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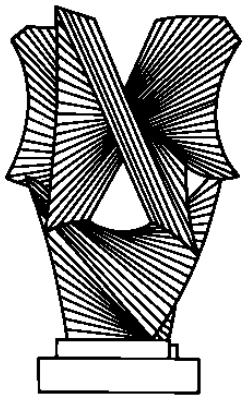

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To some fanfare, *Riley v. California*[1] announced the fourth amendment[2] requirements for searching a cell phone found on a person incident to that person's lawful arrest. The Supreme Court held that such a search requires a warrant. To reach this conclusion, the Court made two decisions. The first was whether to deviate from the rule established in *United States v. Robinson*,[3] which categorically allows the warrantless search, incident to arrest, of the personal property "immediately associated with" the arrestee.[4] *Robinson* specifically allows the thorough search of a container, and the first question in *Riley* was whether that rule applied when the container was a cell phone.

I shall have only a little to say about this aspect of *Riley*. *Robinson* had not been uncontroversial, but, for a long time, when applied to containers found in the possession of a person being arrested, the loss of privacy from a search was usually limited, given what people tended to carry on their person, so there was something to be said for relieving the police of the burden of getting a warrant, given a valid arrest. Occasionally, people might possess something particularly sensitive on their person, a diary or medical file, but no rule gets the tradeoff right in every case. Nonetheless, long after *Robinson*, people started to carry cell

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[*] Bernard D. Meltzer Professor, University of Chicago Law School. I thank Arnold Loewy for hosting this conference and including me. For very helpful comments on my presentation and earlier drafts, I thank Orin Kerr, Andy Leipold, John Rappaport, Chris Slobogin, and Lior Strahilevitz. For excellent research assistance, I thank Kayla Gamin and Ben Montague.

[1] 134 S.Ct. 2473 (2014). The case combined Riley v. California and United States v. Wurie.

[2] The fourth amendment provides:

> 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.

[3] 414 U.S. 218 (1973).

[4] The quoted words come from the later case, United States v. Chadwick, 433 U.S. 1, 15 (1977), where the Court distinguished *Robinson* and required a warrant to search a footlocker when it was not "immediately associated with" the person of the arrestee.

phones. The pervasive use of cell phones changes the tradeoff, as it means that a high percentage of Americans now routinely possess a digital device that contains a huge volume of personal data about their lives – messages, locations, photographs, internet search history, personalized apps, etc. It is simply too much to give the police warrantless access to 100% of that information based merely on probable cause to believe a person has committed a crime, even the most trivial crime and even crimes for which there is no reason to expect the phone to contain evidence of the crime.

So it was not entirely surprising that the Court decided unanimously that *Robinson* does not apply to cell phone searches incident to arrest. The Court gave various good legal and policy reasons for its decision. I might add one reason the Court predictably did not mention, given its hostility to claims of pretext[5]: if police expected to acquire a treasure trove of personal and historical information by arresting an individual, because the arrest automatically made the entire cell phone subject to search, they would have a powerful incentive to make arrests for trivial crimes, of the sort they would not ordinarily make, for no other purpose than to gain that evidence.[6]

Yet my concern and the sole focus of this essay is the second decision in *Riley*, less obvious but no less necessary to resolve the case. If *Robinson* is not controlling, must the result be that a warrant (or other warrant exception) is required for any cell phone search incident to arrest? The United States argued for various "fallback options,"[7] in the event that *Robinson* were not controlling. These options compromised between the *Robinson* rule that requires no additional justification for the search (given a valid arrest) and the general container rule that requires a warrant (or other warrant exception).[8] If the chief concern in distinguishing *Robinson* is to avoid the absurd result that a valid arrest

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[5] See, e.g., Ashcroft v. Al-Kidd, 131 S.Ct. 2074, 2080-83 (2011) (holding that an objectively justified arrest does not violate the fourth amendment just because it was a pretext for detaining the citizen); Whren v. United States, 517 U.S. 806, 814 (1996) (holding that whether a traffic stop is consistent with the fourth amendment does not depend on the officer's subjective motivations).

[6] The problem is acute because, in past decisions, the Court has ruled that the fourth amendment permits arrests for misdemeanors committed in the officer's presence, no matter how trivial the offense, Atwater v. City of Lago Vista, 532 U.S. 318 (2001), and even if the state law does not authorize the arrest for that offense. See Virginia v. Moore, 553 U.S. 164 (2008).

[7] *Riley*, at 2491.

[8] See *Chadwick*, supra note 3.

gives the police *everything on the phone* without any judicial oversight, no matter the nature of the offense, then one might avoid that result while still giving the police a power in *some* cases to search *some part* of the phone. So the governments (the United States and California) argued in the alternative for various intermediate rules, which would permit but limit warrantless cell phone search incident to arrest. A crucial part of Chief Justice Robert's opinion in *Riley* is the section rejecting all of these alternatives.[9] In this essay, I examine the arguments for the compromise of a *scope-limited* search of cell phone incident to arrest, as I will define.

I proceed in three parts. I begin by stepping back from the particular context of cell phones and searches incident to arrest. The decision whether to recognize a scope-limited search incident to arrest is part of a fundamental choice for fourth amendment law, which is whether to recognize distinctions in the intensity of searches. As I explain in Part I, the Court recognizes a distinct category of low-intensity, scope-limited searches in several contexts, but rejects it in others. *Riley* is the latest example of the latter. Given the case's high profile significance for the intersection of new technology with the fourth amendment, it may be easy to overlook this other way that *Riley* matters to the fundamentals of doctrine.

In Part II, I define the particular scope-limited search of a cell phone searches incident to arrest that I will defend: the Court could have permitted police to conduct a brief field search of a cell phone incident to arrest, without a warrant, where there is reason to believe that the phone contains useful evidence of the crime of arrest and where the police limit their search to the places where such evidence might realistically be found. In this Part, I consider the Court's brief argument for rejecting any such compromise solution.

In Part III, I make the case for the warrantless scope-limited search. I do so while assuming, as the Court did, the basic framework of relevant fourth amendment doctrine.[10] First, even if one prefers simple rules for searches incident to arrest, and therefore prefers a single category of "search," this context is one where the stakes, for privacy and law enforcement, are high enough to

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[9] *Riley*, at 2491–93.

[10] Thus, I assume a warrant requirement subject to numerous exceptions. I do not consider general arguments against the warrant requirement, nor a general attack on the search-incident doctrine (that might, contrary to *Robinson*, demand a warrant to search any container found on an arrestee once it is secured).

justify a more complex rule, such as one that distinguishes between scope-limited and full-fledged searches.

Second, a scope-limited search would plausibly set the right balance between law enforcement needs and the values of the fourth amendment. Limited cell phone searches, incident to arrest, may be an important component of good investigative police work, where persistent promptness in following up leads is valuable, even though the value of timeliness falls short of that demanded by the exigent circumstances exception. Indeed, just a few months after *Riley*, the Canadian Supreme Court authorized a kind of scope-limited search of a cell phone incident to arrest based on just these concerns.[11] By contrast, the warrant requirement might actually produce cell phone searches that are far more intrusive and destructive of privacy than what a cursory field search would allow.

Third, *Riley* creates a doctrinal anomaly: the enormous gap between searching private digital and private analog data incident to arrest. As I explain, the gap would be less incongruous if the Court allowed a warrantless, scope-limited search of the cell phone. Indeed, the category of scope-limited searches might facilitate greater fourth amendment protection of ordinary analog "papers," incident to arrest, than currently exists.

Finally, the refusal to recognize a scope-limited search will put pressure on lower courts to expand the exigent circumstances exception, to recognize an alternative path to quick and minor searches of phones. If so, the broadening of exigent circumstances will have undesirable effects beyond the search of cell phones incident to arrest, making it easier to justify the warrantless search of homes.

In sum, although I fully agree with the Court's decision to distinguish *Robinson*, I argue that the Court erred in its unanimous decision to reject all the governments' compromise solutions. The Court should not have required a warrant or (other) warrant exception for any and all searches of a cell phone incident to arrest.

I. HOW MANY KINDS OF SEARCHES ARE THERE?

To show how *Riley* fits into the broader framework of the fourth amendment, I begin by identifying the *subcategories* of a search. By subcategories,

[11] Regina v. Fearon, 2014 SCC 77 (2014).

I distinguish the broader *category* of a search, which, for understandable reasons, occupies the considerable attention of courts and scholars.[12] The line between a search and a non-search (like the line between a seizure and a non-seizure) defines the threshold issue for application of the fourth amendment. But once the government activity is classified as a search, there remain important doctrinal distinctions *within* the category, defining differences among searches. The relevant doctrine sometimes refuses to recognize any difference among searches, concluding that "a search is a search."[13] In other cases, however, the doctrine distinguishes between search types, each with a different requirement for making the search reasonable. (There are also parallel distinctions among types of seizures, but they are less pertinent to *Riley*[14]).

When the police seek evidence of criminal wrongdoing, how many types of search are there?[15] The answer in fourth amendment doctrine depends on

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[12] For recent commentary, see Sherry F. Colb, "What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy," 55 Stan. L. Rev. 119 (2002); Thomas K. Clancy, "What is a 'Search' Within the Meaning of the Fourth Amendment?," 70 Alb. L. Rev. 1 (2006); Orin S. Kerr, "The Curious History of Fourth Amendment Searches," 2012 Sup. Ct. Rev. 67 (2012).

[13] Arizona v. Hicks, 480 U.S. 321, 325 (1987).

[14] Regarding seizures of persons, Terry v. Ohio, 392 U.S. 1 (1968), famously recognizes the lesser seizure of an investigative stop, justified by reasonable suspicion, as distinguished from the greater seizure of an arrest, justified only by probable cause. Of practical significance, the concept of the low intensity seizure applies to ordinary automobile stops. See Rodriguez v. United States, 135 S.Ct. 1609, 1614 (2015) (stating that "a routine traffic stop," which is ordinarily relatively brief, "is 'more analogous to a so-called "Terry stop" . . . than to a formal arrest,'" quoting Knowles v. Iowa, 525 U.S. 113, 117 (1998), in turn quoting Berkemer v. McCarty, 468 U.S. 420, 439 (1984). The fourth amendment also recognizes a separate category of high intensity seizures of persons, those involving the use of deadly force, which require heightened justification. See Tennessee v. Garner, 471 U.S. 1 (1985) (holding that use of deadly force to seize a fleeing felon violates the fourth amendment unless the felon has committed a violent crime or other poses an ongoing danger).

