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ABSTRACT

In 1973, the United States Supreme Court in United States v. Robinson *granted police broad authority to search arrestees' personal property.* Robinson's *broad rule has not been significantly limited and appears increasingly anachronistic in an age of rapidly advancing mobile technologies. Whether upholding or invalidating such searches, courts have relied on reasoning that ignores or conflicts with* Robinson*. This Article illustrates four problematic contrivances used by state and federal courts: (1) the comparison of mobile devices to "containers; (2) the misinterpretation of* United States v. Chadwick*'s concept of "property not immediately associated with the person;" (3) the unjustifiable application of* Arizona v. Gant*'s "reason to believe" rationale; and (4) the baseless categorical exclusion of cell phones from the search incident doctrine. In light of the public's apparently high expectation of privacy for information stored on mobile devices, this Article recommends two possible solutions for restricting police authority: (1) return to an exigency-based rationale following* Chimel v. California *or (2) look to state legislatures to curb police powers through law making.*

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TABLE OF CONTENTS

INTRODUCTION

The technological innovations of the digital age have certainly added "grist to the mill"[1] of Fourth Amendment jurisprudence. In

[1] Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127 (1974) ("[T]he

particular, the proliferation and advancement of digital media and portable storage devices allow individuals to carry virtual warehouses of highly personal information. In all but one state,[2] arrests for an infraction as slight as a traffic violation may allow arresting officers to conduct unrestricted, warrantless searches of electronic devices under the Fourth Amendment's search-incident-to-arrest exception. The United States Supreme Court has not yet spoken directly about the constitutionality of warrantless cell phone searches incident to arrest. However, state and federal courts interpret past Supreme Court rulings to allow police almost unrestricted authority.

Most scholars, and a few courts, have recoiled from such broad authority to search and have crafted arguments that appear to rescue cell phones from the search-incident-to-arrest exception. Closer inspection of several major arguments reveals flaws in their reasoning that ultimately render these positions unworkable. A common theme among these arguments is the failure to confront the Supreme Court's language in *United States v. Robinson*, which explicitly grants police broad authority to search all property found on an arrestee's person.[3] This Article suggests that restoring the original policy interests of *Chimel v. California*[4] offers the only persuasive means of confronting the broad search authority of *Robinson*. The law must return to the exigency-based roots of the search-incident-to-arrest exception: officer safety and evidence preservation.

Part I briefly surveys the search-incident-to-arrest exception to the warrant requirement, including its roots in the Fourth Amendment, its later development and expansion, and the courts' recent application of the doctrine to cell phones. Part II introduces and rebuts four common arguments used by courts to limit the general authority of police to search mobile phone contents incident to lawful arrest. These are (1) the irrelevant comparison of cell phones to physical "containers;" (2) the misinterpretation of

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confirmed Fourth Amendment buff is never in want of grist for his mill.").

[2] At the time of writing, Ohio is the only state prohibiting cell phone searches incident to arrest. *See* State v. Smith, 920 N.E.2d 949 (Ohio 2009).

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

[4] 395 U.S. 752 (1969).

United States v. Chadwick's concept of property "not immediately associated with the person"[5] as a categorical exception to the search-incident-to-arrest exception; (3) the inability to justify the application of *Arizona v. Gant*'s evidence-based "reason to believe" rationale to cell phone searches;[6] and (4) the baseless categorical exclusion of cell phones from the search-incident-to-arrest doctrine, pioneered by the Ohio Supreme Court in *State v. Smith*.[7]

In light of the public's apparently high expectation of privacy for information accessible through cell phones, Part III advocates two possible approaches for restricting police access during searches incident. First, a potential judicial rule may return courts' focus to the exigency-based rationale first articulated in *Chimel*.[8] Second, state legislatures offer a more likely avenue for reform. A legislative solution can directly address the public's privacy concerns, avoid the jurisprudential morass of the Fourth Amendment, and remain adaptable to future evolution of portable technologies.

I. BACKGROUND

A. The Fourth Amendment and the Search-Incident-to-Arrest Exception

The Fourth Amendment forbids the government from conducting "unreasonable searches and seizures."[9] An unreasonable search occurs when governmental action violates an individual's "reasonable" or "legitimate" expectation of privacy. Such a violation exists when "a person [has] exhibited an actual (subjective) expectation of privacy and . . . society is prepared to recognize [that expectation] as 'reasonable.'" [10] Warrantless

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[5] 433 U.S. 1, 15 (1977).
[6] 556 U.S. 332 (2009).
[7] 920 N.E.2d 949 (Ohio 2009).
[8] 395 U.S. 752 (1969).
[9] U.S. CONST. amend. IV.
[10] Katz. v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

infringements on legitimate privacy interests are normally deemed per se unreasonable.[11] If the warrant requirement serves as a gate that separates law enforcement from citizens' private lives, then magistrates play the gatekeeper. Magistrates only issue search warrants if the government has shown a great enough need to justifiably infringe on an individual's particular privacy interests.[12] At the same time, however, the United States Supreme Court recognizes "a few specifically established and well-delineated exceptions" that allow the government to sidestep the normal warrant requirement.[13]

One such exception is for searches incident to lawful arrest. Current criminal procedure treats the warrantless search of an arrestee's person as a definite right of the police. However, historical records dating back to the 18th century illustrate searches far more limited in scope.[14] From the late 19th century and into the 20th century, searches incident to arrest were permitted out of the police's need to disarm potentially violent suspects. Police were also allowed to search arrestees to secure evidence material to the particular crime of arrest.[15]

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[11] Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

[12] Chimel v. California, 395 U.S. 752, 761 (1969) ("[Magistrates issue warrants] so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.") (quoting McDonald v. United States, 335 U.S. 451, 455-56 (1948)).

[13] *Katz*, 389 U.S. at 357.

[14] Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 385 (2001).

[15] United States v. Wilson, 163 F. 338, 340 (S.D.N.Y. 1908) ("[T]he property must be material, or seem to be material, as evidence on the charge which is made against the defendant."); Thatcher v. Weeks, 11 A. 599 (Me. 1887) (finding officers entitled to seize items "that may be of use as evidence upon the trial"); Holker v. Hennesey, 42 S.W. 1090, 1093 (Mo. 1897) ("[A]n officer has no right to take any property from the person of the prisoner, except such as may afford evidence of the crime charged . . . ."); Dillon v. O'Brien, 16 Cox Crim. Cas. 245, 249 (Exchequer Div. 1887) ("[C]onstables . . . are entitled, upon a lawful arrest by one of them charged with treason or felony to take and detain property found in his possession, which will form material evidence in his prosecution for that crime."); *see* Joseph H. Beale, Jr., CRIMINAL PLEADING AND PRACTICE § 29, 24-25 (1889) ("Any article found upon the prisoner which is

In 1914, the United States Supreme Court first addressed the topic of searches incident to arrest as dictum in *Weeks v. United States*.[16] *Weeks* involved a warrantless seizure of papers belonging to the defendant in the defendant's absence. The Court explicitly distinguished the issue of search incident to arrest:

> What, then, is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. The right has been uniformly maintained in many cases . . . .[17]

Today's conception of the search-incident-to-arrest doctrine did not emerge until the Court's decision in *Chimel v. California*.[18] In *Chimel*, police executed an arrest warrant for an individual at his house who was suspected of burglarizing a coin store. Without the defendant's consent or a valid search warrant, police spent nearly an hour exploring the three-bedroom house, attic, and garage for evidence of the burglary. During the search, they uncovered coins and other items which were later used to convict defendant.[19]

Breaking with precedent that allowed similar but more limited searches,[20] the Court invalidated the search of the appellant's home

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needed as evidence to prove the crime, or any property of another which he acquired by the crime, may be taken from him."); Francis Wharton, TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 2975, at 39 (7th ed. 1874) ("Those arresting a defendant are bound to take from his person any articles which may be of use as proof in the trial of the offense with which the defendant is charged."). *See generally* Logan, *supra* note 14, at 388-89 (2001).

[16] 232 U.S. 383 (1914).

[17] *Id.* at 392; *see also* Carroll v. United States, 267 U.S. 132 (1925) (reiterating *Weeks* dicta).

[18] 395 U.S. 752 (1969).

[19] *Id.* at 753-54.

[20] *See* United States v. Rabinowitz, 339 U.S. 56 (1950) (upholding warrantless search of defendant's one-room office for forged stamps incident to arrest); Harris v. United States, 331 U.S. 145 (1947) (upholding warrantless search of four-room apartment for stolen checks incident to arrest).

as unreasonably broad. While a "strictly limited right" permitted police to search the person and the area of "immediate control" of an arrestee, the majority found that the Fourth Amendment forbids general search of premises.[21] In limiting the scope of searches incident to arrest, the Court identified officer safety and preservation of evidence as the two determinative social policy considerations behind the exception:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.[22]

The Court then extended these policy concerns to the area within an arrestee's reach:

> [T]he area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.[23]

The Court held that the trial court should have suppressed the resulting evidence because the police search of Chimel's house

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[21] Chimel v. California, 395 U.S. 752, 763 (1969).
[22] *Id.* at 762-63.
[23] *Id.* at 763.

extended beyond the area of "immediate control."[24]

In 1973, *United States v. Robinson* answered a looming question left by *Chimel*: can factual circumstances limit an officer's authority to conduct a search incident to an arrest?[25] Unlike *Chimel*, the search in *Robinson* bore no apparent relation to the underlying offense. In *Robinson*, police recognized a motorist and had reason to believe he was driving with a revoked operator's permit. An officer stopped Robinson and asked to see his license. When he produced a fake, the officer arrested him and subjected him to a "full 'field type search,'" a standard procedure within the officer's department.[26] That search produced a crumpled cigarette pack from Robinson's coat pocket, containing fourteen heroin capsules. The appellate court suppressed the drugs as evidence and found that, where nothing justifies a search for additional evidence of the crime of arrest, the search must be limited to a "frisk" for weapons.[27] The Supreme Court reversed, pronouncing an "unqualified authority" of police to search the person of an arrestee incident to lawful arrest:[28]

> The authority to search . . . while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.[29]

Under this bright-line rule, the circumstantial facts of a particular arrest did not influence the police's right to search:

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[24] *Id.* at 768.

