

RILEY'S LESS OBVIOUS TRADEOFF: FORGOING SCOPE-LIMITED SEARCHES

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I. INTRODUCTION

To some fanfare, *Riley v. California*¹ announced the Fourth Amendment² requirements for searching a cell phone found on a person incident to that person’s lawful arrest. The Supreme Court held that such a search requires a warrant.³ To reach this conclusion, the Court made two decisions. The first was whether to deviate from the rule established in *United States v. Robinson*,⁴ which categorically allows the warrantless search incident to arrest of the personal property “immediately associated with” the arrestee.⁵ *Robinson* specifically allows the thorough search of a container,

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1. *Riley v. California*, 134 S. Ct. 2473, 2485 (2014). The case combined *Riley v. California* and *United States v. Wurie*. See *United States v. Wurie*, 728 F.3d 1 (1st Cir. 2013).

2. The Fourth Amendment provides:

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

U.S. CONST. amend. IV.

3. *Riley*, 134 S. Ct. at 2485.

4. *United States v. Robinson*, 414 U.S. 218, 235 (1973).

5. *United States v. Chadwick*, 433 U.S. 1, 15 (1977) (distinguishing *Robinson*, and requiring a warrant to search a footlocker when it was not “immediately associated with” the person of the arrestee), limited by *California v. Acevedo*, 500 U.S. 565 (1991).

and the first question in *Riley* was whether that rule applies when the container was a cell phone.⁶

I have only a little to say about this aspect of *Riley*. *Robinson* had not been uncontroversial, but for a long time, when applied to containers found in the possession of a person being arrested, the loss of privacy from a search was usually limited (given what people tended to carry on their person).⁷ So there was something to be said for relieving the police of the burden of getting a warrant, given a valid arrest. Occasionally, people might possess something particularly sensitive on their person—a diary or medical file—but no rule gets the tradeoff right in every case. Nonetheless, long after *Robinson*, people started to carry cell phones. The pervasive use of cell phones changes the tradeoff because a high percentage of Americans now routinely possess a digital device that contains a huge volume of personal data about their lives—messages, locations, photographs, internet search history, personalized apps, etc. It is simply too much to give the police warrantless access to 100% of that information based merely on probable cause that a person has committed a crime, even the most trivial crimes, or crimes for which there is no reason to expect the phone to contain evidence of the crime.

So it was not entirely surprising that the Court decided unanimously that *Robinson* does not apply to cell phone searches incident to arrest.⁸ The Court gave various good legal and policy reasons for its decision.⁹ My only comment here is to note one good reason the Court did not give. Given its hostility to claims of pretext,¹⁰ the Court predictably chose not to mention that if police expected to acquire a treasure trove of personal and historical information by arresting an individual, because the arrest automatically made the entire cell phone subject to search, they would have a powerful incentive to make arrests for trivial crimes—of the sort they would not ordinarily make—for no other purpose than to gain that evidence.¹¹

6. *Riley*, 134 S. Ct. at 2484–85; *Robinson*, 414 U.S. at 236.

7. *See Robinson*, 414 U.S. at 236.

8. *Riley*, 134 S. Ct. at 2485.

9. *Id.* at 2485–91.

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

11. The problem is acute because in past decisions the Court has ruled that the Fourth Amendment permits arrests for misdemeanors committed in the officer's presence, no matter how trivial the offense and even if state law does not authorize the arrest for that offense. *See Virginia v. Moore*, 553 U.S. 164, 176 (2008) (holding that a warrantless arrest was constitutionally reasonable because the crime was committed in the presence of an arresting officer, even if state law did not authorize the arrest); *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (“If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may . . . arrest the offender.”).

Yet my concern, and the sole focus of this Article, is the second decision in *Riley*, less obvious but no less necessary to resolve the case. If *Robinson* is not controlling, must the result be that a warrant (or other warrant exception) is required for any cell phone search incident to arrest? The United States argued for various “fallback options,” in the event that *Robinson* was not controlling.¹² These options compromised between the *Robinson* rule that requires no additional justification for the search given a valid arrest and the general container rule that requires a warrant or other warrant exception.¹³ If the chief concern in distinguishing *Robinson* is to avoid the absurd result that a valid arrest gives the police everything on the phone without any judicial oversight, no matter the nature of the offense, then one might avoid that result while still giving the police power in some cases to search some parts of the phone. The United States and California argued in the alternative for various intermediate rules that would permit, but limit, warrantless cell phone searches incident to arrest.¹⁴ A crucial part of Chief Justice Roberts’ opinion in *Riley* is the section rejecting all of these alternatives.¹⁵ In this Article, I examine the arguments for the compromise of a “scope-limited” search of cell phones incident to arrest, as I will define.¹⁶

I proceed in three substantive parts. I begin by stepping back from the particular context of cell phones and searches incident to arrest.¹⁷ The decision of whether to recognize a scope-limited search incident to arrest is part of a fundamental choice for Fourth Amendment law, which is whether to recognize distinctions in the intensity of searches.¹⁸ As I explain in Part II, the Court recognizes a distinct category of low-intensity, scope-limited searches in several contexts, but rejects it in others. *Riley* is the latest example of the latter. Given the case’s high-profile significance for the intersection of new technology with the Fourth Amendment, it may be easy to overlook this other way that *Riley* matters to the fundamentals of the doctrine.

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

12. *Riley*, 134 S. Ct. at 2491.

13. *Id.* at 2491–93; *see also* United States v. Chadwick, 433 U.S. 1, 15 (1977), *limited by* California v. Acevedo, 500 U.S. 565 (1991); United States v. Robinson, 414 U.S. 218, 235 (1973).

14. *Riley*, 134 S. Ct. at 2491–93.

15. *Id.*

16. *See infra* Part IV.

17. *See infra* Part II.

18. *See infra* Figure I.

In Part IV, I make four arguments for the warrantless scope-limited search. I do so while assuming, as the Court did, the basic framework of relevant Fourth Amendment doctrine.¹⁹ First, even if one generally prefers simple rules for searches incident to arrest, and therefore presumptively prefers a single category of search, this context is one in which the stakes for privacy and law enforcement are high enough to justify a more complex rule, such as one that distinguishes between scope-limited and full-fledged searches.²⁰

Second, a scope-limited search would plausibly set the right balance between law enforcement needs and the values of the Fourth Amendment.²¹ Limited cell phone searches incident to arrest may be an important component of good investigative police work, when persistent promptness in following up leads is valuable, even though the value of timeliness falls short of that demanded by the exigent circumstances exception. Indeed, just a few months after *Riley*, the Canadian Supreme Court authorized a kind of scope-limited search of a cell phone incident to arrest based on just these concerns.²² By contrast, the warrant requirement might actually produce cell phone searches that are far more intrusive and destructive of privacy than what a cursory field search would allow.²³

Third, *Riley* creates a doctrinal anomaly: the enormous gap between searching private digital and private analogue data incident to arrest.²⁴ As I explain, the gap would be less incongruous if the Court allowed a warrantless, scope-limited search of the cell phone. Indeed, the category of scope-limited searches might facilitate greater Fourth Amendment protection of ordinary analogue papers incident to arrest than currently exists.

Finally, the refusal to recognize a scope-limited search will put pressure on lower courts to expand the exigent circumstances exception in order to create an alternative path to quick and minor searches of phones.²⁵ If so, the broadening of exigent circumstances will have undesirable effects beyond the search of cell phones incident to arrest, making it easier to justify the warrantless search of homes.

In sum, although I fully agree with the *Riley* Court's decision to distinguish *Robinson*, I argue that the Court erred in its unanimous decision to reject all the Governments' compromise solutions. The Court should not

19. *See Riley*, 134 S. Ct. at 2482–83. Thus, I assume a warrant requirement is subject to numerous exceptions. *See id.* I do not consider general arguments against the warrant requirement or a general attack on the search incident to arrest doctrine (that might, contrary to *Robinson*, demand a warrant to search any container found on an arrestee once it is secured). *See United States v. Robinson*, 414 U.S. 218, 234 (1973).

20. *See infra* Part IV.A.

21. *See infra* Part IV.B.

22. *R. v. Fearon*, [2014] 3 S.C.R. 621, 627 (Can.).

23. *See infra* Part II.

24. *See infra* Part IV.C.

25. *See infra* Part IV.D.

have required a warrant or other warrant exception for any and all searches of a cell phone incident to arrest.

II. HOW MANY KINDS OF SEARCHES ARE THERE?

To show how *Riley* fits into the broader framework of the Fourth Amendment, I begin by identifying the subcategories of a search.²⁶ By subcategories, I distinguish the broader category of a search, which, for understandable reasons, occupies the considerable attention of courts and scholars.²⁷ The line between a search and a non-search, like the line between a seizure and a non-seizure, defines the threshold issue for the application of the Fourth Amendment.²⁸ Yet, once the government activity is classified as a search, important doctrinal distinctions remain within the category, defining differences among searches.²⁹ The relevant doctrine sometimes refuses to recognize any difference among searches, concluding that “a search is a search.”³⁰ In other cases, however, the doctrine distinguishes between search types, each with a different requirement for making the search reasonable. There are also parallel distinctions among types of seizures, but they are less pertinent to *Riley*.³¹

When the police seek evidence of criminal wrongdoing, how many types of searches are there?³² The answer in the Fourth Amendment depends

26. See *infra* note 33 and accompanying text.

27. See Thomas K. Clancy, *What Is a “Search” Within the Meaning of the Fourth Amendment?*, 70 ALB. L. REV. 1, 2–3 (2006); see Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 122 (2002); Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 68–69 (2013).

28. See, e.g., *Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987).

29. See Kerr, *supra* note 27, at 73–75.

30. *Hicks*, 480 U.S. at 325.

31. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 10–11 (1968). Regarding seizures of persons, *Terry v. Ohio* famously recognizes the lesser seizure of an investigative stop justified by reasonable suspicion, distinguished from the greater seizure of an arrest, which is justified only by probable cause. *Id.* Of practical significance, the concept of the low-intensity seizure applies to ordinary automobile stops. See *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015) (stating that “a routine traffic stop,” which is ordinarily relatively brief, “is ‘more analogous to a so-called “Terry stop” . . . than to a formal arrest”” (quoting *Knowles v. Iowa*, 525 U.S. 113, 117 (1998))). The Fourth Amendment also recognizes a separate category of high-intensity seizures of persons—those involving the use of deadly force, which require heightened justification. See *Tennessee v. Garner*, 471 U.S. 1, 6 (1985) (holding that the use of deadly force to seize a fleeing felon violates the Fourth Amendment unless the felon has committed a violent crime or poses an ongoing danger).

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

32. My focus on ordinary criminal wrongdoing excludes consideration of the “special needs” doctrine, in which the Court steps outside the probable cause/warrant framework that governs *Riley* in favor of a general balancing. See, e.g., Fabio Arcila, Jr., *Special Needs and Special Deference*:

on what is being searched. The Fourth Amendment lists four objects of a search: persons, houses, papers, and effects.³³ *Terry* established that there is more than one category of searches of persons.³⁴ *Terry* created the new category of a “frisk,” the patting down of outer clothing in a search for weapons.³⁵ The doctrinal significance is that a full search requires probable cause to believe the suspect has committed a crime,³⁶ whereas, after a lawful stop, the frisk requires only reasonable or articulable suspicion that the suspect is armed.³⁷ For our purposes, what matters is that there is more than one type of search.