The Supreme Court has extended this distinction in the intensity of seizures to property, where the duration of detention determines whether probable cause or reasonable suspicion is required. See United States v. Place, 462 U.S. 696, 705-06 (1983) ("Given . . . that seizures of property can vary in intrusiveness, some brief detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime.").

[15] My focus on ordinary criminal wrongdoing excludes consideration of the "special needs" doctrine, where the Court steps outside the probable cause/warrant framework that governs *Riley* in favor of a general balancing. Regarding the special

what is being searched. The fourth amendment lists four objects of a search: persons, houses, papers, and effects. Begin with the search of *persons*, the context in which it is most well-established, since *Terry v. Ohio*,[16] that there is more than one category. *Terry* created the new category of a "frisk," the patting down of the outer clothing in a search for weapons.[17] The doctrinal significance is that a full search requires the probable cause (to believe the suspect has committed a crime[18]), whereas, after a lawful stop, the frisk requires only reasonable or articulable suspicion that the suspect is armed.[19] For our purposes, what matters is that there is more than one type of search (of a person).

In fact, there are more than two. Some cases involve extraordinary searches. For example, *Lee v. Winston* held that ordinary standards, such as probable cause and a warrant, are not sufficient to justify a search that involved surgery (requiring general anesthesia) to recover a bullet in the suspect's shoulder, probably the same bullet the victim had justifiably fired at the criminal perpetrator.[20] The Court upheld an injunction against the surgery, partly because other substantial evidence meant that the bullet was not vital evidence for securing a conviction, a factor not ordinarily relevant to fourth amendment

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needs doctrine, see, e.g., Scott E. Sundby, "Protecting the Citizen 'Whilst He Is Quiet': Suspicionless Searches, 'Special Needs' and General Warrants," 74 Miss. L.J. 501, 546-47 (2005); Fabio Arcila, Jr., "Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State," 56 Admin. L. Rev. 1223 (2004). For the relationship between the doctrine and administrative search doctrine, see Eva Brensike Primus, "Disentangling Administrative Searches," 111 Colum. L. Rev. 254 (2001). For special needs, one might say there are no finite number of searches because the court balances the law enforcement benefits against the privacy (or other) costs of the specific search at issue. *Riley* deals with police searches to advance "the general interest in crime control," City of Indianapolis v. Edmond, 531 U.S. 32, 47 (2000), so I generally ignore special needs in what follows (except in note xx [39]).

[16] 392 U.S. 1 (1968).

[17] Id at 8.

[18] More precisely, the police officer needs probable cause to believe the suspect has committed a felony or probable cause the suspect has committed a misdemeanor in the officer's presence. See United States v. Watson, 423 U.S. 411, 418 (1976)(discussing the common-law rule that an "officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest"); Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001)("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may . . . arrest the offender.").

[19] See *Terry*, supra.

[20] 470 U.S. 753 (1985).

analysis.[21] Again, for my purposes, what matters is that there are (at least) three kinds of searches of persons in fourth amendment law: a low intensity frisk, a medium intensity ordinary search, and a high intensity surgical intrusion.[22]

When we move from "persons" to "houses, papers, and effects," however, it becomes more difficult to answer the question: how many types of search are there? Start with "houses" or real property and, here, start with entry. Entry into a home, or even the curtilage around a home, requires probable cause and a warrant or warrant exception.[23] Yet one could plausibly say that the doctrine recognizes two degrees of entry. Ordinary home searches require that police "knock and announce" their presence and pause for a brief time before entering. Yet police can avoid this requirement (by a "no knock" warrant or exigency) if there is reasonable suspicion to believe the warning would prompt the occupants to destroy evidence or prepare to attack police.[24] An unwarned entry is more intense and more threatening to privacy and security, so the

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[21] Id. at 765–66.

[22] Another high intensity search of a person is a strip search or body cavity search. The Supreme Court recently upheld strip searches of those entering the general jail population in Florence v. Board of Chosen Freeholders of the County of Burlington, 566 U.S. __ (2012). But there is still a general understanding that such searches must be analyzed separately from an ordinary search of a person. See, e.g., United States v. Husband, 226 F.3d 626, 634 (7th Cir. 2000)("A compelled medical procedure, coupled with an invasive search of a person's body cavity, is a significant intrusion upon an individual's dignity and privacy interests, and whenever possible, should be preceded by a neutral evaluation of the manner in which the search is to be executed.").

[23] See, e.g., Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523 (1967)(overruling prior decision upholding warrantless administrative searches of homes); Kyllo v. United States, 533 U.S. 27 (2001)(holding that a non-trespassory use of thermal imager measuring only the heat emanating from a house was a house search requiring warrant). See also United States v. Dunn, 480 U.S. 294 (1987) (explaining four-factor test for defining curtilage, the search of which requires a warrant).

[24] See Wilson v. Arkansas, 514 U.S. 927 (1995)(holding that the knock-and-announce principle is part the reasonableness requirement); Richards v. Wisconsin, 520 U.S. 385, 394 (1997)(holding that the knock and announce obligation does not apply when officers "have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or ... would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence"); United States v. Banks, 540 U.S. 31 (2003)(holding that an interval of 15-20 seconds after announcing and before entry was reasonable given the exigency of possible destruction of evidence). Of course, all of this matters less because the exclusionary rule does not apply to knock-and-announce violations. See Hudson v. Michigan, 547 U.S. 586 (2006).

doctrine requires greater justification. Thus, we might say that the search constituting a home entry has two levels, warned and unwarned.

After entry is effected, there is more than one kind of search inside the home. An ordinary interior search requires probable cause and a warrant or warrant exception.[25] But there are lesser searches in the home, such as the "protective sweep,"[26] a quick search for people in the home (other than those named in the warrant) who might be a threat to the officers. The issue arises because the ordinary search has to end when the object of the search, including a person to be arrested, is found; the ordinary search is also limited to places where the items named in the warrant might be found.[27]

In *Maryland v. Buie*, however, the Court authorized searching beyond these temporal and spatial limits, empowering police in every case to examine immediately adjoining areas for hidden persons without any reason to believe these adjoining areas actually contain such persons, much less that they pose a danger.[28] Second, *Buie* empowered officers to look anywhere beyond the immediately adjoining areas they have reasonable suspicion to believe that a dangerous person is present and may pose a risk of attack. The Court analogized to *Terry* and a subsequent case authorizing the "frisk" of a car (discussed in the next paragraph).[29] Like *Terry*, the protective sweep authorized is more limited in scope than an ordinary home search – applying to a narrower band of the home and for a limited purpose that will exclude searching drawers, cabinets, and other compartments too small for a person.[30] And it is triggered by something less than probable cause (for adjoining spaces, by the mere validity of the entry,

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[25] Mincey v. Arizona, 437 U.S. 385, 390 (1978)(rejecting "murder scene exception" to warrant requirement for home search).

[26] Maryland v. Buie, 494 U.S. 325, 327 (1990).

[27] For example, if one were looking for a recently stolen car or other particularly large items, then the search warrant would not authorize looking through closets or shower stalls or on upper floors where they could not plausibly be located.

[28] *Buie*, at 334.

[29] Id. at 332.

[30] One might object that protective sweeps are not a different category of search, but merely a standard search for something the size of a person. Yet there is something distinctive about *Buie* searches. First, the normal principles would not allow the search; otherwise there would be no need for a special rule. Second, the search authorized is intended to be scope-limited, a quick look in separate rooms for a person. That is why the court explicitly refers to the idea of a frisk, citing *Terry*. The Court uses *Terry* because it means to authorize only a low-intensity search

and for further searches, by reasonable suspicion). So there are at least two categories of search of real property ("houses").[31]

With respect to personal property ("papers and effects"), we see a similar rule in one and only one instance: the automobile. An ordinary search of an automobile is excused from the warrant requirement, but requires probable cause.[32] Yet in *Michigan v. Long*, the Court recognized the possibility that a valid *Terry*-stop could permit a cursory search for weapons of the car of the person stopped.[33] In the case, police had approached an individual outside his car, which was parked on the side of the road. The car door was open; upon seeing the police, the suspect walked back to the open door; and from the outside, police spotted a hunting knife in the car. The Court therefore upheld a cursory sweep for weapons in the passenger area of the car based on reasonable suspicion, not probable cause.[34] The Court saw the case as entirely about the scope of *Terry* to frisk the area around the suspect in addition to the suspect.[35] An ordinary car search allows the police to look anywhere in the car where they may find the evidence they have probable cause to believe is present in the car.[36] In

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[31] Exactly how many more than one is a difficult issue. One might count *Buie* itself as creating *two* non-ordinary search subcategories, for the home, one for persons in spaces adjoining the location where police find the object of the search such as an arrestee (which requires no additional justification) and another for non-adjoining spaces (requiring reasonable suspicion to believe a dangerous person is present), so the total number of search types is arguably three. Further complicating the count is Chimel v. California, 395 U.S. 752, 763 (1969), under which, if the arrest in the home is valid, the police can, without further justification, search for evidence of a crime or weapons not only on the arrestee's person, but also in "the area [in the home] 'within his immediate control' – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."

No Supreme Court case identifies a high intensity search of real property, analogous to surgery on a person, in which a warrant is insufficient. But one might imagine that the courts would create such a category if the police wanted to do something highly destructive, such as to dig up the foundations of a house looking for a buried body. See, e.g., United States v. Martineau, No. 03-10298 at *17 (D.Mass. Feb. 23, 2005) (finding that the removal of part of a wall was unreasonable, given the absence of suspicion that the wall contained evidence of crime). But see United States v. Becker, 929 F.2d 442 (9th Cir. 1991) (holding that the use of a jackhammer to search for evidence beneath a concrete slab on the land behind defendant's home was reasonable).

[32] See California v. Acevedo, 500 U.S. 565 (1991).

[33] 463 U.S. 1032 (1983).

[34] Id. at 1035–36.

[35] Id. at 1043.

[36] *Acevedo*, at 568.