[25] 414 U.S. 218 (1973).

[26] *Id.* at 221-22 n.2.

[27] United States v. Robinson, 471 F.2d 1082, 1117 (D.C. Cir. 1972) (en banc).

[28] *Robinson*, 414 U.S. at 225.

[29] *Id.* at 235.

> It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.[30]

With *Robinson*, the Court effectively severed the search-incident-to-arrest exception from a fact-based analysis. As long as an officer executes a lawful arrest, he or she may conduct a "full" search of the arrestee and, by the implication of *Chimel*, the area within the arrestee's "immediate control."

However, *Robinson* significantly departed from Supreme Court precedent on the search-incident-to-arrest exception.[31] Prior cases required either an evidentiary link that tied the object of the search to the basis for the arrest or an evident threat to police safety.[32] By allowing a search incident to arrest wherever a lawful arrest occurs, the *Robinson* Court removed such factual considerations from the equation.

The most recent Supreme Court examination of the search-incident-to-arrest doctrine came in 2009 with *Arizona v. Gant*,[33] in which the Court backed away from a bright-line authorization to search automobiles incident to arrest. In *Gant*, police received an

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[30] *Id.*

[31] *Id.* at 233 ("While . . . earlier authorities are sketchy, they tend to support the broad statement of the authority to search incident to arrest found in the successive decisions of this Court, rather than the restrictive one which was applied by the Court of Appeals in this case."). *But see id.* at 249 ("No precedent is cited for this broad assertion—not surprisingly, since there is none. Indeed, we only recently rejected such a rigid all-or-nothing model of justification and regulation under the Amendment, (for) it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation. This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope.") (Marshall, J., dissenting).

[32] *See, e.g.*, Sibron v. New York, 392 U.S. 40, 67 (1968) ("[T]he incident search was obviously justified 'by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime.'") (quoting Preston v. United States, 376 U.S. 364, 367 (1964)).

[33] 556 U.S. 332 (2009).

anonymous tip reporting suspected drug activity at a house. When they discovered that one resident had an outstanding warrant for driving with a suspended license, police waited until he arrived at the house in his car. An officer arrested Gant and secured him in the patrol car's back seat. As Gant sat handcuffed, officers searched his vehicle and uncovered a firearm and a bag of cocaine.

The Supreme Court used *Gant* to redefine and narrow the parameters of acceptable searches of vehicles incident to arrest, as originally outlined in *New York v. Belton*.[34] The Court rejected a broad reading of *Belton* that would allow a vehicle search-incident-to-arrest even when the arrestee was secured and unable to access the vehicle's interior.[35] Instead, the *Gant* Court agreed with the Arizona Supreme Court that such an expansive right of police conflicts with the dual policy considerations of *Chimel*.[36] In an attempt to reunite *Belton* with *Chimel*, the majority fashioned a new test for vehicle searches incident to arrest:

> [T]he *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.
>
> Although it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[37]

Using the new test, the Court invalidated the search of Gant's car, since Gant was not in reaching distance of the passenger compartment and the officer had no reason to believe evidence

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[34] 453 U.S. 454 (1981).

[35] *Gant*, 556 U.S. at 342-43.

[36] *Id.* at 343 ("To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception . . . .").

[37] *Id.* (quoting Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).

relating to the crime (driving with a suspended license) would be found in the car.[38] Importantly, *Gant* reintroduced factual analysis to one region of the search incident exception.

B. Searches of Digital Devices Incident to Arrest

One justification behind the *Robinson* bright-line rule is that an officer should have the power to thoroughly investigate potential dangers hidden in an arrestee's clothing or containers.[39] Since the flood of portable electronics, searches incident to arrest have inevitably extended to devices such as pagers and cell phones. While courts uniformly recognize a reasonable expectation of privacy in the digital content of these devices and an accompanying right to challenge related governmental intrusions,[40] a majority of courts currently uphold such searches.

1. Lower Courts Permitting Searches of Cell Phones

Robinson's rule provides rich fodder for lower courts upholding searches of digital devices incident to arrest, and courts are keen to adhere to its framework. Many courts favor the "container" analogy lifted from *Robinson*. Since *Robinson* focused on the permissibility of a search of a physical container found on the arrestee's person, many lower courts simply characterize pagers and cell phones as electronic containers.

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[38] *Id.*

[39] *See* Thornton v. United States, 541 U.S. 615, 631-32 (2004) ("[A]uthority to search an arrestee's person does not depend on the actual presence of one of *Chimel's* two rationales in the particular case; rather, the fact of arrest alone justifies the search.") (Scalia, J., concurring); *supra* notes 26-31 and accompanying text.

[40] *See* United States v. Finley, 477 F.3d 250, 259 (5th Cir. 2007) ("[Defendant] had a reasonable expectation of privacy in the call records and text messages on the cell phone and that he therefore has standing to challenge the search."); *see also* City of Ontario, California v. Quon, 560 U.S. 746, 760 130 S. Ct. 2619, 2630 (2010) ("Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy.").

One of the earliest cases to apply the container analogy to pagers was *United States v. Chan*.[41] During a sting operation, DEA agents arrested two heroin dealers who coordinated a sale through one of the defendant's pager. After the arrest, an officer seized the pager, accessed its memory, and recovered numbers associated with the drug deal. In his defense, Chan argued that the pager was a container, and that the agents unjustifiably searched it incident to arrest because of the high expectation of privacy associated with its contents.[42] The court quickly rejected Chan's argument. Under *Belton*, "the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have."[43]

United States v. Finley was one of the first cases to validate the search of a cell phone incident to arrest.[44] In *Finley*, police conducted a controlled purchase of methamphetamine. Finley drove the seller to the prearranged location and immediately after the exchange was made police arrested both individuals. During the arrest, officers found a cell phone in Finley's pocket. A later search of the phone's stored text messages revealed several references to narcotics.

The Fifth Circuit upheld the lawfulness of the search under the Fourth Amendment.[45] Finley argued his cell phone ought to be treated as a closed container, but mistakenly relied on authority that suppressed a search of a closed container but did not involve an exception to the warrant requirement.[46] Like in *Chan*, once the cell phone bore the brand of a "container," the *Finley* court invoked the categorical rule of *Robinson*, along with other cases explicitly ruling on container searches incident to arrest.[47] Many cases have relied on the *Finley* decision to uphold the cell phone-

[41] 830 F. Supp. 531, 533 (N.D. Cal. 1993).
[42] *Id*. at 535.
[43] *Id*. (quoting New York v. Belton, 453 U.S. 454, 461 (1981)).
[44] 477 F.3d 250 (5th Cir. 2007).
[45] *Id*. at 259.
[46] *Id*. at 260.
[47] *Id.* at 260-61 (citing United States v. Robinson, 414 U.S. 218, 223-24 (1973); New York v. Belton, 453 U.S. 454, 460-461 (1981)).

container analogy.[48]

Pagers and cell phones have also been analogized to address books and wallets, searches of which incident to arrest are traditionally permitted. In *United States v. Cote*, police searched the call logs and electronic phone book of a cell phone belonging to a man arrested for soliciting sex from a minor.[49] The court upheld the search and found the analogy of a cell phone to a wallet or address book fitting because both "would contain similar information."[50] According to this perspective, items like wallets, photographs, and address books better approximate the function of cell phones. For example, much of what they contain, such as text messages, contact lists, and photographs, could just as easily appear on a piece of paper. Just as those papers are searchable incident to arrest, so too are their digital counterparts.[51]

2. Cases Restricting Searches of Cell Phones Incident to Arrest

A minority of state and federal courts have suppressed evidence obtained from cell phones incident to arrest. The U.S. district court in *United States v. Park* found that a heightened privacy interest in the contents of mobile phones justified their protection from searches incident to arrest.[52] In *Park*, the police arrested Park for marijuana cultivation and seized his cell phone. Police later searched the phone and copied down names and phone

[48] *See, e.g.*, United States v. Curtis, 635 F.3d 704, 714 (5th Cir. 2011) (upholding search incident of text messages); United States v. Gomez, 807 F. Supp. 2d 1134, 1146 (S.D. Fla. 2011) (upholding the *Finley* decision in the context of a caller ID; describing *Finley* as "the leading case on this issue"); United States v. Rodriguez, No. C-11-344, 2011 US Dist. LEXIS 100433, at *11 (S.D. Texas Sept. 6, 2011) (upholding the Finley decision in the context of incriminating cell phone photographs).

[49] No. 03CR271, 2005 WL 1323343 (N.D. Ill. May 26, 2005).

[50] *Id*. at *6.

[51] *See, e.g.*, United States v. McCray, No. CR408-231, 2009 WL 29607, at *4 (S.D. Ga. Jan. 5, 2009) ("[It] is an electronic 'container,' in that it stores information that may have great evidentiary value . . . . While such electronic storage devices are of more recent vintage than papers, diaries, or traditional photographs, the basic principle still applies: incident to a person's arrest, a mobile phone or beeper may be briefly inspected [for evidence].").

[52] No. CR 05-375, 2007 WL 1521573 (N.D. Cal. May 23, 2007).

numbers stored in its memory.