In fact, there are more than two. Some cases involve extraordinary searches. For example, *Lee v. Winston* held that ordinary standards, such as probable cause and a warrant, are not sufficient to justify a search that involved surgery (requiring general anesthesia) to recover a bullet in the suspect’s shoulder, allegedly the same bullet the victim had justifiably fired at the criminal perpetrator.³⁸ The Court upheld an injunction against the surgery, partly because other substantial evidence meant that the bullet was not vital evidence for securing a conviction, a factor not ordinarily relevant to the Fourth Amendment analysis.³⁹ Again, for our purposes, what matters is that there are (at least) three kinds of searches of persons in Fourth Amendment law: a low-intensity frisk, a medium-intensity ordinary search, and a high-intensity surgical intrusion.⁴⁰

Suspicionless Civil Searches in the Modern Regulatory State, 56 ADMIN. L. REV. 1223, 1228–30 (2004) (detailing the special needs doctrine); Scott E. Sundby, *Protecting the Citizen “Whilst He Is Quiet”*: *Suspicionless Searches*, “Special Needs” and *General Warrants*, 74 MISS. L.J. 501, 546–47 (2004). For the relationship between the doctrine and the administrative search doctrine, see Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 276–77 (2011). For special needs, one might say there are no finite number of searches because the court balances the law enforcement benefits against the privacy (or other) costs of the specific search at issue. See Arcila, *supra*; Sundby, *supra*. *Riley* deals with police searches to advance “the general interest in crime control,” so I generally ignore special needs in what follows (except in *infra* note 64). *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000).

33. See *supra* note 2.

34. See *Terry*, 392 U.S. at 30–31.

35. *Id.* at 8.

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

37. See *Terry*, 392 U.S. at 8.

38. *Winston v. Lee*, 470 U.S. 753, 766–67 (1985).

39. *Id.* at 765–66.

40. Another high-intensity search of a person is a strip search or body cavity search. *Florence v. Bd. of Chosen Freeholders of Burlington*, 132 S. Ct. 1510, 1522–23 (2012). The Supreme Court recently upheld strip searches of those entering the general jail population. *Id.* Yet, there is still a general understanding that strip searches must be analyzed separately from an ordinary search of a person. See, e.g., *United States v. Husband*, 226 F.3d 626, 634 (7th Cir. 2000) (“A compelled medical procedure, coupled with an invasive search of a person’s body cavity, is a significant intrusion upon an individual’s

When we move from persons to houses, papers, and effects, however, it becomes more difficult to answer the question: How many search types are there? Houses or real property start with entry. Entry into a home, or even the curtilage around a home, requires probable cause and a warrant or warrant exception.⁴¹ Yet, one could plausibly say that the doctrine recognizes two degrees of entry. Ordinary home searches require that police “knock and announce” their presence and pause for a brief time before entering.⁴² Yet, police can avoid this requirement by a “no knock” warrant or exigency if there is reasonable suspicion to believe the warning would prompt the occupants to destroy evidence or prepare to attack police.⁴³ An unwarned entry is more intense and more threatening to privacy and security, so the doctrine requires greater justification.⁴⁴ Thus, we might say that the search constituting a home entry has two levels: warned and unwarned.

After entry is effected, more than one kind of search exists inside the home. An ordinary interior search requires probable cause and a warrant or warrant exception.⁴⁵ But there are lesser searches in the home, such as the “protective sweep”—a quick search for people in the home, other than those named in the warrant, who might be a threat to the officers.⁴⁶ The issue arises because the ordinary search has to end when the object of the search, including a person to be arrested, is found; the ordinary search is also limited to places where the items named in the warrant might be found.⁴⁷

In *Maryland v. Buie*, however, the Court authorized searching beyond these temporal and spatial limits, empowering police in every case to examine immediately adjoining areas for hidden persons without any reason to believe these adjoining areas actually contain such persons, much less that

dignitary and privacy interests and, whenever possible, should be preceded by a neutral evaluation of the manner in which the search is to be executed.”)

41. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that a non-trespassory use of a thermal imager measuring only the heat emanating from a house was a house search requiring warrant); *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 540 (1967) (overruling a prior decision upholding warrantless administrative searches of homes); see also *United States v. Dunn*, 480 U.S. 294, 302–04 (1987) (explaining a four-factor test for defining curtilage, the search of which requires a warrant).

42. *Wilson v. Arkansas*, 514 U.S. 927, 930 (1995).

43. See *United States v. Banks*, 540 U.S. 31, 41–43 (2003) (holding that an interval of 15–20 seconds after announcing and before entry was reasonable given the exigency of the possible destruction of evidence); *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (holding that it is not necessary to knock and announce when officers “have a reasonable suspicion that [doing so], under the particular circumstances, would be dangerous or futile, or . . . would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence”). Of course, all of this matters less because the exclusionary rule does not apply to knock-and-announce violations. See *Hudson v. Michigan*, 547 U.S. 586, 604–05 (2006).

44. See *Richards*, 520 U.S. at 393–95.

45. See *Mincey v. Arizona*, 437 U.S. 385, 395 (1978) (rejecting a “murder scene exception” to the warrant requirement for a home search).

46. See *Maryland v. Buie*, 494 U.S. 325, 327 (1990).

47. See, e.g., *id.* at 332–33. If one were looking for a recently stolen car or other particularly large items, then the search warrant would not authorize looking through closets, showers, stalls, or on upper floors where they could not plausibly be located. See *id.*

they pose a danger.⁴⁸ Second, *Buie* empowered officers to look anywhere beyond the immediately adjoining areas if they have reasonable suspicion to believe that a dangerous person is present and may pose a risk of attack.⁴⁹ The Court analogized the case to *Terry* and a subsequent case authorizing the frisk of a car.⁵⁰ Like *Terry*, the protective sweep is more limited in scope than an ordinary home search—applying to a narrower band of the home and for a limited purpose that will exclude searching drawers, cabinets, and other compartments too small for a person.⁵¹ Likewise, a protective sweep is triggered by something less than probable cause (for adjoining spaces, by the mere validity of the entry, and for further searches, by reasonable suspicion).⁵² So there are at least two categories of searches of real property.⁵³

With respect to personal property (papers and effects), we see a similar dichotomy in one and only one instance: the automobile. An ordinary search of an automobile is excused from the warrant requirement but requires probable cause.⁵⁴ Yet in *Michigan v. Long*, the Court recognized the

48. *Id.* at 334.

49. *Id.*

50. *Id.* at 332.

51. *Id.* at 327. One might object that protective sweeps are not a different category of search but merely a standard search for something the size of a person. Yet there is something distinctive about *Buie* searches. First, the normal principles would not allow the search; otherwise, there would be no need for a special rule. *Id.* at 336. Second, the authorized search is intended to be scope-limited—a quick look in separate rooms for a person. *Id.* That is why the court explicitly refers to the idea of a frisk, citing *Terry*. *Id.* at 335–36 (citing *Terry v. Ohio*, 392 U.S. 1, 24–25 (1968)). The Court uses *Terry* because it wanted to authorize only a low-intensity search. *See id.*

52. *Id.* at 334.

53. Exactly how many more categories is a difficult issue. One might count *Buie* itself as creating two non-ordinary search subcategories for the home: one for persons in spaces adjoining the location where police find the object of the search, such as an arrestee (which requires no additional justification), and another for non-adjoining spaces (which requires reasonable suspicion to believe a dangerous person is present). *See id.* at 335–37. Thus, the total number of search types is arguably three. A case further complicating the count is *Chimel v. California*, under which, if the arrest in the home is valid, the police can, without further justification, search for evidence of a crime or weapons not only on the arrestee's person, but also in "the area [of the home] 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Chimel v. California*, 395 U.S. 752, 763 (1969).

No Supreme Court case identifies a high-intensity search of real property, analogous to surgery on a person, in which a warrant is insufficient. But one might imagine that the courts would create such a category if the police wanted to do something highly destructive, such as dig up the foundations of a house looking for a buried body. Some lower courts have. *See, e.g., San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 971–72 (9th Cir. 2005) (holding unreasonable the police ripping up a concrete slab containing gang-member signatures given the large amount of other gang indicia present at the home in question); *United States v. Martineau*, No. 03-10298-NG, 2005 WL 5517798, at *12 (D. Mass. Feb. 23, 2005) (finding that the removal of part of a wall was unreasonable, given the absence of suspicion that the wall contained evidence of crime). *But see United States v. Whisnant*, 391 F. App'x 426, 430 (6th Cir. 2010) (finding that cutting into wall was reasonable as part of a murder investigation when the officer noticed a part of a wall appeared recently patched); *United States v. Becker*, 929 F.2d 442, 446–47 (9th Cir. 1991) (holding that the use of a jackhammer to search for evidence beneath a concrete slab on the land behind defendant's home was reasonable).

54. *See California v. Acevedo*, 500 U.S. 565, 579 (1991).

possibility that a valid *Terry* stop could permit a cursory search for weapons in the car of the person stopped.⁵⁵ In that case, the police approached an individual outside his car, which was parked on the side of the road.⁵⁶ The car door was open and upon seeing the police, the suspect walked back to the open door, and, from the outside, the police spotted a hunting knife in the car.⁵⁷ The Court, therefore, upheld a cursory sweep for weapons in the passenger area of the car based on reasonable suspicion, not probable cause.⁵⁸ The Court saw the case as entirely about the scope of *Terry* to frisk the area around the suspect in addition to the suspect.⁵⁹ An ordinary car search allows the police to look anywhere in the car where they may find the evidence and have probable cause to believe it is present in the car.⁶⁰ In *Long*, the police acted on reasonable suspicion and “restricted” their search “to those areas to which Long would generally have immediate control, and that could contain a weapon.”⁶¹ Thus, the *Terry* search is more limited in scope and duration than a car search justified by probable cause.⁶² As the Court later put it: “In a sense, *Long* authorized a ‘frisk’ of an automobile for weapons.”⁶³ Thus, there are at least two categories of a search of an automobile.

Beyond these cases—persons, real property, and automobiles—the Supreme Court has never recognized a distinctive category of a low-intensity or scope-limited search (although some lower courts have).⁶⁴ To the contrary, the Court emphatically rejected this category in *Arizona v. Hicks*.⁶⁵ There, the police entered an apartment based on exigent circumstances—the recent firing of a weapon.⁶⁶ The circumstances justified the police to look

55. *Michigan v. Long*, 463 U.S. 1032, 1050–51 (1983).

56. *Id.* at 1035–36.

57. *Id.*

58. *Id.* at 1049.

59. *See id.* at 1045–50.

60. *California v. Acevedo*, 500 U.S. 565, 568 (1991).

61. *Long*, 463 U.S. at 1050.