Long, the police acted on reasonable suspicion and "restricted" their search "to those areas to which Long would generally have immediate control, and that could contain a weapon."[37] Thus, the *Terry* search is more limited in scope and duration than a car search justified by probable cause. As the Court later put it: "In a sense, *Long* authorized a 'frisk' of an automobile for weapons."[38] Thus, there are at least two categories of search of an automobile.

Beyond these cases – persons, real property, and automobiles – the Supreme Court has never recognized a distinctive category of low intensity or scope-limited search (although some lower courts have[39]). To the contrary, the Court emphatically rejected such a category in *Arizona v. Hicks*.[40] There, the police entered an apartment based on exigent circumstances, the recent firing of a weapon. The circumstances justified the police in looking for a shooter or a weapon. The Court held that police exceeded that authority by picking up a stereo they suspected was stolen and turning it around to read serial numbers otherwise blocked from view. Writing for the Court, Justice Scalia stated that "[a] search is a search, even if it happens to disclose nothing but the bottom of a turntable."[41] He held that this additional search required additional justification in the form of probable cause to believe the stereo was stolen.[42]

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[37] *Long*, at 1050.

[38] *Buie*, at 332.

[39] In the *Terry*-search context, some courts uphold what is described as a "frisk" of a backpack or purse, as part of a frisk of a person for guns supported only by reasonable suspicion. See, e.g., United States v. Hernandez-Mendez, 626 F.3d 203, 213 (4th Cir. 2010); United States v. Medina, 130 Fed.Appx. 862 (9th Cir. 2005). These cases do not actually hold that a greater search would violate the fourth amendment, and other cases have rejected that idea. See US v. Walker, 615 F.3d 728 (6th Cir. 2010), and cases cited therein. Nonetheless, *Hernandez-Mendez* and *Medina*, recognize a conceptual distinction in high and low-intensity searches of personal effects. Another example is the special needs context (which I am generally ignoring for reasons explained in n. xx). In MacWade v. Kelly, 460 F.3d 260 (2nd Cir. 2006), the court upheld a program of the inspection of bags for individuals entering the New York City subway. Besides relying on the fact that the process was random and focused only on bags large enough to contain explosives, the court also emphasized the cursory nature of the inspection: only a quick look, lasting a few seconds, inside compartments big enough to hold explosives. Id. at 264–65.

[40] *Hicks*, 480 U.S. at 1154.

[41] Id. at 1153.

[42] Id. at 1153–54.

In contrast, the *Hicks* dissent saw the case as the perfect vehicle to recognize a scope-limited search doctrine for personal property other than cars. Justice O'Connor, writing for herself, Chief Justice Rehnquist, and Justice Powell, distinguished "a full-blown search" from "a cursory inspection of an item in plain view,"[43] where the former required probable cause and the later, only reasonable, articulable suspicion. Characterizing the precedent of the time, she said that "the overwhelming majority of both state and federal courts have held that probable cause is not required for a minimal inspection of an item in plain view."[44] She found this to be entirely consistent with the general tenets of fourth amendment doctrine: "We have long recognized that searches can vary in intrusiveness, and that some brief searches 'may be so minimally intrusive . . . that strong countervailing governmental interests will justify a [search] based only on specific articulable facts' that the item in question is contraband or evidence of a crime."[45] She concluded that "the theoretical advantages of the 'search is a search' approach . . . are simply too remote to justify the tangible and severe damage it inflicts on legitimate and effective law enforcement."[46]

Figure 1 summarizes this tentative taxonomy, showing the how fourth amendment doctrine does and does not distinguish between searches, depending on the target of the search. Now we can see how *Riley* fits into the overall picture. *Riley* offered another opportunity to recognize a category of low intensity searches of personal property. The Court could have held that, incident to arrest of a person with a cell phone, the police may conduct a cursory, "minimal inspection" of the phone, but that a warrant would be needed to proceed beyond the limited scope. Without either side referring to *Hicks*, the governments were arguing (as a fallback) for the position of the *Hicks* dissent and the Court unanimously favored the position of the *Hicks* majority.[47]

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[43] Id. at 1157.

[44] Id. at 1158.

[45] Id at 1159. Justice Powell, writing for himself, Chief Justice Rehnquist, and Justice Powell, made similar points, distinguishing the movement of the stereo from a "general exploratory search." Id. at 1156.

[46] Id. at 1160

[47] The comparison does not mean that *Hicks* could not be distinguished from *Riley*, as discussed infra TAN at p. xx.

SEARCH INTENSITY

SEARCH TARGET:	LOW	ORDINARY	HIGH
PERSONS	Frisk (*Terry*)	Search	Surgery (*Winston*)
REAL PROPERTY	Protective Sweep (*Buie*)	Search	None?
PERSONAL PROPERTY			
Generally	None (*Hicks*)	Search	None
But Automobiles	Protective Sweep (*Long*)	Search	None?
But Cell phones?	None (*Riley*)	Search	None

FIGURE 1[48]

As a small digression from the focus on *Riley*, consider that Figure 1 might have even more cases in it if I included, not only cases that are explicitly about the number of search subcategories, but also cases that might be reinterpreted to include this concern. I offer one example, drawing on another case heavily discussed at the conference: *United States v. Jones.*[49] There, Justices Breyer, Ginsburg, and Kagan joined Justice Alito's concurring opinion, which said that the monitoring of an individual's public movements, using a GPS device placed on his automobile, would constitute a search only if the duration

[48] One might complicate the figure in various ways to reflect, for example, the fact that knock-and-announce rules create two levels of home entry, as discussed TAN xx, or the point made in note xx that *Buie* arguably creates two non-ordinary subcategories of the search within a home.

One might also chart the subcategories of seizure, of persons and property, as discussed above in note [14], as follows:

SEIZURE TARGET:	LOW	ORDINARY	HIGH
PERSONS	Stop (*Terry*)	Arrest	Deadly Force (*Garner*)
PROPERTY	Temporary Detention (*Place*)	Full Seizure (*Place*)	None?

[49] United States v. Jones, 132 S.Ct. 945 (2012).

were sufficiently long.[50] This reasoning was supposed to distinguish the 1983 decision in *United States v. Knotts*,[51] where the court held that several hours of locational monitoring (using a transponder or "beeper") did not constitute a search. As new cell phone technology creates a compelling policy reason in *Riley* to distinguish *Robinson*, new tracking technology creates a compelling policy reason in *Jones* to distinguish *Knotts*. Under the Alito reasoning, the locational monitoring itself is, for some time, not a search and therefore entirely free of fourth amendment restraint; after some duration – 28 days in *Jones*[52] – the monitoring becomes a search and demands the full panoply of fourth amendment justifications – a warrant and probable cause.

Law is full of discontinuities, but this one is striking and unfortunate. The variable of time is so perfectly continuous that distinctions the court creates seem arbitrary. If *Time D* is the moment dividing non-search locational monitoring from a search, we lack even the fiction of a qualitative difference between *Time D* minus 5 minutes and *Time D* plus 5 minutes. Another reason for the unseemliness is the difficulty of squaring any selection with the doctrinal formula "reasonable expectations of privacy."[53] At least if reasonable expectations are supposed to be tied in some way to actual expectations, it seem unlikely that American expectations change sharply at any particular moment in the continuum of monitoring duration.[54] But the main difficulty, I contend, is

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[50] Id. at 964 (suggesting that locational monitoring for "a very long period" is a search). The plurality reasoning is significant because it could in the future command a majority; the other five justices avoided the issue only by deciding the case on narrower grounds that happened to be available on the facts. Writing for the Court, Justice Scalia held that the attachment of the GPS device was itself a search because it was a physical intrusion upon Jones' property rights in his car. Id. at 948-54.

[51] United States v. Knotts, 460 U.S. 276 (1983). See Richard H. McAdams, Note, "Tying Privacy in *Knotts*: Beeper Monitoring and Collective Fourth Amendment Rights," 71 Va. L. Rev. 297 (1985).

[52] *Jones*, at 948.

[53] The language defining a search famously originates with Justice Harlan's concurring opinion in Katz v. United States, 389 U.S. 347 (1967) and is subsequently endorsed by the Court in various opinions. See, e.g., Kyllo v. United States, 533 U.S. 27, 33 (2001) ("[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.").

[54] For evidence to the contrary, see Matthew B. Kugler and Lior Strahilevitz, "Surveillance Duration Doesn't Affect Privacy Expectations: An Empirical Test of the Mosaic Theory" (2015), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629373 (finding that duration does not affect the expectations of locational privacy for the large majority of survey respondents).

how much depends on the difference in time. A *Terry* stop may, by the passage of time, become an arrest.[55] But the practical difference for law enforcement is only that police need reasonable suspicion for the former but probable cause for the latter.[56] When the timing issue is posed as in *Jones*, however, we move from initially requiring no justification for the monitoring to abruptly requiring probable cause plus a warrant. In fourth amendment terms, we go from requiring nothing to requiring everything.[57]

The plurality reasoning in *Jones* would be more persuasive if it minimized the significance of this strong discontinuity, which it could manage by recognizing two categories of locational searching and reinterpreting *Knotts*. Instead of saying there was no search in *Knotts* (as the Court there reasoned), one could say that it was a low-intensity locational search, the type justified merely by reasonable suspicion that Knotts was transporting contraband, a standard easily met on the facts of the case. By contrast, the multi-week monitoring in *Jones* is not low intensity or cursory, but a full-fledged (locational) search requiring a warrant and probable cause. So the variable of time only affects how demanding the fourth amendment requirements are, not whether the fourth amendment applies at all. Although the time spans are presumably different, it would operate like the time difference between a *Terry* stop and an arrest, which defines the line between the requirements of reasonable suspicion and probable cause.[58]

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[55] See, e.g., *Robinson*, *supra*, at 253-54 ("A *Terry* stop involves a momentary encounter between officer and suspect, while an in-custody arrest places the two in close proximity for a much longer period of time."); United States v. Sharpe, 470 U.S. 675, 685 (1985) ("Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop."); Dunaway v. New York, 442 U.S. 200, 212 (1979) (finding that longer duration of the police encounter with suspect, and movement away from the initial scene of encounter, characterize arrest requiring probable cause). Cf. United States v. Place, 462 U.S. 696, 709 (1983) (finding that 90-minute detention of luggage required probable cause rather than reasonable suspicion).

[56] See *Terry*, supra; *Sharpe*, supra.