Breaking with other courts' reliance on *Robinson*,[53] the *Park* court turned to *United States v. Chadwick*[54] for support.[55] In *Chadwick*, the Supreme Court suppressed evidence recovered from a locked container. The Court reasoned that "[b]y placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination." Therefore, the footlocker deserved protection under the Fourth Amendment warrant clause "[n]o less than one who locks the doors of his home against intruders . . . ."[56] *Chadwick* distinguished property searched incident to arrest based on whether the property was "immediately associated with the person."[57] According to the Court, a valid search of property "not immediately associated with the person" requires: (1) the search not be remote in time or place from the arrest; and (2) some form of exigent circumstances compels the search.[58] Furthermore, the Court held:

> Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer incident of the arrest.[59]

The *Park* court fundamentally distinguished its case from *Finley* by finding that cell phones should not be considered property that is immediately associated with an arrestee's person, implicitly comparing the searched cell phone to the locked footlocker of *Chadwick*. According to *Park*, "[t]his is so because modern cellular phones have the capacity for storing immense amounts of

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[53] *See, e.g.*, United States v. Finley, 477 F.3d 250 (5th Cir. 2007), *supra* notes 44-52 and accompanying text.

[54] 433 U.S. 1 (1977).

[55] *Park*, No. CR 05-375, 2007 WL 1521573, at *6.

[56] *Chadwick*, 433 U.S. at 11.

[57] *Id.* at 15.

[58] *Id.*

[59] *Id.*

private information."[60] Given the "increasingly blurry" line between cell phones and computers, the court feared that "[a]ny contrary holding could have far-ranging consequences."[61]

The Ohio Supreme Court case *State v. Smith* was the first case to specifically prohibit cell phone searches incident to arrest.[62] In *Smith*, the court suppressed evidence from a cell phone search on the grounds that the expansive privacy interests in cell phone contents rendered the container analogy entirely inapplicable.[63] The court began by reviewing approaches to characterizing cell phones: "Whether the warrantless search of a cell phone passes constitutional muster depends upon how a cell phone is characterized, because whether a search is determined to be reasonable is always fact-driven."[64] It then examined *Finley* and *Park*, the two "leading" cases on the subject.[65] The defendant in *Finley* conceded that "the officers' post-arrest seizure of his cell phone from his pocket was lawful, but he argued that, since a cell phone is analogous to a closed container,[66] the police had no authority to examine the phone's contents without a warrant." [67] Because the defendant had not invoked a container analogy, the *Smith* court found *Finley* inapplicable to its decision.[68] Briefly addressing *Park*, the *Smith* majority noted that the *Park* court found "significant privacy interests" in cell phones, due to their

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[60] *Park*, No. CR 05-375, 2007 WL 1521573, at *8.

[61] *Id.* (*Park* also rebuked the investigatory nature of the search, stating that the officer's search of Park's cell phone went "beyond the original rationales for searches incident to arrest." However, the court here appears to have overlooked *Robinson*'s explicit indifference to the actual presence of *Chimel*'s dual rationales incident to arrest.); *see* United States v. Robinson, 414 U.S. 218, 235 (1973); *supra* notes 24-31 and accompanying text.

[62] State v. Smith, 920 N.E.2d 949 (Ohio 2009).

[63] *Id.* at 954-55.

[64] *Id.* at 952. *But see* People v. Diaz, 244 P.3d 501 (Cal. 2011) (finding inappropriate any inquiry into character of property in context of search incident to arrest under *Robinson*); United States v. Smallwood, 61 So. 3d 448 (Fla. Dist. Ct. App. 2011), *review granted*, 68 So. 3d 235 (Fla. 2011) (using the same reasoning as *Diaz*).

[65] *Smith*, 920 N.E.2d at 953-54.

[66] United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007).

[67] *Id.*

[68] *Smith*, 920 N.E.2d at 953.

"capacity for storing immense amounts of private information."[69]

The court rejected the container analogy, an approach advocated by the state.[70] Eschewing all figurative conceits, the court clarified that "[a container] means 'any object capable of holding another object,'"[71] which "must actually have a physical object within it."[72] Such a rigid definition left no room for electronic storage devices since "[e]ven the more basic models of modern cell phones are capable of storing a wealth of digitized information wholly unlike any physical object found within a closed container."[73]

Smith found no satisfactory classification for cell phones in use by courts. The "multifunctional" nature of cell phones was compared to traditional address books, which are entitled to a lower expectation of privacy compared to laptop computers in a search incident to arrest.[74] Although cell phones are "still, in essence, phones" and not computers,[75] the court found the "large amounts of private data" on cell phones sufficiently gave their owners a heightened expectation of privacy in that information.[76] *Smith* concluded:

> Once the cell phone is in police custody, the state has satisfied its immediate interest in collecting and preserving evidence and can take preventative steps to ensure that the data found on the phone are neither lost nor erased. But because a person has a high expectation of privacy in a cell phone's contents, police must then obtain a warrant before intruding into the phone's contents.[77]

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[69] *Id.* (quoting United States v. Park, No. CR 05-375, 2007 WL 1521573, at *8 (N.D. Cal. May 23, 2007)).

[70] *Id.* at 953-54.

[71] *Id.* at 954 (quoting New York v. Belton, 453 U.S. 454, 460 (1981)).

[72] *Id.*

[73] *Id.*

[74] *Id.* (citing no sources in support of alleged higher expectation of privacy attributed to laptops).

[75] *Id.* at 955.

[76] *Id.*

[77] *Id.* Note that, like *Park*, *Smith* admonishes any search done in the absence

While not expressly stating it, the *Smith* majority effectively fashioned a new rule disqualifying cell phones from the search-incident-to-arrest exception. The three dissenting justices attacked the majority for announcing "a sweeping new Fourth Amendment rule that is at odds with decision of other courts," when traditional Fourth Amendment principles governing searches incident to arrest could have decided the case.[78] According to the dissent, since only the cell phone's call log was searched, the majority should have accordingly confined its inquiry.[79] Because a phone's call log approximates the function of a traditional address book, which police are permitted to search incident to arrest, the dissent argued evidence gleaned from the call logs should not have been suppressed.[80]

3. *United States v. Robinson*'s Relevance to Cell Phones

The *Smith* decision incited significant criticism from other courts for treading so far from *Robinson*'s categorical rule.[81] While the *Smith* dissent strayed little from the analysis of *Finley*,[82] a reaction more fundamentally attuned to *Robinson* arrived from the Florida District Court of Appeals in *Smallwood v. State*.[83]

Affirming the admission of incriminating photographs stored on a cell phone, the trial court decision in *Smallwood* adhered strictly to the language of *Robinson* permitting a "full" search of an

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of *Chimel*'s justifications (officer safety and preservation of evidence), and thereby is inconsistent with *Robinson*'s express disavowal of those justifications when an officer searches a suspect incident to arrest. *See supra* note 61 and accompanying text.

[78] *Smith*, 920 N.E.2d at 956 (Cupp, J., dissenting).

[79] *Id.* at 956-57.

[80] *Id.*

[81] *See, e.g.*, People v. Diaz, 244 P.3d 501, 511 n.17 (Cal. 2011).

[82] *Compare* United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007) (validating the search of a cell phone incident to arrest), *with* State v. Smith, 920 N.E.2d 949 (Ohio 2009) (disqualifying cell phones from the search incident exception).

[83] 61 So. 3d 448 (Fla. Dist. Ct. App. 2011), *rev'd*, 113 So.3d 724 (Fla. 2013). For a discussion of the Florida Supreme Court's reversal, *see infra* notes 177 to 185 and accompanying text.

arrestee's person.[84] The court took issue with restrictive approaches used by other courts. *Smallwood* first criticized the container analogy, observing that in *Robinson*, *Belton*, and *Chimel*, "nothing in these decisions even hints that whether a warrant is necessary for a search of an item properly seized from an arrestee's person incident to a lawful arrest depends in any way on the character of the seized item."[85]

Accordingly, the *Smallwood* court noted, "whether or not a cell phone is properly characterized as a traditional 'container' is irrelevant to whether or not it is searchable upon arrest."[86] No language permits a court to exclude cell phones from searches incident to arrest under *Robinson*'s grant of authority to arresting officers to search any items on the person or within the immediate control of the arrestee. *Smallwood* also relied on *Robinson* to discredit the argument that an officer must reasonably believe a cell phone contains evidence of the crime of arrest in order to search the phone. Instead, the *Robinson* court found irrelevant "what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect."[87] Hence, "clearly the Supreme Court has established a bright-line rule permitting a search incident to arrest, regardless of whether an officer had reason to believe evidence would be found."[88]

Even in light of the "vast amount of personal information" stored on mobile phones, the *Smallwood* court felt "bound by Supreme Court precedent" to allow the search.[89] The court observed that *Robinson* permitted the search of similar information contained in address books and wallets. However, the court expressed "great concern" in this new application of *Robinson* to

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[84] United States v. Robinson, 414 U.S. 218, 235 (1973).

[85] *Smallwood*, 61 So.3d at 455 (quoting *Diaz*, 244 P.3d 501 at 507).

[86] *Id.* at 460.

[87] *Id.* (quoting *Robinson*, 414 U.S. at 235).

[88] *Id; see also* Knowles v. Iowa, 525 U.S. 113, 118 (1998) (noting "[i]n *Robinson*, we held that the authority to conduct a full field search as incident to arrest was a 'bright-line rule,' which was based on the concern for officer safety and destruction or loss of evidence, but which did not depend in every case upon the existence of either concern.").

