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An Unreasonable Expectation? Warrantless Searches of Cell Phones

I. INTRODUCTION

Nick was speeding down the road going 38 mph, traveling in a 30 mph zone, when he saw the familiar red and blue of a police officer's lights in his rearview mirror. Irritated by the delay, Nick pulled over. When Officer Jacobs walked up, he asked to see Nick's license and registration. Obediently, Nick handed over the requested documents, not realizing his license was expired. Officer Jacobs looked at Nick's license and muttered under his breath something about "scofflaw," and asked Nick to step out of the car. Telling Nick that he was under arrest, Jacobs handcuffed Nick and read him the familiar Miranda rights. Officer Jacobs then proceeded to search Nick incident-to-arrest. When Officer Jacobs found Nick's cell phone, he opened the pictures gallery. In the file, Officer Jacobs saw legal, nude pictures of Nick and his girlfriend together in various sexual positions.

Later, after taking Nick in to be booked, Officer Jacobs shared the pictures with Sergeant Brandon. Sergeant Brandon proceeded to share the pictures with additional officers at the station. Eventually Brandon and the other officers shared the pictures with various members of the public, knowing that Nick intended to keep the pictures private. Because of the publicity of the pictures, Nick lost his job, broke up with his girlfriend, and was publically humiliated.¹

This story demonstrates the dangers of the government having the power to search a cell phone without a warrant. Cell phones today have nearly the capabilities of a personal computer.² A survey last year revealed that 88% of adults in the United States own a cell phone, and 55% of all adult cell phone owners use their phones for

1. These facts were based on *Newhard v. Borders*, 649 F. Supp. 2d 440 (W.D. Va. 2009).

2. See Sam Biddle, *The iPhone 5 is More Powerful than the Fastest PowerBook Ever Made*, GIZMODO (Sept. 17, 2012), <http://gizmodo.com/5943988/the-iphone-5-is-more-powerful-than-the-fastest-powerbook-ever-made> (stating that the iPhone 5 is more powerful than the 2005 model Powerbook, a discontinued line of Apple laptop computers).

Internet or email.³ The amount and type of information that can be stored on a cell phone includes “phonebook information, appointment calendars, text messages, call logs, photographs, audio and video recordings, web browsing history, electronic documents and user location information,”⁴ and more. One court noted that in order to carry the same amount of personal information contained in cell phones today, a person would need to carry with them “one or more large suitcases, if not file cabinets.”⁵ Because most of this information is of a personal or business nature, it is not surprising that people expect privacy in their cell phones and the information contained on them.

The widespread use of cell phones is a relatively recent phenomenon,⁶ and courts have struggled to fit them into existing Fourth Amendment jurisprudence. In particular, the courts have not reached a consensus regarding the legality of warrantless cell phone searches incident-to-arrest. The Supreme Court has yet to rule on the issue, and the Circuit courts are split.⁷ Additionally, scholars have also failed to come to a consensus.⁸ With the vast majority of adults using cell phones, the United States Supreme Court needs to rule on the important issue of warrantless searches incident-to-arrest of cell phones. Part II of this paper addresses the history and justification of warrantless searches starting with *Katz v. United States*,⁹ and exceptions to the general warrant requirement in *Chimel*

3. Aaron Smith, *Cell Internet Use 2012*, PEW INTERNET (June 26, 2012), <http://pewinternet.org/Reports/2012/Cell-Internet-Use-2012/Main-Findings/Cell-Internet-Use.aspx>.

4. *Schlossberg v. Solesbee*, 844 F. Supp. 2d 1165, 1170 (D. Or. 2012).

5. *Id.* at 1169.

6. In 2000, only about 28.3% of U.S. adults reported owning their own cell phone. PETER TUCKEL & HARRY O'NEILL, OWNERSHIP AND USAGE PATTERNS OF CELL PHONES: 2000–2005, available at <http://www.amstat.org/sections/srms/proceedings/y2005/Files/JSM2005-000345.pdf>.

7. For a list of cases upholding cell phone searches incident-to-arrest, see Adam M. Gershowitz, *Password Protected? Can a Password Save Your Cell Phone from a Search Incident to Arrest?*, 96 IOWA L. REV. 1125, 1137 n.66 (2011). And, for a list of cases rejecting warrantless cell phone searches incident-to-arrest, see *id.* at 1139 n.76. As can be seen from these lists, and as will be shown in this paper, the courts do not always agree on this issue, even within a single circuit.

8. 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*, 2012 FED. CTS. L. REV. 38.

9. 389 U.S. 347 (1967).

*v. California*¹⁰ and *Arizona v. Gant*.¹¹ Part III of this paper examines the array of approaches taken by the various courts that have addressed this issue, with emphasis on the reasons and justifications given by the various courts. Part IV explains that because the courts have failed to fully appreciate the extensive role cell phones play in modern society and the attendant expectation of privacy, existing jurisprudence fails to appropriately address cell phone searches incident-to-arrest. Section V presents two possible theories under which the Supreme Court could settle the uncertain law regarding warrantless cell phone searches incident-to-arrest. As will be explained more fully below, the Court could extend its *Arizona v. Gant* decision, allowing cell phone searches incident-to-arrest *only* for evidence relating to the crime of arrest. Alternatively, the Court could require a warrant for essentially all cell phone searches, recognizing the high expectation of privacy inherent in cell phones.

II. SEARCH INCIDENT-TO-ARREST: LEGAL JUSTIFICATIONS AND EXCEPTIONS

The Supreme Court has famously stated: “the Fourth Amendment protects people, not places.”¹² This important principle is often lost in the maze of exceptions to the warrant requirement of the Fourth Amendment. In relation to cell phone searches, two exceptions to the rule against warrantless searches stand out. First, the search incident-to-arrest exception, which allows law enforcement to search a person at the time of arrest, has been exploited by the courts to allow warrantless searches of cell phones incident-to-arrest, exposing the personal, private information in a cell phone. Second, the automobile exception, which allows law enforcement to warrantlessly search a vehicle in certain situations, has also been used as a loophole permitting the government to warrantlessly search a cell phone. This section presents the foundational Fourth Amendment case of *Katz v. United States* and then examines the origins and rationales behind the two exceptions to the general proscription of warrantless searches presented above.

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

11. 556 U.S. 332 (2008).

12. *Katz*, 389 U.S. at 351.

A. Reasonable Expectation of Privacy: Katz

In the landmark case of *Katz v. United States*, the Court recognized that what a person seeks to keep private could be protected by the Constitution, even if the person is in public.¹³ The Court also recognized that modern technology had begun to change societal expectations of privacy. In *Katz*, the government warrantlessly placed a listening and recording device on the outside of a public telephone booth.¹⁴ Even though the government agents exercised restraint in the use of the device, listening only to conversations made by the suspect and not by other members of the public, the court still found the warrantless intrusion prohibited by the Fourth Amendment.¹⁵ The Court reasoned that if the Constitution were read so narrowly as to protect conversations on the telephone only when they are made on a private phone, this would “ignore the vital role that the public telephone has come to play in private communication.”¹⁶ While public telephone booths do not play quite the vital role in private communication now that they once did, this still shows that the Court recognized that as technology changed, so did the public’s perception of what was a reasonable expectation of privacy.

Generally, “a search conducted without a warrant issued upon probable cause is ‘per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.’”¹⁷ The *Katz* Court attempted to set out the test to determine when a search is reasonable. In Justice Harlan’s concurrence, he distilled a rule out of the majority opinion’s reasoning. In what has later become recognized as the de facto test, Justice Harlan noted that the majority decision’s rule comprised two parts: “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.’”¹⁸ Unfortunately, all too often courts use the reasoning in *Katz* to justify a host of confusing exceptions to the warrant requirement, even if under the *Katz* test a person could reasonably expect privacy.

13. *Id.*

14. *Id.* at 348.

15. *Id.* at 359.

16. *Id.* at 352.

17. *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (citing *Katz*, 389 U.S. at 357).

18. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

B. Chimel v. California and the Search Incident-to-Arrest Exception

The most widely used justification for searching cell phones is the search incident-to-arrest exception. When analyzing the search incident-to-arrest exception courts often have had to decide whether police can search items in the arrestee's possession, like luggage, purses, and other containers. Today, courts attempt to analogize these types of containers to cell phones to justify a cell phone search incident-to-arrest. It was in *Chimel v. California* that the justifications for warrantless searches incident-to-arrest really took form.¹⁹ The Court held that it is reasonable to search a person incident-to-arrest in order to remove weapons that could threaten the safety of the arresting officers and to secure destructible evidence.²⁰ The area that an officer can search according to *Chimel* includes both the "arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."²¹

Preventing violence against officers making arrests is an important public policy. Police face a considerable amount of danger every day; it makes sense to take any reasonable precaution to prevent further danger, without violating constitutional principles. Similarly, it is reasonable to prevent the destruction of evidence. When arresting a suspect, it is likely that the suspect will try to destroy any incriminating evidence. Public policy also dictates that reasonable, constitutional steps be taken to prevent this destruction of evidence. However, the rationales used to establish the search incident-to-arrest exception in *Chimel* suggest an implicit limitation. If the suspect cannot access a weapon or evidence, he cannot use the weapon to harm others and cannot destroy evidence. Any further search should require a search warrant.²²

Initially, *Chimel*'s rationales seemed to provide clear limits on the search incident-to-arrest exception. However, later courts found it difficult to define the appropriate parameters of what constitutes a proper search incident-to-arrest, especially when it came to evidence.

19. *Chimel v. California*, 395 U.S. 752 (1969). It is worth noting that the search incident-to-arrest exception first started taking form in dicta in 1914 in *Weeks v. United States*, 232 U.S. 383, 392 (1914).

20. *Chimel*, 395 U.S. at 768.

21. *Id.* at 763.

22. *Id.*

One important case that attempted to clarify the extent of a search incident-to-arrest after *Chimel* was *United States v. Robinson*.²³

In *Robinson*, an officer performed a routine traffic stop and had probable cause to arrest the driver.²⁴ When the officer arrested the driver, he also made a search incident-to-arrest of the driver's person, discovering a crumpled up cigarette package.²⁵ When the officer felt the package, he could tell there was something other than cigarettes inside, so he opened the package, finding heroin.²⁶ Even though the officer had no reason to believe that the package was a weapon, or that the driver was destroying evidence,²⁷ the Supreme Court held that a lawful arrest "establishes the authority to search" and that during a lawful arrest "a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search."²⁸

The Court was especially unwilling to second-guess the officer's actions in performing the search.²⁹ The Court reasoned that an officer's authority to perform the search did not "depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect."³⁰ Ultimately, the Court found that because the officer found the package while conducting a lawful search, he was entitled to search the package and seize the evidence contained inside.³¹ With this broad holding, the Court radically expanded the power of the police to search without a warrant beyond the rationales originally offered in *Chimel*.

In subsequent years, the Supreme Court and lower courts have further broadened the contours of the *Chimel* rule. In *New York v. Belton*, the Court held that police could search any container (open or closed) within reach of the arrestee,³² defining an open container as

23. 414 U.S. 218 (1973).

24. *Id.* at 221.

25. *Id.* at 223.

26. *Id.*

27. *Id.* at 251-52.

28. *Id.* at 235.

29. *Id.*

30. *Id.*

31. *Id.* at 235-36.

32. *New York v. Belton*, 453 U.S. 454, 461 (1981).

“any object capable of holding another object.”³³ In *United States v. Edwards*, the Court held that clothing could be seized and tested for evidence.³⁴ Other courts have allowed, incident-to-arrest, the government to search wallets,³⁵ an address book,³⁶ hand-held luggage,³⁷ and a woman’s purse.³⁸ From these cases, it seems that almost anything a person may carry on them capable of holding or concealing something, may be searched incident-to-arrest.³⁹ It appears that Justice Powell was correct when he said, “an individual lawfully subjected to a custodial arrest retains *no* significant Fourth Amendment interest in the privacy of his person.”⁴⁰

The problem is that the Supreme Court has found it necessary to redefine what constitutes a lawful search incident-to-arrest many times, carving out categories and exceptions, leaving many questions unanswered, and leaving lower courts to make inapt comparisons. For example, courts often compare a cell phone to a closed container. However, as will be shown below, this is not a good comparison and is an alarming infringement on a person’s reasonable expectation of privacy.

C. The Automobile Exception: Gant

Closely related to the search incident-to-arrest exception is the automobile exception. Police often use the automobile exception as an excuse to warrantlessly search cell phones. The automobile exception allows a warrantless search of a vehicle incident-to-arrest.⁴¹

In the seminal case of *Arizona v. Gant*, police arrested the defendant for driving on a suspended license.⁴² After handcuffing

33. *Id.* at 460 n.4.

34. *United States v. Edwards*, 415 U.S. 800, 804 (1974).

35. *United States v. Sheehan*, 583 F.2d 30, 32 (1st Cir. 1978).

36. *United States v. Rodriguez*, 995 F.2d 776, 778 (7th Cir. 1993).

37. *United States v. Garcia*, 605 F.2d 349, 355 (7th Cir. 1979).

38. *United States v. Moreno*, 569 F.2d 1049, 1052 (9th Cir. 1978).

39. This is especially true if the court finds that the item the person is carrying is associated with the body of the person. *See United States v. Chadwick*, 433 U.S. 1, 15 (1977) (a delayed warrantless search of a person, including property “immediately associated with the person of the arrestee,” at the time of arrest is valid).

40. *United States v. Robinson*, 414 U.S. 218, 237 (1973) (Powell, J., concurring) (emphasis added).

41. *See Arizona v. Gant*, 556 U.S. 332 (2009).

42. *Id.* at 335.

the defendant and securing him in the back of the patrol car, the police conducted a search of the defendant's car and discovered cocaine in the pocket of a jacket in the backseat.⁴³ The Court held that in order for a warrantless search of an automobile incident-to-arrest to be lawful, the arrestee must either be "within reaching distance of the passenger compartment at the time of the search" or the police must reasonably believe that the passenger compartment contains evidence of the offense for which the arrest is being made.⁴⁴

The first half of *Gant's* approach is in line with *Chimel*. If the arrestee has access to the car at the time the search is performed, then it is reasonable to assume that the arrestee might attempt to access a weapon (endangering the officers), or access some other evidence (so he can destroy it). The second justification provided in *Gant*—requiring reasonable suspicion that evidence will be found relating to the crime *even when* the arrestee does not have access to the car—is also in agreement with *Chimel*. Because *Chimel* is concerned with lost evidence, it follows that if the police do not reasonably believe that there is evidence in the car, then there is no reason to allow a search; there is likely no evidence that can later be moved or destroyed.⁴⁵ This approach only allows an evidentiary search and not a search specifically for weapons. If the arrestee does not have access to the car, then it is unlikely that he will be able to retrieve a weapon from the car and attack the officers conducting the search.

Even when police do not immediately search a car incident-to-arrest, they may search the car later at the police station.⁴⁶ This rationale *might* fit into the safety reasoning in *Chimel*. It might not be safe to search a car at the location where the police arrest the driver and take possession of the car. So, although it strains *Chimel*, officer safety arguably requires the car to be searched at a later time and a safer location. However, the dissent in *Chambers v. Maroney*—

43. *Id.*

44. *Id.* at 351.

45. *See* *Carroll v. United States*, 267 U.S. 132 (1925) (explaining that a car may be searched without a warrant because a car is movable, and the contents might not be found if the police have to wait for a warrant. Even if the police have the driver in custody, a friend could come and drive away with the car and the evidence).