62. *Compare id.* (holding that the search during a *Terry* stop is limited to the area within the immediate control of the defendant), with *Acevedo*, 500 U.S. at 568 (holding that if the officer has probable cause to search a car, then the entire car may be searched).

63. *Maryland v. Buie*, 494 U.S. 325, 332 (1990).

64. In the *Terry*-search context, some courts uphold what is described as a frisk of a backpack or purse as part of a frisk of a person for guns supported only by reasonable suspicion. *See, e.g.*, *United States v. Hernandez-Mendez*, 626 F.3d 203, 213 (4th Cir. 2010); *United States v. Medina*, 130 F. App’x 862, 863–64 (9th Cir. 2005). These cases do not actually hold that a greater search would violate the Fourth Amendment, and other cases have rejected that idea. *See United States v. Walker*, 615 F.3d 728, 733–34 (6th Cir. 2010). Nonetheless, *Hernandez-Mendez* and *Medina* recognize a conceptual distinction in high- and low-intensity searches of personal effects. *See Hernandez-Mendez*, 626 F.3d at 213; *Medina*, 130 F. App’x at 863–64. Another example is the special needs context, which I am generally ignoring for reasons explained in note 32, *supra*. In *MacWade v. Kelly*, the court upheld a program allowing the inspection of bags for individuals entering the New York City subway. *MacWade v. Kelly*, 460 F.3d 260, 275 (2d Cir. 2006). Besides relying on the fact that the process was random and focused only on bags large enough to contain explosives, the court also emphasized the cursory nature of the inspection: only a quick look, lasting a few seconds, inside compartments big enough to hold explosives. *Id.* at 264–65.

65. *Arizona v. Hicks*, 480 U.S. 321, 327–29 (1987).

66. *Id.* at 323–24.

for a shooter or a weapon.⁶⁷ The Court held that police exceeded their authority by picking up a stereo they suspected was stolen and turning it around to read serial numbers otherwise blocked from view.⁶⁸ Writing for the Court, Justice Scalia stated that “[a] search is a search, even if it happens to disclose nothing but the bottom of a turntable.”⁶⁹ He held that this additional search required additional justification in the form of probable cause to believe the stereo was stolen.⁷⁰

In contrast, the *Hicks* dissent saw the case as the perfect vehicle to recognize a scope-limited search doctrine for personal property other than cars.⁷¹ Justice O’Connor, writing for herself, Chief Justice Rehnquist, and Justice Powell, distinguished “a full-blown search” from “a cursory inspection of an item in plain view,” in which the former required probable cause and the latter, only “reasonable, articulable suspicion.”⁷² Characterizing the precedent of the time, she stated that “the overwhelming majority of both state and federal courts have held that probable cause is not required for a minimal inspection of an item in plain view.”⁷³ She found this to be entirely consistent with the general tenets of the Fourth Amendment doctrine: “We have long recognized that searches can vary in intrusiveness, and that some brief searches ‘may be so minimally intrusive . . . that strong countervailing governmental interests will justify a [search] based only on specific articulable facts’ that the item in question is contraband or evidence of a crime.”⁷⁴ She concluded that “[t]he theoretical advantages of the ‘search is a search’ approach . . . are simply too remote to justify the tangible and severe damage it inflicts on legitimate and effective law enforcement.”⁷⁵

Figure 1 summarizes this tentative taxonomy, showing how the Fourth Amendment doctrine does and does not distinguish between searches, depending on the target of the search. Now we can see how *Riley* fits into the overall picture. *Riley* offered another opportunity to recognize a category of low-intensity searches of personal property. The Court could have held that, incident to arrest of a person with a cell phone, the police may conduct a cursory, “minimal inspection” of the phone, but that they would need a warrant to proceed beyond this limited scope. Without either side referring to *Hicks*, the Governments were arguing, as a fallback, for the position of the

67. *Id.* at 324–25.

68. *Id.* at 323–24.

69. *Id.* at 325.

70. *Id.* at 326–27.

71. *See id.* at 338–39 (O’Connor, J., dissenting).

72. *Id.* at 333, 335.

73. *Id.* at 336.

74. *Id.* at 337 (quoting *United States v. Place*, 462 U.S. 696, 706 (1983)). Justice Powell, writing for himself, Chief Justice Rehnquist, and Justice O’Connor made similar points, distinguishing the movement of the stereo from a “general exploratory search.” *Id.* at 331 (Powell, J., dissenting).

75. *Id.* at 339 (O’Connor, J., dissenting).

Hicks dissent, and the Court unanimously favored the position of the *Hicks* majority.⁷⁶

SEARCH INTENSITY

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

FIGURE 1⁷⁷

As a small digression from the focus on *Riley*, consider that Figure 1 might include more cases in it if I included not only cases that are explicitly about the number of search subcategories, but also cases that might be reinterpreted to include this concern. One example is *United States v. Jones*, a case heavily discussed at the Symposium.⁷⁸ In *Jones*, Justices Breyer, Ginsburg, and Kagan joined Justice Alito's concurring opinion, which stated that the monitoring of an individual's public movements, including using a

76. See *id.* at 336. The comparison does not mean that *Hicks* could not be distinguished from *Riley*, as discussed *infra* Part IV.A.

77. One might complicate the figure in various ways to reflect, for example, the fact that knock-and-announce rules create two levels of home entry, warned and unwarned. See *supra* text accompanying notes 42–43. *Buie* arguably creates two non-ordinary subcategories of the search within a home. See *supra* note 53.

One might also chart the subcategories of seizure of persons and property, as discussed *supra* in note 31, as follows:

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

78. *United States v. Jones*, 132 S. Ct. 945, 954 (2012).

GPS device placed on his automobile, would constitute a search only if the duration were sufficiently long.⁷⁹ This reasoning was intended to distinguish the 1983 decision of *United States v. Knotts*, in which the Court held that several hours of locational monitoring (using a transponder or beeper) did not constitute a search.⁸⁰ As new cell phone technology created a compelling policy reason in *Riley* to distinguish *Robinson*, new tracking technology created a compelling policy reason in *Jones* to distinguish *Knotts*. Under Justice Alito's reasoning, the locational monitoring itself is, for some time, not a search and, therefore, entirely free of Fourth Amendment restraint.⁸¹ After some duration—twenty-eight days in *Jones*—the monitoring becomes a search and demands the full panoply of Fourth Amendment justifications—a warrant and probable cause.⁸²

Law is full of discontinuities, but this one is striking and unfortunate. The variable of time is so perfectly continuous that the distinction Justice Alito creates seems arbitrary. If *Time D* is the moment dividing non-search locational monitoring from a search, we lack even the fiction of a qualitative difference between *Time D* minus five minutes and *Time D* plus five minutes. Another reason for the unseemliness is the difficulty of squaring any selection with the doctrinal formula “reasonable expectation of privacy.”⁸³ At the very least, if reasonable expectations are supposed to be tied in some way to actual expectations, it seems unlikely that American expectations change sharply at any particular moment in the continuum of monitoring duration.⁸⁴ But the main difficulty, I contend, is how much depends on the difference in time. A *Terry* stop may, by the passage of time, become an arrest.⁸⁵ But the practical difference for law enforcement is only that police

79. *Id.* at 964 (Alito, J., concurring) (suggesting that locational monitoring for “a very long period” is a search). The plurality reasoning is significant because it could in the future command a majority; the other five Justices avoided the issue only by deciding the case on narrower grounds that happened to be available on the facts. *See id.* Writing for the Court, Justice Scalia held that the attachment of the GPS device was itself a search because it was a physical intrusion upon Jones's property rights in his car. *Id.* at 948–54 (majority opinion).

80. *United States v. Knotts*, 460 U.S. 276, 285 (1983); see Richard H. McAdams, Note, *Tying Privacy in Knotts: Beeper Monitoring and Collective Fourth Amendment Rights*, 71 VA. L. REV. 297, 305–10 (1985).

81. *Jones*, 132 S. Ct. at 949–54.

82. *Id.* at 948.

83. *See Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring). The language defining a search famously originates with Justice Harlan's concurring opinion in *Katz v. United States*, and is subsequently endorsed by the Court in various opinions. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 33 (2001) (“[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.”).

84. *See* Matthew B. Kugler & Lior Strahilevitz, *Surveillance Duration Doesn't Affect Privacy Expectations: An Empirical Test of the Mosaic Theory* 31 (Univ. Chi., Pub. Law Working Paper, No. 534, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629373 (finding that duration does not affect the expectations of locational privacy for the large majority of survey respondents).

85. *See, e.g., United States v. Sharpe*, 470 U.S. 675, 685 (1985) (“Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop.”); *Dunaway v. New York*, 442 U.S. 200, 212 (1979) (finding that the longer duration of the police encounter with the

need reasonable suspicion for the former, but probable cause for the latter.⁸⁶ When the timing issue is posed, like in *Jones*, however, the Court moves from initially requiring no justification for the monitoring to abruptly requiring probable cause plus a warrant. In Fourth Amendment terms, the Court goes from requiring nothing to requiring everything.⁸⁷

Justice Alito's reasoning in *Jones* would be more persuasive if it minimized the significance of this strong discontinuity, which it could manage by recognizing two categories of locational searching and reinterpreting *Knotts*. Instead of saying there was no search in *Knotts* (as the Court reasoned), one could say that it was a low-intensity locational search; the type justified merely by reasonable suspicion that *Knotts* was transporting contraband, a standard easily met on the facts of the case.⁸⁸ By contrast, the multi-week monitoring in *Jones* is not low-intensity or cursory, but a full-fledged locational search requiring a warrant and probable cause.⁸⁹ Thus, with two types of search, the variable of time would affect only how demanding the Fourth Amendment requirements are, not whether the Fourth Amendment applies at all. Although the time spans are presumably different, it would operate like the time difference between a *Terry* stop and an arrest, which defines the line between the requirements of reasonable suspicion and probable cause.⁹⁰

Proportional rules are more complex, requiring two doctrinal lines: (1) the line between no search and a cursory search and (2) the line between a cursory search and a full search. But the complexity allows for more refined tradeoffs and lessens the discontinuity by providing a more proportionate response.⁹¹ If triggering Fourth Amendment protection always requires a

suspect and movement away from the initial scene of encounter characterize an arrest requiring probable cause); *United States v. Robinson*, 414 U.S. 218, 253–54 (1973) (“A *Terry* stop involves a momentary encounter between officer and suspect, while an in-custody arrest places the two in close proximity for a much longer period of time.”); *cf. United States v. Place*, 462 U.S. 696, 709 (1983) (finding that a 90-minute detention of luggage required probable cause rather than reasonable suspicion).