[89] *Smallwood*, 61 So.3d at 461.

cell phones, since "the *Robinson* court could not have contemplated the nearly infinite wealth of personal information cell phones and other similar electronic devices can hold."[90] In view of the many functions of modern cell phones, including their ability to access content on the Internet, the *Smallwood* court perceived that cell phones "can make the entirety of one's personal life available for perusing by an officer every time someone is arrested for any offense." The court reasoned that "this result could not have been . . . intended by the *Robinson* court."[91] The *Smallwood* court recognized the *Gant* court's concerns about "giving officers unbridled discretion to rummage" without reason to believe evidence of the crime of arrest will be found.[92] Displaying great anxiety over the implications of its holding, the *Smallwood* court noted:

> Were we free to do so, we would find, given the advancement of technology with regards to cell phones and similar portable electronic devices, officers may only search cell phones incident to arrest if it is reasonable to believe evidence relevant to the crime of arrest might be found on the phone.[93]

The opinion ended by posing this question of "great public importance"[94]: "Does the holding in [*Robinson*] allow a police officer to search through photographs contained within a cell phone which is on an arrestee's person at the time of a valid arrest, notwithstanding that there is no reasonable belief that the cell phone contains evidence of any crime?"[95]

Smallwood illustrates the predicament of current criminal procedure regarding searches of cell phones and other digital devices incident to arrest. The more that the courts appreciate the full range of digital information implicated by the *Robinson* line of

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[90] *Id*.
[91] *Id*.
[92] *Id*. at 462. *See* Arizona v. Gant, 556 U.S. 332 (2009).
[93] *Smallwood*, 61 So.3d at 462.
[94] *Id*.
[95] *Id.* (emphasis in original).

cases, the more they appear to recoil from it. Decisively, the *Smith* court was only able to protect the individual's privacy interests in cell phone contents by either misinterpreting or ignoring the full effect of *Robinson*'s holding. In contrast, the trial court in *Smallwood* confronted *Robinson* and showcased the tension produced by the technological capabilities of mobile computing that currently afflicts the search incident exception.

II. RESOLVING COURTS' PROBLEMATIC REASONING IN THE DEBATE OVER CELL PHONE SEARCHES INCIDENT TO ARREST

When determining the reasonableness of a warrantless search under the Fourth Amendment, "there is 'no ready test . . . other than by balancing the need to search . . . against the [privacy] invasion which the search . . . entails.'"[96] In the context of searches incident to arrest, the Court in *United States v. Robinson* effectively ended this inquiry in favor of governmental interests.[97] *Robinson*'s basic holding engendered significant criticism,[98] and the introduction of cell phones has only further complicated the situation.

Some state and federal cases and a wave of scholarly disapproval have endeavored to curb the trend of allowing police an unlimited right to search cell phones incident to arrest. Four relevant arguments will be examined below. The first section makes an attempt to distinguish cell phones from traditional containers, and thereby exclude cell phones from the *Robinson* line

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[96] Terry v. Ohio, 392 U.S. 1, 21 (1968).

[97] 414 U.S. 218, 235 (1973) ("The authority to search the person incident to a lawful custodial arrest . . . does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect . . . . It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.").

[98] *See Robinson*, 414 U.S. at 239 (Marshall, J., dissenting) (calling the majority's approach "a clear and marked departure from our long tradition of case-by-case adjudication of the reasonableness of searches and seizures under the Fourth Amendment").

of cases. The second section examines the misapplication of a concept developed in *United States v. Chadwick*, which prevents officers from searching property "not immediately associated with the person of the arrestee." The third section investigates a peculiar jurisprudential dualism at work in *Arizona v. Gant*, and the unjustifiability of applying its "reasonable-to-search" test to cell phones. Finally, the last section critiques *State v. Smith*'s "bright-line" reversal of *Robinson*'s ability to reach mobile phones.

A. The Irrelevance of Categorizing Cell Phones as "Closed Containers"

Beginning with pagers,[99] a majority of courts have validated warrantless searches of digital communications devices by invoking the traditional analogy of the closed container,[100] thereby recalling Supreme Court cases that expressly upheld searches incident of closed containers.[101] While the higher Court rulings unambiguously extended the search-incident-to-arrest doctrine to closed containers, nothing in those cases limited the search incident to searches of closed containers.[102] Nevertheless, recent court opinions have mistakenly sought to distinguish cell phones from a traditional container analogy as a means of sidestepping the bright-line rule embodied in *Robinson* and its line of cases.[103]

State v. Smith's exemption of cell phones from searches incident relied in part on this attempt to distance cell phones from

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[99] *See* United States v. Chan, 830 F. Supp. 531 (N.D. Cal. 1993), *supra* notes 41-43 and accompanying text.

[100] *See, e.g.*, United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007) (holding the same for cell phones); United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996) (finding that a pager is analogous to a closed container); United States v. Chan, 830 F. Supp. 531, 534 (N.D. Cal. 1993) (holding the same); United States v. David, 756 F. Supp. 1385, 1390 (D. Nev. 1991) (finding computer memo book "indistinguishable from any other closed container").

[101] *See, e.g.*, United States v. Edwards, 415 U.S. 800, 802-809 (upholding search of defendant's clothing incident to arrest); *Robinson*, 414 U.S. at 224-37 (upholding search of cigarette package incident to arrest).

[102] People v. Diaz, 244 P.3d 501, 510 (Cal. 2011).

[103] *See Robinson*, 414 U.S. at 235.

physical containers.[104] In finding the analogy improper, *Smith* turned to the definition of "container" relied on by the Supreme Court, stating that containers "have traditionally been physical objects capable of holding other physical objects. . . . '[C]ontainer' means 'any object capable of holding another object.'"[105] Because cell phones do not "actually have a physical object within" them, *Smith* held they are "not . . . closed container[s] for purposes of a Fourth Amendment analysis."[106]

Two years after *Smith*, the California Supreme Court conclusively demonstrated the irrelevance of any container inquiry under current Supreme Court jurisprudence.[107] In *People v. Diaz*, the court determined that "whether an item of personal property constitutes a 'container' bears no relation"[108] to "the reasonableness of searching for . . . evidence of crime when a person is taken into official custody and lawfully detained."[109] Instead, "application of [the search incident exception] turns . . . on whether [the item] is 'property,' i.e., a 'belonging[]' or an 'effect[].'"[110] For example, in upholding the search of the arrestee's cigarette package in *Robinson*, the Supreme Court reasoned that "[h]aving in the course of a lawful search come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them . . . ."[111] As the court in *Smallwood v. State* observed of *Robinson*, "the search of an item found on an arrestee was [not] contingent upon that item being a 'container,'

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104 *See* State v. Smith, 920 N.E.2d 949, 954 (Ohio 2009).

105 *Id.* at 954 (Ohio 2009) (quoting New York v. Belton, 453 U.S. 454, 460 (1981)).

106 *Id.* at 954 (Ohio 2009); *see also Diaz*, 244 P.3d at 517 ("Electronic devices 'contain' information in a manner very different from [traditional containers, and] are not even 'containers' within the meaning of the [Supreme Court's] search decisions.") (citing *Smith*, 920 N.E.2d at 954 (Ohio 2009)) (Werdegar, J., dissenting).

107 *See Diaz*, 244 P.3d at 510.

108 *Id.*

109 *Id.* (quoting United States v. Edwards, 415 U.S. 800, 802-03 (1974)).

110 *Id.* (quoting *Edwards*, 415 U.S. at 803-04, 807-08).

111 United States v. Robinson, 414 U.S. 218, 236 (1973).

nor did the opinion even use the word 'container.'"[112] Cases like *Diaz* and *Smallwood* illustrate the error in assuming that classification as a "container" has any impact on a police officer's ability to search a cell phone under *Robinson*'s bright-line rule.

B. Misapplication of United States v. Chadwick

Much of the confusion surrounding police authority to search particular containers incident to arrest originates from *United States v. Chadwick*. In determining the reasonableness of a police search of a locked footlocker, the Supreme Court developed the concept of items "not immediately associated with the person of the arrestee."[113] In respect to searches incident to arrest, the Court held that:

> [W]arrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the search is remote in time or place from the arrest, . . . or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.[114]

Because police had taken "exclusive dominion" of the footlocker, and the search occurred 90 minutes after arresting the defendant, the Court refused to justify the search as incident to the arrest.[115] *Chadwick* notably distinguished[116] the earlier rule of *United States v. Edwards*, which validated the search of an arrestee's clothing ten hours after his arrest.[117] In so distinguishing, the *Chadwick* court

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112 Smallwod v. State, 61 So.3d 448, 459 (Ct. App. Fla. 2011).
113 United States v. Chadwick, 433 U.S. 1, 15 (1977).
114 *Id.* (quotation marks omitted).
115 *Id.*
116 *Id.* at 16 n.10.
117 United States v. Edwards, 415 U.S. 800, 805-09 (1974).

noted "[u]nlike searches of the person . . . searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest."[118]

Some critics of searches of cell phones incident to arrest have misinterpreted *Chadwick*'s "not-immediately-associated-with-the-person" concept as a device to except categorically cell phones from searches incident.[119] Contrary to this view, *Chadwick*'s rule on searches incident to arrest did not establish a bright line for absolutely classifying property as either "immediately associated with the person" or not. [120] *Chadwick* is better read as defining the outer limit the "incident" of arrest.[121] Applying *Chadwick*'s test therefore requires factual analysis centering primarily on the circumstances of the arrest, seizure, and search, rather than the general identity of the item.[122]

While courts have interpreted *Chadwick* with little difficulty in regard to purely spatial containers, such as purses[123] and

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[118] *Chadwick*, 433 U.S. at 16 n.10.

[119] *See, e.g.*, Byron Kish, *Cellphone Searches: Works Like A Computer, Protected Like A Pager?*, 60 CATH. U.L. REV. 445 (recommending courts "classify" cell phones as possessions not immediately associated with person of arrestee).