[57] Well, *almost* everything, but not as much cause as surgery requires.

[58] Other cases might benefit from this recharacterization. Arguably, *Bond v. United States*, 529 U.S. 334 (2000) is a non-technological example. There, police squeezed and manipulated soft luggage in the overhead rack of a bus, and the majority held it to be a search requiring a warrant and probable cause. A dissent by Justice Breyer, joined by Justice Scalia, challenged the claim that the police did anything beyond what members of the public would do when moving someone else's luggage to make room for their own. Id., at 339-43. But there was clear opportunity to recognize that this kind of tactile

Proportional rules are more complex, requiring two doctrinal lines: (1) the line between no search and a cursory search and (2) the line between a cursory search and a full search. But the complexity allows for more refined tradeoffs and lessens the discontinuity by providing a more proportionate response.[59] If triggering fourth amendment protection always requires a warrant and probable cause, the decision to recognize a search is particularly costly. Effectively, the police must wait until they have cause to arrest a person before they can monitor his or her public movements (beyond some time period). If that is the only option, then the Court will withhold placing that burden on law enforcement until the government has engaged in locational monitoring for an extended duration. By contrast, if there is a category of low-intensity searches that triggers only the requirement of reasonable suspicion, then the Court will be willing to go back in time to impose it, possibly to the very beginning of GPS monitoring.[60] Unless the government is engaged in a locational dragnet (monitoring everyone or a substantial part of the population), it probably only engages in electronic

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manipulation, even if it exceeds what members of the public do, falls short of an ordinary search involving visual inspection and could therefore require the lesser justification of reasonable suspicion (which was probably present in the case). Again, however, neither the majority nor the dissent thought it worthwhile there to complicate the categories.

[59] See *Terry*, supra, at 17 ("[B]y suggesting a rigid all-or-nothing model of justification and regulation under the [Fourth] Amendment, [the government's argument] obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation."). For a general defense of proportionality in the fourth amendment, see Christopher Slobogin, Privacy at Risk: The New Government Surveillance and the Fourth Amendment 21-48 (2007) (discussing the proportionality principle). See also Christopher Slobogin, "Making the Most of *United States v. Jones* in a Surveillance Society: A Statutory Implementation of Mosaic Theory, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2098002##, at 14 ("In *Jones* itself, Justice Alito's distinction between "prolonged" and short-term tracking could be seen as an application of the proportionality idea.").

[60] Of course, it is also true that, with two search categories, the Court could require a longer duration before characterizing the monitoring as a full-fledged search requiring a warrant and probable cause. Indeed, some Supreme Court Justices might prefer to require only reasonable suspicion for any duration of locational search. Commentators who would disagree with this outcome might therefore strategically prefer on this issue (and others) that the Court be forced to pick between recognizing a search and requiring a warrant or recognizing no search and leaving the matter entirely unregulated, because they might think it will force the Court to require the warrant earlier in the locational surveillance. My point is simply that that, abstracting from these political issues, one-size-fits-all inflexibility is not inevitably or even likely the best approach. If you can draw the lines in the right places, two lines are sometimes better than one.

monitoring when it has reasonable suspicion, so calling that a limited search may impose minimal costs on government (other than to prevent dragnets).

Of course, there is no magic to the number two. In a given context, one might prefer to have three or more subcategories of search. Indeed, one might dispense with discontinuous categories entirely and judge each search on its own merits by some sort of reasonableness balancing. That is essentially what the Court does when it analyzes a search under the "special needs" doctrine.[61] But there are obvious advantages to categorical rules, and to simpler rather than more complex rules, to be weighed against the precise results that a standard enables. The point of this article is not to identify the optimal level of complexity for subcategories of fourth amendment searches, but merely to demonstrate the superiority of a more complex rule than the one the Court articulated in *Riley*. My main aim with the hasty analysis of this Part is to frame the decision in *Riley*, to show one way in which *Riley* fits in with the other cases. Now I will turn to the merits of the scope-limited search of a cell phone, beginning with how to formulate the rule.

II. DEFINING A SCOPE-LIMITED CELL PHONE SEARCH

In *Riley*, the United States and California argued for several alternatives to the warrant requirement for searching a cell phone incident to arrest. I will review the more promising options and identify what I think is the best scope-limited rule.[62] In the next Part, I will consider the merits of the rule.

As the first alternative, the government proposed that the Court permit, by analogy to *Gant*, "a warrantless search of an arrestee's cell phone whenever it is reasonable to believe that the phone contains evidence of the crime of arrest."[63] By itself, this would place only a minor limitation on when police could search a cell phone and no limit on the scope of the search. Because the phone contains so much historical information about one's movements, messages, contacts, etc., many people who commit a crime will leave evidence of it on their phone; police

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[61] See sources cited at n. [15].

[62] I do not discuss two options the governments raised. In the brief, the United States also suggested a rule under which the police are always allowed to examine a cell phone's call log incident to arrest. At oral argument, California suggested a rule of analogy, as the Court put it: "officers could search cell phone data if they could have obtained the same information from a pre-digital counterpart." Riley, at 2493. I find these arguments unappealing for the reasons the Court provides.

[63] Id at 2492.

will frequently have reason to expect to find it. Roberts goes further, stating: "It would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone."[64] As a result, the *Gant* rule, by itself, would allow police "unbridled discretion to rummage at will."[65]

Roberts exaggerates.[66] The *Gant* rule would place *some* constraint on police, at least if the Court had demanded not merely that it be conceivable that the cell phone contains evidence of the crime of arrest, but that there is a reasonable (i.e., non-trivial) probability that it does. One would not expect to find in the phone's messages, photos, web searches, or apps evidence for the traffic offense of not wearing a seat belt. Nor should we expect to find there evidence for crimes of opportunity, such as embezzlement, shoplifting, or a sudden bar fight. One might reply that the phone could contain texts or emails revealing the intent to commit the crime or an admission after the fact. But without something more (given that the crimes require no cooperation of others), the purely speculative possibility is not a "reason to believe" the evidence exists. Or so the Court could have declared.

But what about locational data? Perhaps there is always reason to believe the locational data is evidence of the crime of arrest, as long as the crime was committed in a specific location. The officer specifies that he arrested the defendant for a stated crime committed on a particular road or in a particular workplace, store, or bar. The phone confirms that the defendant was present at that road, workplace, store, or bar at the time when the officer says the crime was committed.

With a little innovation, this result is not too difficult to avoid. The Court could have stated that the expectation of locational data is itself insufficient to justify a cell phone search in cases where there is no reason to expect location to be disputed. In other words, the anticipated evidence must have some practical value. When the defendant is arrested for embezzling from his regular employer, he is not going to defend himself by saying that he was never present in his place

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[64] Id. Roberts also says that *Gant* is distinguishable because of the unique circumstances of being a car search. Id. That distinction hardly answers the policy issues that are my focus.

[65] Id.

[66] If Roberts is literally correct, he casts doubt onto *Gant* itself because it is becoming increasingly common for cars to have built-in, on-board computers, which can contain extensive locational information and email.

of employment when he obviously was (or at least there is no "reason to believe" he will). Thus, the police cannot justify warrantlessly searching the cell phone incident to arrest by saying it will show the suspect to have regularly visited his workplace, when his being at work is not in dispute. When police arrest the defendant at the scene of the crime – the shop where the theft occurred; the bar where the fight occurred – there is no expected practical value to the locational data on the defendant's phone because the police and other witnesses can testify to his obvious presence. Or, again, the Court could have so declared in creating a category of scope-limited search incident to arrest.[67]

Nonetheless, Roberts is correct to think that the *Gant*-limitation, *by itself*, would be quite permissive. To prevent unbridled rummaging in many cases, we would need a limitation on the scope of the search: not merely *when*, but *how* the police can look through the phone incident to arrest. The Solicitor General's next argument addressed this point, claiming that the scope of the search could be limited, as the Court later described it, to "those areas of the phone where an officer reasonably believes that information relevant to the crime, the arrestee's identity, or officer safety will be discovered."[68] This is the idea of a cursory inspection or "frisk" of a phone.

Various lower courts had embraced this idea and the circumstances of those cases provide useful illustrations. In one Seventh Circuit case, the police had examined the phone, incident to arrest, solely to determine the operational number assigned to the phone, limiting their examination to the cursory search needed to acquire that information.[69] Judge Posner upheld the validity of the search precisely because of its triviality, reserving for "another day" the permissibility of a "more extensive search."[70] In a Massachusetts case, the Supreme Court upheld a phone search limited to "a simple examination of the recent call list," emphasizing that "no further intrusion into the telephone's contents occurred."[71] The Supreme Court of Georgia upheld a search accessing the specific text messages an undercover officer had sent the defendant earlier on

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[67] Cf. Fisher v. United States, 425 U.S. 391, 411 (1976)(holding on the facts of the case that there was no testimonial content to the act of producing papers in response to subpoena because "[t]he existence and location of the papers are a foregone conclusion."). Personal location is often a "foregone conclusion," so the evidence has no value to the government.

[68] *Riley*, at 2492.

[69] U.S. v. Flores-Lopez, 670 F.3d 803 (7th Cir. 2012) (Posner, J.)

[70] Id. at 810.

[71] Commonwealth v. Phifer, 463 Mass. 790 (2012).

the day of the arrest, confirming that she was the person with whom he had been communicating about an (undercover) drug transaction. The court noted: "'[A cell phone] search must be limited as much as is reasonably practicable by the object of the search.' That will usually mean that an officer may not conduct a 'fishing expedition' and sift through all of the data stored in the cell phone."[72]

Given that this was a common approach below, it is surprising how briefly, in a long opinion, the Court explains its rejection of the compromise rule: "This approach would again impose few meaningful constraints on officers. The proposed categories would sweep in a great deal of information, and officers would not always be able to discern in advance what information would be found where."[73] In his concurrence, Justice Alito also briefly rejects the scope-limited rule, stating:

> I do not see a workable alternative. Law enforcement officers need clear rules regarding searches incident to arrest, and it would take many cases and many years for the courts to develop more nuanced rules. And during that time, the nature of the electronic devices that ordinary Americans carry on their persons would continue to change.[74]

These reasons are deeply unsatisfying. Defining and elaborating the "cursory inspection" of a cell phone would, no doubt, require judicial time and effort. But that is true of many or most judicially created rules.[75] Technological

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[72] Hawkins v. State, 290 Ga. 785, 788 (2012). See id. at 787–88 ("[T]he fact that a large amount of information may be in a cell phone has substantial import as to the scope of the permitted search . . . Thus, when 'the object of the search is to discover certain text messages, for instance, there is no need for the officer to sift through photos or audio files or Internet browsing history data stored [in] the phone.' Accordingly, reviewing the reasonable scope of the search will largely be a fact-specific inquiry.").

