Incident to a drug arrest, a police officer removes a smartphone from the pocket of the defendant. The smartphone may have incriminating evidence--phone numbers, pictures, text messages, and e-mails. But can the officer examine the smartphone on the scene or back at the station? Or does the officer need to show probable cause and obtain a warrant before examining the phone? If the phone were instead the arrestee's wallet or a cigarette package, under the search incident to lawful arrest exception to the Fourth Amendment's warrant requirement the officer could open and search inside either of these “containers.” Anything found in the wallet or cigarette package, including evidence of a crime other than the one of arrest, could then lawfully be used against the arrestee.

The United States Supreme Court has not yet had occasion to address the warrantless search of a cell phone or smartphone incident to arrest. However, the vast majority of courts, both state and federal, to have considered the issue have allowed warrantless searches of cell phones pursuant to this exception, reasoning that cell phones are containers like any other found on an arrestee. The few courts to consider a warrantless search of a smartphone in similar circumstances have also allowed these searches. But should the search incident to lawful arrest doctrine even apply to cell phones and smartphones? A smartphone is a mini-computer in your pocket with gigabytes of personal information--everything from bank statements to photo albums may be contained on the device. Cell phones are generally somewhat more basic, yet they too can contain pictures, text messages, and other personal information. While these handheld devices function as phones, “telephonic capability no longer limits an electronic device's identity *90 to that of a phone alone.” 2 In light of the large amount of private information that these phones may contain, does current Fourth Amendment doctrine adequately protect privacy interests in these devices?

In State v. Smith, 4 the Ohio Supreme Court found that the ability of cell phones “to store large amounts of private data gives their users a reasonable and justifiable expectation of a higher level of privacy in the information they contain.” 5 Therefore, the court determined that officers must get a warrant before searching the contents of a cell phone incident to arrest. 6 Many scholars have similarly argued that the storage capabilities of cell phones and smartphones put them in a different category than other “containers,” such as a wallet found on an arrestee. Some scholars have suggested a need for legislative and judicial reform in order to adequately protect an individual's expectation of privacy in these devices after an arrest.

I do not disagree with concerns that warrantless searches of these devices incident to arrest could expose potentially large amounts of personal information to the police without the prior approval of a neutral and detached magistrate. However, I question whether the advancement of technology in this area requires an expansion or reformation of the search incident to arrest exception to the warrant requirement. The United States Supreme Court has determined that the Fourth Amendment, at
its core, imposes a reasonableness standard, and that standard has been applied in a variety of warrantless settings. Regarding the search incident to arrest doctrine specifically, the Supreme Court has held that “in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.” As discussed below, most of the lower courts to consider the issue have found that the storage capacity of a cell phone or smartphone does not change the Fourth Amendment analysis. Moreover, the Supreme Court has rejected any distinction between “worthy and unworthy containers” and instead “has defined the term ‘container’ much more expansively.” Perhaps then, the question is not as complicated as it appears: Existing Fourth Amendment doctrine arguably reaches the proper balance between privacy rights and law enforcement needs in this area.

Part I of this article will set forth the search incident to lawful arrest doctrine. Lower court cases where searches of cell phones and smartphones incident to arrest have been addressed will be examined in Part II. Part III will set forth some of the scholarly commentary on the question of whether the search incident to lawful arrest doctrine should apply to cell phones and smartphones. This section will also describe California’s experience with legislative reform. Part IV will argue that courts should consider smartphones as containers under the search incident to lawful arrest doctrine for several reasons: This approach is consistent with Supreme Court precedent which has broadly defined containers, lower courts have determined that they are unwilling to carve out an exception for cell phones and smartphones, and treating these phones as containers provides a bright line rule for courts and police officers to apply. In concluding, I argue that until and unless the Supreme Court provides additional guidance on this issue, lower courts have demonstrated that the current Fourth Amendment doctrine, specifically the search incident to lawful arrest exception to the warrant requirement, strikes an appropriate balance between privacy interests on the one hand and law enforcement needs on the other.

I. The Search Incident to Lawful Arrest Doctrine

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.

The United States Supreme Court has stated that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions.” The search incident to lawful arrest is one of these exceptions, and is perhaps the one most frequently invoked by law enforcement. This exception “derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations.” When a person has been arrested, outside of the vehicle context, only two requirements need be met for a search to be valid:

First, there must be a lawful, custodial arrest, and second, the search must be substantially contemporaneous with the arrest. No further justification beyond the probable cause needed to arrest is necessary. The officer need not have probable cause to believe there is evidence of a crime on the person of the arrestee or within the arrestee's wingspan in order to search the arrestee or his wingspan.
A. The Court Establishes a Bright-Line Rule

The leading cases on the search incident to arrest doctrine “were handed down during a period in which the Supreme Court typically declared there was a ‘warrant requirement,’ i.e., that warrantless searches are unreasonable in the absence of a compelling justification for permitting the police to act without prior judicial authorization.” In 1969, the Supreme Court decided Chimel v. California, “the benchmark search-incident-to-lawful-arrest case.” In Chimel, police officers armed with an arrest warrant for burglary lawfully arrested Chimel in his home. Pursuant to that arrest, the officers searched all the rooms in the three-bedroom house, “including the attic, the garage, and a small workshop.” In declaring the search unconstitutional, the Court referenced its landmark decision in Terry v. Ohio, noting that the scope of any exception to the warrant requirement must be limited by the rationale for the exception:

> *93 When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"--construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

The search in Chimel was unconstitutional because it “went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him.” Thus, the search exceeded the constitutional justification for the exception.

A few years later, the Supreme Court decided United States v. Robinson, which involved the search of the arrestee himself, not the area around him. The importance of the majority's reasoning in Robinson, Professor James Tomkovicz has written, is that “it supplements and seems to qualify the reasoning of Chimel.” While not rejecting the twin rationales underlying the search incident to arrest doctrine, the Court “restrict[ed] the analytical utility of the Chimel justifications by rejecting the notion that the reasonableness of searching an arrestee's person and the area "within his immediate control"--construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Robinson was arrested for operating a motor vehicle with a revoked license and was searched incident to that arrest. During the search, the arresting officer searched through Robinson's pockets, pulling out a crumpled cigarette package. Unsure what was in the package, the officer opened it and discovered capsules of heroin. The Court upheld the search, noting that it was of “no moment that [the arresting officer] did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed” because the custodial arrest itself “gives rise to the authority to search.” Because the officer came upon the cigarette package during the course of a lawful search, “he was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as ‘fruits, instrumentalities, or contraband’ probative of criminal conduct.” The Court stated that the authority to search “does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.”
In Robinson, therefore, the Supreme Court established a bright-line rule that an officer may always conduct a search incident to a lawful arrest, regardless of the offense for which the person was arrested. A search such a search, the Court held, is “reasonable” under the Fourth Amendment:

A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.

Robinson also established that during a search incident to arrest, officers “can open and search through all items on an arrestee's person, even if they are in a closed container, and even if the officers have no suspicion that the contents of the container are illegal.”

In 1981, the Supreme Court extended the bright-line rule of Chimel and Robinson to the passenger compartments of vehicles in New York v. Belton, a case involving a passenger in a car lawfully stopped for a traffic violation. After requiring the four occupants of the vehicle to disembark, and arresting them for possession of marijuana, the state trooper returned to the vehicle and searched it. During the search, the trooper found Belton's jacket, unzipped one of its pockets, and found cocaine. The Supreme Court upheld the search, finding that when an occupant of a vehicle has been lawfully arrested, the police may search the person and the passenger compartment of the vehicle, including any containers found within the passenger compartment, contemporaneously with the arrest. The Court reasoned that containers within the reach of an arrestee are subject to search incident to arrest:

Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have. Thus, while the Court in Chimel held that the police could not search all the drawers in an arrestee's house simply because the police had arrested him at home, the Court noted that drawers within an arrestee's reach could be searched because of the danger their contents might pose to the police.

The Court defined a “container” as “any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like.” The Court also noted that the search incident to arrest doctrine authorized the search of containers even though “they could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested.”

Twenty-eight years later, in Arizona v. Gant, the Supreme Court determined that courts had read Belton's authority too broadly and that many searches of vehicle passenger compartments were not justified by the rationales of Chimel. In Gant, police lawfully arrested Gant for driving with a suspended license. While Gant was handcuffed and sitting in the back of the police car, officers searched his vehicle and found a jacket that contained cocaine. The Court held that:

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle...
contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. 44

Thus “[w]hile Gant changes what is required to justify the search of a vehicle incident to arrest of an occupant or recent occupant of the vehicle, it does not change the scope of what may be searched.” 45 Many scholars, however, have suggested that Gant signals a willingness on the part of the Court to reconsider the search incident to lawful arrest doctrine as set forth in Chimel and Robinson. 46 Others have commented that the “Gant decision is a clear indication that the Supreme Court does not intend to radically change or abandon its traditional approach” 47 as set forth in Chimel.

*97  B. Scope of the Bright-Line Rule: Temporal and Spatial Concerns

The Supreme Court has emphasized that search incident to arrest is a bright-line doctrine, one that provides certainty for police officers and courts. 48 In the non-vehicle context, the Court has held that, to be justified, such a search must be contemporaneous with an arrest and must be confined to the arrestee, any items held by the arrestee, and the area immediately surrounding the arrestee. 49 A search of the arrestee's person is not usually at issue, unless law enforcement officers engage in a search that intruded into body cavities, for example. 50 While the authority to search incident to arrest is clear, courts in some instances still must perform a case-by-case analysis of whether law enforcement exceeded the scope of the exception; for example, whether a search was within an arrestee's area of “immediate control” requires a court to determine what that area was. 51 The Court has provided some guidance on both the temporal and spatial limits of the search incident to arrest doctrine through two cases, United States v. Edwards 52 and United States v. Chadwick. 53 These two cases illustrate that where an item is located impacts how long after an arrest a search can still be justified as incident to that arrest. 54

In United States v. Edwards, the Court held that an item associated with the person, such as an arrestee's clothing, can be searched within a reasonable time after arrest even if the search occurs at a location different than the arrest. 55 Edwards was lawfully arrested for attempted breaking and entering, and was placed in a jail cell overnight. Because it was at night, the officers did not examine his clothing until the next morning, whereupon they discovered paint chips matching the samples from the window that had been used for the break-in. 56 The Supreme Court held that because Edwards' clothing could have been searched at the time of his arrest, and indeed had been seized upon his arrest, the police could lawfully search the clothing and possessions within a reasonable time of arrest was lawful. 57

