation of privacy in cell phones in *Finley*).

160. *See* Orso, *supra* note 25, at 224 (suggesting courts should consider privacy interests in cell phone search cases); *see also* Wolcott, *supra* note 7, at 849 (describing reasonable expectation of privacy in cell phones). An arrestee must have a reasonable and justifiable expectation of privacy in order to be afforded Fourth Amendment protection. *See* Wolcott, *supra* note 7, at 849. Historically, courts have struggled with determining whether arrestees have a reasonable and justifiable expectation of privacy in electronic devices and cell phones. *See* Warfield, *supra* note 19, at 175. More recently, however, courts have determined that individuals do have a reasonable expectation of privacy in such devices. *See id.*

161. *See* Wolcott, *supra* note 7, at 849 (explaining court's consideration of privacy interest in Fourth Amendment violation determination). Courts must decide how to first recognize a privacy interest and then how to apply that interest to the Fourth Amendment because the expectation of privacy is not explicitly mentioned in the Constitution. *See id.*

162. *See* Orso, *supra* note 25, at 187 (describing factors to consider when rationalizing privacy interest). Specifically, "it makes sense to consider (1) whether a phone's owner has a reasonable expectation of privacy in the general contents of a cellular phone, and (2) whether some information is the subject of a reasonable expectation of privacy while other information is not." *See id.* Most, if not all, people will likely have a reasonable expectation of privacy in their own cell phones. *See* Beutler, *supra* note 3, at 377 (describing increased concern for expectation of privacy in cell phones). The level of the expectation of privacy of

would ask officers to distinguish between the types of cell phones and the level of intrusion of information when conducting searches.[163] The Supreme Court acknowledged this difficult position in *Riley*, positing "[t]he need to effect the arrest, secure the scene, and tend to other pressing matters means that law enforcement officers may well not be able to turn their attention to a cell phone right away."[164] Using Justice Harlan's concurring opinion as a guideline, courts should consider specific cell phone use as opposed to the capabilities of cell phones as a whole when determining if a person has a reasonable expectation of privacy in his cell phone.[165]

The balance between the State's interest in officer safety and preservation of evidence and the individual's expectation of privacy should reflect the extent of information contained in a cell phone.[166] The First Circuit, in *Wurie*, noted this increased privacy interest and described the vast amount of personal information that can be stored on a cell phone.[167] Courts in the past have justified the warrantless searches of cell phone data by declaring the government's interest in the searches outweighed individuals' privacy interests; however, in light of the advancements of modern technology it may now be time for that balance to shift in the other direction.[168] Surely the privacy

different contents, however, may vary. *See* Orso, *supra* note 25, at 187; *see also Smith*, 920 N.E.2d at 954 (distinguishing types of cell phones). While the court in *Smith* acknowledges that cell phones come in a variety of types (smart, conventional, standard) and capabilities, it discourages the creation of a rule requiring officers to take note of the type and capabilities of the cell phone before deciding to conduct a search. *See Smith*, 920 N.E.2d at 954. Courts should consider both the expectation and scope of the privacy interest when balancing the state's interest in the search with the privacy interest of the individual. *See* Beutler, *supra* note 3, at 388-89 (distinguishing call log invasion from voicemail invasion of privacy). As technology develops and expands, the types of information we store on cell phones will likely expand as well. *See id.* at 389-90.

163. *See Smith*, 920 N.E.2d at 954 (explaining negative impact of officers' categorization of phones). It would be unduly burdensome to ask officers to differentiate between the types of phones when determining if they can conduct a valid search incident to arrest. *See id.*

164. *See* Riley v. California, 134 S. Ct. 2473, 2487 (2014) (suggesting difficultly in assessing phone's vulnerability immediately following arrest).

165. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (describing two-prong test regarding Fourth Amendment protection). Courts would need to find both that the individual has a subjective expectation of privacy and that the privacy interest is one that society recognizes as reasonable. *See id.* A cell phone and the information it contains seems to satisfy this test. *See* Corradi, *supra* note 40, at 958-59 (reasoning heightened expectation of privacy in cell phones). Modern cell phones contain similar information to computers, so courts should view the privacy interest in the same manner. *See id*.