[73] *Riley*, at 2492.

[74] Id. at 2497 (Alito, J., concurring).

[75] The same is also true of legislation, though the legislature might be the better institution for formulating such rules. Alito makes this point in his concurrence, stating that he would reconsider the constitutionality of warrantless cell phone searches incident to arrest if Congress or state legislatures, after gathering appropriate information, were to "enact legislation that draws reasonable distinctions based on categories of information or perhaps other variables." Id. Alito seems to advocate what John Rappaport calls "second order" regulation, where the Court encourages other branches to operate as the primary regulators of the police. See John Rappaport, "Second-Order Regulation of Law Enforcement," 103 Cal. L. Rev. 205 (2015). In this article, I take as given the judicial role in

change complicates the project of defining scope-limitations, but the evolution of technology will challenge fourth amendment rules in any event (as in this case), and the concept of a cursory digital search might prove useful as that happens.

I find it particularly difficult to take seriously the idea that this rule would be less workable than other fourth amendment rules, or indeed, the current doctrine of searches incident to arrest, which borders on the incoherent. Starting with *Robinson*, Supreme Court doctrine justifies allowing the search of containers incident to arrest by the risk that the arrestee will access weapons or tamper with evidence. But, as Alito observed in his concurrence, once the officer knows the container does not hold a weapon, the risks of tampering are fully avoided by having the officer secure the container without searching it. Given the rationale, therefore, the officer should seek a warrant before searching the container, i.e., the rule in *Riley*. Yet *Robinson* continues to permit an unlimited and warrantless container search incident to arrest. Unless, of course, the container is an automobile, where, in *Gant*, Scalia succeeded in introducing a different idea. Once the arrestee is secure, *Gant* authorizes searches of the vehicle, not to prevent access to weapons or evidence tampering, but to further the investigation by finding evidence of criminality, though limited to evidence of the crime of arrest. Scalia would prefer that this doctrine would apply generally to govern searches of non-automobile containers and houses. But *Gant* held its rule to be limited to the context of vehicles, as *Riley* points out.

Thus, we have three competing doctrines regarding warrantless searches of containers incident to arrest: (1) the permissibility of a full search (*Robinson*), (2) the permissibility of a scope-limited search (*Gant*), and, now, (3) the impermissibility of any search absent another warrant exception (*Riley*). So understood, the virtue of simplicity would favor placing cell phones in category 2 and avoiding the creation of a new category 3. Indeed, as I suggest below, one advantage of defining a scope-limited search of a cell phone is that the momentum towards this category might, in the future, have facilitated the transfer of other search objects (namely, "papers") from the *Robinson* regime of category 1 to the *Gant* regime of category 2. In any event, it is not the case that the Court had to reject the governments' compromise rules in *Riley* in order to preserve the simplicity and coherence of its search-incident doctrine.

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specifying the constitutionally minimal standards, and that doing so will make it the primary regulator of police when the legislature is inactive.

The above quotation from Roberts raises the separate concern that "officers would not always be able to discern in advance what information would be found where."[76] That is no doubt true. Clever criminals may hide or encode information; they might use programs to scramble the dates of messages and photos. But it is the nature of any cursory search or seizure that the officer cannot guarantee success. If police stop a person based only on reasonable suspicion, but can neither confirm nor dispel that suspicion, after the passage of some amount of time, the *Terry*-stop must come to an end.[77] Without probable cause, the police cannot continue to detain the suspect in a way tantamount to arrest. The same is true here. The police have some limited time to look in relevant places to find what evidence they have reason to believe exists. The failure to find it promptly undermines the reason to believe it is present and, in any event, eventually exhausts the time available. At that point, even with a scope-limited exception, the officer has to get a warrant.

Finally, from Alito, we receive the familiar trope of needing "clear rules" for police. Depending on one's general attitude, it is frustrating or amusing that Supreme Court opinions trumpet the simple-rules-the-police-can-understand argument whenever a justice favors a bright-line rule over a standard, but the opinions then ignore the point whenever a justice adopts or applies one of its open-ended standards. To do their jobs constitutionally, police must understand the fundamental concepts of "probable cause" and "reasonable suspicion." Those are not rules but standards based on a totality of circumstances.[78] The doctrines for when police have seized a person, when the seizure is an arrest, and when they have received consent for a search – all fundamental to police work – are also governed by a totality of circumstances standard.[79] If police can understand

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[76] Id. at 2492.

[77] See sources cited supra note [51].

[78] Regarding probable cause, see Illinois v. Gates, 462 U.S. 213 (1983); Maryland v. Pringle, 540 U.S. 366 (2003). Regarding reasonable suspicion, see Terry, supra; United States v. Arvizu, 534 U.S. 266 (2002); Illinois v. Wardlow, 528 U.S. 119 (2000).

[79] For the definition of a seizure of a person, see Draper v. United States, 358 U.S. 307 (1959); Florida v. Bostick, 501 U.S. 429 (1991); United States v. Mendenhall, 446 U.S. 544 (1980). Regarding the distinction between the seizure that is an investigatory stop under *Terry* (justified by reasonable suspicion) and the greater seizure that is an arrest (justified by probable cause), see United States v. Sharpe, 470 U.S. 675, 685 (1985) ("Admittedly, *Terry, Dunaway, Royer,* and *Place,* considered together, may in some instances create difficult line-drawing problems in distinguishing an investigative stop from a *de facto* arrest."). For cases defining consent, see Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Georgia v. Randolph, 547 U.S. 103 (2006). As the Court has revived the

these evolving standards, one needs a better reason to reject the proposed standard of a limited cell phone search than the idea that police require simple rules.[80]

The inconsistency between fourth amendment rules and fourth amendment standards arises in this very case. Roberts emphasizes that, despite its general holding, the police can search a cell phone incident to arrest (or otherwise, presumably) when there is an exigency. The Court states:

> In light of the availability of the exigent circumstances exception, there is no reason to believe that law enforcement officers will not be able to address some of the more extreme hypotheticals that have been suggested: a suspect texting an accomplice who, it is feared, is preparing to detonate a bomb, or a child abductor who may have information about the child's location on his cell phone.[81]

Yet no bright line rule defines the parameters of exigent circumstances; exigency is judged by a standard of immediate need.

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relevance of trespass to the Fourth Amendment, a similarly open-ended question is whether the police are engaged in a licensed or unlicensed use of property. See Florida v. Jardines, 133 S. Ct. 1409, 1415-17 (2013).

[80] One might reply that the Court favors rules by using them whenever possible, employing standards only where there is no workable rule. To the contrary, however, the Court is not so consistent. On numerous occasions, lower courts have formulated plausible rules about probable cause, seizures, and consent searches in some recurrent context only to be reversed by the Court, which insisted on a totality-of-circumstances standard. See, e.g., Florida v. Harris, 133 S. Ct. 1050 (2013)(rejecting lower court efforts to define specific rules for when dog sniffs generate probable cause); Ohio v. Robinette, 519 U.S. 33, 39 (1996) (rejecting lower court efforts to define specific rules for when a stopped motorist gives valid consent); Florida v. Bostick, 501 U.S. 429, 439-40 (1991) (rejecting lower court rules for determining when an investigatory tactic is a seizure); Michigan v. Chesternut, 486 U.S. 567, 572-73 (1988)(same); *Sharp*, *supra* (rejecting a per se rule specifying the maximum permissible duration of a *Terry*-stop). The Court abandoned its own successful efforts to make rules to define probable cause in a recurrent situation. See Illinois v. Gates, 462 U.S. 213, 238 (1983) (abandoning *Aguilar*'s and *Spinelli*'s rules specifying when anonymous tips can generate probable cause). Michael Coenen uses these fourth amendment cases as central examples in discussing the odd rule he discerns from Supreme Court precedent: that some standards may not be clarified by rules. See Michael Coenen, "Rules Against Rulification," 124 Yale L.J. 576 (2014).

[81] *Riley*, at 2494.

The standard is easily applied to the two textbook examples the Court offers. For many cases, however, there is much uncertainty for police. For example, suppose that 24 hours ago, a pair of men committed a felony, a robbery, arson, rape, or the theft of some weapons or art. Today, based on probable cause, the police arrest one suspect. Do we have an exigency simply because the other perpetrator is at large? If the crime is a theft, do we have an exigency because the stolen weapons or art is still missing? Presumably not. What if the police also see the arrestee using his phone right before they make contact, perhaps trying to send a text before the police can take the phone? What if the pair is believed to be serial offenders, so there might be another crime today, or the police have reason to think the other suspect could flee the jurisdiction? Or what if the facts are like one of the cases in *Riley* (the defendant Wurie): after the arrest, the phone keeps ringing.[82] Does it matter if the incoming call is labeled "Boss" or "Bro"?

These questions are difficult. There is no bright line defining exigency. Yet even when we have determined that an exigency exists, we must move to a second question: what kind of cell phone search does the exigency justify? Does it mean the police can now rummage through all the contents of the phone? Not at all. Basic doctrine says that if an exigency justifies the search, the search is limited by the exigency.[83] In *Hicks*, for example, the police could enter an apartment based on the exigency of a recent shooting, but could only look in places where the shooter or a weapon could fit.[84] In general, the exigency limits police to looking in the places where they might expect to find evidence the contingency makes relevant. To take one of the Court's examples, if the police are looking for the kidnap victim, and the victim was taken two days ago, the information they need is in the locational data of the past two days, and it is likely that police can also examine texts or phone calls of the same time period (given that kidnapping usually involves cooperating criminals). Perhaps the exigency also allows the police to go back some period before the kidnapping occurred. Defining that time period requires an open-ended inquiry that the exigency standard is used to resolve. The exigency exception thus requires the

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[82] *Riley*, at 2481.