In contrast, in United States v. Chadwick, 59 the Supreme Court found that a search of the arrestee's footlocker more than an hour after arrest was not contemporaneous with the arrest and thus could not be justified under the search incident to arrest doctrine. 60 In Chadwick, FBI agents seized defendant's 200-pound footlocker incident to his lawful arrest. About an hour and a half later, after the footlocker had been reduced to the agents' "exclusive control," 61 the FBI opened it without a warrant and discovered marijuana. The Court distinguished searches "of the person" in Edwards and Robinson from searches "of possessions within an arrestee's immediate control [which] cannot be justified by any reduced expectations of privacy caused by the arrest." 62 In invalidating the search, the Court stated:
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[Warrantless searches] of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the “search is remote in time or place from the arrest” . . . or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest. 63

Edwards and Chadwick also illustrate how the spatial circumstances of a particular case impact the temporal considerations. There is no bright-line rule as to the scope of the area subject to search: “[i]n principle, the scope of the grabbing area depends on the circumstances of the individual case.” 64 In Edwards, the Court's holding rested upon the fact that the officers could have searched Edwards' clothing, his “personal effects,” 65 upon arrest. In Chadwick, the Court distinguished *99 items “not immediately associated with the person of the arrestee,” 66 and noted that once police have reduced those items “to their exclusive control,” 67 a search could not be justified as incident to arrest. 68 The Court's decisions in these two cases: [T]hus offer two different rules for the temporal scope of searches incident to arrest. If the search is of items associated with the person, police have greater flexibility and can conduct searches many hours after arrest. If, however, the police search possessions that are not associated with the person and are merely nearby, then there is a more rigid time limitation. 69

Although the Court has “offered no additional guidance on this distinction,” 70 lower courts have found that wallets, 71 purses, 72 address books, 73 and briefcases found on or near the arrestee 74 fall within the Edwards line of cases because “they more closely resemble items on the person rather than nearby possessions”; 75 thus, incident to and contemporaneously with arrest, officers may open and search these items, including within a reasonable time later at the station house. 76 In contrast, where courts have determined that an item is not within an *100 arrestee's immediate control, police must obtain a warrant to search the item once it has come within the exclusive control of the police.

II. Cell Phones, Smartphones, and the Search Incident to Arrest Doctrine

At a basic level, cell phones and smartphones are handheld wireless devices that function as phones. 77 Smartphones are somewhat more advanced, although there is no one specific definition for a smartphone. 78 Smartphones, and some advanced cell phones, have also been compared to computers:

Like computers, smart phones allow a user to access the Internet, share photographs, view movies, and use email among other functions. Some smart phones add to this list the ability to record and replay live video, a capability that many computers lack. While they still serve as phones, telephonic capability alone no longer limits an electronic device's identity to that of a phone alone. 79

These advanced phones also have address books, clocks, calendars, calculators, games, and voice messaging features; “[i]n short, for those on the go, the [[smartphone] packages multiple applications into a single device small enough to fit into a back pocket.” 80 One commentator has noted: “[e]ach day seems to bring phones with newer features and greater storage capacity; each day also seems to take these devices further away from their single-function, fixed-line ancestors.” 81 Some smartphones can now even be used as “mobile wallets” with credit card and checkbook functions. 82
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For law enforcement, these devices can be “attractive targets for criminal investigators,” providing a wealth of evidence such as lists of recent incoming and outgoing calls, text messages, and possibly incriminating photographs. An officer searching a cell phone can at least initially do so fairly easily, by “just ‘thumbing through’ the cell phone.” As Professor Gershowitz has written, searches of pagers and early generation cell phones “do not require in-depth searching to obtain evidence. Police need to push only a limited number of buttons in order to reach pager numbers and only a few additional buttons to retrieve text messages.”

For Fourth Amendment purposes, cell phones and smartphones present unique issues. As one court has noted: Given their unique nature as multifunctional tools, cell phones defy easy categorization. On one hand, they contain digital address books very much akin to traditional address books carried on the person, which are entitled to a lower expectation of privacy in a search incident to an arrest. On the other hand, they have the ability to transmit large amounts of data in various forms, likening them to laptop computers, which are entitled to a higher expectation of privacy.

But cell phones are neither address books nor laptop computers. They are more intricate and multifunctional than traditional address books, yet they are still, in essence, phones, and thus they are distinguishable from laptop computers.

Although the United States Supreme Court has yet to address the constitutionality of a warrantless cell phone searches, lower courts have had many occasions to do so. With the rapid growth in the smartphone and mobile devices market, it is likely that courts will soon have to consider whether warrantless searches of smartphones are constitutional. Indeed, as set forth below, a few courts have already addressed this issue. Because many of the cell phones on the market today also perform some of these smartphone functions, it is instructive to consider how courts have addressed warrantless searches of cell phones in determining whether a different approach is appropriate for smartphones. Cases involving pagers searched incident to arrest also provide some guidance.

As an initial matter, lower courts have “regularly held that a person has a reasonable expectation of privacy in the contents of his cellular phone.” Thus, in the absence of an applicable exception to the warrant requirement, law enforcement must obtain a warrant to search a cell phone. While courts have considered searches of cell phones under several different exceptions to the warrant requirement, courts have decided the “bulk of warrantless cell-phone searches under the search-incident-to-arrest doctrine.” In light of that, this article will focus only on the search incident to arrest exception.

A. Searches of Other Electronic Devices Incident to Arrest

Although cell phones and smartphones have outpaced pager technology, at one time pagers were quite popular. Pagers were small devices “capable of receiving transmitted radio text messages,” and stored only phone numbers and short messages. The lower courts that have had occasion to consider whether warrantless searches of pagers incident to arrest are constitutional have “universally upheld the search incident to arrest of such devices.” Federal district courts and courts of appeal have classified pagers as containers that may be searched incident to lawful arrest. For example, in United States v. Chan, the court, rejecting an argument that a search warrant was required, found that a pager on the arrestee was a container that could be searched incident to arrest. In United States v. Lynch, the court determined that a pager was a container similar to an address book or wallet, and thus could be searched incident to arrest; the pager was also considered part of the defendant’s
person because it had been found on his hip. These courts, along with other courts upholding searches of pagers incident to arrest, did not base their holdings on a lowered expectation of privacy in pagers, but rather the key to understanding these decisions is recognizing the courts’ implicit assumption that the privacy interest in electronic data held in pagers and similar electronic devices is the same as the privacy interest in non-electronic content such as address books. . . . [and the] arrestee’s privacy interest is, in the view of these courts, outweighed by the law enforcement interests described in Chimel (officer safety and the preservation of evidence).

Although some courts noted that due to the limited memory capacity of pagers, evidence could be destroyed, other courts did not rely on the twin rationales for the exception--officer safety and destruction of evidence--in upholding the searches incident to arrest.

There appear to be few decisions considering the search of a laptop computer incident to arrest. The reason for this perhaps rests on the fact that “most law enforcement officers prefer to seize computers and then obtain a warrant for a forensic analysis.”

B. Searches of Cell Phones and Smartphones Incident to Arrest

In determining whether searches of cell phones and smartphones incident to arrest are lawful, courts “have been forced to confront whether the search incident to arrest doctrine--designed with a world of tangible evidence in mind--should apply to data digitally contained in electronic devices.” Most courts, both federal and state, that have considered searches of cell phones incident to arrest have treated these devices as containers, drawing analogies between cell phones and address books, or pagers, for example. And, most courts have found that the phones can be searched under the exception, provided the other elements--lawful arrest and contemporaneous search--are also present:

Perhaps the reason for the lack of contrary authority is that searching a conventional cell phone or pager incident to arrest is relatively easy to square with precedent that permits police to search tangible containers found on an arrestee. A cell phone's memory of incoming and outgoing calls, as well as its text messages, can easily be analogized to an address book or letter in an envelope. Much as the traditional search incident to arrest cases permit police to open a wallet, take out a letter, and read it before the arrestee has an opportunity to destroy the evidence, it also makes sense to allow the police to review electronic call histories and text messages in a cell phone. An arrestee familiar with the functions of his cell phone could just as easily delete test messages or call logs as he could tear up a letter or an incriminating list of addresses on a piece of paper.

If a cell phone is a container, then law enforcement should be able to search it incident to arrest just as they could with any other container, as long as the other elements of that exception are present: The “only significant restriction on the search of cell phones incident to arrest is that the search must be conducted close in time to the arrest--i.e., ‘contemporaneously’ with the arrest.” Answering the “contemporaneously” question involves determining whether a cell phone in the particular case is more like an item immediately associated with a person which allows law enforcement reasonable time to search it, or whether it should be classified like the footlocker in Chadwick: Once the police have reduced it to their exclusive control, it may not be searched without a warrant. This is generally a factual determination based upon the evidence in a particular
Moreover, as with cases involving pagers, some courts have dismissed the argument that because cell phones cannot harm officers or destroy evidence, the doctrine does not apply. Instead, most courts simply find that the cell phone falls within the area properly searched without a warrant pursuant to arrest.

A few courts have rejected the application of the search incident to arrest doctrine based upon the particular facts of the case. For example, a few courts have determined that cell phones are not items associated with the arrestee, like the footlocker in Chadwick, and thus cannot be searched without a warrant once they have been reduced to the exclusive control of the police. At least two courts have reasoned that cell phones are simply not containers and thus should not be searched at all without a warrant.

1. Courts Applying the Search Incident to Arrest Doctrine to Cell Phones and Smartphones

Most courts to consider whether a cell phone can be searched incident to arrest have upheld the searches. Based upon the facts of the particular case, courts have found that cell phones are possessions associated with the person of the arrestee; thus, “law enforcement officers have flexibility in the time it takes them to search the phones incident to arrest.” Courts that fall into this camp generally follow the Fifth Circuit's reasoning in United States v. Finley, which is perhaps the most cited case in this area.

In Finley, the Fifth Circuit upheld the search through text messages and call records of a cell phone incident to lawful arrest where the cell phone had been seized from the arrestee's pocket. Notably, in so holding, the court “did not recognize any conceptual difference between searching physical containers for drugs and searching electronic equipment for digital information.” In light of this, the court held, the “permissible scope of a search incident to a lawful arrest extends to containers found on the arrestee's person.” The court, citing United States v. Edwards, found it of no moment that the search took place after the defendant had been transported to a different location after his arrest. Likewise, the court said, United States v. Chadwick was inapplicable: The defendant's cell phone “does not fit into the category of ‘property not immediately associated with [his] person’ because it was on his person at the time of his arrest.”