86. See *Sharpe*, 470 U.S. at 685; *Terry v. Ohio*, 392 U.S. 1, 10–11 (1968).

87. Well, almost everything. But not as much justification as surgery requires.

88. See *United States v. Knotts*, 460 U.S. 276, 284–85 (1983).

89. See *United States v. Jones*, 132 S. Ct. 945, 953–54 (2012).

90. Other cases might benefit from this recharacterization. Arguably, *Bond v. United States* is a non-technological example. See *Bond v. United States*, 529 U.S. 334 (2000). There, police squeezed and manipulated soft luggage in the overhead rack of a bus, and the majority held it to be a search requiring a warrant and probable cause. *Id.* at 336. A dissent by Justice Breyer, joined by Justice Scalia, challenged the claim that the police did anything beyond what members of the public would do when moving someone else's luggage to make room for their own. *Id.* at 339–43 (Breyer, J., dissenting). But there was clear opportunity to recognize that this kind of tactile manipulation, even if it exceeds what members of the public do, falls short of an ordinary search involving visual inspection and could, therefore, require the lesser justification of reasonable suspicion (which was probably present in the case). *Id.* at 335–39. Again, however, neither the majority nor the dissent thought it worthwhile to complicate the categories.

91. See *Terry*, 392 U.S. at 17 (“[B]y suggesting a rigid all-or-nothing model of justification and regulation under the [Fourth] Amendment, [the Government's argument] obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation.”); see also CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE*

warrant and probable cause, the decision to recognize a search is particularly costly. Effectively, the police must wait until they have cause to arrest a person before they can monitor his or her public movements beyond the initial time period.⁹² If waiting is the only option, then the Court will withhold placing that burden on law enforcement until the government has engaged in locational monitoring for an extended duration. By contrast, if a category of low-intensity searches exists that triggers only the requirement of reasonable suspicion, then the Court may be willing to go back in time to impose it, possibly to the very beginning of GPS monitoring.⁹³ Unless the government is engaged in a locational dragnet (monitoring everyone or a substantial part of the population), it probably only engages in electronic monitoring when it has reasonable suspicion; thus, demanding reasonable suspicion for the briefest locational search imposes minimal costs on the government (other than to prevent dragnets).

Of course, there is no magic to the number *two*. In a given context, one might prefer to have three or more subcategories of search. Indeed, one might dispense with discontinuous categories entirely and judge each search on its own merits by some sort of reasonableness balancing. That is essentially what the Court does when it analyzes a search under the special needs doctrine.⁹⁴ But there are obvious advantages to categorical rules—and to simpler rather than more complex rules—to be weighed against the precise results that a standard enables.⁹⁵ The point of this Article is not to identify the optimal level of complexity for subcategories of Fourth Amendment searches, but merely to demonstrate the superiority of a more complex rule than the one the Court articulated in *Riley*. My main aim with the analysis of this Part has been to frame the decision in *Riley* to show one way in which the decision fits in with the other cases. Now I will turn to the merits of the scope-limited search of a cell phone, beginning with how to formulate the rule.

FOURTH AMENDMENT 21–48 (2007) (discussing the proportionality principle); Christopher Slobogin, *Making the Most of United States v. Jones in a Surveillance Society: A Statutory Implementation of Mosaic Theory*, 8 DUKE J. CONST. L. & PUB. POL’Y 1, 14 (2012) (“In *Jones* itself, Justice Alito’s distinction between ‘prolonged’ and short-term tracking could be seen as an application of the proportionality idea.”).

92. See *Jones*, 132 S. Ct. at 949.

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

94. See *supra* note 32 and accompanying text.

95. See *infra* Part IV.

III. DEFINING A SCOPE-LIMITED CELL PHONE SEARCH

In *Riley*, the United States and California argued for several alternatives to the warrant requirement for searching a cell phone incident to arrest.⁹⁶ I will review the more promising options and identify what I think is the best scope-limited rule.⁹⁷ In the next Part, I will consider the merits of the rule.

As the first alternative, the Government proposed that the Court permit, by analogy to *Gant*, “a warrantless search of an arrestee’s cell phone whenever it is reasonable to believe that the phone contains evidence of the crime of arrest.”⁹⁸ By itself, this would place only a minor limitation on when police could search a cell phone and would place no limit on the scope of the search. Because the phone contains so much historical information about one’s movements (messages, contacts, etc.), many people who commit a crime will leave evidence of it on their phone; police will frequently have reason to expect to find it.⁹⁹ Chief Justice Roberts goes further, stating, “It would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone.”¹⁰⁰ As a result, the *Gant* rule, by itself, would allow police “unbridled discretion to rummage at will.”¹⁰¹

Chief Justice Roberts exaggerates.¹⁰² The *Gant* rule would place *some* constraint on police, at least if the Court had demanded not merely that it be conceivable that the cell phone contains evidence of the crime of arrest, but that there is a reasonable (i.e., non-trivial) probability that it does. One would not expect to find in the phone’s messages, photos, web searches, or apps evidence for the traffic offense of not wearing a seat belt. Nor should we expect to find on the phone evidence for crimes of opportunity, such as embezzlement, shoplifting, or a sudden bar fight. One might reply that the phone could contain texts or emails revealing the intent to commit the crime

96. See *Riley v. California*, 134 S. Ct. 2473, 2491–92 (2014).

97. See *id.* at 2492–93. I do not discuss two options the Governments raised. In their brief, the United States also suggested a rule: the police would always be allowed to examine a cell phone’s call log incident to arrest. See *id.* During oral arguments, California suggested a rule of analogy and as the Court put it: “officers could search cell phone data if they could have obtained the same information from a pre-digital counterpart.” *Id.* at 2493. I find these arguments unappealing for the reasons the Court provides. See *id.*

98. *Id.* at 2492.

99. See *id.* (“In the cell phone context . . . it is reasonable to expect that incriminating information will be found on a phone regardless of when the crime occurred.”)

100. *Id.* Chief Justice Roberts also said that *Gant* is distinguishable because of the unique circumstances involving a car search. *Id.* That distinction hardly answers the policy issues that are my focus.

101. *Id.* (quoting *Arizona v. Gant*, 556 U.S. 332, 345 (2009)).

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

or an admission after the fact.¹⁰³ But without something more (given that the crimes require no cooperation of others), the purely speculative possibility is not a “reason to believe” the evidence exists.¹⁰⁴ Or so the Court could have declared.

But what about locational data? Perhaps there is always reason to believe that locational data is evidence of the crime of arrest as long as the crime was committed in a specific location.¹⁰⁵ The officer specifies that he arrested the defendant for a stated crime committed on a particular road or in a particular workplace, store, or bar. The phone confirms that the defendant was present at that road, workplace, store, or bar at the time when the officer says the crime was committed.

With a little innovation, this result is not too difficult to avoid. The Court could have stated that the expectation of locational data is itself insufficient to justify a cell phone search in cases in which there is no reason to expect location to be disputed. In other words, the anticipated evidence must have some practical value. When the defendant is arrested for embezzling from his regular employer, he is not going to defend himself by saying that he was never present in his place of employment when he obviously was (or at least there is no reason to believe he will). Thus, the police cannot justify warrantlessly searching the cell phone incident to arrest by arguing the cell phone will show the suspect to have regularly visited his workplace, when his presence at work is not in dispute. When police arrest the defendant at the scene of the crime—the shop where the theft occurred or the bar where the fight occurred—there is no expected practical value to the locational data on the defendant’s phone because the police and other witnesses can testify to his obvious presence. Or, the Court could have so declared in creating a category of scope-limited searches incident to arrest.¹⁰⁶

Nonetheless, Chief Justice Roberts is correct to think that the *Gant* limitation, by itself, would be quite permissive.¹⁰⁷ To prevent unbridled rummaging in many cases, we would need a limitation on the scope of the search: not merely when, but how the police can look through the phone incident to arrest. The Solicitor General’s next argument addressed this point, claiming that the scope of the search could be limited, as the Court later described it, “to those areas of the phone where an officer reasonably believes that information relevant to the crime, the arrestee’s identity, or

103. See, e.g., *State v. Roden*, 321 P.3d 1183, 1184 (Wash. 2014) (discussing a drug deal arranged through text messaging).

104. See *United States v. Gorman*, 314 F.3d 1105, 1111–15 (9th Cir. 2002).

105. See *United States v. Stubblefield*, 931 F. Supp. 2d 118, 130 (D.D.C. 2013).

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

107. See *Riley*, 134 S. Ct. at 2492.

officer safety will be discovered.”¹⁰⁸ This is the idea of a cursory inspection or frisk of a phone.¹⁰⁹

Various lower courts had embraced this idea and the circumstances of those cases provide useful illustrations. In one Seventh Circuit case, the police examined the phone incident to arrest solely to determine the operational number assigned to the phone, limiting their examination to the cursory search needed to acquire that information.¹¹⁰ Judge Posner upheld the validity of the search precisely because of its triviality, reserving for “another day” the permissibility of “a more extensive search.”¹¹¹ In a Massachusetts case, the state’s supreme court upheld a phone search limited to “a simple examination of the recent call list,” emphasizing that “no further intrusion into the telephone’s contents occurred.”¹¹² The Supreme Court of Georgia upheld a search accessing the specific text messages an undercover officer had sent the defendant earlier on the day of the arrest, confirming that she was the person with whom he had been communicating about an undercover drug transaction.¹¹³ The court noted, “[A cell phone] search must be limited as much as is reasonably practicable by the object of the search.’ That will usually mean that an officer may not conduct a ‘fishing expedition’ and sift through all of the data stored in the cell phone.”¹¹⁴

Given that this was a common approach among the lower courts, it is surprising how briefly, in a long opinion, the Court explains its rejection of the compromise rule: “This approach would again impose few meaningful constraints on officers. The proposed categories would sweep in a great deal of information, and officers would not always be able to discern in advance what information would be found where.”¹¹⁵ In his concurrence, Justice Alito also briefly rejected the scope-limited rule, stating:

I do not see a workable alternative. Law enforcement officers need clear rules regarding searches incident to arrest, and it would take many cases and many years for the courts to develop more nuanced rules. And during that

108. *Id.*

109. *See Terry v. Ohio*, 392 U.S. 1, 8 (1968).

110. *United States v. Flores-Lopez*, 670 F.3d 803, 804 (7th Cir. 2012).

111. *Id.* at 810.

112. *Commonwealth v. Phifer*, 979 N.E.2d 210, 215 n.8 (Mass. 2012).

113. *Hawkins v. State*, 723 S.E.2d 924, 925 (Ga. 2012).

114. *Id.* at 926. (“[T]he fact that a large amount of information may be in a cell phone has substantial import as to the scope of the permitted search Thus, when ‘the object of the search is to discover certain text messages, for instance, there is no need for the officer to sift through photos or audio files or Internet browsing history data stored [in] the phone.’ Accordingly, reviewing the reasonable scope of the search will largely be a fact-specific inquiry.”) (quoting *Hawkins v. State*, 704 S.E.2d 886, 892 (Ga. App. 2010)).

115. *Riley v. California*, 134 S. Ct. 2473, 2492 (2014).

time, the nature of the electronic devices that ordinary Americans carry on their persons would continue to change.¹¹⁶

These reasons are deeply unsatisfying. Defining and elaborating the cursory inspection of a cell phone would, no doubt, require judicial time and effort. But that is true of many or most judicially created rules.¹¹⁷ Technological change complicates the project of defining scope-limitations, but the evolution of technology will challenge Fourth Amendment rules in any event (as in this case), and the concept of a cursory digital search might prove useful as that happens.

