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Riley v. California—Cell Phones and Technology in the Twenty-First Century

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RILEY V. CALIFORNIA— CELL PHONES AND TECHNOLOGY IN THE TWENTY-FIRST CENTURY

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I. INTRODUCTION

It is well settled that law enforcement officials may search an arrestee's person and surrounding area under his control without a warrant when the search is incident to the arrest itself.[1] However, recent courts have grappled with applying this doctrine to searches in the modern era in which most people carry on their persons cell phones with powerful capabilities that have only recently developed.[2] Courts are forced to apply a doctrine designed with tangible evidence in mind to devices that digitally, or non-tangibly, store immense amounts of data with little direction from the Supreme Court.[3]

In its recent decision *Riley v. California*,[4] the Supreme Court finally addressed the impact technology is having on the Fourth Amendment's "search incident to arrest" doctrine and the growing privacy concerns plaguing the courts. The Court considered two cases presenting a similar question—whether law enforcement can conduct a warrantless search of an arrestee's cell phone—and

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1. Riley v. California, 134 S. Ct. 2472, 2482–83 (2014); United States v. Robinson, 414 U.S. 218, 224 (1973); Chimel v. California, 395 U.S. 752, 755, 768 (1969); Weeks v. United States, 232 U.S. 383, 392 (1914).

2. Ian Millhiser, *Supreme Court Issues Bold Decision on Cell Phone Privacy*, THINKPROGRESS (June 25, 2014, 11:13 AM), http://thinkprogress.org/justice/2014/06/25/3453015/the-supreme-court-finally-starts-to-bring-privacy-into-the-21st-century/.

3. Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 36 (2008).

4. 134 S. Ct. 2472 (2014).

determined that it could not.[5] It came to the correct conclusion that law enforcement must obtain a warrant prior to searching the contents of a cell phone due to the vast amount of personal information contained in this device. In so doing, it partially brought the Fourth Amendment into the twenty-first century. At the same time, however, the Supreme Court hampered the progress it could have made by limiting its decision to cell phones instead of including other devices that also implement smart technology ("smart devices"), which present similar privacy concerns. By limiting its decision, the Court created the potential for future litigation and resulting circuit splits when lower courts try to apply the search incident to arrest doctrine to other smart devices located on an arrestee's person, such as iPads, Apple Watches, Kindles, and the like.[6]

This Comment analyzes the Supreme Court's recent decision in *Riley v. California*, focusing both on its accomplishments and its forfeitures, and seeks to provide a solution that could have more fully brought the Fourth Amendment into the modern era. Part II discusses the evolution of warrantless searches incident to arrest as reasonable searches under the Fourth Amendment. Part III details the two cases considered in the Supreme Court's decision, *People v. Riley*[7] and *United States v. Wurie*.[8] Part IV addresses the Court's reasoning in concluding that warrantless searches of cell phones incident to arrest are unreasonable under the Fourth Amendment.[9]

Part V propounds that the Supreme Court came to the correct conclusion with respect to cell phones due to the colossal amount of personal data stored in these devices. However, this part advocates that while the Supreme Court made important advances, it hindered itself from achieving resolution on warrantless searches of various other smart devices that are likely to present future issues if left unresolved. This part thus offers an alternative way to frame the issue before the Court that would better address present and future

5. *Id.* at 2482, 2495.

6. These devices are all equipped with wireless Internet browsing, have significant storage capacity, and many make use of Global Positioning Systems (GPS). For further discussion of these devices, see *infra* Part V.B.1 and notes 104–108.

7. No. D059840, 2013 WL 475242 (Cal. Ct. App. Feb. 8, 2013), *rev'd in part sub nom.* Riley v. California, 134 S. Ct. 2473 (2014).

8. 728 F.3d 1 (1st Cir. 2013), *aff'd sub nom.* Riley v. California, 134 S. Ct. 2473 (2014).

9. *Riley*, 134 S. Ct. at 2495.

concerns about both cell phones and non-cell phone smart devices. Part VI concludes that the Supreme Court took an important step toward bringing the Fourth Amendment into the present but left open certain questions that will likely result in future litigation.

II. HISTORICAL FRAMEWORK—THE SEARCH INCIDENT TO ARREST DOCTRINE

The Fourth Amendment establishes "the right of the people to be secure in their persons, houses, papers, and effects" and protects the people from "unreasonable searches and seizures."[10] Generally, a search is unreasonable when it occurs without a warrant.[11] However, a long-standing exception to the warrant requirement, first discussed in *Weeks v. United States*,[12] is a search conducted incident to an arrest.[13] Known as the search incident to arrest doctrine, this exception permits law enforcement to conduct a warrantless search of an arrestee, which includes a search of both the person arrested and the surrounding area under his control.[14]

Since *Weeks*, several Supreme Court cases have further developed the search incident to arrest doctrine. First, in *Chimel v. California*,[15] the Court proffered two rationales for the warrantless search of a person and his surrounding area incident to an arrest.[16] The first rationale is to protect the officer's safety.[17] Under this rationale, law enforcement is reasonable in searching the arrestee or the area under his immediate control for any weapons the arrestee could use against law enforcement or to implement an escape.[18] The second rationale is to prevent the destruction or concealment of evidence.[19] Thus, in *Chimel*, the Court suppressed evidence police officers obtained when they conducted an expansive search incident to arrest of the arrestee's entire three-bedroom house, including areas