46. *Chambers v. Maroney*, 399 U.S. 42, 52 (1970) (explaining that there is "little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained").

unwilling to extend *Chimel* so far—points out that the facts that justify the search of the car will also usually justify the arrest of the driver.⁴⁷ If that is the case then the arrestee will suffer no further inconvenience if the police also detain his car while waiting for a search warrant.⁴⁸ Certainly, a warrantless search is a far greater intrusion than a temporary seizure.⁴⁹

We can see that the Court's reasoning may be overreaching when we consider how the Court has applied this same type of logic to luggage, but comes to the opposite conclusion.⁵⁰ The Court reasoned that once the police have exclusive control of luggage and "there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest."⁵¹ Perhaps the contradictory reasoning in the two decisions stems from the personal nature of luggage as compared to the less personal nature of cars. After all, the contents of luggage are not usually visible to the outside observer, and luggage often contains personal items such as toiletries, clothes, work product, and personal photos. The contents of cars are visible to the outside observer through the windows, and cars do not as often contain the personal items that luggage does.⁵²

When transporting luggage in a car, luggage loses its protection. Because an officer can conduct a warrantless search of a car (and any containers in the car that can hold the object of the search), an officer can also search a car when his probable cause extends only to the container itself.⁵³ So, if the police have probable cause to search your luggage, and you put your luggage in a car, the officer can search the luggage without obtaining a warrant. Consequently, in jurisdictions that compare cell phones to luggage or similar closed containers, when an officer wants to search your cell phone and you are in a car, the law often does little to protect the privacy of your cell phone.

47. *Id.* at 63–64 (Harlan, J., concurring in part and dissenting in part).

48. *Id.* at 64 (Harlan, J., concurring in part and dissenting in part).

49. If the driver is arrested, a search incident-to-arrest usually takes place, which would then fall under *Gant*.

50. *United States v. Chadwick*, 433 U.S. 1, 15 (1977) (citing *Preston v. United States*, 376 U.S. 364, 367 (1964)) ("[W]arrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest,' or no exigency exists.").

51. *Id.*

52. *See id.* at 12.

53. *See California v. Acevedo*, 500 U.S. 565 (1991).

III. JURISDICTIONS DIVIDED: WARRANTLESS CELL PHONE SEARCHES INCIDENT-TO-ARREST

Most courts find that a person has a reasonable expectation of privacy in their cell phone. However, when it comes to the legality of a warrantless government search of a cell phone incident-to-arrest, the courts are divided. Even among the jurisdictions that generally find that police need to obtain a warrant to search a cell phone, these jurisdictions often still outline a certain number of exceptions that would allow warrantless searches.

A. A Reasonable Expectation of Privacy in Cell Phones

If warrantless cell phone searches incident-to-arrest were judged solely on the basis of the *Katz* test, cell phones would likely receive a great deal of protection. Under the *Katz* test, most courts have found that individuals maintain a reasonable expectation of privacy with respect to their cell phones, and that this expectation is one that society is prepared to recognize as reasonable.

Courts have even found a reasonable expectation of privacy in employer-issued cell phones. In *United States v. Finley*, government agents warrantlessly searched a defendant's company-issued cell phone, finding evidence of drug trafficking in text messages on the cell phone.⁵⁴ The Fifth Circuit held that although the defendant's employer could read the text messages once the phone was returned to the employer, the defendant had a reasonable expectation to be free from intrusion from the government and the general public.⁵⁵ When people have cell phones for their personal use, they expect the use to be just that—personal.⁵⁶ Cell phone users may use text-messaging, email, or instant messaging from their cell phones so that people nearby cannot hear an otherwise audible conversation. One court noted that it is reasonable for a person to expect privacy in information contained in a cell phone, especially when much of information contained on a cell phone is not even available to the service provider.⁵⁷

54. *United States v. Finley*, 477 F.3d 250, 254 (5th Cir. 2007).

55. *Id.* at 259.

56. One court even stated that "it seems indisputable that a person has a subjective expectation of privacy in the contents of his or her cell phone." *United States v. Wurie*, 612 F. Supp. 2d 104, 109 (D. Mass. 2009), *rev'd*, No. 11-1792, 2013 WL 2129119, at *12 (1st Cir. May 17, 2013).

57. *United States v. James*, No. 1:06CR134 CDP, 2008 U.S. Dist. LEXIS 34864, at *10 (E.D. Mo. Apr. 29, 2008).

Privacy in a person's cell phone is also an expectation that society is prepared to recognize as reasonable. One court analogized text messages to traditional mail and email.⁵⁸ The court reasoned that because individuals maintain a reasonable expectation of privacy in the contents of traditional mail and in the contents of email, then text messages should be no different.⁵⁹ Society recognizes personal communications as private and maintains that expectation as technology advances. Like the telephone booth in 1967, today the cell phone plays a vital role in private communication. In fact, because of the way cell phones are used, and the information stored on them (like the pictures in the opening example), cell phones have become even more vital to private communication today than telephone booths were in 1967. If courts read the Constitution so narrowly as to protect communications on a cell phone only when they are made by a traditional voice call, and not when sent by digital message or Internet use, courts would be "ignor[ing] the vital role" cell phones have "come to play in private communication."⁶⁰ Therefore, if *Katz* were the only standard to judge cell phone searches, police would almost always have to get a warrant. However, in reality, cell phones usually lose their protection in the tangled mass of exceptions to the Fourth Amendment's warrant requirement.

B. Cell Phones Not Protected Incident-to-Arrest

Even though cell phone users have a reasonable expectation of privacy in their cell phones, courts have used the search incident-to-arrest exception as a loophole that has rendered cell phones essentially unprotected. Most often, courts analogize cell phones to closed containers, like the cigarette package in *Robinson*, allowing the search incident-to-arrest.⁶¹ Some courts take it a step further, categorizing cell phones as personal property associated with the arrestee's person, expanding both the time and the place of the cell phone search incident-to-arrest.⁶² Other courts allow warrantless

58. *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 905 (9th Cir. 2008), *rev'd on other grounds sub nom*, *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).

59. *Id.*

60. *Katz v. United States*, 389 U.S. 347, 352 (1967).

61. *See, e.g.*, *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007).

62. *See, e.g.*, *People v. Diaz*, 244 P.3d 501 (Cal. 2011).

cell phone searches because it is difficult to ascertain an individual cell phone's memory capability, and these courts fear that delay would result in a loss of valuable evidence.⁶³ Finally, some courts rely on *Gant*-style reasoning to allow warrantless cell phone searches, especially in the context of illegal drug arrests.⁶⁴

1. *The Finley closed container test*

In *United States v. Finley*, *supra*, the defendant tried to get the evidence found on his cell phone thrown out by arguing that because a cell phone is analogous to a closed container, the police could not search the phone's contents without a warrant.⁶⁵ The defendant relied on *Walter v. United States*, a case in which the search did not occur incident-to-arrest.⁶⁶ The *Finley* court explained that the *Walter* facts contained no evidence of an applicable exception to the warrant requirement.⁶⁷ The court further explained that the "permissible scope of a search incident to a lawful arrest extends to containers found on the arrestee's person."⁶⁸ The court further cited a case that allowed the search of a pager incident-to-arrest.⁶⁹ It seems the court found a pager sufficiently analogous to a cell phone to allow the search.

According to the *Finley* decision, when no currently recognized exception to the warrant requirement applies, cell phones are protected. However, when there is a warrant exception like search incident-to-arrest, police can freely search cell phones, despite the reasonable expectation of privacy. With the amount of information available on cell phones, such a ruling requires cell phone users to leave their cell phones at home (defeating the purpose of a cell phone), avoid arrest, or be prepared to open up their whole lives to the police. As long the police have a legitimate reason for arrest,

63. *See, e.g.*, *United States v. Young*, 278 F. App'x. 242 (4th Cir. 2008).

64. *See, e.g.*, *United States v. Quintana*, 594 F. Supp. 2d 1291 (M.D. Fla. 2008).

65. *Finley*, 477 F.3d at 260.

66. *Walter v. United States*, 447 U.S. 649 (1980). In *Walter*, the Supreme Court ruled unconstitutional a search where federal agents opened and searched a closed package delivered to the wrong address. *Id.* at 655.

67. *Finley*, 477 F.3d at 260.