While Finley involved a search of a more conventional cell phone, the court in United States v. Hill applied the same rationale to the search of a smartphone seized from an arrestee's pants pocket incident to arrest. In Hill, defendant's iPhone was searched at the scene of arrest. During the search, the reviewing deputy discovered pornographic photographs of the defendant and a young girl. The deputy searched the iPhone again at the Sheriff's Office and found videos of the defendant and the same girl. The defendant urged the court to follow those cases finding that cell phones should be considered as an item "not immediately associated with the person," which cannot be searched once they have been reduced to the exclusive control of the police. The court rejected this approach and instead found that because the phone was found on the defendant's person, Robinson and Edwards applied:

This Court recognizes that many modern cell phones, like computers, are capable of storing large amounts of personal information. However, absent guidance from the Supreme Court or the Ninth Circuit, the Court is unwilling to conclude that a cell-phone that is found in a defendant's clothing and on his person, as is the case here, should not be considered an element of the person's clothing. Accordingly, the Court concludes that, on the facts of this case, Hill's iPhone should not be treated any differently than, for example, a wallet taken from a defendant's person.
The court also rejected defendant's argument that because he was handcuffed in the back of a patrol car at the time of the search, the search was improper. Because the iPhone was found in defendant's pocket, the court noted, the deputy could search it properly incident to arrest.

Although several courts have invalidated warrantless searches of cell phones incident to arrest, this was not due to a rejection of the doctrine's application to cell phones; rather, courts invalidated the searches based upon the particular facts of the case. In United States v. Park, for example, approximately ninety minutes after arrest, police searched defendant's cell phones at the station house. While not outright rejecting the comparison of cell phones to containers, the court found that cell phones “should not be characterized as an element of [an] individual's clothing or person, but rather as a possession “within an arrestee's immediate control” due to the quantity and quality of information that can be stored on the phones. The court thus distinguished its holding from Finley, which found that cell phones were items associated with the arrestee. This distinction led the Park court to find that because the search was not contemporaneous with the arrest, and the officers did not search the phones due to officer safety concerns or to prevent the destruction of evidence, the search was invalid. As Professor Gershowitz has noted, the Park court rejected the application of the doctrine based upon the particular facts of the case.

In contrast to Park, in People v. Diaz the California Supreme Court held that the ninety minutes between the arrest and warrantless search of the defendant's cell phone did not invalidate the search because the phone was “immediately associated with [defendant's] person” like the clothing in Edwards and the cigarette package in Robinson. Responding to the defendant's argument that cell phones should be accorded higher protection due to the quantity of personal information it stores, the court noted that “the relevant high court decisions do not support the view that whether police must get a warrant before searching an item they have properly seized from an arrestee's person incident to a lawful custodial arrest depends on the item's character, including its capacity for storing personal information.”

In summary, most lower courts that have considered searches of cell phones and smartphones incident to arrest have treated these devices like any other container that could be searched under this exception to the warrant requirement. As to those cases that found the searches were not valid due to contemporaneous concerns, “[i]mportantly, these contemporaneousness cases limit, but do not outrightly forbid, the search of cell phones incident to arrest.”

2. Courts That Have Rejected Application of Search Incident to Lawful Arrest Doctrine to Cell Phones

A few courts have rejected the “searchable” container analogy. These courts have instead found that a warrant is required before these devices can be searched. The Ohio Supreme Court “is the most prominent court to reject the search incident to arrest of cell phones.” In State v. Smith, officers searched defendant's cell phone incident to his lawful arrest for selling drugs, finding call records and phone numbers that confirmed his involvement in the drug sale. Although it was not clear when the search occurred, there was evidence that at least some of the search had occurred at the station and, that the police had located the cell phone on the defendant's person. The court began by noting that whether “the warrantless search of a cell phone passes constitutional muster depends upon how a cell phone is characterized, because whether a search is determined to be reasonable is always fact-driven.” Unlike the Fifth Circuit in Finley, the Ohio Supreme Court found that “a cell phone is not a closed container for purposes of a Fourth Amendment analysis” due to the phone's “ability to...
store large amounts of private data [which] gives their users a reasonable and justifiable expectation of a higher level of privacy in the information they contain.” The court reasoned that because cell phones hold only intangible data, they could not be containers under the definition set forth in Belton. Therefore, according to the court, once the phone has been reduced to police custody, the state has satisfied its immediate interest in collecting and preserving evidence and can take preventative steps to ensure that the data found on the phone are neither lost nor erased. But because a person has a high expectation of privacy in a cell phone's contents, police must then obtain a warrant before intruding into the phone's contents.

The court did seem to leave open the possible argument that a cell phone could be searched incident to arrest if it was necessary for officer safety or other exigent circumstances: “the warrantless search of data within a cell phone seized incident to a lawful arrest is prohibited by the Fourth Amendment when the search is unnecessary for the safety of law enforcement officers and there are no exigent circumstances.”

At least one other court, the federal district court in Oregon, has adopted the Smith court's reasoning at least in part. In Schlossberg v. Solesbee, the court agreed that “personal electronic devices such as cameras and cell phones cannot be considered closed containers.” Considering a 42 U.S.C. § 1983 claim, the court found the warrantless search of the plaintiff's camera incident to arrest violated the Fourth Amendment. However, the court also held that “warrantless searches of such devices are not reasonable incident to a valid arrest absent a showing that the search was necessary to prevent the destruction of evidence, to ensure officer safety, or that other exigent circumstances exist.” In essence, then, the court found that electronic devices could not be searched incident to arrest unless the rationales underlying that exception were present.

*113 III. Scholarly Commentary and Legislative Proposals

A number of legal commentators have argued that searches of cell phones and smartphones incident to arrest are unreasonable without a warrant. The crux of this argument is that these devices deserve heightened Fourth Amendment protection due to the vast amount of personal information that can be stored on them; in light of this, the argument continues, defining cell phones and smartphones as “containers” is misguided. Moreover, scholars argue, allowing searches incident to arrest undermines the rationales of the exception: officer safety and prevention of evidence destruction. Once seized by the police, the argument continues, these handheld devices are not likely to pose any threat to officer safety nor could an arrestee access the phone to destroy evidence. Some commentators suggest that if there are concerns about destruction of evidence, either remotely or through a quick acting arrestee, then officers can turn off the phones or put them in “airplane mode.”

*114 Legal commentators have proposed various alternatives to applying the search incident to arrest exception to cell phones and smartphones seized during an arrest. The most obvious proposal, of course, is that no exception should apply: While an officer may lawfully seize a cell phone incident to arrest, the officer must get a search warrant before searching it. Other proposals include applying Gant to all searches incident to arrest, thus limiting the search to evidence relating to the crime of arrest; limiting searches to applications that are open when the phone is seized; limiting searches to a phone's coding information while excluding content-based information; and limiting searches to information stored on the phone itself as opposed to allowing access to data stored remotely. Another proposed approach is to adopt the reasoning in Park:
Regardless of the facts of the specific case, classify cell phones as “possessions in an arrestee's immediate control subject to the warrant requirement once they are within the exclusive control of the police.”

Some have suggested that state legislatures should be encouraged to enact more protective laws to restrict the doctrine or that state courts could look to their own constitutions for more protection. The California legislature appears to be the only state legislature to address this issue to date. On September 11, 2011, the California legislature passed SB 914, which prohibited the search of cell phones incident to arrest. The bill was passed in response to the California Supreme Court's decision in Diaz, discussed supra, and mandated that cell phones should be treated as an item not immediately associated with the arrestee:

> It is the intent of the Legislature in enacting [this bill] to reject as a matter of California statutory law the rule under the Fourth Amendment to the *United States Constitution* announced by the California Supreme Court in People v. Diaz. The Legislature finds that once in the exclusive control of the police, cellular telephones do not ordinarily pose a threat to officer safety. The Legislature declares that concerns about destruction of evidence on a cellular telephone can ordinarily be addressed through simple evidence preservation methods and prompt application to a magistrate for a search warrant and, therefore, do not justify a blanket exception to the warrant requirement.

California Governor Jerry Brown vetoed the bill on October 9, 2011, declaring that the “courts are better suited to resolve the complex and case-specific issues relating to constitutional search-and-seizures protections.”

Two state district courts of appeal in Florida have certified to the Florida Supreme Court similar questions “of great public importance” asking whether “the holding in United States v. Robinson . . . allow[s] a police officer to search through photographs contained within a cell phone which is on an arrestee's person at the time of a valid arrest.” The Florida Supreme Court has not yet decided the question.

**IV. The Search Incident to Lawful Arrest Doctrine Should Extend to Smartphones**

The United States Supreme Court has not yet had occasion to address a warrantless search of a personal electronic device incident to arrest. Whether the Court would consider a cell phone or a smartphone searchable under this exception to the warrant requirement is not clear. However, while the Court has not opined on that exact question, the Court has long determined that the Fourth Amendment, at its core, imposes a reasonableness standard. In Brigham City v. Stuart, the Court stated that “because the Fourth Amendment's ultimate touchstone is ‘reasonableness,’ the warrant requirement is subject to certain exceptions.” And, the Court has determined that a search incident to lawful arrest is “not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.” Finally, the Court has held that such a search can include containers located on and around an arrestee, without any additional justification for the search.

I agree that there are concerns about warrantless searches of electronic devices incident to arrest, particularly with regards to accessing information stored on the internet. However, I question whether the above proposals, both scholarly and legislative, to curb these searches overlook some strengths of the argument to the contrary: that current search incident to arrest doctrine does not need to be revised to protect privacy rights in this new technology. While not indisputably clear, there is a fair argument that
the reasonableness standard encompasses warrantless searches of smartphones incident to arrest under the Court's current jurisprudence in this area.

As an initial matter, the Supreme Court has emphasized that bright-line rules in Fourth Amendment doctrine are important for police officers, courts, and citizens. And, as discussed infra, the technological sophistication of these devices is more a quantitative change than a qualitative one. This quantitative change in the information that can now be carried should not change what the Court has determined is reasonable for police officers to do pursuant to the search incident to lawful arrest doctrine. Treating cell phones and smartphones like traditional containers—at least with regards to the data stored on the phones—is consistent with Supreme Court precedent, which has broadly defined “containers” and which has not distinguished between “worthy and unworthy containers.” Likewise, this approach provides police in particular with a consistent set of rules to apply.

Finally, the vast majority of courts that have addressed the constitutionality of warrantless searches of cell phones and smartphones incident to arrest have determined that the current doctrine applies to these searches even if the doctrine is not applicable in the specific case before the court. These lower courts have demonstrated that they are unwilling to carve out an exception for cell phones and smartphones. Until and unless the United States Supreme Court provides additional guidance on this issue, courts should continue to follow current doctrine.