[120] For example, purses have generally, but not universally, been interpreted as items associated with the person due to their proximity to the arrestee. *Compare* People v. Mannozzi, 632 N.E.2d 627, 632 (Ct. App. Ill. 1994) (finding purse immediately associated with person "because it is carried on the person at all times"), *with* United States v. Monclavo-Cruz, 662 F.2d 1285 (9th Cir. 1981) (rejecting search of purse incident to arrest when search occurred at police station one hour after arrest and purse was "either in [defendant's] hand, on her lap, or on the seat of the car at the time of arrest").

[121] *See* Adam M. Gershowitz, *Password Protected? Can A Password Save Your Cell Phone from A Search Incident to Arrest?*, 96 IOWA L. REV. 1125, 1156 (2011) ("*Edwards* and *Chadwick* offer two different rules for the temporal scope of searches incident to arrest.").

[122] *See id.* at 1161 (suggesting that categorization of item as associated with the person or nearby possession "depends on the specific facts of the case").

[123] *See, e.g.*, People v. Thomas, 760 N.E.2d 1012 (Ill. App. Ct. 2001) (finding search at police station valid under *Edwards*); People v. Mannozzi, 632 N.E.2d 627, 632 (Ill. App. Ct. 1994) ("[A] purse, unlike a footlocker, has been held to be an item immediately associated with the person of an arrestee, because it is carried on the person at all times."); People v. Harris, 164 Cal. Rptr.

backpacks,[124] application of the rule to cell phones has produced controversy. *United States v. Finley* embodies the leading authority supporting the view that cell phones are possessions associated with the person of the arrestee.[125] The *Finley* court reasoned that, because the arrestee's cell phone "was on his person at the time of his arrest," *Edwards*'s rule, rather than *Chadwick*'s, ought to apply.[126] A majority of courts have applied *Finley*'s purely spatial formulation of *Chadwick*'s distinction.[127]

An opposing view originated in *United States v. Park*, which concluded that mobile phones "should be considered 'possessions within an arrestee's immediate control' and not part of 'the person.'"[128] Avoiding *Finley*'s preoccupation with physical proximity to the arrestee, *Park* rested its conclusion on the arrestee's high privacy interests in the contents of the cell phone.[129] Curiously, the *Park* court provided no explanation or support for this absolute categorization.

Although *Park*'s finding is unpersuasive on its own, at least one other case has held that *Chadwick* fundamentally requires an analysis of privacy interests in the general class of item searched.

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296 (Ct. App. 1980) (validating a search at a station house of a purse and wallet contained within because under California law purses are considered regular extensions of the person).

[124] *See* People v. Boff, 766 P.2d 646, 651 n.9 (Col. 1988) (en banc) (finding the search of a backpack at a station was valid under *Edwards* because it "is more like a purse than a two-hundred pound double-locked footlocker").

[125] 477 F.3d 250, 258-60 (5th Cir. 2007).

[126] *Id.*

[127] *See, e.g.*, People v. Diaz, 244 P.3d 501, 505-06 (2011); United States v. Murphy, 552 F.3d 405, 412 (4th Cir. 2009); United States v. Wurie, 612 F. Supp. 2d 104, 110 (D. Mass. 2009) ("I see no principled basis for distinguishing a warrantless search of a cell phone from the search of other types of personal containers found on a defendant's person that fall within the [*Edwards*] exceptions to the Fourth Amendment's reasonableness requirements."); United States v. Curry, Criminal No. 07-100-P-H, 2008 WL 219966, at *10 (D. Me. Jan. 23, 2008); United States v. Diaz, No. CR 05-0167 WHA, 2006 WL 3193770, at *4 (N.D. Cal. Nov. 2, 2006).

[128] United States v. Park, No. CR 05-375 SI, 2007 WL 1521573, at *8 (N.D. Cal. May 23, 2007) (quoting United States v. Chadwick, 433 U.S. 1, 16 n.10 (1977)).

[129] *Id.* at *8 ("This is so because modern cellular phones have the capacity for storing immense amounts of private information.").

In *United States v. Calandrella*, the Sixth Circuit found the arrestee's briefcase was not associated with the person of the arrestee because "the container's 'very purpose' is to transport papers and other items of an inherently personal, private nature."[130] However, contrary to *Calandrella*, the Supreme Court in *Chadwick* made no indication that a footlocker's typical contents determined whether it was associated with the person.[131]

In fact, *Park*'s holding actually contradicts accepted divisions between *Edwards* and *Chadwick*. As one commentator points out, a person's wallet serves as an easy counterexample to *Park*'s holding:

> [C]onsider the enormous amount of information police can obtain from searching a wallet—generally held to be associated with the person of an arrestee—including where the arrestee banks (via his ATM card); where he shops (via his rewards cards); whether he has any medical conditions (via medical cards); pictures of his children; and more scandalous information such as motel key cards, condoms, or the phone number of his mistress. These items do not cease to be on the person of an arrestee simply because they convey a wealth of information.[132]

If Supreme Court precedent exists to exempt cell phones from the search-incident-to-arrest exception, it does not reside in *Chadwick*'s highly fact-oriented standard. While courts may use *Chadwick* to invalidate certain searches of cell phones under the right circumstances, *Chadwick* does not provide an absolute bar to

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[130] 605 F.2d 236, 249 (6th Cir. 1979) (noting under *Chadwick*, "an individual has a legitimate expectation of privacy in the contents of a container such as a footlocker which differs from the expectation of privacy associated solely with the person."); *id*. (relying on *Chadwick*'s assertion that "searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest. [The arrestee's] privacy interest in the contents of the footlocker was not eliminated simply because they were under arrest.") (citing *Chadwick*, 433 U.S. at 16 n.10).

[131] *See Chadwick*, 433 U.S. 1.

[132] *See supra* Gershowitz, note 126 at 1160.

the practice.

C. The Arbitrariness of the Arizona v. Gant *Standard*

The Supreme Court's decision in *Arizona v. Gant*[133] has inspired some lower courts to take a different approach to limit cell phones searches. *Gant* introduced a novel, two-prong standard for searches of automobiles incident to arrest: "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."[134] Some courts have extended *Gant*-like analyses to cell phones,[135] despite serious doctrinal criticism of *Gant*'s holding and a tenuous analogical thread.

1. Doctrinal Ambivalence in *Arizona v. Gant*

The *Gant* decision sought to remedy dissatisfaction over *Belton*'s broad allowance of searches of passenger compartments of cars incident to arrest.[136] The replacement, which all but eliminated *Belton*'s bright-line rule,[137] was adopted from a position advocated by Justice Antonin Scalia in his concurrence in

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[133] 556 U.S. 332 (2009); *see supra* notes 32-37 and accompanying text.

[134] *Gant*, 556 U.S. at 351.

[135] *See, e.g.*, United States v. McGhee, No. 8:09CR31, slip op., 2009 WL 2424104, at *3 (D. Neb. July 21, 2009) (invalidating cell phone search incident to arrest because not reasonable for officer to believe evidence of drug conspiracy in phone contents); United States v. Quintana, 594 F. Supp. 2d 1291, 1299-1301 (M.D. Fla. 2009) (holding the same).

[136] *See Gant*, 556 U.S. at 351-52 ("The experience of the 28 years since we decided *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded. We now know that articles inside the passenger compartment are rarely within the area into which an arrestee might reach . . . and blind adherence to *Belton*'s faulty assumption would authorize myriad unconstitutional searches.").

[137] *Id.* at 343 n.4 ("Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that the real possibility of access to the arrestee's vehicle remains.").

Thornton v. United States.[138] In *Thornton*, Justice Scalia based his "reason to believe" test on the distinction that, in contrast to *Robinson* cases (where the fact of arrest justifies the search), "in the context of a general evidence-gathering search, the state interests [expressed in *Chimel*] that might justify any overbreadth [sic] are far less compelling."[139] However, Justice Scalia's justification for these "general evidence-gathering" searches incident to arrest remains suspect. Scalia defended these searches, such as the one used in *United States v. Rabinowitz*,[140] stating:

> There is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested. The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of his crime from general rummaging. Moreover, it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.[141]

Professor Wayne LaFave has cast serious doubt on the merits of these assertions, finding them "totally lacking in substance."[142] Perhaps more significantly, the justification Justice Scalia relied on —that the Fourth Amendment arguably accommodates purely "evidence-gathering" searches incident to arrest—necessarily opposes the twin policy interests adopted by *Chimel* to limit those searches.[143] In spite of this incompatibility, the *Gant* majority in nearly the same breath purports to adhere to *Chimel* while also supporting Justice Scalia's rule.[144] For this reason, the *Gant* dissenters criticized the majority for "rais[ing] doctrinal . . .

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[138] Thornton v. United States, 541 U.S. 615, 632 (2004) ("I would . . . limit *Belton* searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.") (Scalia, J., concurring).

[139] *Id*.

[140] 339 U.S. 56 (1950) (upholding search incident of one-room office space), *overruled by* Chimel v. California, 395 U.S. 752 (1969).

[141] *Thornton*, 541 U.S. at 630.

[142] 3 WAYNE R. LAFAVE, SEARCH & SEIZURE § 7.1 (4th ed. 2011).

[143] *Id.* After all, *Chimel* overruled *Rabinowitz*.