I find it particularly difficult to take seriously the idea that this rule would be less workable than other Fourth Amendment rules or the current doctrine of searches incident to arrest, which borders on the incoherent. Starting with *Robinson*, Supreme Court doctrine justifies allowing the search of containers incident to arrest with the risk that the arrestee will access weapons or tamper with evidence.¹¹⁸ But, as Justice Alito observed in his concurrence, once the officer knows the container does not hold a weapon, the risks of tampering are fully avoided by having the officer secure the container without searching it.¹¹⁹ Given the rationale, therefore, the officer should seek a warrant before searching the container—the rule in *Riley*.¹²⁰ Yet, *Robinson* continues to permit an unlimited and warrantless container search incident to arrest.¹²¹ Unless, of course, the container is an automobile, as in *Gant*, in which Justice Scalia succeeded in introducing a different idea.¹²² Once the arrestee is secure, *Gant* authorizes searches of the vehicle, not to prevent access to weapons or evidence tampering, but to further the investigation by finding evidence of criminality, though limited to evidence of the crime of arrest.¹²³ Justice Scalia would prefer that this doctrine apply generally to govern searches of non-automobile containers and houses.¹²⁴

116. *Id.* at 2497 (Alito, J., concurring).

117. The same is also true of legislation, though the legislature might be the better institution for formulating such rules. Justice Alito makes this point in his concurrence, stating that he would reconsider the constitutionality of warrantless cell phone searches incident to arrest if Congress or state legislatures, after gathering appropriate information, were to “enact legislation that draws reasonable distinctions based on categories of information or perhaps other variables.” *Id.* Justice Alito seems to advocate what John Rappaport calls “second-order” regulation, where the Court encourages other branches to operate as the primary regulators of the police. See John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CAL. L. REV. 205, 210–11 (2015). In this Article, I take as given the judicial role in specifying the constitutionally minimal standards, and that doing so will make it the primary regulator of police when the legislature is inactive.

118. See *United States v. Robinson*, 414 U.S. 218, 226 (1973).

119. See *Riley*, 134 S. Ct. at 2497.

120. See *id.* at 2495.

121. See *Robinson*, 414 U.S. at 235.

122. See *Arizona v. Gant*, 556 U.S. 332, 353 (2009) (Scalia, J., concurring).

123. *Id.* at 343 (majority opinion).

124. See *id.* at 353 (Scalia, J., concurring).

But *Gant* held its rule to be limited to the context of vehicles, as *Riley* points out.¹²⁵

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

The above quotation from Chief Justice Roberts raises the separate concern that "officers would not always be able to discern in advance what information would be found where."¹²⁶ That is no doubt true. Clever criminals may hide or encode information; they might use programs to scramble the dates of messages and photos. But it is the nature of any cursory search or seizure that the officer cannot guarantee success. If the police stop a person based only on reasonable suspicion, but can neither confirm nor dispel that suspicion, after the passage of some amount of time the *Terry* stop must come to an end.¹²⁷ Without probable cause, the police cannot continue to detain the suspect in a way tantamount to arrest.¹²⁸ The same is true here. The police should have some limited time to look in relevant places to find what evidence they have reason to believe exists. The failure to find it promptly undermines the reason to believe it is present and eventually exhausts the time available. At that point, even with a scope-limited exception, the officer would have to get a warrant.

Finally, from Justice Alito, we receive the familiar trope of needing "clear rules" for police.¹²⁹ Depending on one's general attitude, it is frustrating or amusing that Supreme Court opinions trumpet the simple-rules-the-police-can-understand argument whenever a Justice favors a bright-line rule over a standard one, but the opinions ignore the point whenever a Justice adopts or applies one of its open-ended standards. To do their jobs constitutionally, police must understand the fundamental concepts of probable cause and reasonable suspicion.¹³⁰ Those are not rules, but are

125. See *Riley*, 134 S. Ct. at 2492 (majority opinion).

126. *Id.*

127. See generally *Terry v. Ohio*, 392 U.S. 1 (1968) (allowing only short, minimally invasive stops).

128. *Id.*

129. *Riley*, 134 S. Ct. at 2497 (Alito, J., concurring).

130. See *supra* notes 36, 45, 52, 86 and accompanying text.

standards based on a totality of circumstances.¹³¹ The doctrines for when the police have seized a person, when the seizure is an arrest, and when they have received consent for a search—all fundamental to police work—are also governed by totality-of-circumstances standards.¹³² If police can understand these evolving standards, there needs to be a better reason to reject the proposed standard of a limited cell phone search than the idea that police require simple rules.¹³³

This general inconsistency between Fourth Amendment rules and Fourth Amendment standards arises in *Riley* itself. Chief Justice Roberts emphasized that despite the Court's general holding, the police can search a cell phone incident to arrest (or otherwise presumably) when there is an exigency.¹³⁴ The Court stated:

In light of the availability of the exigent circumstances exception, there is no reason to believe that law enforcement officers will not be able to address some of the more extreme hypotheticals that have been suggested: a suspect texting an accomplice who, it is feared, is preparing to detonate a bomb, or a child abductor who may have information about the child's location on his cell phone.¹³⁵

131. See *Maryland v. Pringle*, 540 U.S. 366, 369–73 (2003) (regarding probable cause); *Illinois v. Gates*, 462 U.S. 213, 231–41 (1983) (same); see also *United States v. Arvizu*, 534 U.S. 266, 273–77 (2002) (regarding reasonable suspicion); *Illinois v. Wardlow*, 528 U.S. 119, 122–28 (2000) (same); *Terry*, 392 U.S. at 36–37 (same).

132. See *Florida v. Jardines*, 133 S. Ct. 1409, 1415–17 (2013) (reviving further the relevance of trespass to the Fourth Amendment, which entails open-ended questions of whether the police are engaged in a licensed or unlicensed use of the property); *Georgia v. Randolph*, 547 U.S. 103, 109–11 (2006) (defining consent); *Florida v. Bostick*, 501 U.S. 429, 433–34 (1991); *United States v. Sharpe*, 470 U.S. 675, 685 (1985) (“Admittedly, *Terry*, *Dunaway*, *Royer*, and *Place*, considered together, may in some instances create difficult line-drawing problems in distinguishing an investigative stop from a *de facto* arrest.”); *United States v. Mendenhall*, 446 U.S. 544, 553–54 (1980); *Schneekloth v. Bustamonte*, 412 U.S. 218, 227–34 (1973) (defining consent); *Draper v. United States*, 358 U.S. 307, 310–14 (1959) (defining a seizure of a person).

133. One might reply that the Court favors rules by using them whenever possible, employing standards only when there is no workable rule. To the contrary, the Court is not so consistent. On numerous occasions, lower courts have formulated plausible rules about probable cause, seizures, and consent searches in some recurrent context only to be reversed by the Court, insisting on a totality-of-circumstances standard. See, e.g., *Florida v. Harris*, 133 S. Ct. 1050, 1058 (2013) (rejecting lower court efforts to define specific rules for when dog sniffs generate probable cause); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (rejecting lower court efforts to define specific rules for when a stopped motorist gives valid consent); *Bostick*, 501 U.S. at 439–40 (rejecting lower court rules for determining when an investigatory tactic is a seizure); *Michigan v. Chesternut*, 486 U.S. 567, 572–73 (1988) (same); *Sharpe*, 470 U.S. at 685–86 (rejecting a per se rule specifying the maximum permissible duration of a *Terry* stop). The Court abandoned its own successful efforts to make rules to define probable cause in a recurrent situation. See *Gates*, 462 U.S. at 238 (abandoning *Aguilar* and *Spinelli*'s rules specifying when anonymous tips can generate probable cause). Michael Coenen uses these Fourth Amendment cases as central examples in discussing the odd rule he discerns from Supreme Court precedent: some standards may not be clarified by rules. See Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 699–701 (2014).

134. See *Riley*, 134 S. Ct. at 2494 (majority opinion).

135. *Id.*

Yet no bright-line rule defines the parameters of exigent circumstances; exigency is judged by a standard of immediate need.¹³⁶

The exigency standard is easy enough to apply to the two textbook examples the Court offers. For many cases, however, there will be much uncertainty for police. For example, suppose that twenty-four hours ago a pair of men committed a felony—robbery, arson, rape—or theft of some weapons or art. Today, the police arrest one suspect based on probable cause. Do they have an exigency simply because the other perpetrator is at large? If the crime is a theft, do they have an exigency because the stolen weapons or art is still missing? Presumably not. What if the police also see the arrestee using his phone right before they make contact, perhaps trying to send a text before the police can take the phone? What if the pair is believed to be serial offenders, so there might be another crime today, or the police have reason to think the other suspect could flee the jurisdiction? What if the facts are like one of the cases in *Riley* (for example, defendant Wurie), and after the arrest the phone keeps ringing?¹³⁷ Does it matter if the incoming call is labeled “Boss” or “Bro”?

These questions are difficult. There is no bright-line rule defining exigency.¹³⁸ Yet even when the Court determines that an exigency exists, it must move to a second question: what kind of cell phone search does the exigency justify? Does it mean the police can now rummage through all the contents of the phone? Not at all. Basic doctrine says that if an exigency justifies the search, the search is limited by the exigency.¹³⁹ In *Hicks*, for example, the police could enter an apartment based on the exigency of a recent shooting, but could only look in places where the shooter or a weapon could fit.¹⁴⁰ In general, the exigency exception limits police to looking in the places where they might expect to find evidence the contingency makes relevant.

To illustrate, if the police are looking for a kidnapping victim, and the victim was taken two days ago, the information they need is in the locational data of the past two days, and it is likely that the police can also examine texts or phone calls of the same time period (assuming that kidnapping usually involves cooperating criminals). Perhaps the exigency also allows the police to go back some period before the kidnapping occurred, but no rule defines how far. Defining that time period depends on an open-ended inquiry using the exigency standard. The exigency exception thus requires the very

136. *See id.*

137. *Id.* at 2481.

138. *See Mincey v. Arizona*, 437 U.S. 385, 392–95 (1978).

139. *See id.* (noting in a case involving the search of a murder scene that “a warrantless search must be ‘strictly circumscribed by the exigencies which justify its initiation’” (quoting *Terry v. Ohio*, 392 U.S. 1, 25–26 (1968))); *Missouri v. McNeely*, 133 S. Ct. 1552, 1559 (2013); *Kentucky v. King*, 131 S. Ct. 1849, 1856–58 (2011).

140. *Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987).