*119 A. Treating Smartphones as Containers Provides a Bright Line Rule

“In its search-incident-to-arrest jurisprudence, the Court has long endorsed bright-line rules that will be workable for police on the street.” Professor LaFave has written that because the exclusionary rule is “primarily intended to regulate the police in their day-to-day activities,” it should be expressed “in terms which are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged.” As with other items lawfully seized and searched by the police incident to arrest, cell phones and smartphones should be subject to the same rules, at least with regard to data stored on the devices. Thus, if an officer seizes a smartphone from the person of the arrestee (such that it is fair to say it was “immediately associated” with the arrestee), then the officer should be able to search the phone just as the officer did with the cigarette package in Robinson; the fact that the officer has reduced the phone to her control is of no consequence. If, on the other hand, the smartphone is not within the immediate control of the arrestee, then the officer should follow the rule of Chadwick: Once the phone has been reduced to the officer's exclusive control, the officer must get a warrant to search it. This provides the police with a workable rule that should be easy to apply.

*120 Moreover, the Supreme Court “has explicitly refused to draw a distinction between worthy and unworthy containers.” and instead “has defined the term ‘container’ much more expansively.” While at one point the Court “attempted to distinguish among types of containers in ranking expectations of privacy,” the Court subsequently adopted the view that the “traveler who carries a toothpaste and a few articles of clothing in a paper bag . . . [may] claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case.” It should follow from this that the arrested executive with a smartphone should not be entitled to more protection for the information on that smartphone than the traveler who is arrested with her paper address book in her pocket. To treat the two situations differently would provide the more expensive device (and the person who could afford it) with more protection than the less expensive paper address book (and the person who could afford only that).
Finally, while users of smartphones and cell phones may store highly personal information on these devices, this is a personal choice of the user and should not change the nature of the “container.” As the court noted in People v. Diaz, the “relevant high court decisions do not support the view that whether the police must get a warrant before searching an item [they] have properly seized from an arrestee's person incident to a lawful custodial arrest depends on the item's character, including its capacity for storing personal information.” Similarly, the court in Fawdry v. State rejected a distinction based upon “the manner in which [personal information] is stored”:

Although it may be true that a digital file itself is “wholly unlike any physical object found within a closed container,” the information found within it is likely no different than information found within a printed physical copy of a digital file. Indeed, before the innovations made available in current cell phone technology, the information contained within digital files would have been contained in tangible copies and carried in closed containers. Digital files and programs on cell phones have merely served as replacements for personal effects like address books, calendar books, photo albums, and file folders previously carried in a tangible form. Viewed in this light, the cell phone merely acts as a case (i.e. closed container) containing these personal effects. When in tangible form, the aforementioned personal effects could clearly be searched incident to arrest if found in a case carried on the suspect's person or in a vehicle which the suspect occupied.

Therefore, cell phones and smartphones should be subject to the same rules as other containers seized and searched incident to a lawful custodial arrest.

B. Lower Courts Have Applied the Doctrine to Cell Phones

As discussed in more detail above, the majority of courts that have considered whether the search incident to arrest doctrine should apply to cell phones and smartphones have found that it does. Through these decisions, these courts have demonstrated that they are following Supreme Court precedent and are unwilling to carve out an exception for cell phones and smartphones. In those cases in which the court invalidated the search, it was based upon the particular facts of the case and was not a repudiation of the doctrine's applicability to cell phone searches incident to arrest. This is not inconsistent with Supreme Court precedent in this area. Indeed, the proper scope of a search incident to arrest depends on the factual circumstances of the particular case. Thus, in many cases, courts have to make fact-bound determinations of whether the police have exceeded the scope of the doctrine. Determining whether a cell phone or smartphone has been appropriately searched incident to arrest is the same type of determination that courts have been making since the doctrine was established.

The fact that lower courts are making these determinations now demonstrates that courts can maintain a balance between privacy rights and law enforcement regardless of the new technology.

Conclusion

Emerging technology often raises new questions for courts interpreting how to apply Fourth Amendment doctrine. The United States Supreme Court may ultimately conclude that the unique storage capacity of smartphones means that users of these devices have a higher expectation of privacy and thus these devices may not be searched without a warrant incident to arrest. This article has argued that until and unless the Court rules on this issue, lower courts have demonstrated that the current Fourth Amendment doctrine, specifically the search incident to lawful arrest exception to the warrant requirement, strikes an appropriate balance between privacy interests on the one hand, and law enforcement needs on the other.
Footnotes

1. See United States v. Robinson, 414 U.S. 218, 236 (1973) (finding that officer was entitled to seize heroin capsules in cigarette package searched incident to arrest for a driving offense because they were “probative of criminal conduct”); see also, e.g., United States v. Nohara, 3 F.3d 1239, 1243 (9th Cir. 1993) (upholding search of bag defendant was carrying as incident to arrest); United States v. Molinaro, 877 F.2d 1341, 1347 (7th Cir. 1989) (citing cases in which courts have upheld searches of wallets incident to a lawful arrest); United States v. McCray, No. CR408-231, 2009 WL 29607, at *2 (S.D. Ga. Jan. 5, 2009) (noting that “both the Supreme Court and the lower federal courts have repeatedly recognized the right of the police to open and inspect papers, wallets, address books, and similar items seized from an arrestee in order to determine whether they have evidentiary value”).


3. This article focuses on information stored on the phone itself, not the information that can be accessed via the phone’s internet functions.

4. 920 N.E.2d 949 (Ohio 2009).

5. Id. at 955.

6. Id.

7. See, e.g., Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006) (noting that the “ultimate touchstone of the Fourth Amendment is ‘reasonableness’”); United States v. Knight, 534 U.S. 112, 118 (2001) (observing that the “touchstone of the Fourth Amendment is reasonableness”); see also, Cynthia Lee, Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis, 81 Miss. L. J. 1133, 1143 (2012) [hereinafter Lee, Reasonableness] (noting that in “case after case” the Court “has announced that the ‘touchstone of the Fourth Amendment is reasonableness’”).


9. Cynthia Lee, Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment, 100 J. Crim. L. & Criminology 1403, 1414 (2010) [hereinafter Lee, Package Bombs] (noting that the Supreme Court has defined the term “container” much more expansively than a “portable container[s] that can hold one’s personal belongings, such as suitcases, backpacks, and purses”).

10. U.S. Const. amend. IV.


12. See Adam M. Gershowitz, Password Protected? Can a Password Save Your Cell Phone from a Search Incident to Arrest?, 96 Iowa L. Rev. 1125, 1131 (2011) [hereinafter Gershowitz, Password Protected].


14. In Gant, the Court limited searches of vehicles incident to an occupant’s arrest to situations where the arrestee was “within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” Id. at 351.
Lee, Package Bombs, supra note 9, at 1428-29 (footnotes omitted). If the arrest was unlawful, “the incidental warrantless search cannot be justified on the basis of this warrant exception.” 1 Joshua Dressler & Alan C. Michaels, Understanding Criminal Procedure: Investigations 189 (5th ed. 2010).

Dressler & Michaels, supra note 15, at 185.


Chimel, 395 U.S. at 794.

392 U.S. 1 (1968).

Chimel, 395 U.S. at 762-63.

Id. at 768.

Id.


Tomkovicz, supra note 18, at 1432.

Id. See also Gershowitz, Password Protected, supra note 12, at 1133 (noting that the Robinson Court “clarified that the search-incident-to-arrest doctrine is automatic, and that courts should not conduct a case-by-case inquiry to determine whether police were actually suspicious or whether the search was truly necessary to protect the officer or prevent the destruction of evidence”).

Robinson, 414 U.S. at 221-22.

Id. at 236.

Id.

Id. See also Dressler & Michaels, supra note 15, at 187 (noting that “the officer need not have probable cause to conduct the ordinary [incident to lawful arrest] search, but must have probable cause to seize the evidence found in the search”).

Robinson, 414 U.S. at 235. See also 3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 7.1(c), 125 (Supp. 2011) (4th ed. 2004) [hereinafter LaFave, Search and Seizure] (writing that the automatic search rule of Robinson “makes sense because the alternative is to impose upon the police the burden of making case-by-case judgments, risking harm to themselves and loss of evidence if they err, about the likelihood of the search being fruitful”).

See LaFave, Search and Seizure, supra note 31, at § 5.2(b) (noting that the Robinson majority “stated the ‘general authority’ in absolute terms: once there is a ‘custodial arrest’ a ‘full search of the person’ requires ‘no additional justification’”).

Robinson, 414 U.S. at 235.

Adam M. Gershowitz, The iPhone Meets the Fourth Amendment, 56 UCLA L. Rev. 27, 33 (2008) [hereinafter Gershowitz, The iPhone].


Id. at 456.
Id. at 460-61.

Id. at 461.

Id. at 461 n.4.

Id. at 461. See also Gershowitz, The iPhone, supra note 34, at 36 (noting that the Court has made “clear that, incident to a lawful arrest, officers can open containers located on a person or in their immediate grabbing space without having any independent probable cause to search those containers”).


Id. at 338.

Id. at 335.

Id. at 351.

Lee, Package Bombs, supra note 9, at 1436; see also Joshua A. Engel, Doctrinal Collapse: Smart Phones Cause Courts to Reconsider Fourth Amendment Searches of Electronic Devices, 41 U. Mem. L. Rev. 233, 246 (2010); United States v. Gomez, 807 F. Supp. 2d 1134, 1143 (S.D. Fla. 2011) (noting that while Gant signaled a “retraction” of Belton, “it is still well established that any objects found on an arrestee's person, on his clothing, on any area within his immediate control, may be searched by law enforcement, with or without any reason to suspect that the person is armed or carrying contraband”).

See e.g., Barbara E. Armacost, Arizona v. Gant: Does It Matter?, 2009 Sup. Ct. Rev. 275, 311 (2009); Gershowitz, Password Protected, supra note 12, at 1135 (noting that it is not clear whether the Court will expand Gant to “restrict nonvehicle searches incident to arrest, such as the cigarette pack in Robinson”); George M. Dery III, A Case of Doubtful Certainty: The Court Relapses Into Search Incident to Arrest Confusion in Arizona v. Gant, 44 Ind. L. Rev. 395, 425 (2011) (suggesting that Gant’s “reasonable to believe” test might limit all searches incident to lawful arrests because Court did not distinguish between searches of people and searches of passenger compartments; the “force of Gant’s logic could, at worst, undermine officers' ability to make quick ad hoc judgments as necessary in arrest situations and, at least, sow confusion”); Angad Singh, Comment, Stepping Out of the Vehicle: The Potential of Arizona v. Gant to End Automatic Searches Incident to Arrest Beyond the Vehicular Context, 59 Am. U. L. Rev. 1759, 1782 (2010) (arguing that “an automatic search of a personal container incident to arrest is unconstitutional in light of Gant”).