68. *Id.*

69. *Id.* (citing *United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996), which held that a pager is sufficiently analogous to a closed container to justify the search incident-to-arrest.).

even a pre-textual reason,⁷⁰ they can search your cell phone⁷¹ with all of your private information.⁷²

2. Cell phones as personal property associated with the arrestee's person

Other courts have built on *Finley*, further distinguishing the closed container argument by categorizing cell phones as personal property associated with the arrestee's person. Such a categorization broadens police authority to search cell phones incident-to-arrest. In *People v. Diaz*, the California Supreme Court distinguished and categorized cell phones as personal property associated with the arrestee's person (analogous to the cigarette package in *Robinson*, or the clothes in *Edwards*), rather than an item merely in the area of the arrestee's immediate control (more like the luggage in *Chadwick*).⁷³ The U.S. Northern District of California also made this same distinction in *United States v. Hill*, finding a cell phone to be an element of a person's clothing.⁷⁴ Because these courts found cell phones to be personal property associated with the arrestee's person, they allowed cell phone searches as incident-to-arrest, even when the search was remote in time or place.⁷⁵

The *Diaz* court rejected the argument that because a cell phone can contain "quantities of personal data unrivaled by any conventional item of evidence traditionally considered to be 'immediately associated with the person of the arrestee,'" it should be exempt from search incident-to-arrest.⁷⁶ The *Diaz* court explained that the Supreme Court had previously rejected "the view

70. *See* *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

71. Generally, even locking your cell phone does not guarantee protection from a warrantless search. *See, e.g.*, Gershowitz, *supra* note 7.

72. Several other courts have followed *Finley* without taking much time to discuss the issue, apparently simply agreeing with the *Finley* holding. *See, e.g.*, *Silvan W. v. Briggs*, 309 F. App'x. 216 (10th Cir. 2009); *United States v. Salgado*, No. 1:09-CR-454-CAP-ECS-5, 2010 U.S. Dist. LEXIS 77266 (N.D. Ga. June 15, 2010); *United States v. Deans*, 549 F. Supp. 2d 1085 (D. Minn. 2008).

73. *People v. Diaz*, 244 P.3d 501, 505 (Cal. 2011).

74. *United States v. Hill*, No. CR 10-00261 JSW, 2011 U.S. Dist. LEXIS 4104, at *21 (N.D. Cal. Jan. 10, 2011).

75. *Diaz*, 244 P.3d at 505 (explaining that a "delayed warrantless search was a valid search incident to defendant's lawful custodial arrest" because the cell phone was personal property immediately associated with the defendant's person).

76. *Id.* at 506.

that the validity of a warrantless search depends on the character of the searched item.”⁷⁷ The court then went on to argue that making a rule based on the amount of information an item can hold is problematic, stating that it would be difficult for other courts to determine whether a particular item has enough storage space to warrant constitutional protection.⁷⁸ The court ultimately concluded that even if a cell phone is not a “container,” the real question is whether a cell phone is “property,” and that because a cell phone is “property” it is searchable incident-to-arrest.⁷⁹

Other courts have followed suit, comparing cell phones to other items that have very little in common with cell phones. In *United States v. Wurie*, the U.S. District of Massachusetts compared the information in a cell phone to a wallet, an arrestee’s pockets, hand-held luggage, and a purse.⁸⁰ In *United States v. Gomez*, the U.S. Southern District of Florida analogized a cell phone to a wallet, purse, briefcase, backpack or personal bag, address book or organizer, home closet, a person’s groin area, and even a person’s bicycle handlebar.⁸¹

3. *The unknown memory exception*

Other courts avoid the property distinction. At least one court has found that due to the unknown memory capabilities, exigent circumstances allowed the warrantless search. In 2008, the Fourth Circuit argued that because the police have “no way of knowing whether . . . text messages would automatically delete themselves or be preserved,” they may search a phone incident-to-arrest to preserve evidence.⁸² In 2009, the Fourth Circuit reaffirmed this analysis, and refused to distinguish between smartphones and other cell phones, saying it is unlikely that a policeman would be able judge the memory capacity of a cell phone by merely looking at it.⁸³

77. *Id.* at 507 (citing *United States v. Ross*, 456 U.S. 798, 825 (1982)).

78. *Id.* at 508.

79. *Id.* at 510.

80. *United States v. Wurie*, 612 F. Supp. 2d 104, 110 (D. Mass. 2009) *rev’d*, No. 11-1792, 2013 WL 2129119, at *12 (1st Cir. May 17, 2013).

81. *United States v. Gomez*, 807 F. Supp. 2d 1134, 1144 (S.D. Fla. 2011).

82. *United States v. Young*, 278 F. App’x 242, 245 (4th Cir. 2008).

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

4. *Gant*-style reasoning and the illegal drug test

Other courts have used the automobile exception reasoning to justify warrantless searches of cell phones. Courts in this category do not necessarily allow across-the-board cell phone searches incident-to-arrest, but they do allow broad enough searches that I have included this category with courts that generally allow warrantless cell phone searches.

In *United States v. Fierros-Alvarez*, during a routine inventory search, the police discovered a hidden compartment in the car that contained drugs.⁸⁴ The police then seized the defendant's cell phone, believing the cell phone was used to facilitate drug distribution, and performed a warrantless search.⁸⁵ The *Fierros-Alvarez* court concluded the search was permissible because the phone was in the car, and because cell phones are "recognized tools of the drug-dealing trade."⁸⁶ In *United States v. James*, the U.S. Eastern District of Missouri cited *Fierros-Alvarez* explaining that "[b]ecause probable cause existed to believe that evidence of a crime would be found in the cell phone call records and address book, the automobile exception allows the search of the cell phone just as it allows a search of other closed containers found in vehicles."⁸⁷ Both courts compared cell phones to containers, which left the door open for more invasive searches based on the search incident-to-arrest exception.⁸⁸ In *United States v. Quintana*, the U.S. Middle District of Florida used the reasoning in *James* and expressly allowed police to search a cell phone incident-to-arrest.⁸⁹ The reasoning in these decisions is reminiscent of *Gant*, even though all three decisions were decided a year before *Gant*.⁹⁰

84. *United States v. Fierros-Alvarez*, 547 F. Supp. 2d 1206, 1208 (D. Kan. 2008).

85. *Id.* at 1212.

86. *Id.* (citing *United States v. Lazcano-Villalobos*, 175 F.3d 838, 844 (10th Cir. 1999)).

87. *United States v. James*, No. 1:06CR134 CDP, 2008 U.S. Dist. LEXIS 34864, at *10-11 (E.D. Mo. Apr. 29, 2008).

88. The *James* court noted in dicta that search incident-to-arrest does not justify cell phone searches. *Id.* at *27 n.4. But, this language was simply dicta, and other courts have used the reasoning in *James* to justify cell phone searches incident-to-arrest.

89. *United States v. Quintana*, 594 F. Supp. 2d 1291, 1299 (M.D. Fla. 2009). However, the court suppressed the evidence from the cell phone because searching a cell phone incident-to-arrest to "preserve evidence is permissible only to secure evidence of the crime of arrest, not evidence of an unrelated crime." *Id.* at 1300.

90. It is interesting to note that in *Quintana*, the court recognized that *Gant* would soon be decided and actually quoted some of the oral argument from *Gant*. *Id.*

C. Warrantless Cell Phone Searches Generally Prohibited

A few courts do not allow search incident-to-arrest of cell phones. However, even among the courts that protect cell phones from warrantless searches, some exceptions still apply. In addition, there is disagreement among these courts regarding the rationale for prohibiting warrantless searches of cell phones. First, courts have found that cell phones are not personal property associated with the arrestee's person, but instead are possessions within the immediate control of the arrestee.⁹¹ Other courts have refused to compare cell phones to containers at all, reasoning that a container must be able to contain another physical object.⁹² Finally, some courts allow very limited cell phone searches incident-to-arrest, requiring a warrant for broader searches.⁹³

1. Cell phones as possessions within the immediate control of the arrestee

One of the most important cases disallowing warrantless searches of cell phones is *United States v. Park*. In *Park*, the police officers arrested the defendant, later seizing his phone.⁹⁴ While there is some confusion as to whether the phone was searched before or after booking, the phone was not searched until sometime after the arrest.⁹⁵ The U.S. Northern District of California disagreed with *Finley's* analysis and distinguished *Park*.⁹⁶ It found that "cellular phones should be considered 'possessions within an arrestee's immediate control' and not part of 'the person.'"⁹⁷ The court reasoned that this was because cell phones have "the capacity for storing immense amounts of private information."⁹⁸ Then the court distinguished cell phones from items such as address books and pagers, noting that unlike address books and pagers, cell phones can contain incoming and outgoing call records, address books,

91. *See, e.g.*, *United States v. Park*, No. CR 05-375 SI, 2007 U.S. Dist. LEXIS 40596 (N.D. Cal. May 23, 2007).