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

In addition, various judges thought it possible to develop a law of cursory phone searches. The Governments cited those cases in their briefs.¹⁴¹ A few months after the *Riley* decision, the Canadian Supreme Court reached the same issue in *Regina v. Fearon*.¹⁴² That court fashioned a rule permitting a scope-limited search: Assuming that the arrest is lawful and that the cell phone search be “truly incidental to the arrest,” the court also required the police to have “a valid law enforcement purpose to conduct the search” and that “[t]he nature and the extent of the search [be] tailored to the purpose of the search.”¹⁴³ The court was serious enough about the scope limitation that it added a process requirement that “[t]he police take detailed notes of what they have examined on the device and how it was searched.”¹⁴⁴ In context, it appears that these notes need to be nearly contemporaneous with the search.¹⁴⁵ The notes are an independent requirement; if the police do not take notes, they cannot meet their burden of proving the search to be within the permitted scope.¹⁴⁶ In *Fearon*, the police, not yet informed of this rule, had not taken notes, and so the court held the cell phone search to be unlawful—though in the end, it did not exclude the evidence.¹⁴⁷

Fearon offers a plausible definition for a cursory search of a cell phone.¹⁴⁸ One might disagree with how the court limited the ends of the search merely to any objectively “valid law enforcement purpose”—which was similar to the Solicitor General’s second proposal in *Riley*.¹⁴⁹ To use the

141. Brief for The United States at IV–VI, *United States v. Wurie*, 134 S. Ct. 2473 (2014) (No. 13-212), 2014 WL 828012; Brief for Respondent at IV–VIII, *Riley*, 134 S. Ct. 2473 (No. 13-132), 2014 WL 1348466.

142. *R. v. Fearon*, [2014] 3 S.C.R. 621, 661 (Can.).

143. *Id.*

144. *Id.*

145. *Id.* at 660–61.

146. *Id.* at 661.

147. *Id.* at 662–63. The court offered this summary of its holding:

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

- (1) The arrest was lawful;
- (2) The search is truly incidental to the arrest in that the police have a reason based on a valid law enforcement purpose to conduct the search, and that reason is objectively reasonable. The valid law enforcement purposes in this context are:
 - (a) Protecting the police, the accused, or the public;
 - (b) Preserving evidence; or
 - (c) Discovering evidence, including locating additional suspects, in situations in which the investigation will be stymied or significantly hampered absent the ability to promptly search the cell phone incident to arrest;
- (3) The nature and the extent of the search are tailored to the purpose of the search; and
- (4) The police take detailed notes of what they have examined on the device and how it was searched.

Id. at 661.

148. *Id.* at 661.

149. *See id.*; *supra* note 108 and accompanying text.

narrower limitation of *Gant* would be better: the goal of securing evidence of the crime of arrest.¹⁵⁰ The *Fearon* court properly insisted on the means being narrowly tailored to achieve the legitimate ends, limiting the nature and extent of the search, including the issue of time.¹⁵¹ Worth considering is the requirement that police take notes indicating the reasons for and the scope of their search, which obviously facilitates judicial review of the scope limitations, but this requirement has no American precedent as far as I can determine.

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

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

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

I offer four arguments for the scope-limited rule I have defined. The starting point is a discussion of the normative basis for Figure 1.¹⁵² Is there any good reason for varying the number of search categories with the target of the search? I argue there is such a reason and that it points toward a more nuanced rule for cell phones. Second, I evaluate the eternal balance between law enforcement and the values of the Fourth Amendment, contending that it favors a compromise rule.¹⁵³ Third, I consider how *Riley* produces an

150. *Arizona v. Gant*, 556 U.S. 332, 350–51 (2009); *see supra* note 98 and accompanying text.

151. *Fearon*, 3 S.C.R. at 657–58.

152. *See* discussion *infra* Part IV.A.

153. *See infra* Part IV.B. Regarding the general need to balance, *see*, for example, *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999) (“Where [the historical] inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”).

unfortunate doctrinal anomaly—the differential treatment of digital and analogue papers—that the scope-limited search would narrow.¹⁵⁴ Finally, I predict that *Riley* may produce an unintended negative consequence—the loosening of the exigent circumstances exception to the warrant requirement.¹⁵⁵

A. Higher Stakes Justify Scope-Limited Rules

Is there a normative theory that can explain Figure 1? Why should the law recognize more categories of a search in some contexts than in others? The answer that I propose is that the complexity of the rule should depend on the stakes involved for privacy and law enforcement. When the stakes for both are low, the optimal rule is simple because the administrative costs of a complex rule are not likely to be worth the stakes. When the stakes are high on one side and low on the other, the optimal rule is still likely to be simple and in favor of whichever side has the higher stakes. For example, if the privacy stakes of a category of search are high and the law enforcement stakes are low, we should expect a simple rule offering strong protections against searches. The final case of interest is when the stakes are high on both sides—privacy and law enforcement. In this scenario, the optimal rule is likely more complex.¹⁵⁶

We might guess that the stakes are particularly high for searches of persons and homes, two areas in which the Court recognizes a distinction between ordinary searches and some kind of low-intensity search.¹⁵⁷ The privacy or liberty interest is particularly high when it involves one's bodily integrity; the stakes are especially high when it involves the home—the property one expects to serve as a refuge—a place of relative isolation from the world. At the same time, the law enforcement stakes were high in both *Terry* and *Buie* because the purpose of the frisk (of the person or house) was to identify immediate threats to the safety of the police officer. The high privacy stakes push against a simple rule requiring no additional justification for the frisk; the high law enforcement stakes push against a simple rule requiring probable cause and a warrant. The compromise rule—a lesser form of search (frisk) sustained by a lesser level of justification (reasonable suspicion)—is more complicated and costly, but justified by the costs of the simple rule.¹⁵⁸

154. See *infra* Part IV.C.

155. See *infra* Part IV.D.

156. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Francesco Parisi, *Rules Versus Standards*, in ENCYCLOPEDIA PUB. CHOICE 510, 510–15 (Charles K. Rowley & Friedrich Schneider eds., 2004).

157. See discussion *supra* Part II; *supra* note 64 and accompanying text.

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

The search of property in an *Arizona v. Hicks* situation is more difficult to classify. Given that the police are already lawfully inside the apartment, the privacy interests are limited to their inspection of personal property, which for things that are not papers, are generally less serious than the interest involved in searching one's body or home. The law enforcement interest is also plausibly less. First, there is no issue of police safety. Second, the main use of a cursory inspection of appliances would be, as in *Hicks*, to find the serial number to identify if the goods were stolen.¹⁵⁹ Unless the appliances were stolen in the course of a deadly robbery, the law enforcement interest in detecting theft is moderate—not at all trivial, but not of the highest importance. Thus, the case for creating a scope-limited rule was weaker than in *Terry* or *Buie*.¹⁶⁰ None of this is to say that *Hicks* came out the right way; I still believe the dissent had the stronger argument.¹⁶¹ The case, however, is a close one and the analysis of stakes shows that one could justify the distinction from *Terry* and *Buie*.¹⁶²

Where do cell phones fit in this analysis? A cell phone is a container for an immense number of digital papers—documents of one's messages, images, locations, etc. As *Riley* explains, the privacy stakes in these digital papers are extremely high—much higher than for an appliance serial number.¹⁶³ What about the law enforcement interests? On the rule/standard theory I am offering, the Court's decision—a simple rule strongly protecting Fourth Amendment rights by requiring a warrant—would make sense if the law enforcement interests were low. Yet I don't think they are. First, there is the possibility that an arrestee recently communicated on the phone with criminal confederates who might be on their way to the scene, posing a threat to the officer.¹⁶⁴ Second, the very fact that there is pervasive private information on one's cell phone means that when the owner is actually guilty

463 U.S. 1032, 1050 (1983).

159. See *supra* text accompanying note 68.

160. Although I mention the severity of crime as being relevant for picking the doctrine, I assume that the scope-limited rule I advocate would not be applied differentially depending on the seriousness of the crime. I instead follow the conventional assumption that the Fourth Amendment doctrine is a transsubstantive rule. See Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1 (2011) (exchanging normative views on the transsubstantive basis of Fourth Amendment doctrine); Christopher Slobogin, *Why Crime Severity Analysis Is Not Reasonable*, 97 IOWA L. REV. BULL. 1 (2012); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2140 (2002) (“[M]ost constitutional limits on policing are transsubstantive—they apply equally to suspected drug dealers and suspected terrorists.”).

161. See *Arizona v. Hicks*, 480 U.S. 321, 325 (1987).

162. See *id.* One might justify the *Hicks* outcome on other grounds, while still rejecting the logic of “[a] search is a search.” *Id.* When police safety is not at issue, perhaps cursory searches incident to arrest or of items in plain view should always be limited by a connection to the crime of arrest or the exigency justifying the home entry that puts the item in plain view (i.e., whatever justifies the initial warrantless search or seizure), as in *Gant*. See *Arizona v. Gant*, 556 U.S. 332, 343–44 (2009). In *Hicks*, the police search of the stereo was unrelated to the exigent circumstances justifying entry into the apartment. *Hicks*, 480 U.S. at 325. I thank Chris Slobogin for this point.

163. *Riley v. California*, 134 S. Ct. 2473, 2485 (2014).

164. See *id.*

of the crime of arrest, it is likely to contain highly probative evidence of that crime, and this relationship is likely to hold for very serious crimes.¹⁶⁵ Thus, the stakes are high on both sides. The search of a cell phone is therefore more like *Terry* and *Buie*.¹⁶⁶ High stakes on both sides make it easier to justify a more complex rule—one that distinguishes ordinary searches from cursory searches and requires more justification for the former than the latter.

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

B. *Balancing Privacy and Law Enforcement*

When the issue turns on balancing, as it often does, the frustrating reality of Fourth Amendment law is that we usually have nothing but our intuitions. Whether the constitutional value at issue is defined as privacy (as I will assume), autonomy, property, dignity, security, or something else, we have no good way of measuring the loss of that value when the rule permits greater government intrusion. There are empirical studies of privacy expectations, which are a valuable start, but we lack a good way of assigning a weight to a loss of any particular kind of privacy, and we are in even worse shape with many other values.¹⁶⁷ On the other side, we have the law enforcement interest. The problem here seems more tractable; in principle, criminologists could quantify the crime reduction (or increased clearance rate or cost savings) attributable to a particular police practice. Yet, social science still debates the value of more basic things, like whether adding police decreases crime, so it is not surprising that there is no empirical consensus on the effect of specific police tactics.¹⁶⁸ When the job is balancing, it would be beneficial if the evidence permitted a serious cost–benefit analysis, but for now courts and legal commentators can only offer intuition.

So here is my intuition, with the brevity it deserves: the privacy losses of cursory cell phone searches are outweighed by the law enforcement gains. First, as *Riley* describes, much of the privacy concern about cell phones arises from what could be reconstructed about a person if the police are allowed to excavate the entire phone, piecing together locational information, contacts, messages, photos, search history, etc.¹⁶⁹ That sort of comprehensive search and mosaic reconstruction is, in almost all cases, beyond the capability of an officer in the field limited by time and the places to be searched (related to

165. See *Hawkins v. State*, 723 S.E.2d 924, 926 (Ga. 2012).

166. See *supra* text accompanying note 150.

167. Regarding privacy empiricism, see Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society"*, 42 DUKE L.J. 727, 728 (1993); Kugler & Strahilevitz, *supra* note 84, at 1.

168. See, e.g., Ben Vollaard & Joseph Hamed, *Why the Police Have an Effect on Violent Crime After All: Evidence from the British Crime Survey*, 55 J.L. & ECON. 901, 902 (2012).