[83] See Mincey v. Arizona, *supra*, at 393 (noting in a case involving the search of a murder scene that "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation,'" citing *Terry*); Missouri v. McNeely, 133 S. Ct. 1552, 1559 (2013); Kentucky v. King, 131 S.Ct. 1849 (2011).

[84] *Hicks*, supra, at 324–25.

very scope-limitation which is supposedly too taxing for the courts to create and too complicated for police to follow.

In addition, various judges thought it possible to develop a law of cursory phone searches. The governments cited those cases, a few of which were mentioned above, in their briefs. A few months after the *Riley* decision, the Canadian Supreme Court reached the same issue in *Regina v. Fearon.*[85] That Court fashioned a rule permitting a scope-limited search: Assuming that the arrest is lawful, and that the cell phone search be "truly incidental to the arrest," the Court also required that police have "a valid law enforcement purpose to conduct the search" and that "the nature and the extent of the search are tailored to the purpose of the search."[86] The Court was serious enough about the scope-limitation that it added a process requirement that "police take detailed notes of what they have examined on the device and how it was searched."[87] In context, it appears that these notes need be nearly contemporaneous with the search. The notes are an independent requirement; if the police don't take notes, it cannot meet its burden of proving the search to be within the permitted scope. In *Fearon*, the police had not taken notes, not yet having been informed of this rule, and so the Court held the cell phone search to be unlawful (though, in the end, it did not exclude the evidence).[88]

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[85] *Fearon*, supra.

[86] Id. at 83.

[87] Id.

[88] Id. The court offered this summary of its holding:

[P]olice officers will not be justified in searching a cell phone or similar device incidental to every arrest. Rather, such a search will comply [with Canadian constitutional law] where:

(1) The arrest was lawful;

(2) The search is truly incidental to the arrest in that the police have a reason based on a valid law enforcement purpose to conduct the search, and that reason is objectively reasonable. The valid law enforcement purposes in this context are:

(a) Protecting the police, the accused, or the public;

(b) Preserving evidence; or

(c) Discovering evidence, including locating additional suspects, in situations in which the investigation will be stymied or significantly hampered absent the ability to promptly search the cell incident to arrest;

(3) The nature and the extent of the search are tailored to the purpose of the search; and

Fearon offer a plausible definition for a cursory search of a cell-phone. One might disagree with how the court limited the ends of the search merely to any objectively "valid law enforcement purpose" (which was similar to the Solicitor General's second proposal in *Riley*[89]). It would be better to use the narrower limitation of *Gant*: the goal of securing evidence of the crime of arrest. The *Fearon* court properly insists on the means being narrowly tailored to achieve the legitimate ends, limiting the "nature and extent" of the search, including the issue of time. Worth considering is the requirement that police take notes indicating the reasons for and scope of their search, which obviously facilitates judicial review of the scope limitations, but has no American precedent, as far as I can determine.

Thus, the threshold for the warrantless search I am proposing is a reason to believe the cell phone contains useful evidence of the crime of arrest; the scope is a brief examination of the part of the phone that the police reasonably believe can contain such evidence. The police should be limited to examining the phone promptly after the arrest, which means in the field, not in the police crime lab. If the crime is recent, the search should ordinarily be limited to a recent time period. In the normal case, if the crime was committed in the past few hours or days, the police are fishing if they go back a year or a month. Thus, a court can prevent general rummaging by identifying it where it exists. The task of defining scope-limitations would require some common law refinement of the standard over time, but it could obviously be done.

To summarize, I propose that the Court should have permitted police to conduct a brief field search of a cell phone, without a warrant, when it is incident to a valid arrest, there is reason to believe that the phone contains useful evidence of the crime of arrest, and the police limit their search to the places where such evidence might realistically be found. With that definition in mind, I now turn to the case for granting police the power of a low intensity search of a cell phone incident to arrest.

> (4) The police take detailed notes of what they have examined on the device and how it was searched.

Id.

[89] See TAN [68].

III. THE ADVANTAGES OF A SCOPE-LIMITED CELL PHONE SEARCH

I offer four arguments for the scope-limited rule I have defined. The starting point is a discussion of the normative basis for Figure 1. Is there any good reason for varying the number of search categories with the target of the search? I argue there is such a reason and that it points toward a more nuanced rule for cell phones. Second, I evaluate the eternal "balance" of law enforcement and the values of the fourth amendment, contending that it favors a compromise rule.[90] Third, I consider how *Riley* produces an unfortunate doctrinal anomaly – the differential treatment of digital and analog "papers" – that the scope-limited search would narrow. Finally, I predict that *Riley* may produce an unintended negative consequence – loosening of the exigent circumstances exception to the warrant requirement.

A. Higher Stakes Justify Scope-Limited Rules

Is there a normative theory that can explain Figure 1? Why should the law recognize more categories of a search in some context than in others? The obvious answer that I propose is that the complexity of the rule should depend on the stakes involved for privacy and law enforcement. When the stakes for both are low, the optimal rule is simple, because it matters less that the rule gets some cases wrong, given the cost of a more complex rule. Where the stakes are high on one side and low on the other, the optimal rule is still likely to be simple, in favor of the side where the stakes are much higher. For example, if the privacy stakes of a category of search are high and the law enforcement stakes are low, we should expect a simple rule offering strong protections against search. But the final case of interest is where the stakes are high on both sides, privacy and law enforcement. Here, it is likely that the optimal rule is more complex.[91]

We might guess that the stakes are particularly high for searches of persons and homes, two areas in which the Court recognizes a distinction between ordinary searches and some kind of low-intensity search. The privacy or

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[90] See, e.g., Wyoming v. Houghton, 526 U.S. 295, 299-300 (1999) ("Where [the historical] inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.").

[91] See, e.g., Louis Kaplow, "Rules versus Standards: An Economic Analysis," 42 Duke L.J. 557 (1992); Francesco Parisi, "Rules versus Standards," The Encyclopedia of Public Choice 835 (2004).

liberty interest is particularly high when it involves one's bodily integrity; the stakes are especially high when it involves the home, i.e., the property one expects to serve as a refuge, a place of relative isolation from the world. At the same time, the law enforcement stakes were high in both *Terry* and *Buie* because the purpose of the frisk (of the person or house) was to identify immediate threats to the safety of the police officer. The high privacy stakes push against a simple rule requiring no additional justification for the frisk; the high law enforcement stakes push against a simple rule requiring probable cause and warrant. The compromise rule – a lesser form of search (frisk) justified by a lesser level of justification (reasonable suspicion) – is more complicated and costly, but justified by the error costs of the simple rule.[92]

The search of property in *Arizona v. Hicks* is harder to classify. Given that the police are already lawfully inside the apartment, the privacy interests are limited to their inspection of personal property, which for things that are not papers, is generally less serious than that the interest involved in searching one's body or home. The law enforcement interest is also plausibly less. First, there is no issue of police safety. Second, the main use of a cursory inspection of appliances would be, as in *Hicks*, to find the serial number to identify if the goods were stolen. Unless they were stolen in the course of a deadly robbery, the law enforcement interest in detecting theft is moderate, not at all trivial but not of the highest importance. Thus, the case for creating a scope-limited rule was weaker than in *Terry* or *Buie*.[93] None of this is to say that *Hicks* came out the right way; I still believe the dissent had the stronger argument. But the case is a close one and

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[92] On this analysis, the result in Michigan v. Long arises from the fact that the law enforcement stakes are high (officer safety), while the privacy stakes are not so high (a brief search for weapons in the subset of the passenger area of a car in which the suspect might grab a weapon).

[93] Although I am mentioning the severity of crime as being relevant for picking the doctrine, I assume that the scope-limited rule I advocate would not be applied differentially depending on the seriousness of the crime. I instead assume and follow the conventional assumption that fourth amendment doctrine is trans-substantive rule. See William J. Stuntz, Essay, "Local Policing After the Terror," 111 Yale L.J. 2137, 2140 (2002) ("[M]ost constitutional limits on policing are transsubstantive -- they apply equally to suspected drug dealers and suspected terrorists."). For an exchange of normative views on the transsubstantive basis of fourth amendment doctrine, see Jeffrey Bellin, "Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World," 97 Iowa L. Rev. 1 (2011); Christopher Slobogin, "Why Crime Severity Analysis is Not Reasonable," 97 Iowa L. Rev. Bull. 1 (2012).

the above analysis shows that one could justify the distinction from *Terry* and *Buie*.[94]

Where do cell phones fit this analysis? A cell phone is a container for an immense number of digital "papers," documents of one's messages, images, location, etc. As *Riley* explains, the privacy stakes in these digital papers are extremely high, obviously much higher than for an appliance serial number. What about the law enforcement interests? On the rule/standard theory I am offering, the Court's decision – a simple rule strongly protecting fourth amendment rights by requiring a warrant – would make sense if the law enforcement interests were low. Yet I don't think they are. First, there is the possibility that an arrestee recently communicated on the phone with criminal confederates who might be on their way to the scene, posing a threat to the officer. Second, the very fact that there is pervasive private information on one's cell phone means that, when the owner is guilty of the crime of arrest, it is highly likely to contain highly probative evidence of that crime, and this relationship is likely to hold for very serious crimes. Thus, the stakes are high on both sides. The search of a cell phone is therefore more like *Terry* and *Buie*. High stakes on both sides make it easier to justify a more complex rule, one that distinguishes ordinary searches from cursory searches, and requires more justification for the former than the latter.

The point about optimal rule complexity is fairly abstract. Now let us move to a more pragmatic balancing of costs and benefits.

B. Balancing Privacy and Law Enforcement

When the issue turns on balancing, as it often does, the frustrating reality of fourth amendment law is that we usually have nothing but our intuitions. Whether the constitutional value at issue is defined as privacy (as I will assume), autonomy, property, dignity, security, or something else, we have no good way of measuring the loss of that value when the rule permits greater government

[94] One might justify the *Hicks* outcome on other grounds, while still rejecting the logic of "a search is a search." Where police safety is not in issue, perhaps cursory searches incident to arrest or of items in plain view should always be limited by a connection to the crime of arrest or the exigency justifying the home entry that puts the item in plain view (i.e., whatever justifies the initial warrantless search or seizure), as we see in *Gant*. In *Hicks*, the police search of the stereo was unrelated to the exigent circumstances justifying entry into the apartment. I thank Chris Slobogin for this point.

intrusion. Sometimes there are empirical studies of privacy expectations,[95] which are a valuable start, but we lack a good way of assigning a weight to a loss of any particular kind of privacy, and we are in even worse shape with many other values. On the other side we have the law enforcement interest. The problem here seems more tractable; in principle, criminologists could quantify the crime reduction (or increased clearance rate or cost savings) attributable to a particular police practice. Yet social science still debates the value of more basic things, like whether adding police decreases crime,[96] so it is not surprising that there is no empirical consensus on the effect of specific police tactics. When the job is balancing, it would be good if the evidence permitted a serious cost-benefit analysis, but courts and commentators can only offer intuition.