92. *See, e.g.*, *State v. Smith*, 920 N.E.2d 949 (Ohio 2009).

93. *See, e.g.*, *United States v. Flores-Lopez*, 670 F.3d 803, 806 (7th Cir. 2012).

94. *Park*, 2007 U.S. Dist. LEXIS 40596, at *4-5.

95. *Id.* at *10-11.

96. *Id.* at *21.

97. *Id.* (citing *United States v. Chadwick*, 433 U.S. 1, 16 n.10 (1977)).

98. *Id.* at *21.

calendar, email, video, pictures, and voice and text messages.⁹⁹ The court also found it important that “[i]ndividuals can store highly personal information on their cell phones, and can record their most private thoughts and conversations on their cell phones through email and text, voice and instant messages.”¹⁰⁰

Further, the court found that the search strayed from the original justifications in *Chimel* (safety and preventing destruction of evidence),¹⁰¹ and that instead the search was purely investigatory.¹⁰² The court did not consider cell phones sufficiently analogous to pagers to allow the search in order to prevent the destruction of evidence.¹⁰³ The court indicated that cell phone memories are different from pager memories, and that cell phones are not as susceptible to memory loss as are pagers.¹⁰⁴ The court also rejected the argument that a search of the cell phone was necessary for a routine booking search.¹⁰⁵ Because the purpose behind booking searches is to create an inventory of the arrestee’s possessions, it is sufficient merely to list the cell phone on the booking form.¹⁰⁶

2. Cell phones as a computer

Some courts analogize cell phones to computers, recognizing that they contain digital information.¹⁰⁷ In *State v. Smith*, the Ohio Supreme Court rejected the argument that a cell phone is analogous to a closed container, and held that a warrantless search incident-to-arrest of cell phones is unconstitutional because such a search is

99. *Id.* at *21–22.

100. *Id.* at *21.

101. *See* *United States v. McGhee*, No. 8:09CR31, 2009 U.S. Dist. LEXIS 62427, at *2 (D. Neb. July 21, 2009) (holding a warrantless cell phone search unconstitutional because, “[I]t was not reasonable for the officer to believe that [the] cell phone . . . would have information relating to crimes.” And, “[T]he phone did not present a risk of harm to officers or appear to be contraband or destructible evidence.”).

102. *Park*, 2007 U.S. Dist. LEXIS 40596, at *24.

103. *See id.* at *27.

104. *See id.*

105. *Id.* at *30–31.

106. *Id.* at *32.

107. *United States v. Flores-Lopez*, 670 F.3d 803, 804 (7th Cir. 2012) (explaining that “a modern cell phone is a computer”). Although the *Flores-Lopez* court goes on to find, mostly in dicta, that a cell phone could be searched incident-to-arrest, the point is still valid that courts compare cell phones to computers. The fact that a court could state that a cell phone is a computer and still allow it to be searched without a warrant shows how important it is that the Supreme Court weighs in on the debate.

unnecessary to ensure the safety of officers or prevent the destruction of evidence.¹⁰⁸ In rejecting the closed container argument the court argued that the “Supreme Court has stated that in this situation, ‘container’ means ‘any object capable of holding another object.’”¹⁰⁹ The *Smith* court concluded that this definition means that a container must hold another physical object, and digital data is not a physical object.¹¹⁰ The *Smith* court agreed with the analysis in *Park* that the immense amount of capacity for personal data available on cell phones heightens the privacy interest in cell phones.¹¹¹ The court also declined to create a rule that would require officers to discern the memory capabilities on a cell phone before searching a phone incident-to-arrest.¹¹² Instead, the court required a warrant because “[o]nce the cell phone is in police custody, the state has satisfied its immediate interest in collecting and preserving evidence and can take preventive steps to ensure that the data found on the phone are neither lost nor erased.”¹¹³

More recently, in *Schlossberg v. Solesbee*, the U.S. District Court of Oregon found the reasoning in *Park* and *Smith* to be persuasive and followed those cases. The *Schlossberg* court found the classification of cell phones as containers problematic:

Consideration of an electronic device as a “container” is problematic. Electronic devices do not store physical objects which are in plain view once the containers are opened. Moreover, the storage capability of an electronic device is not limited by physical size as a container is. In order to carry the same amount of personal information contained in many of today’s electronic devices in a container, a citizen would have to travel with one or more large suitcases, if not file cabinets.¹¹⁴

The court’s characterization may seem heavy-handed, but it is probably not far off the mark. For example, “[a] cell phone with just one gigabyte of memory can store over 64,000 pages of Microsoft Word text, or over 100,000 pages of e-mails, or over 675,000 pages

108. *State v. Smith*, 920 N.E.2d 949, 955 (Ohio 2009).

109. *Id.* at 954 (citing *New York v. Belton*, 453 U.S. 454, 460 n.4 (1981)).

110. *Id.*

111. *Id.* at 955 (rejecting analysis that finds modern cell phones to be analogous to address books and pagers).

112. *Id.* at 954.

113. *Id.* at 955.

114. *Schlossberg v. Solesbee*, 844 F. Supp. 2d 1165, 1169 (D. Or. 2012).

of text files.”¹¹⁵ Thus, considering that the iPhone 5 is offered with memory capabilities of 16 gigabytes, 32 gigabytes, and 64 gigabytes,¹¹⁶ it is hard to imagine how many suitcases or filing cabinets would contain the equivalent amount of information. Another court observed that:

An iPhone application called iCam allows you to access your home computer’s webcam so that you can survey the inside of your home while you’re a thousand miles away. At the touch of a button a cell phone search becomes a house search, and that is not a search of a “container” in any normal sense of that word, though a house contains data.¹¹⁷

The scope of a cell phone search can expand dramatically and easily at the touch of a screen.¹¹⁸ Indeed, it seems everything really has an “app for that.” With so many applications and immense storage capacities on cell phones, our personal lives are increasingly being stored on our phones. The *Schlossberg* court went on to reject the reasoning in *Finley*, saying that “any citizen committing even the most minor arrestable offense is at risk of having his or her most intimate information viewed by an arresting officer.”¹¹⁹

3. *The trivial information test*

Some courts generally require a warrant for cell phone searches, except for specific exceptions. First, some courts have allowed police to search cell phone address books and call lists incident-to-arrest, but require a warrant for more invasive searches. In *Quon v. Arch Wireless*, the court compared text messages and email to traditional letters.¹²⁰ The court protected the content of text messages and

115. MacLean, *supra* note 8, at 41.

116. *iPhone*, APPLE, <http://www.apple.com/iphone/compare/> (last visited Oct. 21, 2013).

117. *United States v. Flores-Lopez*, 670 F.3d 803, 806 (7th Cir. 2012) (citation omitted).

118. An entire home can be monitored and controlled from a cell phone. Best Buy offers a service, controlled through a laptop or a cell phone, that allows the user to “monitor your entire house and control your lights and appliances. . . . Check to make sure your doors are locked securely. If you notice the temperature changing back at home, adjust your thermostat accordingly.” *Monitor and Control Your Home While You’re on Vacation*, BEST BUY, <http://www.bestbuy.com/site/Appliances-Promotions/Control-Your-Home-From-Anywhere/pcmcat253800050004.c?id=pcmcat253800050004> (last visited Oct. 21, 2013).

119. *Schlossberg*, 844 F. Supp. 2d at 1169.