[144] Arizona v. Gant, 556 U.S. 332, 343 (2009).

problems."[145] As Justice Alito's dissent emphasizes, the *Rabinowitz* line of cases Justice Scalia relied upon in *Thornton* were overruled by *Chimel*.[146] While *Gant* accomplishes the intended goal of narrowing *Belton*, "'better than *Belton*' is hardly high praise," and its "two-faced" loyalty to *Chimel* leaves Fourth Amendment jurisprudence visibly fractured.[147]

As with *Gant*'s automobile, there is simply little theoretical justification for applying *Gant*'s "reason to believe" rule to cell phones. Unsurprisingly, lower courts using the rule in the context of cell phones expose little of their reasoning. In *United States v. Quintana*, a district court suppressed evidence gained from the search of a cell phone of an individual incident to an arrest for driving with a suspended license. Although *Quintana* was decided while *Gant* was still pending, *Quintana* introduced a similar, yet even broader, rule that "a search incident to arrest to preserve evidence is permissible only to secure evidence of the crime of arrest, not evidence of an unrelated crime."[148] *Quintana* purportedly derived its rule from *Knowles v. Iowa*,[149] though the court's true inspiration came from Justice Scalia's concurring opinion in *Thornton*.[150]

When it came time for the court to apply its novel rule to the case at hand, however, the court inexplicably fell back upon an evaluation of *Chimel*'s rationales. "The search of the contents of Defendant's cell phone had nothing to do with officer safety or the preservation of evidence related to the crime of arrest. This type of

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[145] *Id.* at 364 (2009) (Alito, J., dissenting); *see also* James J. Tomkovicz, 2007 U. ILL. L. REV. 1417, 1459 (2007) ("Justice Scalia's historical case for the evidence-gathering justification for searches incident to arrest is hardly compelling, [as it] provides no genuine insight into the Framers' attitudes toward the authority to search private spaces where arrestees are found.").

[146] *See Gant*, 556 U.S. at 364 (Alito, J., dissenting).

[147] *See* LaFave, *supra* note 147.

[148] United States v. Quintana, 594 F. Supp. 2d 1291, 1300 (M.D. Fla. 2009).

[149] 525 U.S. 113 (1998) (invalidating search of car incident to traffic stop not involving custodial arrest).

[150] *Quintana*, 594 F. Supp. 2d at 1300. The opinion went so far as to support its reasoning with corroborating comments made by Justice Scalia during oral arguments for *Gant*.

search is not justified by the twin rationales of *Chimel* and pushes the search-incident-to-arrest doctrine beyond its limits."[151] Although decided before *Gant, Quintana*'s approach highlights the confusion surrounding the test Justice Scalia envisioned in *Thornton*. Instead of arriving at an application of this test through cogent analysis, supporters abuse the "reason to believe" standard as a shortcut to their goal of avoiding the reach of *Robinson* and limiting searches of cell phones incident to arrest.[152]

2. The Problem of Analogizing *Gant*

Even if we tolerate *Gant*'s underlying ambivalence toward *Chimel*, the more practical problem remains of properly analogizing vehicles and cell phones. *Gant* involved, of course, the search of a vehicle incident to the occupant's arrest. Central to its justification for espousing Justice Scalia's *Thornton* rule was the majority's consideration of the "circumstances unique to the vehicle context."[153] Apart from the Court's use of the word "unique"—suggesting *Gant*'s rule is limited to automobiles—the opinion yields almost no explanation of what those circumstances are, and how those facts necessitate *Gant*'s holding. One clue might arise from the Court's disapproval of *Belton*'s undervaluation of individuals' privacy interests in cars.[154] The

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[151] *Id.*

[152] *See, e.g.*, H. Morley Swingle, *Smartphone Searches Incident to Arrest*, 68 J. MO. B. 36, 38 (2012) ("The *Gant* 'evidence-related-to-crime-of-arrest' analysis provides a workable framework to apply to searches of smartphones incident to arrest."); Jana L. Knott, *Is There An App for That? Reexamining The Doctrine of Search Incident to Lawful Arrest in The Context of Cell Phones*, 35 OKLA. CITY U.L. REV. 445, 477 ("A rule allowing officers to search a cell phone incident to lawful arrest if they have reason to believe evidence of the offense of arrest will be found in the phone prevents courts from having to fashion a completely new rule based on the technology of cell phones. With such a rule, the focus is less on the type of phone, the features of a particular phone, or whether the phone is a smart phone or a basic cell phone, but rather the focus for courts is whether the officer had reason to believe that evidence of crime would be stored in the phone.").

[153] Arizona v. Gant, 556 U.S. 332, 364 (2009) (quoting Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).

[154] *Id.* at 344-45 ("[T]he State seriously undervalues the privacy interests

Gant Court expressed concern over a "serious and recurring threat to privacy"—namely an "unbridled discretion to rummage"—arising "whenever an individual is caught committing a traffic offense."[155] However, if a concern for privacy was the determinative issue, it is not clear why the Court did not simply fall back on a probable cause standard through the automobile exception.[156] *Gant*'s vague reasoning provides no workable basis upon which to rest an analogy between a cell phone and an automobile.

D. State v. Smith, Smallwood v. State, *and the Insufficiency of a High Expectation of Privacy to Preclude a Search Incident to Arrest*

1. *State v. Smith*

Modern cell phones' ability to grant access to enormous amounts of personal information and media begs the question of privacy interests under the Fourth Amendment. In the words of the American Civil Liberties Union of Ohio:

> Even the simplest of today's cell phones do more than just make and receive telephone calls. Typically, they have the capability of sending, receiving, and storing text messages. They have built in cameras and can take pictures, send them wirelessly to others, and store them. They record not only phone numbers that people intentionally

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at stake. Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home . . . the former interest is nonetheless important and deserving of constitutional protection.").

[155] *Id.* at 345.

[156] Carroll v. United States, 267 U.S. 132, 153-54 (1925) ("It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search . . . . [T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.").

> left for them, as do pagers, but lists of both numbers called and numbers from which calls were received, commonly with details of both date/time and call duration. More sophisticated phones contain complete address books, appointment calendars, and e-mail. And they can surf the internet. People store everything from recipes and shopping lists to pictures of their children and their social security and bank account numbers on their cell phones. When the phones are used by employees, they often contain highly confidential business information. Rather than pagers, today's cellular phones are properly analogized to a combination telephone, office safe, and laptop computer.[157]

Digital communication and data use through cell phones are growing in our society. In 2011, 331.6 million "wireless subscriber connections" were active in the United States.[158] That number equated to 104.6 percent penetration in 2011, compared to 76.6 percent in 2006, and 44.2 percent in 2001.[159] Another 2011 figure estimated 40 percent of U.S. mobile phone users owning multimedia-centered smartphones.[160] Courts have consistently recognized a reasonable expectation of privacy in cell phone contents.[161] Increasingly, courts have given greater recognition to cell phones' immense storage capabilities.[162]

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[157] Merit Brief for American Civil Liberties Union of Ohio Foundation, Inc. as Amici Curiae Supporting Appellant, Antwaun Smith at 6, State v. Smith, 920 N.E.2d 949, 955 (Ohio 2009).

[158] *Wireless Quick Facts*, CTIA: THE WIRELESS ASSOCIATION, http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts.

[159] *Id.*

[160] Don Kellogg, *40 Percent of U.S. Mobile Users Own Smartphones; 40 Percent are Android*, NIELSONWIRE (Sept. 1, 2011), http://blog.nielsen.com/nielsenwire/online_mobile/40-percent-of-u-s-mobile-users-own-smartphones-40-percent-are-android/.

[161] *See* United States v. Finley, 477 F.3d 250, 259 (5th Cir. 2007).

[162] *See, e.g.*, United States v. Zavala, 541 F.3d 562, 577 (5th Cir. 2008); United States v. Quintana, 594 F. Supp. 2d 1291, 1299 (M.D. Fla. 2009); United States v. Park, No. CR 05-375 SI, 2007 WL 2424104, at *8 (N.D. Cal. May 23 2007); State v. Smith 920 N.E.2d 949, 955 (Ohio 2009); Smallwood v. State, 61

As described above, the Ohio Supreme Court made history in 2009 as the first high court to prohibit categorically searches of cell phones incident to arrest.[163] The court held in *State v. Smith* that modern cell phones' immense storage capabilities created an expectation of privacy high enough to entirely exclude all cell phones from searches incident to arrest.[164] The *Smith* court found that, because nothing about the search of the phone implicated either officer safety or preservation of evidence, and because of the high privacy interest in the phone's contents, "an officer may not conduct a search of a cell phone's contents incident to a lawful arrest without first obtaining a warrant."[165] Apart from an initial citation to *United States v. Katz*,[166] the *Smith* court arrived at its conclusion without referencing a single case.

Smith's silence on prior authority is unsurprising, since none actually supports the court's conclusion. In fact, as the Supreme Court of California identified two years later in *People v. Diaz*,[167] controlling precedent actually opposes the reasoning used by *Smith*. Although it did not directly address the *Smith* opinion, *Diaz* confronted many of the arguments used by the Ohio court. *Diaz* primarily questioned why "the sheer quantity of personal information [stored on cell phones] should be determinative," when smaller containers may still "contain highly personal, intimate and private information."[168] *Diaz* noted that the U.S. Supreme Court has approved of lower court decisions allowing officers to search the contents of papers incident to arrest.[169]

So.3d 448, 461 (Ct. App. Fla. 2011).

[163] State v. Smith, 920 N.E.2d 949 (Ohio 2009).

[164] *Id.* at 955 ("[Cell phones'] ability to store large amounts of private data gives their uses a reasonable and justifiable expectation of a higher level of privacy in the information they contain.").

[165] *Id.* (distinguishing the functionality of cell phones from computers). *But see id.* (declining to distinguish between so-called "standard" cell phones and those with more functions and storage).

[166] *Id.*

[167] 244 P.3d 501 (2011).

[168] *Id*. at 507-08.