So here is my intuition, with the brevity it deserves: the privacy losses of cursory cell phone searches are outweighed by the law enforcement gains. First, as *Riley* describes,[97] much of the privacy concern about cell phones is what could be reconstructed about a person if the police are allowed to excavate the entire phone, piecing together locational information, contacts, messages, photos, search history, etc. That sort of comprehensive search and mosaic reconstruction is in almost all cases beyond the capability of an officer in the field limited by time and the places to be searched (related to the crime of arrest).[98] No doubt, an officer may come across a recent message or photo that is, by itself, embarrassing and revealing of intimate information. But, as I emphasize in section III-C, that risk exists in the world of analog searches incident to arrest, which are still

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[95] See, e.g., Christopher Slobogin and Joseph E. Schumacher, "Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at 'Understandings Recognized and Permitted by Society,'" 42 Duke L.J. 727 (1993); Matthew B. Kugler & Lior Strahilevitz, Surveillance Duration Doesn't Affect Privacy Expectations: An Empirical Test of the Mosaic Theory (July 10, 2015), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629373.

[96] See, e.g., Ben Vollaard and Joseph Hamed, "Why the Police Have an Effect on Violent Crime After All: Evidence from the British Crime Survey." 55 *J. Law & Econ.* 901 (2012).

[97] *Riley*, supra, at 2489.

[98] See Stephen E. Henderson, "Real-Time and Historic Location Surveillance after *United States v. Jones*: An Administrable, Mildly Mosaic Approach," 103 J. Crim. L. & Criminology 803 (2013); David Gray and Danielle Keats Citron, "A Shattered Looking Glass: The Pitfalls and Potential of the Mosaic Theory of Fourth Amendment Privacy," 14 N.C. J. L. & Tech. 381 (2013); Orin S. Kerr, "The Mosaic Theory of the Fourth Amendment," 111 Mich. L. Rev. 311 (2012).

governed by *Robinson*. What is special about cell phones is mostly not at issue in a cursory field search.

Second, police work depends on persistent timeliness – a promptness in identifying and following up leads. When a person is arrested, there may be a limited time to find co-conspirators or witnesses who will, upon learning of the arrest, flee or hide. There may be limited time to find evidence that may be moved or destroyed and to uncover plans for future crimes. In *Fearon*, when the police arrested one robber, but the other robber, the stolen money, and the firearm were still missing, the Canadian Supreme Court thought that good police work involved the immediate search of the phone.[99] The same was true of the other lower court cases discussed above: they endorsed the police immediately following up leads.[100]

Against my argument here are two responses. The first is Roberts' observation about the existence of the exigent circumstance exception.[101] Perhaps the exception will desirably allow a warrantless search in cases like *Fearon*, but not allow warrantless searches in cases without exigency.

My rejoinder is that, unless the exigency doctrine changes (for the worse, as I argue in Part III-D), it only solves a small part of the problem. An exigency is based on a specific threat of evidence destruction or flight or something else. In *Fearon*, the police did not have any specific evidence that the particular co-felon involved had been alerted of the arrest or was in the process of fleeing, nor that the particular money or gun were about to be moved, hidden, or destroyed.[102] Instead, the police had, as they frequently would, a *general* concern that co-felons will be tipped off before the police can get to them, giving them time to put themselves and the evidence beyond the reach of police. Similarly, the fact that the arrestee's phone rings after the arrest is not convincing evidence of exigency, but answering the call or promptly accessing the phone to determine its origin seems like a pretty good police practice, with the potential to create new leads.[103]

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[99] *Fearon*, supra.

[100] See *Hawkins, Phifer, Flores-Lopez*.

[101] *Riley*, supra, at 2494.

[102] *Fearon*, supra, at xx.

[103] This scenario is similar to the facts of Wurie in *Riley*. There the arrestee's phone repeatedly received an incoming call from a source the labeled as "my house." See id. at 2481. In the court below, the dissenter argued that these facts created an exigency justifying the search of the phone. See United States v. Wurie, 728 F.3d 1, 17 (1st Cir. 2013) (Howard, J., dissenting). Yet the claim of exigency here is very weak and supports

It is productive, as a matter of routine police work, to discover the names and locations of co-felons as quickly as possible, which in some cases a cursory search will uniquely achieve.

I don't know how often one of these hidden exigency scenarios arises, but consider a list of the possibilities. Over the course of all arrests, there will be a number of cases where, despite the absence of specific grounds for suspicion, the arrestee has recently used the cell phone to send to, or receive from, co-felons a message regarding the crime. The message might reveal ongoing efforts to flee or hide evidence or the confederates' expectation of an immediate text from the arrestee confirming that all is well, the absence of which will trigger such efforts.[104] In some additional percentage of cases, the criminal confederates will not be tipped off, but the arrestee's phone will have unknown time-sensitive information about their temporary location or plans for an imminent new crime, one that police can thwart only if they search the phone immediately. When there is reason to believe the phone contains useful evidence of the crime of arrest, particularly when there are unaccounted for co-felons, weapons, or evidence, the best routine practice upon securing the arrestee may be to promptly check the arrestee's phone for recent messages (calls, emails, texts) to see if any of these scenarios is playing out. The scope-limited search defined above will permit enough searching to discover these types of evidence with some high frequency. The exigent circumstances, by contrast, permits the warrantless search only when police already have specific evidence that one of these scenarios is present.

The second response to the law enforcement point I am making is that police *can* routinely search the phone incident to arrest if they routinely get a warrant, which can become standard practice for all arrests. And with telephonic

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my claim in Part III-D that the effect of *Riley* will be to weaken the standards for exigency, as discussed there. If there were an exigency here, a crucial fact in support would be that the incoming call was labeled (readable on the outside of the phone) as "my house." Even the dissenter would appear to concede that there would be no exigency for calls not so labelled, yet there would be investigative value to answering any incoming call on the arrestee's phone received shortly after arrest.

[104] See U.S. v. Flores-Lopez, supra note xx, (Posner, J.)("The arrested suspect might have prearranged with coconspirators to call them periodically and if they didn't hear from him on schedule to take that as a warning that he had been seized, and to scatter.").

warrants, the time delay need not be particularly long.[105] This is obviously an important point, probably the best argument for *Riley*'s rejection of a compromise rule. Consider a few replies.

There is a tradeoff between a serious warrant process, which will impede the routine searches I advocate, and a non-serious warrant process, which is a perfunctory and meaningless ritual. First, if the warrant requirement involves serious consideration of probable cause to believe the particular phone contains evidence of a crime, then it could easily prevent phone searches from being routine. Roberts says that it take would be an unimaginative officer who could not think of several types of evidence for the crime of arrest that *might* be on the phone, but that does not have to mean that it is easy to demonstrate *probable cause* to believe that the phone contains such evidence. If the warrant process is serious, the police will frequently fail to justify even the most limited peek into the phone.

Where there is probable cause, the warrant requirement necessitates delay. The *Riley* briefs and opinion extensively discussed the worst case scenario where delay makes the search impossible, for one of two reasons: (1) that the phone, after a short time of disuse, becomes inaccessible without a password the arrestee will not share; and (2) that the phone may be remotely wiped.[106] The Court was ultimately not concerned about these matters given its assessment of the technologies, especially the use of Faraday bags,[107] but (at the conference) Mary Leary offered some cause for pessimism about these solutions.[108] Without resolving the matter, one can say that technology is constantly changing, so it is difficult to be certain that the delay of a warrant will not sometimes put the contents of a phone beyond reach of the police. A cursory but immediate field search may turn out to be a unique moment of access.

Even if there is a warrant and the police gain access to the phone, there is delay. While new technology makes it faster to get warrants, it also accelerates the ability of criminals to coordinate their activities and communicate the need to destroy evidence or flee. It is not clear that the greater speed in warrants fully compensates for the greater quickness in criminal efforts at concealment. One possibility is that co-felons have an agreement to send a certain message

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[105] *Riley*, supra, at 2493.

[106] *Riley*, supra, at 2486.

[107] Id. at 2486–87.

[108] [cite her conference paper in this volume]

periodically to indicate that all is well, in which case the arrest will automatically notify the co-felons whenever the next message is due and the arrestee doesn't send it.[109]

And even if the information remains perfectly accessible, in the aggregate, there is cost to delay. As explained above, when the evidence on the phone is time sensitive, but the police don't know there is an exigency, even brief delay can cause the loss of suspects and evidence.

Now consider a different scenario. Magistrates may wind up granting the request as a matter of course. If police routinely request warrants from the field whenever they arrest someone possessing a phone, that will add millions of new requests each year across the United States.[110] The pressure of those new warrant requests may produce an assembly-line production of warrants. Many magistrates may decide categorically that, unless it is clear that the arrestee is innocent, or clear that a single person committed the crime of arrest by himself or herself, there is always probable cause to search the arrestee's phone, given the likelihood do finding evidence pointing to confederates. But then there is little in the way of individualized consideration of the cause for searching the phone and it is not clear what the warrant requirement accomplishes.

Indeed, note the perverse incentive that may arise from requiring a warrant for even the most cursory search. If, to check for unknown exigencies, police will routinely request and magistrates will routinely grant warrants to search the phone of arrestees, then *Riley* will produce deeper privacy invasions compared to the rule I propose. With a scope-limited exception, the police will routinely conduct a cursory search in the field and frequently, finding nothing of interest, have no reason to seek a warrant. This seems likely because approximately 95% of convictions come from a guilty plea.[111] After a scope-limited search, the police and prosecutor would be able to retain the phone and maintain the option of getting a warrant if the defendant threatens to go to trial. But a busy police force and prosecutor's office would have better things to do than to ask for a warrant for all the phones of defendants already pleading guilty after they have already completed a cursory search and found nothing. If the

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[109] See *Flores-Lopez*, supra.