Engel, supra note 45, at 292-93; see also Robert G. Rose, Note, The “Search-incident-to-arrest [But Prior-to-Securement]” Doctrine: An Outline of the Past, Present, and Future, 23 Regent U. L. Rev. 425, 445 (2011) (arguing that applying Gant’s “time-of-search” rule would “eviscerate the search incident to lawful arrest doctrine as it applies outside the vehicle context); cf. Smallwood v. State, 61 So.3d 448, 452 (Fla. Dist. Ct. App. 2011) (finding Gant inapplicable to instant case “where the item that was searched was found on appellant's immediate person”).

See United States v. Thornton, 541 U.S. 615, 623 (2004) (noting the importance of a “clear rule, readily understood by police officers”); Dunaway v. New York, 442 U.S. 200, 213-14, (1979) (noting that “single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront”); see also Gershowitz, Password Protected, supra note 12, at 1145 (noting that Court has “long endorsed bright-line rules” in its search-incident-to-arrest jurisprudence).


See Amaechi v. West, 237 F.3d 356, 362-63 (4th Cir. 2001) (finding that search incident to arrest was unreasonable because officer touched and penetrated arrestee's genitalia and buttocks).

See Dressler & Michaels, supra note 15, at 192 (noting that there is no bright-line rule for the scope of the “grabbing area”).


54 See United States v. Gomez, 807 F. Supp. 2d 1134, 1149 (S.D. Fla. 2011) (noting that the temporal and spatial requirements of the doctrine limit the scope of any search “as a practical matter”).

55 Edwards, 415 U.S. at 803.

56 Id. at 802.

57 Id. at 806.

58 Id. at 808-09.


60 Id. at 15-16.

61 Id. at 15.

62 Id. at 16 n.10.

63 Id. at 15.

64 Dressler & Michaels, supra note 15, at 192 (listing factors that may properly affect the scope of the arrestee's “grabbing area”).

65 U.S. v. Edwards, 415 U.S. 800, 806 (1974). See also Dressler & Michaels, supra note 15, at 190-91 (noting that cases like Edwards are “rare” because when an arrestee is incarcerated, “the right to search his person incident to the arrest is followed quickly by the right of the police or jail authorities to conduct an arrest inventory that is likely to be at least as thorough as the search incident to arrest”) (internal footnote omitted).


67 Id.

68 Id.

69 Gershowitz, Password Protected, supra note 12, at 1156 (describing how Edwards and Chadwick offer two different rules for the temporal scope of searches incident to arrest).

70 Id.

71 See, e.g., United States v. Passaro, 624 F.2d 938, 944 (9th Cir. 1980) (finding that wallet seized from arrestee's pocket could be lawfully searched incident to arrest as it was an element of arrestee's clothing, citing to Robinson and Edwards); United States v. Castro, 596 F.2d 674, 677 (5th Cir. 1979) (finding that pursuant to Edwards, search of defendant's wallet back at station was still incident to arrest because the wallet was an “immediate personal effect[ ]”); see also Engel, supra note 45, at 246 (noting that lower courts have interpreted Robinson and Belton “to permit police to search personal objects--containers--found on a suspect incident to a lawful arrest”); Gershowitz, The iPhone, supra note 34, at 35-36 (noting that lower courts have “taken a broad approach and upheld searches of numerous small containers incident to arrest, such as wallets, envelopes, and aspirin bottles”) (internal footnotes omitted).

72 See United States v. Moreno, 569 F.2d 1049, 1052 (9th Cir. 1978) (holding that search of arrestee's purse was justified under search incident to arrest doctrine).

73 See United States v. Rodriguez, 995 F.2d 776, 778 (7th Cir. 1993) (finding that a search of an address book in the arrestee's wallet was reasonable under the search incident to arrest exception).
See United States v. Johnson, 846 F.2d 279, 283-84 (5th Cir. 1988) (upholding search of briefcase incident to arrest because briefcase was within arrestee's control).

Gershowitz, Password Protected, supra note 12, at 1157.

See id. (citing cases). Professor Gershowitz has noted that “the fact that wallets, purses, and other items on the arrestee are almost universally considered part of the person, and are thus searchable incident to arrest hours later at the station house, strongly suggests that cell phones stored on an arrestee should fall into this category as well.” Id. at 1158.

See Orso, supra note 2, at 213.

Id. (noting that no agreement seems to exist “regarding what exactly qualifies as a so-called smart phone, and what does not”).

Id.

Gershowitz, The iPhone, supra note 34, at 29; see also Daniel Zamani, Note, There's an Amendment for That: A Comprehensive Application of Fourth Amendment Jurisprudence to Smart Phones, 38 Hastings Const. L. Q. 169, 172 (2010) (discussing differences between smartphones and cell phones and suggesting an “accurate analogy for a smart phone's capacity might be Mary Poppins' carpetbag or Hermione's handbag from Harry Potter, both of near infinite proportions”).

Bryan Andrew Stillwagon, Note, Bringing an End to Warrantless Cell Phone Searches, 42 Ga. L. Rev. 1165, 1168 (2008).


See Ashley B. Snyder, Note, The Fourth Amendment and Warrantless Cell Phone Searches: When is Your Cell Phone Protected?, 46 Wake Forest L. Rev. 155, 163 (2011); Stillwagon, supra note 81, at 1173 (noting that criminals have not missed the cell phone revolution); Gershowitz, Password Protected, supra note 12, at 1146 (noting that “cell phones are recognized tools of the drug trade and drug dealers regularly use text messages to communicate”); cf. United States v. Aguirre, 664 F.3d 606, 614-15 (5th Cir. 2011) (noting agent's testimony that cell phones are “‘highly significant in that they record the transactions of--in some cases the buying and selling of drugs’”).

Snyder, supra note 84, at 163.

Gershowitz, The iPhone, supra note 34, at 41.

State v. Smith, 920 N.E.2d 949, 955 (Ohio 2009); see also Zamani, supra note 80, at 197 (noting that smartphones, by virtue of their versatility, are distinct from pagers and cell phones and, likewise, that they are distinct from computers due to their mobility and “peculiar social niche”).

See Engel, supra note 45, at 237 (noting that the Supreme Court has not directly considered whether “a search incident to arrest may include a search of a cell phone's contents and, if it does, the thoroughness of such a search”); see also Newhard v. Borders, 649 F. Supp. 2d 440, 448 (W.D. Va. 2009) (noting that it is an “open question” whether the contents of a cell phone can be searched without a warrant incident to arrest given “the lack of a clear rule from the Supreme Court or other lower courts regarding the permissible scope of a search of a cell phone incident to arrest”).


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91 See Jana L. Knott, Note, Is there an App for That? Reexamining the Doctrine of Search Incident to Lawful Arrest in the Context of Cell Phone, 35 Okla. City U. L. Rev. 445, 455 (2010) (noting that even those cell phones not considered “smartphones” are “capable of storing massive amounts of information and can be equipped with an address book, a call log, text messaging capabilities, a camera, e-mail, and Internet”).

92 See Orso, supra note 2, at 214 (asking whether “the potential for storing seemingly endless amounts of the most private information” places smartphones in a different Fourth Amendment category than cell phones); Gershowitz, The iPhone, supra note 34, at 45 (noting that although the “difference between the data found on a cell phone and an iPhone is dramatic ... at present, the Fourth Amendment and its search incident to arrest doctrine make no distinction”); cf. Gershowitz, Password Protected, supra note 12, at 1144 (noting that “although the vast majority of cases have involved early-generation cell phones, rather than smart phones, the trend of the law strongly indicates that courts will reach the same results when cases involving iPhones, Blackberries, and other advanced cell phones reach the courts”).

93 Orso, supra note 2, at 191; see also Engel, supra note 45, at 238 (noting that although the Supreme Court has been “reluctant to determine the exact contours of the reasonable expectation of privacy in the face of new technology.... nothing in [City of Ontario v. Quon, 130 S.Ct. 2619 (2010)] suggests that the Court would look unfavorably on the suggestion that there is both a subjective and reasonable expectation of privacy in the contents of other sophisticated electronic devices, such as smart cell phones”); Snyder, supra note 84, at 161-62 (noting that most courts have found that a cell phone user has a reasonable expectation of privacy in contents of a cell phone); Patrick J. Warfield, Putting a Square Peg in a Round Hole: The Search-incident-to-Arrest Exception and Cellular Phones, 34 Am. J. Trial Advoc. 165, 178 (2010) (noting that courts have found that an individual has a reasonable expectation of privacy in call logs, text messages, and other operational functions of a cell phone). Cf. United States v. Chan, 830 F. Supp. 531, 534 (N.D. Cal. 1993) (finding that defendant had a reasonable expectation of privacy in a borrowed pager found on his person).

94 See, e.g., Orso, supra note 2, at 191.

95 Gershowitz, Password Protected, supra note 12, at 1137; see also Orso, supra note 2, at 185 (noting that search incident to arrest and exigent circumstances exceptions are the “most commonly” argued); Mark Mayakis, Comment, Cell Phone - A “Weapon” of Mass Discretion, 33 Campbell L. Rev. 151, 153 (2010) (noting that the search incident to arrest exception “is the most controversial exception with regard to searches of the content stored within cell phones because these types of searches are most commonly justified by this exception, and there is an increasing division among courts in its application to the warrantless searches of cell phones”).

96 See Stillwagon, supra note 81, at 1171; see also Katharine M. O'Connor, Note: o OMG They Searched My Txts: Unraveling the Search and Seizure of Text Messages, 2010 U. Ill. L. Rev. 685 (2010) (noting before widespread use of cell phones, pagers were used to send text messages).

97 Stillwagon, supra note 81, at 1171.

98 See Gershowitz, Password Protected, supra note 12, at 1135.

99 Id.

100 See Engel, supra note 45, at 247; Nathan Judish et al., Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigation 32 (3rd ed. 2009), available at http://www.cybercrime.gov/ssmanual/ssmanual2009.pdf. (listing cases where courts have upheld searches of the content stored within cell phones because these types of searches are most commonly justified by this exception, and there is an increasing division among courts in its application to the warrantless searches of cell phones).