[169] *See id.* (citing United States v. Edwards, 415 U.S. 800, 803, n.4 (1974)); *see, e.g.*, United States v. Gonzalez-Perez, 426 F.2d 1283, 1285–87 (5th Cir. 1970) (upholding search incident of papers contained in pockets, wallets, and purse); United States v. Frankenberry, 387 F.2d 337, 339 (2d Cir. 1967)

Boiling down precedent from *Belton* and *Robinson*, *Diaz* argued:

> [T]he salient point of the high [C]ourt's decisions is that a lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have in property immediately associated with his or her person at the time of arrest . . . even if there is no reason to believe the property contains weapons or evidence.[170]

How *Smith*'s holding—based on a heightened expectation of privacy in cell phones—can survive within the jurisprudential environment *Diaz* describes is perplexing. Tellingly, *Smith* avoids any discussion of *Robinson* within the section pertinent to its holding.[171] *Robinson* would seem to foreclose any inquiry into expectations of privacy or into the type of property searched, as well as *Smith*'s analysis of *Chimel*'s twin justifications for a search.[172] In short, *Smith*'s rule fundamentally conflicts with longstanding Supreme Court precedent defining the valid scope of searches incident to arrest.

Smith's failure to delimit the proper subject of its ruling also raises significant questions as to real-world law enforcement. While *Smith* addressed a particular search incident of a "standard" cell phone, it chose to bundle all mobile phones under its term "cell phone," while neglecting to define any fundamental characteristics a "cell phone" must possess. At most, the court distinguished "cell phones" from address books and laptop computers.[173] In response to this broad umbrella, *Diaz* asked the

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(diary); Cotton v. United States, 371 F.2d 385, 392 (9th Cir. 1967) (papers contained in pockets); Grillo v. United States, 336 F.2d 211, 213 (1st Cir. 1964) (paper contained in wallet).

[170] People v. Diaz, 244 P.3d 501, 508 (Cal. 2011) (citing United States v. Robinson, 414 U.S. 218, 235 (1973) (quotation marks omitted)).

[171] *See* State v. Smith, 920 N.E.2d 949, 954-55 (Ohio 2009).

[172] *See id.* at 955 ("A search of the cell phone's contents was not necessary to ensure officer safety, and the state failed to present any evidence that the call records and phone numbers were subject to imminent destruction.").

[173] *See id.* ("[C]ell phones are neither address books nor laptop computers. They are more intricate and multifunctional than traditional address books, yet they are still, in essence, phones, and thus they are distinguishable from laptop

practical questions: "How would an officer in the field determine whether the item's storage capacity is constitutionally significant? And how would an officer in the field determine this question upon arresting a suspect?"[174] Of course, an argument exists that, based on the integration of increasing local storage capacities and "cloud" storage into modern cell phones,[175] *Diaz*'s questions quickly will become irrelevant.

However, *Smith* still failed to answer the more fundamental questions of "why cell phones, and why now?" *Smith* provided no practicable guidance regarding the point at which other forms of property might contain enough personal information to allow for a heightened expectation of privacy to require a similar exemption from searches incident. The most we know from *Smith* is that, somewhere between an address book and a laptop computer, property becomes imbued with a heightened expectation of privacy. Instead of confronting the perceived flaws of current Fourth Amendment search incident doctrine and attempting to better define the scope of the search incident exception in the digital age, *Smith* merely carved out an unsound shelter for a vague category of technology using reasoning that, as *Diaz* made clear, conflicts with established Supreme Court precedent.

2. *Smallwood v. State*

In 2013, the Florida Supreme Court answered the appellate

computers.").

[174] *Diaz*, 244 P.3d at 508; *see also* United States v. Murphy, 552 F.3d 405, 411 (4th Cir. 2009) (refusing to distinguish cell phones based on "large" storage capacity because of difficulty of quantifying that term "in any meaningful way").

[175] At the time of writing, the largest capacity available in Apple's "iPhone 4S" is 64 gigabytes. *See Select an iPhone 4S*, APPLE (2012), http://store.apple.com/us/browse/home/shop_iphone/family/iphone/iphone4s. The first iPhone, introduced in 2007, held a capacity of only 4 gigabytes. The iPhone software "iCloud" allows users to store music files, photographs, documents, applications, calendars, and contact information in Apple's servers for remote access from their iPhones. *See iCloud*, APPLE (2012), http://www.apple.com/iphone/icloud/.

court's "question of great public importance"[176] with a reversal,[177] using language closely echoing *State v. Smith*. The court began its inquiry by entirely rejecting the relevance of *Robinson* to the facts of *Smallwood v. State*. The court distinguished *Robinson* on the grounds that *Robinson* was "neither factually nor legally on point" with the issue presented in *Smallwood*.[178] The court based its distinction on a comparison of the property searched in each case, ultimately finding that *Robinson*'s crumpled cigarette pack and *Smallwood*'s mobile phone factually dissimilar enough to prevent *Robinson*'s holding from applying. To this effect, the court stated "[i]n our view, attempting to correlate a crumpled package of cigarettes to the cell phones of today is like comparing a one-cell organism to a human being. The two objects are patently incomparable because of the obvious and expansive differences between them."[179] In particular, the cell phone's ability to grant access to "extensive information and data" sufficiently departed from *Robinson*'s set of facts to prevent *Robinson*'s holding from controlling.[180]

The Court's line of inquiry suggests that, when evaluating the propriety of a search of personal items incident to arrest, courts ought to inquire into the nature and characteristics of the property. However, *Robinson* makes no suggestion that the validity of the search depended in any way upon the character of the property searched. To the contrary, *Robinson* suggests characteristics of property are an improper factor for courts to consider:

> The authority to search the person incident to lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of

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[176] Smallwood v. State, 61 So.3d 448 (Fla. Dist. Ct. App. 2011); *see supra* notes 95–96 and accompanying text.

[177] Smallwood v. State, 113 So.3d 724 (Fla. 2013).

[178] *Id.* at 730.

[179] *Id.* at 732.

[180] *Id.* at 731.

the suspect.[181]

Robinson's bright-line rule supported policy considerations that police officers' subjective beliefs about the evidentiary weight of certain items or the dangerousness of certain arrestees should be removed from search incident to arrest procedure.[182] In contrast to the Florida Supreme Court's fixation on the particular characteristics of the searched item, the U.S. Supreme Court in *Robinson* explicitly refused to evaluate the particular facts of the arrestee or the items uncovered in the course of the resulting search. Federal precedent therefore requires that the rule developed in *Robinson* and its line of cases should apply regardless of the type of property at issue.

3. *Smallwood* and *Smith*: Common Problems

The *Smallwood* and *Smith* holdings rely on a common tactic of ignoring the full effect of *Robinson* or, in the *Smallwood* situation, entirely rejecting its relevance, in order to apply a heightened expectation of privacy to cell phones. As demonstrated by *Diaz* and the Florida Court of Appeals, the assumption that *Robinson* has no factual application to searches of cell phones is misguided. If we accept that a cell phone constitutes property, and that it was located on the suspect's person at the time of arrest, then nothing prevents *Robinson* from applying to its search incident to an arrest.

In addition to misinterpreting the reach of *Robinson*'s rule, the *Smallwood* and *Smith* courts fail to define the scope of their own holdings. The *Smallwood* court concluded that "electronic devices that operate as cell phones of today" cannot be treated according to *Robinson*'s rule.[183] The court supplies only nebulous interpretations of the term "cell phone" and what technology suffices to protect an electronic device from searches incident to arrest. The court's conclusion hinged on distinguishing the "vast nature of the information" available through a modern cell phone

[181] United States v. Robinson, 414 U.S. 218, 235-36 (1973).

[182] *See id.* at 236 ("[I]t is of no moment that [the officer] did not indicate any subjective fear of [the arrestee] or that he did not himself suspect that [the arrestee] was armed.").

[183] *Smallwood*, 113 So. 3d at 732.

from the "limited-capacity" and "non-interactive" cigarette packet in *Robinson*.[184] Of course, a stark distinction is easy when the only points of comparison are a modern mobile device and a small cardboard box. But deciding what kind of rule to apply becomes more difficult when comparing different mobile devices which do not lend themselves to easy categorization. Increasingly, electronics are being produced to fit any functional niche for which a market exists: laptops, tablet computers, smartphones, feature-phones, wearable devices with Bluetooth connections, digital cameras with wireless Internet capabilities, e-readers, and so on. The technologies of these gadgets can both overlap and vary greatly.

Even if the *Smallwood* and *Smith* decisions tend to sympathize with the general public's expectation of privacy in mobile devices, they ignore decades of case law on an established exception to the warrant requirement to search property. Other states should take these cases as examples of improper solutions to this complex issue. The following section explores two possible avenues that do not undermine the judiciary's credibility.

III. RECONNECTING WITH *CHIMEL*: TWO APPROACHES FORWARD

Despite the persistent mess of Fourth Amendment jurisprudence,[185] some "fundamental principles"[186] remain relatively unquestioned in the context of searches incident to arrest.[187] One of those principles maintains that "in order for a search incident to arrest to be reasonable as opposed to merely exploratory, it must be grounded in at least one of the rationales for which the exception was created: officer safety or the preservation of evidence."[188] If we accept these two justifications as the basis of

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[184] *Id.*

[185] *See* LaFave, *supra* note 1 ("The [Fourth] Amendment . . . continues to spawn a seemingly endless stream of litigation; as some issues are finally put to rest, still others surface and cry out for litigation.").

[186] New York v. Belton, 453 U.S. 454, 460 (1981) (referring to principles established in Chimel v. California, 395 U.S. 752 (1969)).

[187] *But see* Thornton v. United States, 541 U.S. 615, 631-32 (2004) (Scalia, J., concurring).

[188] United States v. McLaughlin, 170 F.3d 889 (9th Cir. 1999) (quoting

governmental interest in searches incident to arrest, whatever approach is taken toward cell phones and other digital devices must incorporate them. Two possible methods of resolution are discussed here: one judicially based solution, and another legislatively based avenue.