120. *Quon v. Arch Wireless Operating Co.* 529 F.3d 892, 905 (9th Cir. 2008), *rev’d on other grounds sub nom.* *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619 (2010).

emails found on cell phones, but not the addressing information (phone number, email address) used to address the email or text message.¹²¹ The Seventh Circuit, in *United States v. Flores-Lopez*, arrived at a similar result. The *Flores-Lopez* court allowed police to search a cell phone for its phone number, calling that information “trivial.”¹²² However, according to the Seventh Circuit, other information, such as the content of text messages, might be protected because it is similar to a traditional letter.¹²³ The court went on to speculate in dicta that a more thorough search of a cell phone might be possible to prevent destruction of evidence, but expressly refused to make a holding to that effect.¹²⁴

IV. CELL PHONES AS A “SECOND MIND”: A CASE FOR INCREASED PROTECTION OF CELL PHONES

The majority of courts in this country allow search incident-to-arrest of cell phones based on inapt comparisons and resulting in significant violations of privacy. This policy can easily lead to police conducting searches that open up almost every aspect of the suspect’s life, even if the arresting officer has no particular reason to believe that he will find destructible evidence on the phone. Those courts that do not allow police to search cell phones incident-to-arrest provide protection that is either too narrow in scope, does not give workable guidelines, or, in the alternative, allows unacceptable exceptions. All courts fail to recognize what role cell phones have come to play in our society and what cell phones mean to the individuals who use them. The amount of information that cell phones contain, and the associated privacy expectation, essentially renders cell phones a person’s second mind.¹²⁵

121. *Id.*

122. *Flores-Lopez*, 670 F.3d at 806–07.

123. *Id.* at 807.

124. *Id.* at 808–10. However, the court rejected the argument that lost data could be recovered in a lab because this would involve delay. *Id.* at 808.

125. Gershowitz argues that it does not make sense to argue that a phone cannot be associated with the person of an arrestee. Gershowitz, *supra* note 7, at 1160–61. Gershowitz states that “[i]t is difficult to comprehend how a cell phone that is literally attached to an arrestee’s arm could not be associated with the person of an arrestee.” *Id.* Gershowitz is right; cell phones are associated with the person of the arrestee. But, cell phones are associated with the person of the arrestee in a much more intimate way than Gershowitz envisions.

First, it is important to determine what cell phones are *not*. One of the most significant analytical mistakes courts make is comparing cell phones to containers. On the surface, comparing cell phones to traditional containers might make sense. It has been argued that cell phones contain information similar to information found in other, more traditional containers.¹²⁶ As mentioned above,¹²⁷ cell phones do not fit the category of traditional containers, or even come close to fitting the definition of containers as put forth by the Supreme Court in *Belton*.¹²⁸ Cell phones do not contain physical items,¹²⁹ and if they can be said to contain anything it is digital information. One author noted that:

[C]ell phones have a larger memory to store numbers and call logs, which seems to be the object of most of the police searches. But, with this increased memory, cell phones have greater capacity to store information, such as address books, pictures, and emails. These differences should make other courts take a hard look at the validity of the analogy or whether to apply the “container rule,” at all, to cell phones.¹³⁰

Even when courts do not compare cell phones to containers, the need to preserve evidence may still apply to cell phones.¹³¹ However, while it is generally true that some destructible evidence may be at risk, police officers can take steps to safeguard against this destruction without a warrantless search, as will be shown below.

The Supreme Court has always strongly protected the privacy of the home, and as noted above, a cell phone search can quickly become a home search by the touch of a screen.¹³² We now have the ability to carry our homes with us in our pockets. However, cell

126. Byron Kish, Comment, *Cellphone Searches: Works like a Computer, Protected like a Pager?*, 60 CATH. U. L. REV. 445, 466–67 (2011).

127. *Supra* notes 107–115 and accompanying text.

128. See *New York v. Belton*, 453 U.S. 454, 460, n.4 (1981) (defining an open container as “any object capable of holding another object”).

129. One author noted, “Cell phones may very well be—and often are—within their owner’s immediate reach, but they do not contain any of the objects that provide the basis for this justification,” referring to *Chimel* justifications (safety and preventing the destruction of evidence). Bryan A. Stillwagon, Note, *Bringing an End to Warrantless Cell Phone Searches*, 42 GA. L. REV. 1165, 1195 (2008).

130. J. Patrick Warfield, Note, *Putting a Square Peg in a Round Hold: The Search-Incident-to-Arrest Exception and Cellular Phones*, 34 AM. J. TRIAL ADVOC. 165, 185 (2010).

131. Kish, *supra* note 126.

132. *Supra* note 115 and accompanying text.

phones have the capacity to store far more than address books, pictures, and emails. Cell phones have become the organizer and depository of our lives. In some ways, the information kept on cell phones may be more private than that which we keep in our in our homes. Our cell phones have become a part of us in a much more intimate way than was envisioned by courts that categorize cell phones as personal property associated with the arrestee's person.

When the *Diaz* court rejected the argument that the amount of data on a cell phone should preclude search incident-to-arrest, the court argued that the Supreme Court stated that the character of the searched item does not matter when determining the validity of the search.¹³³ However, the court failed to recognize that because of the character of cell phones and the ability of cell phones to contain vast amounts of personal information has changed, the expectation of privacy has changed as well. It is not the character of the item that matters so much as the expectation of privacy. In the example that opened this paper, the pictures that got Nick in trouble were neither illegal nor something he would display in his home. They were personal, intimate pictures that he carried with him away from prying eyes. Before cell phones, people would not likely carry such pictures with them, or even keep them easily accessible within the home. More than likely, information this private would simply be a happy memory that you carried around in your mind. In this way, the information on cell phones can sometimes be more private than information in the home.

Comparing cell phones to other objects a person might carry with them is also problematic. Privacy interests in almost any object from previous case law are not comparable to the privacy interests present in cell phones. A wallet contains personal information, but not on the scale of what is in a cell phone.¹³⁴ The dissent in *Smith* would have found a cell phone search constitutional because the police merely searched the phone's address book.¹³⁵ Comparing an

133. *People v. Diaz*, 244 P.3d 501, 507 (Cal. 2011).

134. One article argues that information contained in a wallet contains a wealth of information, including where an arrestee banks, shops, medical conditions, pictures of children, and other more scandalous information. Gershowitz, *supra* note 7, at 1160. However, while this is a large amount of information, it pales in comparison to the amount of digital information that can be stored in cell phones.

135. *State v. Smith*, 920 N.E.2d 949, 957 (Ohio 2009) (Cupp, J., dissenting).

address book to a cell phone demonstrates a fundamental misunderstanding of the capabilities of cell phones.

While the *Smith* dissent is correct that other courts have upheld searches of a traditional address book incident-to-arrest,¹³⁶ it fails to recognize that to search a traditional address book police need merely search the book itself. Even though cell phones have address books, they contain so much more, and allowing police to simply search a cell phone address book is problematic. A police officer would have to search the cell phone to even find the address book.¹³⁷ While conducting such a search, the police officer may inadvertently stumble across other information that requires a warrant.¹³⁸ Similarly, it is troublesome to allow searches of call logs simply because this information could also be obtained from the phone company.¹³⁹ Even if it is possible to subpoena a third party to obtain information, that does not make it proper to cut out the middleman and perform an unconstitutional search.¹⁴⁰

Trying to compare a message or other communication on a phone to a traditional letter is also misleading. Similar to searching a cell phone's call log, protecting the substance of a communication while allowing police to search for the "addressing" information creates problems. One journal article notes this inconsistency and demonstrates it with an analogy:

Imagine that you send a letter to a friend. Nothing stops law enforcement from observing the information on the outside of the envelope while the letter is in the custody of the postal service. However, if law enforcement does not obtain that information while the letter is in transit, the opportunity is lost. Once the letter

136. *Id.*

137. It does not matter that such a search may be cursory, a search is a search. *Arizona v. Hicks*, 480 U.S. 321, 325 (1987).

138. For example, if a warrantless search really did become a home search at the touch of a button it would be difficult to see how a court could justify such an invasion. *See, e.g., supra* note 115 and accompanying text.

139. *See MacLean, supra* note 8, at 42 (explaining that "[a] cell phone owner has both objective and subjective reasonable expectations of privacy in the content of text messages and other data stored in the cell phone's internal memory, at least where those data are not also maintained long-term by a third party cell service provider").