102 Id. at 536 (holding that the “general requirement for a warrant prior to the search of a container does not apply when the container is seized incident to arrest”). In Chan, the defendant had argued that the pager was like the footlocker in Chadwick and, therefore, the
police needed a warrant to search it. Id. at 532. The court rejected this argument. Id. at 536. See also United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996) (upholding search of pager found on arrestee as lawful incident to arrest).

See Engel, supra note 45, at 248 n.86 (citing cases upholding searches of pagers incident to arrest).

See United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996) (upholding search of pager incident to arrest and noting preservation of evidence concerns with pagers).

See United States v. Chan, 830 F. Supp. 531, 536 (N.D. Cal. 1993) (approving search even though “there was no danger that Chan would in any way produce a weapon from the pager, and probably no threat that he would access the pager to destroy evidence”).

Engel, supra note 45, at 252 n.107; see also Orso, supra note 2, at 215 (noting the “paucity of precedent regarding the search of laptops or other computers incident to arrest”).

Gershowitz, The iPhone, supra note 34, at 36; see also Snyder, supra note 84, at 165 (noting that “when courts assess the exception’s application to warrantless cell phone searches, the primary issue is whether the scope of the search incident to arrest exception should extend to include the contents of the arrestee’s cell phone as well.”); Mayakis, supra note 95, at 164 (noting that while the doctrine has worked “reasonably well since its creation because it is relatively easy for law enforcement officials to understand and apply to searches of traditional closed containers, which have been found to be within its permissible scope,” the issue is whether modern cell phones “fall within the Supreme Court’s broad interpretation of closed containers ... in light of the highly private content it might contain”).

See Orso, supra note 2, at 196-97 (“[m]ore often than not, federal courts have validated warrantless searches of cellular phones, usually relying on one of two exceptions to the warrant requirement—exigent circumstances and search incident to arrest”).

See Gracie v. State, 92 So.3d 806, 812 (Ala. Crim. App. 2011) (agreeing “with the majority of jurisdictions surveyed that a warrantless search of a defendant's cellular phone following his arrest does not violate Fourth Amendment principles;” in instant case, cell phone was “immediately associated with [defendant's] person, and pursuant to the decision of the United States Supreme Court in Robinson, [the detective] was permitted to inspect [it]”).

See Smallwood v. State, 61 So.3d 448, 459 (D. Ct. App. Fla. 2011) (recognizing that many of the state and federal courts that have addressed whether cell phones may be searched incident to arrest have found that it “is contingent upon whether or not a cell phone is a ‘container’ as contemplated in Robinson and Belton”); United States v. Wurie, 612 F. Supp. 2d 104, 110 (D. Mass. 2009) (finding that cell phones were not distinguishable from other types of “personal containers found on a defendant's person”); see also O'Connor, supra note 96, at 710 (noting that most courts have accepted the container analogy with regard to cell phones). Matthew Orso has written that these devices are pieces of “physical property that must be manipulated before the information stored within is exposed. In a way, technology has ‘hidden’ the information stored inside it, such as photographs that would otherwise be printed on photo paper or text messages that otherwise might be written on paper.” Orso, supra note 2, at 196-97.

See United States v. Cote, No. 03CR271, 2005 WL 1323343, at *6 (N.D. Ill. May 26, 2005) (comparing wallets and address books to cell phones “since they would contain similar information” and upholding search of cell phone incident to arrest).

Gershowitz, Password Protected, supra note 12, at 1143 (noting that even though issues are still evolving, “most courts to address the constitutionality of searching cell phones incident to arrest have upheld the practice”). See, e.g., United States v. Gomez, 807 F. Supp.2d 1134, 1146 (S.D. Fla. 2011) (noting that electronic storage devices like cell phones are analogous to “highly personal items like wallets or purses”); Silvan W. v. Briggs, 309 Fed. Appx. 216, 225 (10th Cir. 2009) (finding that the permissible scope of a search incident to arrest includes contents of cell phone on person); United States v. Grooms, No. 2:10-CR-87, 2011 WL 381036, at *1 (E.D. Tenn. Jan. 3, 2011) (agreeing with Fourth, Fifth and Seventh Circuits that cell phones are containers); cf. Hawkins v. State, 704 S.E.2d 886, 890 (Ga. App. 2010) (noting that most courts that have addressed the issue have concluded that cell phones are “roughly analogous to an electronic ‘container’ that properly can be ‘opened’ and searched for the data, much as a traditional ‘container’ can be opened to search for tangible objects within”).

Gershowitz, The iPhone, supra note 34, at 39-40 (footnotes omitted). Professor Gershowitz also notes that “[a]s a conceptual matter, there is no real difference between a crumpled up cigarette package, an early-generation cell phone, and an iPhone with much larger memory. Yet, this is cause for concern because no matter what theoretical similarities exist between an iPhone and a conventional cell phone (or a cigarette package for that matter), the former stores tremendously more information and in a very different way.” Id. at 40-41; see also Snyder, supra note 84, at 158 n.145 (suggesting that the “reluctance of some courts to hold that a search incident to arrest does not extend to a cell phone’s contents may be at least in part attributable to a deferential and broad reading of Supreme Court precedent favoring bright-line rules in this context”).

Gershowitz, The iPhone, supra note 34, at 44 (noting that the doctrine permits police to search the “contents of any container found on the arrestee, including electronic receptacles of digital information”).

Gershowitz, Password Protected, supra note 12, at 1128. Professor Gershowitz has written that “if we think of an iPhone as a container--like a cigarette package or a closed box--police can open and search the contents inside with no questions asked and no probable cause required, so long as they are doing so pursuant to a valid arrest.” Gershowitz, The iPhone, supra note 34, at 31.

See Gershowitz, Password Protected, supra note 12, at 1130 (noting that Supreme Court precedent “provides that when police search for an item associated with the person of an arrestee, such as his clothing or wallet, they can take far longer to conduct the search and can comfortably do so at the station house, rather than at the scene of the arrest”).

See id. at 1156; Snyder, supra note 84, at 170 (noting that “even if an item is classified as within the possession of an arrestee, the Chadwick limitation is relevant only if law enforcement delays its search of the object”).

See Gershowitz, Password Protected, supra note 12, at 1161 (noting that the categorization of whether a cell phone is an item associated with the arrestee or merely a nearby possession “depends on the specific facts of the case”); United States v. Gomez, 807 F. Supp. 2d 1134, 1148 (S.D. Fla. 2011) (noting that when addressing the proper scope of a search incident to arrest, what is “consequential is the location that the device was found incident to arrest and the time that the search was conducted”).

In United States v. Dennis, for example, the court upheld the search of the defendant’s cell phone incident to arrest even though the defendant claimed that it was impossible for him to have destroyed any evidence due to the number of police officers on the scene. Criminal No. 07-008-DLB, 2007 WL 3400500, at *8 (E.D. Ky. Nov. 13, 2007). The court dismissed this argument and stated that the validity of a search incident to arrest “is not whether the defendant has actual, present capacity to destroy evidence, but merely whether the evidence was within his immediate control near the time of his arrest.” Id. See also United States v. Gomez, 807 F. Supp. 2d 1134, 1146 (S.D. Fla. 2011) (upholding search of cell phone incident to arrest, noting that “even though the search of [d]efendant’s cell phone may not have been justified by the agents’ safety or [d]efendant’s possible destruction of the call log history, that necessity or exigency is beside the point” pursuant to the Chimel line of cases); United States v. Valdez, No. 06-CR-336, 2008 WL 360548, at *3 (E.D. Wis. Feb. 8, 2008) (noting that there is no authority “for the proposition that a search incident to arrest must be supported by any level of suspicion that the search will uncover evidence”). In any event, an “arrestee familiar with the functions of his cell phone could just as easily as delete text messages or call logs as he could tear up a letter or an incriminating list of addresses on a piece of paper.” Gershowitz, The iPhone, supra note 34, at 40.

See Gershowitz, Password Protected, supra note 12, at 1143 (noting that “most courts to address the constitutionality of searching cell phones incident to arrest have upheld the practice”); Orso, supra note 2, at 223 (noting that “courts that have applied the search
incident to arrest exception have generally upheld cellular phone searches,” while a minority of courts applying the exception “has held that cellular phones are outside the ambit of the exception’s reach because of their capacity for storing vast quantities of intimately personal data”). See, e.g., United States v. Fuentes, 368 Fed. Appx. 95, 99 (11th Cir. 2010) (finding that search of cell phone incident to arrest was lawful); United States v. Murphy, 552 F.3d 405, 411-12 (4th Cir. 2009) (upholding search of cell phone incident to arrest); People v. Taylor, 2012 WL 2045754, P 21 (Colo. App. June 7, 2012) (upholding search incident to arrest of call history in cell phone found in defendant’s clothes).

Gershowitz, Password Protected, supra note 12, at 1158; see also United States v. Grooms, No. 2:10-CR-87, 2011 WL 381036, at *2 (E.D. Tenn. Jan. 3, 2011) (upholding search of cell phone incident to arrest and noting that “contemporaneous” does not have to mean “simultaneous” when item was found on arrestee).

477 F.3d 250 (5th Cir. 2007). See also Orso, supra note 2, at 203 (a “majority of courts facing similar facts have agreed with Finley's conclusion”).


Finley, 477 F.3d at 260. In Finley, defendant did concede that the cell phone was a container, but the court found that a warrant was not required because the search incident to arrest exception applied. Id. Other courts have held that the warrantless search of the contents of a cell phone was a permissible search incident to arrest. See, e.g., United States v. Fuentes, 368 Fed. Appx. 95, 99 (11th Cir. 2010); United States v. Murphy, 552 F.3d 405, 411-12 (4th Cir. 2009); People v. Diaz, 244 P.3d 501, 511 (Cal. 2011); United States v. Deans, 549 F. Supp. 2d 1085, 1093-94 (D. Minn. 2008); Fawdry v. State, 70 So. 3d 626, 630 (Fla. Dist. Ct. App. 2011); Smallwood v. State, 61 So.3d 448 (Fla. Dist. Ct. App. 2011); Hawkins v. State, 704 S.E.2d 886, 892 (Ga. Ct. App. 2010).

Finley, 477 F.3d at 260 n.7 (noting that although the police had moved Finley, “the search was still substantially contemporaneous with his arrest and was therefore permissible”).

Id.; see also United States v. Curry, Criminal No. 07-100-P-H, 2008 WL 219966, at *10 (D. Me. Jan. 23, 2008) (upholding the search of a cell phone incident to arrest because it was not materially different from the search at issue in Finley).