169. *Riley*, 134 S. Ct. at 2489.

the crime of arrest).¹⁷⁰ Undoubtedly, an officer may come across a recent message or photo that is, by itself, embarrassing and revealing of intimate information. But, as I emphasize in Part IV.C, that risk exists in the world of analogue searches incident to arrest, which are still governed by *Robinson*. What is special about cell phones is mostly not at issue in a cursory field search.

Second, police work depends on persistent timeliness—a promptness in identifying and following up on leads. When a person is arrested, there may be a limited time to find coconspirators or witnesses who will, upon learning of the arrest, flee or hide. There may be limited time to find evidence that may be moved or destroyed and to uncover plans for future crimes. In *Fearon*, when the police arrested one robber, but the other robber, the stolen money, and the firearm were still missing, the Canadian Supreme Court thought that good police work involved the immediate search of the phone.¹⁷¹ The same was true of the other lower court cases discussed previously: they endorsed the police immediately following up on leads.¹⁷²

Against my argument, there are two responses. The first is Chief Justice Roberts’s observation about the existence of the exigent circumstance exception.¹⁷³ Perhaps the exception will desirably allow a warrantless search in cases like *Fearon*, but not allow warrantless searches in cases without an exigency.

My rejoinder is that, unless the exigency doctrine changes (for the worse, as I argue in Part IV.D), it only solves a small part of the problem. An exigency is based on a specific threat of evidence destruction, flight, or something else.¹⁷⁴ In *Fearon*, the police did not have any specific evidence that the particular co-felon involved had been alerted of the arrest, was in the process of fleeing, or that the particular money or gun was about to be moved, hidden, or destroyed.¹⁷⁵ Instead, the police had, as they frequently would, a general concern that co-felons will be tipped off before the police could get to them, giving them time to put themselves and the evidence beyond the reach of the police.¹⁷⁶ Similarly, the fact that the arrestee’s phone rings after

170. See David Gray & Danielle Keats Citron, *A Shattered Looking Glass: The Pitfalls and Potential of the Mosaic Theory of Fourth Amendment Privacy*, 14 N.C. J.L. & TECH. 381, 410–11 (2013); Stephen E. Henderson, *Real-Time and Historic Location Surveillance after United States v. Jones: An Administrable, Mildly Mosaic Approach*, 103 J. CRIM. L. & CRIMINOLOGY 803, 825 (2013); Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311 (2012).

171. *R. v. Fearon*, [2014] 3 S.C.R. 621, 627 (Can.).

172. See *United States v. Flores-Lopez*, 670 F.3d 803, 804 (7th Cir. 2012); *Hawkins v. State*, 723 S.E.2d 924, 925 (Ga. 2012) (holding that there is an exception to the warrant requirement when it is reasonable to believe that evidence relevant to the crime of arrest will be found on the phone); see also *Commonwealth v. Phifer*, 979 N.E.2d 210, 215–16 (Mass. 2012) (upholding the search of a cell phone when police had probable cause to believe that the cell phone contained evidence of the crime of arrest).

173. *Riley*, 134 S. Ct. at 2494.

174. See *infra* note 177.

175. *Fearon*, 3 S.C.R. at 627.

176. *Id.*

the arrest is not convincing evidence of exigency, but answering the call or promptly accessing the phone to determine its origin seems like a useful police practice with the potential to create new leads.¹⁷⁷ It is productive, as a matter of routine police work, to discover the names and locations of co-felons as quickly as possible, which in some cases a cursory search will uniquely achieve.

I do not know how often one of these hidden exigency scenarios arises, but consider a list of the possibilities. Over the course of all arrests, there will be a number of cases in which, despite the absence of specific grounds for suspicion, the arrestee has recently used the cell phone to send to, or receive from, co-felons a message regarding the crime.¹⁷⁸ The message might reveal ongoing efforts to flee or hide evidence or the confederates' expectation of an immediate text from the arrestee confirming that all is well, the absence of which will trigger such efforts.¹⁷⁹ In some cases, the criminal confederates will not be tipped off, but the arrestee's phone will have unknown, time-sensitive information about their temporary location or plans for an imminent new crime, one that police can thwart only if they search the phone immediately.¹⁸⁰ When there is reason to believe the phone contains useful evidence of the crime of arrest, particularly when there are unaccounted for co-felons, weapons, or evidence, the best routine practice upon securing the arrestee may be to promptly check the arrestee's phone for very recent messages to see if any of these scenarios play out. The scope-limited search defined above will permit enough searching to discover these types of evidence with some high frequency.¹⁸¹ The exigent circumstances, by contrast, permit the warrantless search only when police already have specific evidence that one of these scenarios is present.¹⁸²

The second response to my law enforcement point is that the police can routinely search the phone incident to arrest if they routinely get a warrant, which can become standard practice for all arrests. With regard to telephonic

177. See *Riley*, 134 S. Ct. at 2494. This scenario is similar to the facts of *Wurie*'s case in *Riley*. In *Wurie*, the arrestee's phone repeatedly received an incoming call from a source labeled as "my house." *Id.* at 2481. In the First Circuit Court of Appeals, the dissenting judge argued that these facts created an exigency justifying the search of the phone. See *United States v. Wurie*, 728 F.3d 1, 17 (1st Cir. 2013) (Howard, J., dissenting). Yet, the claim of exigency here is very weak and supports my claim in Part IV.D that the effect of *Riley* weakens the standards for exigency. If there were an exigency here, a crucial fact in support would be that the incoming call was labeled (readable on the outside of the phone) "my house." See *Riley*, 134 S. Ct. at 2492–93. Even the dissenter would appear to concede that there would be no exigency for calls not so labeled, however, there would be investigative value to answering any incoming call on the arrestee's phone received shortly after arrest. See *Wurie*, 728 F.3d at 14–22.

178. See *supra* text accompanying notes 110–14.

179. See *United States v. Flores-Lopez*, 670 F.3d 803, 810 (7th Cir. 2012) ("The arrested suspect might have prearranged with coconspirators to call them periodically and if they didn't hear from him on schedule to take that as a warning that he had been seized, and to scatter.").

180. See *infra* Part IV.C–D.

181. See *supra* Part III.

182. See *Riley*, 134 S. Ct. at 2493.

warrants, the time delay need not be particularly long.¹⁸³ This is an important point and probably the best argument for *Riley*'s rejection of a compromise rule. Consider a few replies.

There is a trade off between a serious warrant process, which will impede the routine searches I advocate, and a non-serious warrant process, which is a perfunctory and meaningless ritual. First, if the warrant requirement involves serious consideration of probable cause to believe the particular phone contains evidence of a crime, then it could easily prevent phone searches from being routine. Chief Justice Roberts says that it would take an unimaginative officer who could not think of several types of evidence for the crime of arrest that *might* be on the phone, but that does not have to mean that it is easy to demonstrate *probable cause* to believe that the phone contains such evidence.¹⁸⁴ If the warrant process is serious, the police will frequently fail to justify even the most limited peek into the phone.

When there is probable cause, the warrant requirement necessitates some delay. The *Riley* briefs and opinion extensively discussed the worst case scenario in which delay makes the search impossible, for one of two reasons: (1) the phone, after a short time of disuse, becomes inaccessible without a password the arrestee will not share; and (2) the phone may be remotely wiped.¹⁸⁵ The Court was ultimately not concerned about these matters given its assessment of the technologies, especially the use of Faraday bags,¹⁸⁶ but (at the Symposium) Mary Leary offered some cause for pessimism about these solutions.¹⁸⁷ Technology is constantly changing, thus, it is difficult to be certain that the delay of a warrant will not sometimes put the contents of a phone beyond reach of the police.¹⁸⁸ A cursory but immediate field search may turn out to be a unique moment of access.

Even if there is a warrant and the police gain access to the phone, there is delay. While new technology makes it faster to get warrants, it also accelerates the ability of criminals to coordinate their activities and communicate the need to destroy evidence or flee. It is not clear that the greater speed in warrants fully compensates for the greater quickness in criminal efforts at concealment. One possibility is that co-felons have an agreement to send a certain message periodically to indicate that all is well, in which case the arrest will automatically notify the co-felons whenever the next message is due and the arrestee does not send it.¹⁸⁹

And even if the information remains perfectly accessible, in the aggregate, there are costs to the delay. As explained above, when the

183. *See id.*

184. *See id.* at 2492–93.

185. *Id.* at 2486.

186. *Id.* at 2486–87.

187. Mary Graw Leary, *The Supreme Digital Divide*, 48 TEX. TECH L. REV. 65 (2015).

188. *See Riley*, 134 S. Ct. at 2486–91 (discussing several ways a phone's contents can become out of reach for police).

189. *See United States v. Flores-Lopez*, 670 F.3d 803, 810 (7th Cir. 2012).

evidence on the phone is time-sensitive, but the police do not know there is an exigency, even brief delay can cause the loss of suspects and evidence.

Now consider a different scenario. Magistrates may wind up granting the request for a warrant as a matter of course. If police routinely request warrants from the field whenever they arrest someone possessing a phone, millions of new requests will be issued each year across the United States.¹⁹⁰ The pressure of those new warrant requests may produce an assembly-line production of warrants. Many magistrates may decide categorically that, unless it is clear that the arrestee is innocent or that a single person committed the crime of arrest, there is always probable cause to search the arrestee's phone, given the likelihood of finding evidence pointing to confederates.¹⁹¹ But then there is little in the way of individualized consideration of the cause for searching the phone, and it is not clear what the warrant requirement accomplishes.

Indeed, note the perverse incentive that may arise from requiring a warrant for even the most cursory search. If, to check for unknown exigencies, police will routinely request and magistrates will routinely grant warrants to search the phone of arrestees, then *Riley* will produce deeper privacy invasions compared to the proposed rule above. With a scope-limited exception, the police will routinely conduct a cursory search in the field and frequently, finding nothing of interest, have no reason to seek a warrant. This seems likely because approximately 95% of felony convictions come from a guilty plea.¹⁹² After a scope-limited search, the police and prosecutor would be able to retain the phone and maintain the option of getting a warrant if the defendant threatens to go to trial. But a busy police force and prosecutor's office have better things to do than to ask for a warrant for the phones of defendants already pleading guilty after they have already completed a cursory search and found nothing. If the price of taking the smallest peek inside the phone is a warrant, however, more police officers will seek warrants, and those warrants will allow and produce more general rummaging. True, the warrants may themselves limit the scope of the search, but because the information could be hidden anywhere, as Chief Justice Roberts asserts, and the time for searching is not limited, the warrant-based

190. See FBI, U.S. DEP'T OF JUST., UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2012 (2013), <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/persons-arrested/arrestmain.pdf>. There were more than 12.1 million arrests in the United States in 2012. *Id.*

191. What makes this plausible is that magistrates are presumably used to the old rule that the police can search any container found on the arrestee, and so might be very receptive to weak claims of exigency raised after police find incriminating evidence during what they represent to be a quick and cursory search of the phone. See *United States v. Robinson*, 414 U.S. 218, 235 (1973) (establishing a lenient standard for searches following custodial arrests); see also *Flores-Lopez*, 670 F.3d at 803 (discussing the interplay between the search of a phone and evidence an accomplice might destroy).