166. *See* Beutler, *supra* note 3, at 386 (noting balance between privacy interest and government interest). The privacy interest may outweigh the government interest in officer safety and prevention of destruction of evidence under certain circumstances. *See id.* at 387. The privacy interest should be taken seriously in light of technological advances. *See id.* at 387-88.

167. *See* United States v. Wurie, 728 F.3d 1, 9 (1st Cir. 2013), *aff'd sub nom.* Riley v. California, 134 S. Ct. 2473 (2014) (addressing information stored in cell phones); *see also* Knott, *supra* note 71, at 447 (recognizing cell phones' ability to store vast amounts of data).

168. *See* Knott, *supra* note 71, at 447 (asking courts to shift analysis to reflect cell phone storage capabilities); *see also* Amicus Brief, *supra* note 94, at *3 (suggesting cell phone search incident to arrest harshly invades privacy). The *Chimel* principles do not take into account the vast amount of data found within a cell phone, and thus, courts should not fall back on these principles and declare a search of a cell phone valid

interest in one's cell phone can, today, outweigh the police interests in safety or preservation of evidence in some circumstances.[169]

C. Chimel *Principles*

Another issue the Court addressed in *Riley* was whether the search of a cell phone's contents is valid when examined under the *Chimel* principles.[170] While courts have used both the exigent-circumstances exception as well as the search-incident-to-arrest exception to justify searches of cell phones in the past, the Court reflected on what the scope of the exceptions specifically entails for deciding future cases.[171] Following *Gant*, it is clear that when a search is incident to arrest in the context of an automobile stop, the scope of what is "incident to arrest" and searchable has been significantly narrowed.[172] There should be no question as to whether the search meets this distance factor of the scope—if the cell phone is on the arrestee's person, it is surely within reaching distance and thus meets the scope standard.[173]

The two *Chimel* principles justify a search incident to arrest based on the need for officer safety and the preservation of evidence.[174] Looking first to the officer safety justification, it is fairly easy to discern whether a cell phone is a weapon.[175] The real crux of the argument, then, is that cell phones can be searched incident to arrest for fear of the destruction of evidence.[176] At first glance, this is a valid concern because most cell phones can be wiped clean of

as incident to arrest without also considering the owner's substantial privacy interest. *See* Amicus Brief, *supra* note 94, at *3.

169. See Amicus Brief, *supra* note 94, at *3 (commenting cell phones' risk of destruction of evidence on cell phone as minimal). If the government intrusion is high and the risk of lost evidence is low, then the warrantless search should not occur. *See id.*; Knott, *supra* note 71, at 447 (suggesting balance should shift).

170. *See* Riley v. California, 134 S. Ct. 2473, 2486 (2014) (addressing *Chimel* principles); *Wurie*, 728 F.3d at 10 (questioning cell phone search under *Chimel*); *see also* Beutler, *supra* note 3, at 379 (explaining two rationales from *Chimel*).

171. *See Riley*, 134 S. Ct. at 2486 (suggesting *Chimel* principles perhaps not satisfied); Knott, *supra* note 71, at 447 (positing search incident to arrest perhaps outdated). Instead of attempting to fit cell phones into a search-incident-to-arrest situation, courts should ask whether the doctrine and exceptions still apply to modern cell phones. *See* Knott, *supra* note 71, at 447.

172. *See* Arizona v. Gant, 556 U.S. 332, 351 (2009) (explaining holding in *Gant*). The scope was narrowed, such that a search is only incident to arrest if the arrestee is within reach of the object to be searched. *See id.*

173. *Cf.* Cooper, *supra* note 121, at 375-76 (describing property associated with arrestee's person). If the property is "immediately associated with the arrestee's person," then that scope fits into the rule. *See id.* at 375.

174. *See* Park, *supra* note 2, at 434-35 (describing *Chimel* principles).