Id. at *2.

Id.

Id. at *7.

Id.

Id. at *8. Cf. Schlossberg v. Solesbee, 844 F. Supp. 2d 1165, 1169 (D. Or. 2012) (noting that implicit in the court's holding in Hill “is the principle that the potential volume of information an officer may recover from the search of an electronic device such as a cell phone or camera is irrelevant”).

See Gershowitz, Password Protected, supra note 12, at 1143 (noting that in those “handful of cases” in which evidence was suppressed, “most of those courts did not outrightly reject the practice in all circumstances”).
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142 See id. Cf. State v. Smith, 920 N.E.2d 949, 952 (Ohio 2009) (noting that whether a search incident to arrest is determined to be reasonable “is always fact-driven”).


144 Id. at *1.

145 Id. at *9.

146 Id.

147 Id. at *8.

148 Id.

149 Gershowitz, Password Protected, supra note 12, at 1142. Professor Gershowitz has written that the Park court's “bright-line rule in which all cell phones should constitute nearby possessions and can never be items associated with the arrestee's person” ignores that the categorization of a cell phone “depends upon the specific facts of the case.” Id. at 1161.

150 244 P.3d 501 (Cal. 2011).

151 Id. at 505.

152 Id. at 506.

153 See United States v. Wall, No. 08-60016-CR, 2008 WL 5381412, at *3-4 (S.D. Fla. Dec. 22, 2008) (finding that search of cell phone at stationhouse subsequent to arrest could not be justified under doctrine); United States v. Lasalle, Cr. No. 07-00032 SOM, 2007 WL 1390820, at *7 (D. Haw. May 9, 2007) (finding that Edwards did not apply and thus the search of defendant's cell phone three hours after arrest was invalid under the search incident to arrest exception because it was not “contemporaneous” with the arrest); State v. Novicky, No. A07-0170, 2008 WL 1747805, at *5 (Minn. Ct. App. Apr. 15, 2008) (holding that search of cell phone could not be justified under search incident to arrest exception when cell phone, which had been held in evidence since arrest, was not searched until the day of trial).

154 Gershowitz, Password Protected, supra note 12, at 1142.

155 The container analogy is not a prerequisite to finding that a search of a cell phone or smartphone incident to arrest is lawful. In Smallwood v. State, the court noted that “neither Robinson nor Belton requires an item to be a ‘container’ in order to be searched under arrest.” 61 So.3d 448, 459 (Dist. Ct. App. Fla. 2011). See also People v. Diaz, 244 P.3d 501, 510 (Cal. 2011) (noting that application of the rule of Robinson, Edwards, and Chadwick, “turns not on whether the item in question constitutes a ‘container,’ but on whether it is ‘property,’ i.e., a ‘belonging[ ]’ or an ‘effect’”).

156 Gershowitz, Password Protected, supra note 12, at 1140.

157 920 N.E.2d 949 (Ohio 2009).

158 Id. at 950. The trial court permitted testimony regarding the call records and phone numbers but did not permit use of photographs that had been discovered in the phone. Id. at 951.

159 Id.

160 Id. at 957 (Cupp, J., dissenting).

161 Id. at 952.

162 Id. at 953-54 (noting that unlike the defendant in Finley, in the instant case defendant did not concede that a cell phone is analogous to a closed container). But cf. Alexis P. Theriault, Case Comment, Constitutional Law--Warrants Required to Search Cell Phones
Seized Incident to Arrest--State v. Smith, 920 N.E.2d 949 (Ohio 2009), 44 Suffolk U. L. Rev. 317, 323 (2011) (arguing that the Ohio Supreme Court “mistakenly relied on a purely physical definition of a container to conclude that a cell phone is not a container”).

163 Id. at 955.

164 Id. at 952. Due to the wide variety of functions that basic cell phones have, the court stated “it would not be helpful to create a rule that requires officers to discern the capabilities of a cell phone before acting accordingly.” Id. at 954.

165 Id. at 955.

166 Id. at 956.


168 Id. at 1170.

169 Id. at 1166.

170 Id. at 1170.

171 Id. (finding that “the officer must obtain a warrant unless exigent circumstances exist”).

172 See Kish, supra note 89, at 471-72 (arguing that once a cell phone comes within the exclusive control of the police, a warrant is required before the phone can be searched); Orso, supra note 2, at 221 (suggesting that if smartphones are equivalent to computers due to storage capabilities, then “[w]hatever rule applies to computers should certainly apply to new generation cellular devices, and a suspicionless search incident to arrest does not pass muster”).

173 See, e.g., Knott, supra note 91, at 461 (arguing that courts should look at the “unique storage capabilities of cell phones” in determining how to treat them under the Fourth Amendment); Snyder, supra note 84, at 158 (noting that courts that have approved searches of cell phones incident to arrest “have ... often ignored or minimized the importance of the more difficult issue involved--whether the vast amount of personal information a cell phone holds should be a relevant factor in the analysis of the issues”); Ben E. Stewart, Note, Cell Phone Searches Incident to Arrest: A New Standard Based On Arizona v. Gant, 99 Ky. L. J. 579, 591 (2011) (arguing that cell phones are not containers for purposes of the Fourth Amendment).

174 See, e.g., Kelly A. Borchers, Note, Mission Impossible: Applying Arcane Fourth Amendment Precedent to Advanced Cellular Phones, 40 Val. U. L. Rev. 223, 258-59 (2005) (arguing that the closed container analogy is outdated; instead, the “key to finding a rational principle is to acknowledge that there are two different interests at stake with technological devices: (1) the interest in the physical device and other media used to store information and (2) the interest in the actual informational contents”); Engel, supra note 45, at 289 (positing that “[a]t some point ... the difference in degree between the amount of information traditionally carried in tangible objects and contained in electronic devices becomes a difference in kind”).

175 However, in Robinson, the Supreme Court found that authority to search incident to arrest did not depend on whether the officer in a particular situation felt in danger or that evidence would in fact be found on the arrestee. United States v. Robinson, 414 U.S. 218, 235 (1973).

176 Zamani, supra note 80, at 190 (“unless an argument that the smart phone itself can be used as a weapon, the only remaining justification for a search incident to arrest is to prevent the concealment or destruction of evidence”).

177 See Gershowitz, The iPhone, supra note 34, at 54 (noting that an “arrestee skilled at using his iPhone might be able to turn on the device, select an application, and destroy text messages, emails, photos, or other evidence in a matter of seconds”).

178 Zamani, supra note 80, at 187 (noting that “[l]imiting wireless access protects both the privacy rights of the individual and allows law enforcement officers to prevent access to the remote computers for the duration of the search”).
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See, e.g., Stillwagon, supra note 81, at 1201 (noting that “the first step in solving the problem of warrantless cell phone searches is for the judiciary to recognize that cell phones are, in fact, much more analogous to modern computers than to wallets, briefcases, or even pagers, and thus ‘police should obtain a search warrant, just as they would when they seize a personal computer from an accused’”); Knott, supra note 91 at 469 (“A rule requiring officers to obtain a warrant before searching a cell phone seized incident to lawful arrest provides courts, applying the rule after the fact, with a bright-line rule consistent with Fourth Amendment jurisprudence and modern search incident to arrest doctrine.”); Orso, supra note 2, at 221 (because smartphones are like computers, “a different rule should apply to smart phones as opposed to older generation cellular phones, and it should mirror the rule that applies to the search of a computer incident to arrest: a warrant is required”); Justin M. Wolcott, Comment, Are Smartphones Like Footlockers or Crumpled Up Cigarette Packages? Applying the Search Incident to Arrest Doctrine to Smartphones in South Carolina Courts, 61 S.C.L. Rev. 843, 860 (2010) (arguing that smartphones resemble mobile computers and thus should not be searched without a warrant).

See Gershowitz, The iPhone, supra note 34, at 49; see also Gershowitz, Password Protected, supra note 12, at 1146 (noting that “while it is possible that the Gant doctrine will drastically reduce the number of cell-phone searches conducted incident to arrest, the Court must first adopt the doctrine ... [the prospects of that occurring in the near future are uncertain to say the least”); O'Connor, supra note 96, at 700 (Gant “marks a departure from the Court's previous adherence to bright-line rules and creates a potential opening for protecting the privacy of all contents of a cell phone, including text messages, unless an officer has a warrant or probable cause to believe the phone contains evidence of a particular crime”); Stewart, supra note 173, at 598 (arguing that the standard in Gant should apply to searches of cell phones).

See Orso, supra note 2, at 220; Gershowitz, The iPhone, supra note 34, at 53 (describing an “open applications” alternative to a thorough search through an iPhone, but also noting problems with approach). But see Zamani, supra note 80, at 198 (noting that it “seems parsimonious to simply limit a search incident to arrest to the presently exposed screen on the phone”).

Coding information describes information that merely identifies the parties to a communication. This information includes phone numbers, email addresses, pager numbers, and any label that uniquely identifies an account. This information is similar to the return or receiving address printed on an envelope, which uniquely identifies a location. It tells a third party where to deliver the letter, but it does not reveal the handwriting inside.” Orso, supra note 2, at 187-88 (internal footnote omitted). Content-based information, on the other hand, “describes (1) the substance of a communication and (2) a privately stored piece of information reserved for personal use. This information includes text messages, emails, voicemails, digital photographs, and other data.” Id. at 188. “Where traditional notions of physical scope are a poor fit for digital information,” distinguishing between coding and content-based information “provides a virtual ‘grab area’ within which law enforcement could legally operate.” Id. at 212. Orso also proposes that because smartphones are essentially computers, they should be treated more like computers than older-generation cell phones. Id. at 222 & n.180. Courts should “invalidate the warrantless search of a smart phone if the only basis for the search is that it was incident to arrest.” Id. at 224. See Zamani, supra note 80, at 192 (noting that the versatility of a smartphone “poses a unique problem: whereas coding information in other contexts may be readily viewed or captured separate from its accompanying content, in the context of both warranted and warrantless searches of smart phones, it often exists side-by-side with content-based information”)(internal footnote omitted).

See Gershowitz, The iPhone, supra note 34, at 56 (suggesting that one way to limit the search incident to arrest doctrine would be to draw a line between the iPhone's internet browser function and its other applications that do not connect to the internet; drawing a distinction between data that is “on” or “in” the phone and data that is “simply accessible via the iPhone”). But see Orso, supra note 2, at 211 (suggesting that this approach, while protecting some information, is still overly broad and would leave “too much private information unprotected from a search incident to arrest”); Zamani, supra note 80 at 198 (noting that the average law enforcement officer searching a smartphone under a warrant exception might not be able to distinguish between data stored locally and data stored in “the cloud”).