140. *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 905 (9th Cir. 2008) (explaining that simply because the service provider had access to the contents of the subscriber's messages is irrelevant. A person still does not lose his or her expectation of privacy.), *rev'd on other grounds sub nom. City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619 (2010).

reaches a person's mailbox, or at least the inside of his home, it has entered a location in which an owner has a reasonable expectation of privacy. Similarly, once the information sent from a cellular phone is no longer in transit, it is no longer obtainable by a pen register. Therefore, the incoming and outgoing phone numbers stored in recent call lists are like the letter that has already been delivered—they are now in a protected area.¹⁴¹

Once the message is in the phone, just as when a letter is in a home, the message is no longer in the public space. Justice Scalia once noted in a related context that “[t]he fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment.”¹⁴²

Because of the amount of information available on a cell phone, cell phones should have a heightened expectation of privacy, which may be even greater than the expectation of privacy attached to the home. Therefore, all details on a phone are private (or intimate) details, and as such should be safe from a warrantless search.¹⁴³ This heightened expectation of privacy for cell phones renders the attempts of courts to distinguish between personal property associated with the arrestee's person and items merely within their control meaningless. Cell phones are associated with an individual's person, but they have become so much more than that. Cell phones have become “virtual extensions of ourselves, holding our contacts, text messages, voicemail, e-mail, documents, Facebook feeds, location data, pictures and more.”¹⁴⁴ These are the personal, intimate details of our lives, even the details of our minds. Like Nick at the beginning of this paper, we often carry personal details on our phones that most people would not carry around any other way—in order to keep private things private.

141. Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 SANTA CLARA L. REV. 183, 190–91 (2010).

142. *Kyllo v. United States*, 533 U.S. 27, 35 n.2 (2001).

143. *Id.* at 37.

144. David Kravets, *Lawsuit Challenges Warrantless Searches of Arrestees' Cellphones*, WIRED (Mar. 20, 2013, 2:56 PM), <http://www.wired.com/threatlevel/2013/03/warrantless-cell-search/>. This article reports that the American Civil Liberties Union is suing the San Francisco Police Department, claiming that a warrantless search of an arrestee's cell phone breaches the First Amendment rights of the arrestee and the First Amendment rights of the arrestee's phone contacts, text messages, and Facebook friends. *Id.* While First Amendment rights may indeed be implicated, that is outside the scope of this paper.

While cell phones function as a person's second mind, there are obvious differences between a cell phone and the human mind. Most importantly, the human mind is not searchable like a cell phone. However, if the police could search, or read, a person's mind using advanced technology, it is hard to see how a court could justify such a search absent a warrant. The mere fact that a cell phone is searchable does not diminish the expectation of privacy bestowed on the information saved in the memory of a cell phone. A cell phone's searchability only increases its value as the second mind. Now people can easily remember and look up data that in years past they would easily forget. Cell phones as a second mind function as a way for people to read their own thoughts and more easily access their own memories. Simply because the details of a person's thoughts are recorded digitally, and are more easily accessible, does not make those thoughts any less private. Traditionally the Supreme Court has afforded the home the highest possible protection.¹⁴⁵ A person's mind is the only truly secret place. In our minds, we have thoughts that we never share with anyone. However, now that it is possible to "read" a person's mind by searching their cell phone, the second mind should be given high protection at least as strong as the protection given to the home.

The existing jurisprudence on searches incident-to-arrest of cell phones fails to understand what cell phones have become in our modern society. Courts often fail to give workable guidelines for when warrantless searches might be appropriate. Sometimes a court's holding is too narrow and fails to consider the future changes in the field of electronic communications. Any solution that fails to consider future technological advances would constitute merely a stopgap solution. Other times courts still leave open the possibility of exceptions to the rule that give police too much leeway to perform warrantless cell phone searches. Cell phones have become so associated with an individual that cell phones have essentially become a second mind with an attendant heightened expectation of privacy. If people can no longer control the privacy of their own minds, the term privacy is rendered meaningless.

145. *See, e.g.,* *Kyllo*, 533 U.S. at 37 ("In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes.").

V. BRINGING CELL PHONE SEARCHES IN LINE WITH THE CONSTITUTION: TWO POSSIBILITIES

By prohibiting warrantless searches, the Constitution is simply protecting our privacy. The Supreme Court once stated:

Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law.¹⁴⁶

Innocent people can have their rights violated as well as guilty people. A warrantless search can be just as destructive for an innocent person as for a criminal.

With cell phones containing as much information as they do and the attendant heightened expectation, the point first made by Judge Learned Hand, and subsequently by the *Chimel* court, applies equally well to cell phones:

After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home.¹⁴⁷

It is a small consolation to know that your cell phone is safe so long as you leave it at home.

It would be a mistake to allow search incident-to-arrest of cell phones simply because the majority of courts allow it. The Supreme Court said in *Gant* that “[w]e have never relied on *stare decisis* to justify the continuance of an unconstitutional police practice. And we would be particularly loath to uphold an unconstitutional result in a case that is so easily distinguished from the decisions that

146. *McDonald v. United States*, 335 U.S. 451, 455 (1948).

147. *Chimel v. California*, 395 U.S. 752, 767–68 (1969) (citing *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926)).

arguably compel it.”¹⁴⁸ Cell phones are easily distinguished from other property a person may carry with them.

It is time for the Supreme Court to take up this question and resolve the confusion among the appellate circuits. The following discussion presents two possible options that the Supreme Court could take to stabilize the law regarding searches of cell phones. These options have been tailored to fit alongside current Fourth Amendment jurisprudence, but also recognize the special nature and heightened expectation of privacy associated with cell phones. First, the Court could rest on *Gant*-style reasoning and allow cell phones to be searched incident-to-arrest *only if* there is probable cause to believe the cell phone contains information related to the crime of arrest. Second, the Court could find that cell phones require heightened protection of privacy and hold that cell phone searches do not fall within the exceptions to the Fourth Amendment warrant requirement.

A. A Gant-based Solution

To resolve the dilemma posed by warrantless searches of cell phones incident-to-arrest, the Supreme Court can look to its precedent in *Arizona v. Gant*.¹⁴⁹ In *Gant* the court noted, “[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.”¹⁵⁰ Once the police have possession of an arrestee’s cell phone, the arrestee can no longer delete incriminating information. Therefore, search incident-to-arrest would no longer apply and the search would be unlawful.

If the Supreme Court adopted *Gant*’s reasoning, then police could only search a cell phone for information related to the crime of arrest. This solution is particularly appealing because it would allow police to perform some searches without going through the effort of obtaining a search warrant, while prohibiting most cell phone

148. *Arizona v. Gant*, 556 U.S. 332, 348 (2009).

149. The Supreme Court can also look to the precedent set by *United States v. Fierros-Alvarez*, 547 F. Supp. 2d 1206 (D. Kan. 2008), *United States v. Quintana*, 594 F. Supp. 2d 1291 (M.D. Fla. 2009), and *United States v. James*, No. 1:06CR134 CDP, 2008 U.S. Dist. LEXIS 34864 (E.D. Mo. Apr. 29, 2008).

150. *Gant*, 556 U.S. at 339.

searches.¹⁵¹ For example, during an arrest for a drug crime “it would make sense to search . . . text messages for further evidence of the crime, since that function is commonly used in conjunction with drug sales.”¹⁵² However, in this situation it would be unreasonable for police to search photo albums or Internet history “because such applications likely have nothing to do with drug sales.”¹⁵³ Adopting the *Gant* rule for cell phones “would prevent police from roaming at large among the thousands of pages of data held” in a cell phone.¹⁵⁴

One objection to this approach is that such a search would be a mere evidence gathering expedition, based only on suspicion and not probable cause.¹⁵⁵ Another objection is that the rationale that allows automobile searches is mostly absent when it comes to cell phones. One journal article stated the automobile exception rationale this way:

The rationale is twofold. First, automobiles are mobile and warrantless searches are necessary to locate evidence before the driver leaves the scene and hides or destroys the evidence. Second, because automobiles are utilized on public roads, they carry a significantly lower expectation of privacy than homes and are thus entitled to less constitutional protection.¹⁵⁶

A cell phone generally does not suffer from the same liabilities as automobiles. First, courts in general have upheld only warrantless cell phone searches incident-to-arrest. However, when police merely have probable cause to search a phone, but not arrest the owner, they generally need to secure a search warrant.¹⁵⁷ Therefore, in the circumstances most widely accepted by courts for warrantless cell phone searches (i.e., circumstances involving arrest), the police can search the phone. This fulfills both prongs of the *Chimel* rule. Second, cell phones, while utilized in public, are not subject to extensive

151. Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 49 (2008).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. Adam M. Gershowitz, *Texting While Driving Meets the Fourth Amendment: Deterring Both Texting and Warrantless Cell Phone Searches*, 54 ARIZ. L. REV. 577, 599 (2012).