192. See *FAQ Detail*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=qa&iid=405> (last visited Oct. 12, 2015).

search will be far more intrusive than the cursory field search.¹⁹³ This is all the more true if the warrant allows the police to make a complete copy of the phone.

In sum, my intuition is on the side of many lower courts and the Canadian Supreme Court: the balancing favors allowing a warrantless but cursory search of cell phones incident to arrest.¹⁹⁴

C. *The Gap Between Digital and “Analogue” Searches*

Consider next the doctrinal anomaly *Riley* creates. Justice Alito explains in his concurrence that “[i]t has long been accepted that written items found on the person of an arrestee may be examined and used at trial.”¹⁹⁵ He cites a long string of cases involving the warrantless search incident to arrest of a diary, a ledger, bills, an address book, a notebook, a wallet, meeting minutes, a circular, advertising matter, a checkbook, a set of “memoranda containing various names and addresses,” and other papers.¹⁹⁶ These cases follow *Robinson*, which allows warrantless searches of non-digital containers found on the person of the arrestee: wallets, purses, backpacks, etc.¹⁹⁷ As Alito argues, it would be easy enough to secure papers found on a person or in their containers until a warrant is obtained.¹⁹⁸ But the analogue rule is that all the papers may be thoroughly examined incident to arrest without a warrant.¹⁹⁹ *Riley*’s new digital rule is quite different.²⁰⁰

One could explain this anomaly by the expedience of rulemaking. Rules are always overinclusive and underinclusive. So if it is easy to distinguish between analogue and digital material, and if the former, on average, contains far less private information than the latter, then a different rule for each could make sense. Yet, it is also not so difficult to distinguish papers (all the above examples Justice Alito references) from effects (for example, weapons, drugs, cash, stolen goods).²⁰¹ So once the *Riley* Court decided to complicate the search incident rule for containers, a better distinction than analogue versus digital might be effects versus papers.²⁰² It would be pragmatically

193. See *Riley*, 134 S. Ct. at 2489–91.

194. See *R. v. Fearon*, [2014] 3 S.C.R. 621, 627 (Can.).

195. *Riley*, 134 S. Ct. at 2496 (Alito, J., concurring).

196. *Id.* at n.2.

197. *Id.*

198. See *id.* at 2496–97.

199. See *id.* at 2493–94 (majority opinion).

200. See *id.* at 2493.

201. See, e.g., *United States v. Jones*, 132 S. Ct. 945, 954 (2012).

202. The Supreme Court once recognized a distinction in papers and effects. See *Boyd v. United States*, 116 U.S. 616 (1886). Others have described the long history by which *Boyd* was abandoned and have argued for some limited return to the distinction. See Donald A. Dripps, ‘Dearest Property’: *Digital Evidence and the History of Private ‘Papers’ as Special Objects of Search and Seizure*, 103 J. CRIM. L. & CRIMINOLOGY 49 (2013); Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 881 (1985).

better for purposes of balancing, and the distinction would be grounded more directly in the text of the Fourth Amendment.²⁰³ Perhaps we will see *Robinson*'s application to analogue papers questioned along these lines in future cases, leading to a warrant requirement for all searches of papers incident to arrest.²⁰⁴

In any event, the anomaly *Riley* creates is a stark shift in the rules for what are sometimes very similar materials. Imagine that police surreptitiously observe a suspect buy an extra cell phone, confirm with the vendor that it was a new account (therefore not downloading from the cloud any information associated with an existing account), and arrest him thirty minutes later after he appears to use the phone in a criminal transaction. The fact that the police know the phone contains almost no information does not appear to affect the bright-line rule of *Riley*.²⁰⁵ They cannot search the phone without a warrant based on probable cause that the phone contains evidence of a crime. But if the police surveil a suspect and wait for him to have his 300,000 word paper diary in his possession, it appears that they can carefully read it in its entirety incident to his lawful arrest, without any reason to believe it contains evidence of a crime. The rule is not tightly tailored to the amount of privacy the police violate or expect to violate. It is instead tied to the form in which the private information is stored, which is only a proxy for the amount of private information at stake.

A rule permitting a warrantless, scope-limited search of a cell phone would not eliminate the anomaly, but would narrow it considerably. The compromise of a scope-limited search of digital containers would align that category closer to the search of analogue papers, which are subject to an unlimited search incident to arrest. Instead of all or nothing, as it now stands, the disparity would be all or some.

The scope-limited approach might even lead to the elimination of the anomaly entirely. If we had a scope-limited rule, courts might see the virtue in applying it, not merely to cell phones and other digital devices, but also to all papers, digital or analogue. Thus, the cell phone and the diary would be subject only to a cursory search incident to arrest. As with the cell phone, after a valid arrest, the police in the field could quickly page through a notebook to identify and check recent entries, if police have reason to believe the entries contain evidence of the crime of arrest, but would require a warrant for a more comprehensive search. The *Robinson* rule allowing automatic searches of containers would remain in place for personal effects (i.e., briefcases, purses, backpacks, etc.).²⁰⁶

203. U.S. CONST. amend. IV. ("The right of the people to be secure in their person, houses, papers and effects")

204. *See United States v. Robinson*, 414 U.S. 218, 236 (1973).

205. *See Riley*, 134 S. Ct. at 2495.

206. *See Robinson*, 414 U.S. at 236.

D. Dilution of the Exigent Circumstances Exception

I close with a brief prediction: The refusal to recognize a scope-limited search will put pressure on lower courts to expand the exigent circumstances exception. As in *Fearon*, the police will frequently arrest individuals for a crime committed with reason to believe that co-felons remain at large; they will frequently conduct a search incident to arrest of the arrestee and of the effects in his or her possession, and fail to find instrumentalities or proceeds of the crime.²⁰⁷ The police will then use the missing suspects and evidence to claim exigency. The claims should fail because the mere existence of an undiscovered co-felon or criminal proceeds does not provide probable cause to believe that there is, on the arrestee's phone, evidence of the identity or location of co-felons, weapons, or evidence, much less probable cause that the co-felon is currently fleeing or concealing evidence. But the courts will see some cases in which hindsight proved the police officers to be right and experience increased pressure to uphold the validity of the warrantless search on an exigency theory. The long-term effect will be to expand the category of exigency.

As an example, consider the decision below in *Wurie*, the companion case to *Riley*.²⁰⁸ The police arrested Wurie after observing him make an apparent drug sale from a car.²⁰⁹ Immediately after the arrest, Wurie's phone received repeated calls from a source labeled on the external screen as "my house."²¹⁰ After a few minutes, police opened the phone and determined the number associated with "my house."²¹¹ They further determined that it was a land line and went to the associated apartment.²¹² Through the first floor apartment window, police saw a woman they said matched a photo that served as the cell phone's wallpaper, so they immediately entered the apartment to "freeze" it while waiting to secure a search warrant.²¹³ The Tenth Circuit panel found a Fourth Amendment violation and reversed.²¹⁴ Judge Howard dissented and one ground he gave for upholding the search was exigency: "the risk that others might have destroyed evidence after Wurie did not answer his phone. . . . His failure to answer [repeated] phone calls could have alerted Wurie's confederates to his arrest, prompting them to destroy further evidence of his crimes."²¹⁵

The majority responded that this concern over evidence destruction is "mere speculation [and that] it is also a possibility present in almost every

207. See *R. v. Fearon*, [2014] 3 S.C.R. 621, 627 (Can.).

208. *United States v. Wurie*, 728 F.3d 1 (1st Cir. 2013).

209. *Id.* at 1–2.

210. *Id.* at 2.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 14.

215. *Id.* at 17 (Howard, J., dissenting).

instance of a custodial arrest.”²¹⁶ Judge Howard replied, “On the contrary, the justification is based on the specific facts of this case. The fact that ‘my house’ repeatedly called Wurie’s cell phone provided an objective basis for enhanced concern that evidence might be destroyed and thus gave the police a valid reason to inspect the phone.”²¹⁷

The panel majority correctly concluded that the argument for exigency involves two levels of speculation.²¹⁸ The first is that there are drugs in the apartment of a person suspected of selling drugs, as if the bare fact of arresting a suspected drug dealer in public would always justify a warrant to search the arrestee’s home.²¹⁹ To the contrary, a seller might avoid the risk of keeping drugs in his home, or he might just be out of inventory. The second level of speculation is that the person dialing the suspect’s cell phone from the suspect’s home will (a) interpret the failure to answer (for less than an hour) as evidence of the individual’s arrest and (b) be in a position to take the initiative to move or destroy drugs stored in the home (assuming that person knows the location of the drugs).²²⁰ These are nothing more than mere possibilities. Yet not only did the police search the phone, with the additional fact that they spotted the woman pictured in the cell phone wallpaper inside the apartment, the police also executed a warrantless entry into the home (to secure it pending a search warrant).²²¹ Admittedly, two judges on the panel rejected the exigency argument, but one federal appellate judge found it convincing.²²² By blocking other paths, *Riley*’s holding will make the exigency argument more alluring.

Time will tell whether my prediction is accurate. At the extreme, courts might expand their recognition of exigency to the point that the same searches a scope-limited search doctrine would authorize would be permitted under a different name. That might make it appear unimportant that the Court rejected the idea of a scope-limited search. The problem is that the broadening of exigent circumstances will have effects beyond the search of cell phones incident to arrest. The search-incident-exigency cases can be cited as precedent for home-entry-exigency cases, as in *Wurie*, or other searches ordinarily requiring a warrant.²²³ The same exigency that justifies a

216. *Id.* at 11 n.11 (majority opinion).

217. *Id.* at 17 (Howard, J., dissenting).

218. *Id.* at 11 (majority opinion). To be clear, my argument in Part IV.B for a scope-limited search is based in part on the idea that speculation such as Judge Howard’s will sometimes prove true, making the category of searches productive. But, as I explain, it would be better to authorize the scope-limited search as a direct incident to all arrests than to get to the same result by watering down the meaning of exigency.

219. *See id.* at 2, 11 n.11.

220. *Id.* at 11 n.11.

221. *Id.* at 2.

222. *See generally id.* (rejecting the exigency argument). *But see id.* at 14 (Howard, J., dissenting) (arguing for exigency).

223. *See id.* at 20–22 (Howard, J., dissenting) (discussing the exceptions to the Court’s holding that cell phone searches require a warrant).

peek inside the suspect's cell phone can frequently justify a peek inside the suspect's house. Whatever loosening occurs in the cell phone context will not remain limited to that domain—an undesirable, unintended consequence, and a final reason that it would have been better to address the problem with the right tool, a scope-limited search.

V. CONCLUSION

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

Riley is a notable case for the bedrock issue of how many types of searches exist in the Fourth Amendment. Unfortunately, it is not at all clear that the Court made the right decision, given that many lower courts (and the Canadian Supreme Court) did recognize a scope-limited search incident to arrest, and *Riley* offers only the most superficial analysis of its decision to reject that approach. The effects of this second aspect of *Riley* are more negative than positive, but will ultimately depend on how seriously magistrates review warrant applications for cell phone searches and how much they relax the requirements of exigency in cases in which the police forgo a warrant.