[110] There were more than 12.1 million arrests in the United States in 2012. See https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/persons-arrested.

[111] See http://www.bjs.gov/index.cfm?ty=qa&iid=405.

price of taking the smallest peek inside the phone is a warrant, however, more police will seek warrants and those warrants will allow and produce more general rummaging. True, the warrants may themselves limit the scope of the search, but because the information could be hidden anywhere (as Roberts says), and the time for searching is not limited, the warrant-based search will be far more intrusive than the cursory field search. This is all the more true if the warrant allows police to make a complete copy of the phone.

In sum, for what it's worth, my intuition is on the side of many lower courts and the Canadian Supreme Court: the balancing favors allowing a warrantless but cursory search of cell phones incident to arrest.

C. The Doctrinal Gap between Digital and "Analog" Searches

Consider next the doctrinal anomaly *Riley* creates. Justice Alito explains in his concurrence that "It has long been accepted that written items found on the person of an arrestee may be examined and used at trial."[112] Here he cites a long string of cases involving the warrantless search, incident to arrest, of a diary, ledger, stack of bills, address book, notebook, wallet, meeting minutes, circular, advertising matter, checkbook, set of "memoranda containing various names and addresses," and other "papers."[113] These cases follow *Robinson*, which allows warrantless searches of non-digital containers found on the person of the arrestee: wallets, purses, backpacks, etc. As Alito argues, it would be easy enough to secure papers found on a person or in their containers until such time as a warrant is obtained. But the "analog" rule is that all the papers may be thoroughly examined incident to arrest without a warrant. *Riley*'s new digital rule is quite different.

One could explain this anomaly by the expedience of rule-making. Rules are always over- and under-inclusive. So if it is easy to distinguish between analog and digital material and if the former, on average, contains far less private information than the latter, on average, then a different rule for each could make sense. Yet, it is also not so difficult to distinguish "papers" (all the above examples Alito references) from "effects" (e.g., weapons, drugs, cash, stolen goods). So once the *Riley* Court decides to complicate the search-incident rule for containers, one might have thought that a better distinction than analog vs. digital would be effects vs. papers. I mean it would be pragmatically better for

[112] *Riley*, supra, at 2496 (Alito, J., concurring).

[113] Id.

purposes of balancing, but the distinction would also be grounded more directly in the text of the fourth amendment. Perhaps we will see *Robinson*'s application to analog papers questioned along these lines in future cases, leading to a warrant requirement for all searches of papers incident to arrest.

In any event, the anomaly *Riley* creates is a stark shift in the rules for what are sometimes very similar materials. Imagine that police surreptitiously observe a suspect buy an extra cell phone, confirm with the vendor that it was a new account (therefore not downloading from the cloud any information associated with an existing account), and arrest him 30 minutes later, after he appears to use the phone in a criminal transaction. The fact that the police know the phone contains almost no information does not appear to affect the bright-line rule of *Riley*. They cannot search the phone without a warrant based on probable cause the phone contains evidence of a crime. But if the police surveil a suspect and wait for him to have his 300,000 word paper diary in his possession, it appears that they can carefully read the whole thing incident to his lawful arrest, without any reason to believe it contains evidence of a crime. The rule is not tightly tailored to the amount of privacy the police violate or expect to violate. It is instead tied to the form in which the private is stored, which is only a proxy for the amount of private information at stake.

A rule permitting a warrantless, scope-limited search of the cell phone would not eliminate the anomaly, but would narrow it considerably. The compromise of a scope-limited search of digital containers would move that category closer to the search of analog papers. Instead of all or nothing, it would be all or some.

The scope-limited approach might even lead to the elimination of the anomaly entirely. If we had a scope-limited rule, courts might see the virtue in applying it, not merely to cell phones and other digital devices, but also to all "papers," digital or analog. Thus, the cell phone *and* the diary would be subject only to a cursory search incident to arrest. As with the cell phone, after a valid arrest, the police could page through a notebook quickly to identify and check recent entries if police have reason to believe the entries contain evidence of the crime of arrest, but would require a warrant for any more comprehensive search. The *Robinson* rule allowing automatic search of containers would remain in place for "effects" (briefcases, purses, backpacks, etc.).

D. Dilution of the Exigent Circumstances Exception

I close with a brief prediction: The refusal to recognize a scope-limited search will put pressure on lower courts to expand the exigent circumstances exception. As in *Fearon*, the police will frequently arrest individuals for a crime committed with reason to believe that co-felons remain at large; they will frequently conduct a search incident to arrest of the arrestee and the effects in his or her possession and fail to find instrumentalities or proceeds of the crime, e.g., weapons, drugs, or stolen goods. The police will then use these missing suspects and evidence to claim exigency. The claims *should* fail because the mere existence of an undiscovered co-felon or criminal proceeds does not provide probable cause to believe that there is on the arrestee's phone evidence of the identity or location of co-felons, weapons, or evidence, much less probable cause that the co-felon is currently fleeing or concealing evidence. But the courts will see some cases where hindsight showed the police officers to be right, and there will be pressure to uphold the validity of the warrantless search on an exigency theory. The long term effect will be to expand the category of exigency.

As an example, consider the decision below in *Wurie*, the companion case to *Riley*.[114] Police arrested Wurie after observing him make an apparent drug sale from a car. Immediately after the arrest, Wurie's phone received repeated calls from a source labeled on the external screen as "my house." After a few minutes, police opened the (flip) phone and determined the number associated with "my house." They determined that it was a land line and went to the associated apartment. Through the first floor apartment window, police saw a woman they said matched a photo that served as the cell phone's wallpaper, so they immediately entered the apartment to "freeze" it while waiting to secure a search warrant. The Tenth Circuit panel found a fourth amendment violation and reversed.[115] Judge Howard dissented and one ground he gave for upholding the search was exigency, "the risk that others might have destroyed evidence after Wurie did not answer his phone. . . . His failure to answer [repeated] phone calls

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[114] United States v. Wurie, 728 F.3d 1 (1st Cir. 2013). Cf. Pennsylvania v. Labron 518 U.S. 938 (1996) (confirming that exigent circumstances are not necessary to justify a warrantless car search based on probable cause, despite the original importance of mobility-based exigency to the automobile exception).

[115] Id.

could have alerted Wurie's confederates to his arrest, prompting them to destroy further evidence of his crimes."[116]

The majority responded that this concern over evidence destruction is "mere speculation" and that "it is also a possibility present in almost every instance of a custodial arrest."[117] Judge Howard replied: "On the contrary, the justification is based on the specific facts of this case. The fact that 'my house' repeatedly called Wurie's cell phone provided an objective basis for enhanced concern that evidence might be destroyed and thus gave the police a valid reason to inspect the phone."[118]

The panel majority was correct; the argument for exigency involves not one but two levels of speculation.[119] The first is that there are drugs in the apartment of a person suspected of selling drugs, as if the bare fact of arresting a suspected drug dealer in public would always justify a warrant to search the arrestee's home. To the contrary, a seller might avoid the risk of keeping drugs in his home or he might just be out of inventory. The second level of speculation is that the person dialing the suspect's cell phone from the suspect's home will (a) interpret the failure to answer (for less than an hour) as evidence of the individual's arrest and (b) be in a position to take the initiative to move or destroy drugs stored in the home (knowing, for example, where they are located). These are nothing more than mere possibilities. Yet not only did the police search the phone, with the additional fact that the woman in the cell phone wallpaper was spotted inside the apartment, the police executed a warrantless entry into a home (to secure it pending a search warrant). Admittedly, two judges on the panel rejected the exigency argument, but one federal appellate judge found it convincing. By blocking other paths, *Riley*'s holding will make the exigency argument more alluring.

Time will tell whether my prediction is accurate. At the extreme, courts might expand their recognition of exigency to the point where the same searches a scope-limited search doctrine would authorize are permitted under a different

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[116] Id. at 17.

[117] Id. at 11 & n.11.

[118] Id. at 17.

[119] To be clear, my argument in Part III-B for a scope-limited search is based in part on the idea that speculation such as Judge Howard's will sometimes prove true, making the category of searches productive. But, as I explain, it would be better to authorize the scope-limited search as a direct incident to all arrests than to get to the same result by watering down the meaning of exigency.

name. That might make it appear unimportant that the Court rejected the idea of a scope-limited search. The problem is that the broadening of exigent circumstances will have effects beyond the search of cell phones incident to arrest. The search-incident exigency cases can be cited as precedent for home-entry exigency cases or other searches ordinarily requiring a warrant. The same exigency that justifies a peek inside the suspect's cell phone can usually justify a peek inside the suspect's house. Whatever loosening occurs in the cell phone context will not remain limited to that domain, an undesirable unintended consequence and a final reason that it would have been better to address the problem with the right tool, a scope-limited search.

Conclusion

Riley has been immediately recognized as an important case for the proposition that fourth amendment rules and precedents of non-technological settings may not apply to analogous technological settings. For that reason, it deserves praise. Less obviously, however, the case is important in a second way, for its rejection of a cursory, scope-limited search of (digital) papers incident to arrest. Instead of requiring a warrant for any cell phone search incident to arrest, the Court could have permitted police to conduct a brief field search of a cell phone incident to arrest, without a warrant, where there is reason to believe that the phone contains useful evidence of the crime of arrest and where the police limit their search to the places where such evidence might realistically be found (perhaps all as confirmed by contemporaneous police notes of the search). Some fourth amendment rules distinguish between a full-fledged and cursory search, but here the Court added to the precedent (notably *Hicks*) rejecting such a distinction when the object of the search is personal property (other than an automobile).

Riley is for this reason a notable case for the bedrock issue of how many types of search exist in the fourth amendment. Unfortunately, it is not at all clear that the Court made the right decision, given that many lower courts (and the Canadian Supreme Court) did recognize a scope-limited search incident to arrest, and *Riley* offers only the most superficial analysis of its decision to reject that approach. The effects of this second aspect of *Riley*, I have argued, are more negative than positive, but will ultimately depend on how seriously magistrates

review warrant applications for cell phone searches and how much they relax the requirements of exigency in cases where police forgo a warrant.

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