175. *See* United States v. Wurie, 728 F.3d 1, 10 (1st Cir. 2013), *aff'd sub nom.* Riley v. California, 134 S. Ct. 2473 (2014) (opining not necessary to look in phone to promote officer safety). While a phone in a pocket may look like a gun or another weapon, once the phone is displayed it is unlikely to cause the arresting officer or passersby any harm. *See id.* An officer can tell fairly quickly whether or not a cell phone is inherently dangerous; any data contained within the cell phone is not likely to cause a threat to the officer. *See supra* note 134 (noting difference between cell phones and other concealed objects).

176. *See* Snyder, *supra* note 23, at 163 (explaining need to search phone for evidence of crime).

all data, which could extinguish important and necessary evidence.[177] There is not, however, always a true issue of exigency or need for immediate action, and thus, a search of a cell phone's contents may not be required at the time of arrest.[178] There are several precautions police officers can take to ensure data is saved if the phone will be later used for evidence, and thus, the preliminary search may not be necessary.[179] If the *Chimel* rationales do not point to a need for a search of the cell phone's contents, then perhaps the privacy interests should outweigh the search-incident-to-arrest exception.[180]

D. Going Forward

The Supreme Court's holding was not absolute and left some areas open for warrantless searches of cell phones.[181] The Court suggested that the exigent-circumstances exception may be better suited to cover scenarios where a warrantless cell phone search may be necessary.[182] When a cell phone is seized

177. *See Wurie*, 728 F.3d at 10-11 (highlighting fear of destruction of evidence). While evidence could be destroyed, it would be easy for officers to prevent this from happening once they separated the cell phone from its owner. *See id.* at 11. The court in *Wurie* notes several options for officers in this predicament: they can turn the phone off; they can remove the battery; they can put the phone in an enclosure; or they can copy the contents should the phone be wiped later. *See id. But see* Snyder, *supra* note 23, at 163 (reasoning officers may need cell phone data as evidence).

178. *See* Beutler, *supra* note 3, at 396 (stating extremely low probability exigency will occur from arrestee's data wipe during arrest); *see also* Snyder, *supra* note 23, at 174-75 (noting exigency dismissed once officer takes phone).

179. *See Wurie*, 728 F.3d at 11 (providing several examples of simple tactics to prevent evidence destruction); *see also* Amicus Brief, *supra* note 94, at *2 (suggesting officers should use Faraday envelopes or aluminum foil to protect evidence). A Faraday envelope is a container lined in aluminum to protect the phone from any external signals that could wipe the phone's data. *See* Amicus Brief, *supra* note 94, at *2.

180. *See Wurie*, 728 F.3d at 11 (suggesting privacy interests outweigh risk of evidence destruction). The state could serve the government interest in preventing the destruction of evidence by seizing but not searching cell phones. *See* Amicus Brief, *supra* note 94, at *2 (providing solution to prevention of destruction of evidence). Some argue that there is minimal—if any—government interest in actually searching through the contents of a cell phone if the threat of evidence destruction is limited using one of the techniques discussed above. *See id*. In balancing the government's interest in preserving evidence or officer safety with the individual's privacy interest, the latter seems to greatly outweigh the former. *See Wurie*, 728 F.3d at 11.

181. *See* Riley v. California, 134 S. Ct. 2473, 2494 (2014) (suggesting some searches justified as incident to arrest). While officer safety is not likely at issue with cell phone searches, the Court recognized and acknowledged "[t]o the extent dangers to arresting officers may be implicated in a particular way in a particular case, they are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances." *Id.* at 2486; *see also* Liptak, *supra* note 126 (addressing broader impact of *Riley* decision). Liptak suggests that this decision "almost certainly also applies to searches of tablet and laptop computers, and its reasoning may apply to searches of homes and businesses and of information held by third parties like phone companies." Liptak, *supra* note 126. It is likely that future cases will follow this bright-line approach in assessing the balance between privacy and government interest because the Court acknowledged the vast amount of information that could be stored on a phone as well as the privacy implications for a search without a warrant. *See id*.