157. *Id.* (“Unlike the search incident to arrest doctrine, which is automatic following a lawful arrest, the automobile exception is premised on the police having probable cause.”).

regulation like automobiles.¹⁵⁸ The regulation to which automobiles are subject significantly reduces the owner's expectation of privacy. Without this extensive regulation, the public's expectation of privacy in their cell phones is not diminished like the expectation of privacy in their vehicles. Third, even though cell phones are inherently mobile, police can more easily confiscate them, preventing the destruction of evidence. In addition, the information on cell phones is not as easily visible as the contents of a car are. A *Gant*-based solution fits within existing Fourth Amendment jurisprudence, provides increased privacy protection for cell phones, and still empowers police in limited situations. However, because cell phones are more like a second mind, the heightened privacy expectation may make this solution problematic.

B. Cell Phones are Different

Because a *Gant*-based solution fails to fully protect the privacy interest in cell phones, the Supreme Court should consider excluding cell phone searches from the warrant requirement exceptions. Such a solution would give full weight to the unique and personal character of cell phones. We need to have a rule for cell phones that is easy for government officials to follow and apply. Society has become dependent on cell phones and other electronic storage devices, and this dependence will only continue to grow.¹⁵⁹ The simplest, and most workable, way to answer the cell phone dilemma is to exclude cell phones from the warrant requirement exception.¹⁶⁰ Courts should require government officials to obtain a warrant before searching cell phones.¹⁶¹ Creating exceptions for cell phones based on memory capacity, and type of information searched only serves to enhance confusion and multiply litigation.¹⁶² Creating a new rule for cell phones, and similar electronic storage devices, is the best way to protect individual privacy.

Creating a rule protecting cell phones, but failing to address future advances in electronic communications devices would be

158. The regulation of cars is one reason why courts have found cars to have a reduced expectation of privacy. *See California v. Carney*, 471 U.S. 386 (1985).

159. *See Warfield*, *supra* note 130, at 193.

160. *Id.* at 192.

161. *Id.*

162. *Id.*

impractical.¹⁶³ Such a rule would require police officers to memorize the various electronic devices on the market, which are constantly changing.¹⁶⁴ In addition, storage capacity on a cell phone or other device is an immaterial consideration because even “dumb” cell phones can contain a large amount of information.¹⁶⁵ What is really needed is a rule that doesn’t change with technology. The Supreme Court should create a rule that protects “Digital Storage Devices.” Such a designation would encompass not only cell phones, but also laptop computers, memory sticks, digital cameras, more recent advances like the popular tablet computers, and most future advances in communications technology. Such a designation would acknowledge the *Katz* court’s recognition that as technology changes, so does an individual’s expectation of privacy. Additionally, a “Digital Storage Device” category would satisfy existing Fourth Amendment jurisprudence. For example, this rule would satisfy both prongs of the *Chimel* decision.

First, this designation would do nothing to endanger our law enforcement personnel. The *Park* court noted that “[u]nlike other ‘closed containers,’ such as purses or bags which might contain contraband or weapons, there is no possibility that a cell phone will contain any dangerous instrumentalities.”¹⁶⁶ And while weapons are easily hidden on a person’s body or in a traditional container, “there is apparently no ‘app’ that will turn an iPhone or any other mobile phone into an effective weapon for use against an arresting officer (and if there were, officers would presumably seek to disarm the phone rather than search its data files).”¹⁶⁷

The only credible reason to search a cell phone incident-to-arrest is to prevent destruction of evidence. Once police have confiscated the cell phone, this ceases to be a danger. Even the danger of a remote memory wipe¹⁶⁸ is not that problematic. If a criminal wipes a phone’s memory remotely, there are ways to recover the lost data.¹⁶⁹

163. Schlossberg v. Solesbee, 844 F. Supp. 2d 1165, 1170 (D. Or. 2012).

164. *Id.*

165. United States v. Flores-Lopez, 670 F.3d 803, 806 (7th Cir. 2012).

166. United States v. Park, No. CR 05-375 SI, 2007 WL 1521573, at *11 (N.D. Cal. May 23, 2007).

167. MacLean, *supra* note 8, at 48.

168. Flores-Lopez, 670 F.3d at 807–8.

169. Kish, *supra* note 126, at 472 (“[M]ost information, even when ‘deleted’ by a criminal, can be recovered through forensics in the same way as information found on a computer’s hard

One problem with this technology is that recovering lost data requires extra expended resources and delay.¹⁷⁰ However, police can overcome even this obstacle by using a so-called “faraday bag.” Faraday bags “can be used to dramatically reduce or completely eliminate any risk of remotely disturbing a cell phone’s internal memory.”¹⁷¹ Faraday bags work by blocking external radio waves and static electrical fields, blocking signals that would wipe a cell phone’s memory.¹⁷² A small faraday bag big enough to contain a cell phone can cost as little as ten dollars.¹⁷³ Use of faraday bags would certainly not put a financial hardship on most law-enforcement agencies nor would it be a hardship for law enforcement to carry one.¹⁷⁴ When proper steps are taken, losing evidence due to remote wipes is not much of an issue.

Therefore, because “searching a cell phone’s internal memory advances neither the need to protect the arresting officers’ safety, nor the need to preserve evidence,”¹⁷⁵ *Chimel* does not prevent the Supreme Court from creating a rule that protects digital storage devices. In addition, because these devices are like a second mind with a heightened expectation of privacy, *Katz* provides the rationale to protect digital storage devices.¹⁷⁶

VI. CONCLUSION

Even though law enforcement officers may reasonably believe a phone contains valuable information, that is no reason to suspend our Fourth Amendment rights. For example, in a drug-related arrest, one article explained that:

drive.”).

170. *See Flores-Lopez*, 670 F.3d at 808.

171. MacLean, *supra* note 8, at 50.

172. *How Faraday Bags Work*, FARADAYBAG.COM, <http://www.faradaybag.com/how-faraday-bags-work.html> (last visited Oct. 21, 2013).

173. *Mobile Phone Blocking Bag*, FORENSIC STORE, <http://forensicstore.com/product/isolation-solutions/mobile-phone-blocking-bag> (last visited Oct. 21, 2013).

174. *Cf. Flores-Lopez*, 670 F.3d at 810 (arguing that to carry faraday bags and to be instructed in faraday bag use would be a burden on law-enforcement agencies).

175. MacLean, *supra* note 8, at 42.

176. Under this solution, it is likely that the only acceptable exception to the warrant requirement would be the plain view doctrine. If incriminating evidence is showing on the screen when the law enforcement officer legally views the phone, that information may be used, opening a way for the officer to further search the phone.

Because the cell phone contains call logs and address books, it would be an obvious target for investigators. That information could help link a defendant to a particular drug transaction, and it also could provide authorities with other persons involved in the illegal activity. The officers may even have seen the defendant using the cell phone during the commission of a crime. However, these are precisely the types of situations where probable cause could be used to obtain a search warrant.¹⁷⁷

If the police have probable cause to get a search warrant, there is no reason for the police to circumvent constitutional requirements and conduct a warrantless search. With cell phones constituting a sort of second mind, the expectation of privacy is heightened, and *Katz* demands a warrant. The *Chimel* justifications do not apply to cell phones, because cell phones do not pose a danger to police, and the risk of losing valuable evidence is minimal when compared to the expectation of privacy. Therefore, the Supreme Court should create a “digital storage device” category to protect cell phones and other digital devices from warrantless searches. If the Supreme Court does this, it will prevent a reasonable expectation of privacy from becoming unreasonable.

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177. Stillwagon, *supra* note 129, at 1204.

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