A. Judicial Solution: Limit Robinson*'s Scope*

Although it would depart from the present categorical search incident rule developed in *Robinson*,[189] this Article recommends that courts adopt a rule similar to one proposed by Professor Stephen Saltzburg:.[190] His rule is that during a search of the person of the arrestee incident to lawful arrest, (1) once an officer determines that a piece of property seized from the arrestee contains nothing posing a risk to officer safety, (2) the officer may continue searching that item only if (a) the possibility reasonably exists that the item contains evidence related to the crime of arrest, and (b) the arrestee remains capable of accessing the item.[191] If either of the last two criteria are unfulfilled during the search, the officer must refrain from further intrusion and seek a warrant for the particular item.[192]

This rule offers courts numerous advantages. First, it centers the focus of a search incident analysis to the foundational, exigency-based tenets of *Chimel v. California*.[193] It is well established that a warrantless search must be "strictly

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Chimel v. California, 395 U.S. 752, 768 (1969)) (Trott, J., concurring).

189 *See supra* notes 24-31 and accompanying text.

190 *See* Stephen A. Saltzburg, *The Fourth Amendment: Internal Revenue Code or Body of Principles?*, 74 GEO. WASH. L. REV. 956, 980 (2006) ("(1) an officer always may search the arrested person for weapons and search any container from which the suspect could get a weapon; (2) once an officer has determined that a suspect has no weapon or has disarmed the suspect, the officer may only continue to search a container for evidence as long as there is some possibility that it contains evidence and the suspect remains capable of opening the container and destroying the contents; and (3) thereafter, the officer may only seize a container to bring before a magistrate in order to seek a warrant to search it further.").

191 *Id.*

192 *Id.*

193 395 U.S. 752 (1969); *see supra* notes 17–23 and accompanying text.

circumscribed by the exigencies which justify its initiation."[194] Cell phones naturally carry no threat to officer safety. When a cell phone is seized from the arrestee and the arrestee has no ability to regain control of the device, the officer has fulfilled *Chimel*'s second exigency justification of preserving evidence. Some courts have pointed to the potential of incoming calls or messages to overwrite stored data, or for an accomplice to remotely wipe a phone's content.[195] While these observations may hold merit, such questions require highly technical examinations of different devices' technologies and countermeasures. Such inquiries extend beyond the scope of this Article.

The above rule would intentionally limit an officer's ability to peruse the written content papers or visual content of photographs found on the person of the arrestee. The exigency argument for searching the contents of physical papers is even weaker than for electronic media because there is no threat of data loss. Absent peculiar circumstances threatening to destroy the papers, a search of such documents would require a warrant.

Second, the proposed rule returns the scope of searches incident to offense-specific evidence preservation—an approach that better reflects early search incident procedure.[196] While the exact point at which this historical limitation of searches incident to arrest dropped out of Supreme Court jurisprudence is unclear, *Robinson* unambiguously heralded the Court's interpretation of an "unqualified" ability of police to search. Parting ways with *Robinson*'s unqualified "general authority" in favor of the earlier "crime of arrest" approach would more closely approximate the Framers' understanding of a reasonable search incident to arrest. As Professor LaFave writes, "it is unfortunate that Justice Rehnquist [in *Robinson*] did not give closer attention to the question of whether such a broad search-incident-to-arrest rule is warranted [by prior Supreme Court decisions]."[197] Again, this

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[194] Terry v. Ohio, 392 US 1, 26 (1968).

[195] *See, e.g.*, United States v. Flores-Lopez, 670 F.3d 803, 807–9 (7th Cir. 2012) (discussing possibility of "remote-wiping" of phone and rejecting practicality of preventative measures by officers).

[196] *See supra* notes 13-14 and accompanying text.

[197] LaFave, *supra* note 147, at § 5.2.

subject calls for greater examination elsewhere.

Third, this rule ultimately acknowledges the public's high expectation of privacy in their mobile devices[198] while avoiding the line-drawing problems that plagued *State v. Smith*.[199] The topic of cell phone searches incident to arrest has received significant and generally negative attention from public interest organizations[200] and the technology community,[201] indicating a widespread and high public expectation of privacy in information accessible through digital devices. Finally, this rule by design is not limited to "cell phones," which are a technology in flux and already can be seen functionally overlapping with other portable computers, such as laptops and tablets.

B. Legislative Solution: Bypass Judicial Indecision

Given the improbability of a court narrowing *Robinson*'s bright-line rule, state legislatures provide a better avenue for greater protection of digital devices. The California Legislature's attempt to limit searches of cell phones[202] drew the attention of news media.[203] The bill produced even greater response after California governor Jerry Brown vetoed it amid speculation of political motivations to support law enforcement interests.[204] In a

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[198] *See supra* notes 162-66 and accompanying text.

[199] *See supra* notes 177-79 and accompanying text.

[200] *See, e.g.*, Elizabeth Wong, *Can You Hear Me Now? Get A Warrant!*, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA (June 3, 2011, 11:54 AM), http:// va.org/7617/can-you-hear-me-now-get-a-warrant; *Searches Incident to Arrest*, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/issues/search-incident-arrest (last visited April 19, 2012).

[201] *See, e.g.*, Ryan Radia, *Why you should always encrypt your smartphone*, ARS TECHNICA ("published about a year ago"), http://arstechnica.com/gadgets/guides/2011/01/why-you-should-always-encrypt-your-smartphone.ars.

[202] S.B. 914, 2011-12 Reg. Sess. (Cal. 2011), http://info.sen.ca.gov/pub/11-12/bill/sen/sb_0901-0950/sb_914_bill_20110902_enrolled.pdf.

[203] *See, e.g.*, Ryan Singel, *Gov. Brown: Sign Bill Outlawing Warrantless Smartphone Searches*, WIRED: THREAT LEVEL (Sept. 22 2011 8:26 pm), *available at* http://www.wired.com/threatlevel/2011/09/smartphone-warrant/.

[204] *See* David Kravets, *Calif. Governor Veto Allows Warrantless Cellphone Searches*, WIRED: THREAT LEVEL (Oct. 10, 2011 11:09 am),

terse written message the public, Governor Brown explained his veto that "[t]his measure would overturn a California Supreme Court decision that held that police officers can lawfully search the cell phones of people who they arrest. The courts are better suited to resolve the complex and case-specific issues relating to constitutional search-and-seizure protections."[205] The case Brown referred to was *People v. Diaz*.[206]

In response, Professor Orin Kerr addressed what he saw as Brown's misplaced reliance on the courts in this context:

> I think Governor Brown has it exactly backwards. It is very difficult for courts to decide Fourth Amendment cases involving developing technologies like cell phones. Changing technology is a moving target, and courts move slowly: They are at a major institutional disadvantage in striking the balance properly when technology is in flux . . . . In contrast, legislatures have a major institutional advantage over courts in this setting. They can better assess facts, more easily amend the law to reflect the latest technology, are not stuck following precedents, can adopt more creative regulatory solutions, and can act without a case or controversy. For these reasons, legislatures are much better equipped than courts to strike the balance between security and privacy when technology is in flux.[207]

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available at http://www.wired.com/threatlevel/2011/10/warrantless-phone-searches/ ("[A] police union that opposed the legislation . . . recently donated $38,900 to Brown's campaign coffers.").

[205] Edmund G. Brown Jr., *SB 914 Veto Message*, OFFICE OF THE GOVERNOR (Oct. 9, 2011), http://gov.ca.gov/docs/SB_914_Veto_Message.pdf.

[206] *See* 244 P.3d 501 (Cal. 2011); *supra* notes 171-74 and accompanying text.

[207] Orin S. Kerr, *Governor Brown Vetoes Bill on Searching Cell Phones Incident to Arrest*, THE VOLOKH CONSPIRACY (Oct. 10, 2011 2:29 am), http://volokh.com/2011/10/10/governor-brown-vetoes-bill-on-searching-cell-phones-incident-to-arrest/; *see also* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and The Case for Caution*, 102 MICH. L. REV. 801, 867-82 (2004) (reviewing "three basic differences critical to a comparison of the institutional competence of courts and legislatures" in the

Unbound by stare decisis and capable of easily revising their rules to adapt to changes in the technological world, legislatures likely provide a better channel than the courts to effect this kind of reform.

CONCLUSION

As cell phones and future iterations of mobile computing become more portable, more powerful, and more convenient, the public will increasingly rely on them to organize and access personal information. While devices like cell phones might store a great amount of personal information, our right to the privacy of that information during custodial arrests is not supported by Supreme Court case law. Numerous arguments have been made to limit police access to the contents of cell phones during searches incident to arrest.[208] Although not all have been addressed by this Article, I have attempted to show that many of these arguments are either in direct opposition to Supreme Court precedent, or lack a persuasive rationale for adopting them. In response, this Article recommends two possible approaches for limiting police authority to search cell phones incident to arrest. The first is judicially based.[209] While the rule itself challenges the application of *United States v. Robinson*[210] to digital devices, I have attempted to rest it on established and desirable policy goals.[211] Alternatively, state legislatures enacting statutory protections offer faster, more adaptable, and better informed means of regulating these searches.[212] Whatever method is used should reestablish contact with the search-incident-to-an-arrest exception's foundational policy goals as expressed in *Chimel v. California*.[213]

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context of generating rules of criminal procedure).

208 *See supra* Part III.

209 *See supra* Part IV(A).

210 414 U.S. 218 (1973); *see supra* notes 24-32 and accompanying text.

211 *See supra* Part IV(A).

212 *See supra* Part IV(B).

213 395 U.S. 752 (1969); *see supra* notes 17-23 and accompanying text.