182. *See Riley*, 134 S. Ct. at 2494 (suggesting exigent circumstances may require warrantless searches of cell phone data). "[E]ven though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone." *Id*.; *see also supra* notes 25, 111 (discussing exigent circumstances exception).

incident to arrest, however, the Court was clear: A warrant is required before a search may be conducted.[183]

By acknowledging the competing privacy and governmental interests, the Court successfully restored equilibrium on the matter.[184] "Privacy comes at a cost," and the Court's ruling will have an impact on the ability of law enforcement to effectively and efficiently combat crime.[185] While this cost favors privacy, the outcome of the Court's decision has the potential to create problems in the future.[186]

Finally, there is still a question of whether the courts are the best-suited entity to rule on these privacy concerns.[187] Some believe that the legislature is better equipped to respond to this complex issue.[188] Justice Alito notes that in the coming years, "the nature of the electronic devices that ordinary Americans carry on their persons [will] continue to change."[189] With changes likely in the future, perhaps it makes sense for Congress or state legislatures to enact legislation on cell phone searches and seizures in light of all the privacy considerations and law enforcement demands.[190]

183. *See Riley*, 134 S. Ct. at 2493 (holding warrant required before search of cell phone). The Court did not say that cell phone data is always immune from a search; rather a warrant is required unless exigent circumstances apply. *See id.*

184. *See id*. (explaining balance between privacy and law enforcement operations). The Court acknowledges "[t]he fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." *See id.* at 2488.

185. *See id.* at 2493 (acknowledging decision's impact on law enforcement). "Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals." *Id.* Justice Alito agrees in his concurring opinion that cell phones by their very nature contain highly personal information, requiring "a new balancing of law enforcement and privacy interests." *See id*. at 2496-97 (Alito, J., concurring in part and concurring in the judgment).

186. *See id.* at 2497 (Alito, J., concurring in part and concurring in the judgment) (calling decision anomaly). Justice Alito's hesitance stems from fear of a broad holding. *See id*. He provides an example of a potentially troubling problem: In a situation where two individuals, one with a cell phone call log showing an incriminating number and the other with his phone bill listing the same incriminating number, both are arrested, the suspect's phone bill may be seized without a warrant but the suspect's cell phone may not. *See id*. Potentially valuable and important information may remain hidden. *See id*. Justice Alito contends that this approach, while broad and potentially troublesome, seems to be the only option at this time; there are no other workable alternatives in Justice Alito's mind. *See id*.

187. *See* Riley v. California, 134 S. Ct. 2473, 2497 (2014) (Alito, J., concurring in part and concurring in the judgment) (asking whether legislative involvement more favorable than judicial involvement).

188. *See* Kerr, *supra* note 121 (noting legislature's ability to better assess facts). Legislatures are not bound by precedent and can act quickly to reflect the changes and expansions in technology. *See id*.

189. *See Riley*, 134 S. Ct. at 2497 (Alito, J., concurring in part and concurring in the judgment) (commenting on likelihood of technological advances in future years).

190. *See id.* (suggesting legislative involvement may provide clarity). Justice Alito mentions electronic surveillance as an example of a privacy concern that benefitted from legislative regulation. *See id*. Justice Alito posits:

> [i]n light of these developments, it would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment. Legislatures, elected by the people, are in a better position than we are to assess and

IV. CONCLUSION

The Fourth Amendment protects individuals from unreasonable searches and seizures. Embedded within this right is an implied right to privacy. The balance between the individual's right to privacy and the government's interest in protecting officer safety, as well as preservation of evidence, vis-à-vis warrantless searches and seizures, has changed as the modern cell phone has expanded its technological capabilities. The Supreme Court successfully reconsidered if a cell phone is a traditional container; if a cell phone can be searched incident to arrest; and if the privacy interests behind today's cell phones outweigh the warrantless-search expectations. In doing so, the Court restored the balance between privacy and safety, acknowledging that privacy rights in data contained within one's cell phone are not diminished, but rather protected.

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respond to the changes that have already occurred and those that almost certainly will take place in the future.

Id. at 2497-98. The uncertainty of cell phone usage and technological advances suggest that perhaps the legislatures should pass legislation detailing when a cell phone may be seized and searched without a warrant and the scope of an officer's search when they do so. *See id*.