Kish, supra note 89, at 471-72 (arguing that treating cell phones as possessions under Chadwick “best accommodates current and future technology” while remaining consistent with Supreme Court precedent; neutral magistrates “are in the best position to protect the legitimate expectations of privacy associated with new technology”). Professor Gershowitz has written, however, that the Park court's “bright-line rule in which all cell phones should constitute nearby possessions and can never be items associated with the arrestee's person” ignores that the categorization of a cell phone “depends upon the specific facts of the case.” Gershowitz, Password Protected, supra note 12, at 1161.
See Orso, supra note 2, at 220; Gershowitz, Password Protected, supra note 12, at 1143 (noting that legislatures have taken action in other circumstances “to narrow what they believe to be an overly broad search incident to arrest doctrine”); Robinton, supra note 83, at 347 (arguing that, with respect to searches of computers, “legislatures must strike a balance between these competing factions of privacy and legitimate purposes of law enforcement”).

See Gershowitz, The iPhone, supra note 34, at 50 (noting that a handful of state courts have looked to their own constitutions for limiting the search incident to arrest exception).


See supra notes 150-52 and accompanying text.


Fawdry, 70 So.3d at 630.

The Supreme Court of Florida heard oral arguments in the case in February 2012. Given the current state of the doctrine and the fact that “legislative protection [is] unlikely,” Professor Gershowitz has suggested that cell phone and smartphone users should password-protect their phones, because “protection against searches incident to arrest is left to cell-phone users themselves.” Gershowitz, Password Protected, supra note 12, at 1147; see also United States v. Gomez, 807 F. Supp. 2d 1134, 1150 (S.D. Fla. 2011) (suggesting that password protecting an electronic device might be a practical step to protecting information).

See Engel, supra note 45, at 237 (“The Supreme Court has not directly considered whether a search incident to arrest may include a search of a cell phone's contents and, if it does, the thoroughness of such a search. The extent to which the Fourth Amendment provides protection for the contents of electronic communications and images stored on a cell phone in a search incident to arrest remains an open question.”).

See United States v. Chadwick, 433 U.S. 1, 9 (1977) (stating that the “fundamental inquiry in considering Fourth Amendment issues is whether or not a search or seizure is reasonable under all the circumstances”). See also, Lee, Reasonableness, supra note 7, at 9 (noting that in “case after case” the Court “has announced that the ‘touchstone of the Fourth Amendment is reasonableness’”).


Id. at 403.


See Gershowitz, The iPhone, supra note 34, at 33.

See New York v. Belton, 453 U.S. 454, 459-60 (1981) (“When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.”); see also Orin S. Kerr, An Equilibrium-Adjustment Theory of the Fourth Amendment, 125 Harv. L. Rev. 476, 537 (2011) (noting that the “stability of Fourth Amendment law is desirable because it enhances the clarity of the law, which in turn enables the police to act as effective agents within the permitted zone of power carved out by the courts”); Lee, Package Bombs, supra note 9, at 1468 (noting that the Supreme Court has “on numerous occasions spoken of the importance of having bright-line rules in the Fourth Amendment context to guide police officers who often need to make quick, on-the-spot decisions in the field”); Mayakis, supra note 95, at 164 (noting that “law enforcement officials need to have a bright-line rule that is relatively easy to apply during the split-
second judgments that their profession requires in order to ensure their safety and to preserve evidence’’); Joshua S. Levy, Towards a BRIGHTER FOURTH AMENDMENT: PRIVACY AND TECHNOLOGICAL CHANGE, 16 VA. J.L. & TECH. 499, 513 (2011) (noting that it is ‘‘indisputable that bright line rules provide great certainty to those regulated’’ and, in the ‘‘Fourth Amendment context, such rules enable police to know precisely how far they can intrude while conducting an investigation and, importantly, where they cannot intrude’’).

Professor Gershowitz has proposed that an ‘‘approach that differentiates between material downloaded onto the [smartphone] and material that is simply accessible via the [smartphone] seems to make sense.’’ Gershowitz, The iPhone, supra note 34, at 57. Applying a similar analogy to Robinson, Professor Gershowitz notes that ‘‘just as the police could not search Mr. Robinson's medical records stored in his house (rather than on his person), the police also could not search electronic data not currently downloaded onto his phone.’’ Id.

See Lee, Package Bombs, supra note 9, at 1414 (noting that the Supreme Court has defined the term ‘‘container’’ much more expansively than ‘‘portable container[s] that can hold one's personal belongings, such as suitcases, backpacks, and purses’’).

See LaFave, Search and Seizure, supra note 31, at §5.2(c) (noting that police officers need a ‘‘set of rules which, in most instances, make it possible to reach a correct determination’’ before they act, rather than a ‘‘highly sophisticated set of rules, qualified by all sorts of ifs, ands and buts and requiring the drawing of subtle nuances and hairline distinctions’’).

See supra notes 141-49 and accompanying text.

See Smallwood v. State, 61 So.3d 448, 459 (Dist. Ct. App. Fla. 2011) (recognizing concerns about amount of data stored on cell phones but noting that ‘‘courts have found the broad language in Robinson permits searches incident to arrest of wallets, purses, date books, and other similar items that contain the same types of personal information stored on a cell phone’’); People v. Diaz, 244 P.3d 501, 511 (Cal. 2011) (finding that ‘‘under the United States Supreme Court's binding precedent, the WARRANTLESS SEARCH of defendant's cell phone [incident to arrest] was valid’’).

See United States v. Gomez, 807 F. Supp. 2d 1134, 1153 (S.D. Fla. 2011) (noting that ‘‘in light of the current case law, we are precedent-bound to conclude that all of the information uncovered from [d]efendant's cell phone [which was searched incident to arrest] squared with the Fourth Amendment's present safeguards’’).

Gershowitz, Password Protected, supra note 12, at 1145. See also United States v. Flores-Lopez, 670 F.3d 803, 809 (7th Cir. 2012) (noting that ‘‘[t]oting up costs and benefits is not a feasible undertaking to require of police officers conducting a search incident to an arrest’’).

LaFave, Search and Seizure, supra note 31, at §5.2(c).

Id.

As Professor Clancy has written about computers: ‘‘[a]lthough one may dispute the correctness of some of the Supreme Court's development of Fourth Amendment principles ... there is nothing sui generis where the target of the search or seizure is a computer or other device that contains electronic evidence. Thomas K. Clancy, The Fourth Amendment Aspects of Computer Searches and Seizures: A Perspective and a Primer, 75 Miss. L. J. 193, 272 (2005). See also Josh Goldfoot, The Physical Computer and the Fourth Amendment, 16 Berkeley J. Crim. L. 112, 150 (2011) (noting that ‘‘so long as those objects come into law enforcement's possession lawfully, courts do not require additional Fourth Amendment justification before police subject them to examination’’).

See People v. Diaz, 244 P.3d 501, 509 (Cal. 2011) (noting that the Court in Robinson ‘‘held that a police officer, despite seizing a cigarette package from the defendant's shirt and reducing it to police control, did not need to obtain a warrant before opening the package and examining its contents’’). See also United States v. Flores-Lopez, 670 F.3d 803, 807 (7th Cir. 2012) (remarking that it is ‘‘not even clear that we need a rule of law specific to cell phones or other computers’’ in light of the current search incident to lawful arrest doctrine, which allows police to search pocket diaries and address books found on an arrestee incident to arrest).

See Diaz, 244 P.3d at 505-06 (noting that the ‘‘key question’’ is whether defendant's cell phone was like the cigarette package in Robinson or the locker in Chadwick).
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213 Cf. United States v. Murphy, 552 F.3d 405, 411 (4th Cir. 2009) (noting that requiring police officers to determine the storage capacity of a cell phone before conducting a search “would simply be an unworkable and unreasonable rule”); Schlossberg v. Solesbee, 844 F. Supp. 2d 1165, 1170 (D. Or. 2012) (noting that a “primary goal in search and seizure law has been to provide law enforcement with clear standards to follow”).

214 Lee, Package Bombs, supra note 9, at 1414.

215 Id.

216 Clancy, supra note 210, at 216.


218 Cf. Theriault, supra note 162, at 324 (noting that the Smith court, by prohibiting all searches of cell phones incident to arrest, “has effectively protected the technologically advanced arrestee's address book, even though its physical-world counterpart is not similarly protected”); Clancy, supra note 210, at 217 (writing that based on the reasoning in Ross, “it seems clear that the Supreme Court would-and should reject a special rule for electronic evidence containers”).

219 People v. Diaz, 244 P.3d 501, 506 (Cal. 2011). Referencing United States v. Ross, the court stated that if someone has an equal right to conceal possessions in a paper bag as the “sophisticated executive with the locked attaché case,” then “travelers who carry sophisticated cell phones have no greater right to conceal personal information from official inspection than travelers who carry such information in 'small spatial containers.'” Id. at 508. “Were the rule otherwise, those carrying small spatial containers, which are legally subject to seizure and search if found upon the person at the time of arrest, would find little solace in discovering that their intimate secrets would have been protected if only they had used a device that could hold more personal information.” Id. at 508 n.11.


221 See e.g., Gracie v. State, 92 So. 3d 806, 812 (Ala. Crim. App. 2011) (noting that “[w]e agree with the majority of jurisdictions surveyed that a warrantless search of a defendant's cellular phone following his arrest does not violate Fourth Amendment principles”).

222 See People v. Diaz, 244 P.3d 501, 511 (Cal. 2011) (applying the Supreme Court's “binding precedent” and, responding to the dissent, that “[if] the wisdom of the high court's decisions 'must be newly evaluated' in light of modern technology ... then that reevaluation must be undertaken by the high court itself”).

223 See Gershowitz, Password Protected, supra note 12, at 1143 (noting that those “handful of cases” in which evidence was suppressed, “most of those courts did not outrightly reject the practice in all circumstances”).

224 Kerr, supra note 200, at 535 (noting that “Fourth Amendment caselaw is still decided on a case-by-case basis”).

225 See Dressler & Michaels, supra note 15, at 192 (noting that the “scope of the grabbing area depends on the circumstances of the individual case” and that, this area changes “if the arrestee moves”).

226 See United States v. Gomez, 807 F. Supp. 2d 1134, 1148 (S.D. Fla. 2011) (noting that in order to determine the “proper scope of a search incident to arrest,” courts must consider the location of the device and the time the search was conducted incident to arrest).

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