10. U.S. CONST. amend. IV.
11. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995).
12. 232 U.S. 383 (1914).
13. *Id.* at 392; United States v. Robinson, 414 U.S. 218, 224 (1973); Agnello v. United States, 269 U.S. 20, 30 (1925).
14. *Robinson*, 414 U.S. at 224; Chimel v. California, 395 U.S. 752, 763 (1969); *Agnello*, 269 U.S. at 30.
15. 395 U.S. 752 (1969).
16. *Id.* at 763.
17. *Id.*
18. *Id.*
19. *Id.*

beyond the arrestee's immediate control, because the search did not accomplish or further either of the aforementioned rationales.[20]

Several years later, in *United States v. Robinson*,[21] the Supreme Court expanded the search incident to arrest doctrine.[22] In *Robinson*, the court considered a warrantless search incident to arrest where the police had seized a cigarette pack found on the arrestee's person, searched the contents of the cigarette pack, located heroin capsules inside, and charged the arrestee with narcotics possession, admitting into evidence the heroin capsules.[23] In determining whether the search violated the Fourth Amendment, and ultimately concluding it did not, the Court considered the *Chimel* justifications.[24] It propounded, however, that so long as the arrest is lawful and based on probable cause, "a search incident to the arrest requires no additional justification."[25] Rather,

> [i]t is the fact of the lawful arrest which establishes the authority to search, and . . . 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.[26]

Finally, in *Arizona v. Gant*,[27] the Supreme Court expanded the search incident to arrest doctrine as applied to searches of vehicles.[28] The Court determined that with respect to persons arrested while driving a vehicle, law enforcement can search the vehicle pursuant to an arrest if the officers have a reasonable belief that evidence of the crime of arrest is located inside the vehicle.[29]

The current state of the search incident to arrest doctrine as applied to devices containing digital data has created a complicated issue for courts. The Supreme Court tried to answer this question in *Riley v. California*, at least as applied to cell phones.

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20. *Id.*
21. 414 U.S. 218 (1973).
22. *See id.* at 235.
23. *Id.* at 223.
24. *Id.* at 235.
25. *Id.*
26. *Id.*
27. 556 U.S. 332 (2009).
28. *Id.*
29. *Id.* at 335 (quoting Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).

III. *RILEY V. CALIFORNIA* AND *UNITED STATES V. WURIE*

The recent Supreme Court case *Riley v. California* considers two cases that present what the Court considered a common issue: "whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested."[30] The first case, *People v. Riley*, came up from California state court.[31] The plaintiff, David Riley, challenged admission of photographs and videos obtained during a warrantless search of his cell phone.[32] A police officer stopped Riley for driving with expired registration tags.[33] During the course of the stop, the officer learned that Riley had been driving with a suspended license.[34] Thus, the officer arrested Riley and, in accordance with law enforcement protocol, impounded his car, at which point "another officer conducted an inventory search of the car."[35]

The officers found firearms inside the car and paraphernalia that suggested Riley was a gang member.[36] Inside Riley's pocket, the officers also found a smartphone and searched through its content without a warrant, finding additional references to a gang in the phone's data.[37] Approximately two hours after the arrest, while at the police station, a detective specializing in gang-related crimes further searched the phone's data, finding incriminating photos and videos.[38]

The police officer found a photograph of Riley standing in front of a car that was suspected to have been involved in a shooting a few weeks prior.[39] Riley was charged for his actions in connection with the shooting.[40] In his defense, Riley attempted to suppress the evidence gathered from the warrantless search of his cell phone, but the trial court rejected his argument and admitted the evidence.[41] Riley was convicted on all counts.[42] The California Court of Appeal

30. Riley v. California, 134 S. Ct. 2473, 2480 (2014).
31. *See* People v. Riley, No. D059840, 2013 WL 475242, at *1 (Cal. Ct. App. Feb. 8, 2013), *rev'd in part sub nom.* Riley v. California, 134 S. Ct. 2473 (2014).
32. *Riley*, 134 S. Ct. at 2481.
33. *Id.* at 2480.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 2480–81.
38. *Id.*
39. *Id.* at 2481.
40. *Id.*
41. *Id.*
42. *Id.*

affirmed and the California Supreme Court denied Riley's petition to review the decision.[43] The Supreme Court granted certiorari.[44]

Originating from the First Circuit Court of Appeals, *United States v. Wurie* also considered law enforcement's search of a cell phone incident to arrest.[45] In this second case, a police officer witnessed the defendant, Wurie, engage in a narcotics transaction.[46] He arrested Wurie and took him to the police station, where officers located and seized two cell phones from his possession.[47] While at the station, one of the phones, a flip phone, repeatedly rang from a number the officers could see from the external screen was labeled "my house."[48]

The officers opened the phone without a warrant and noticed a picture of a woman and a baby on the screen of the phone.[49] The officers searched through the call log and presumably the contact information to locate the number associated with the name "my house."[50] Upon locating the number, the officers traced it to an apartment building and proceeded to that apartment building where they noticed through a window a woman resembling the picture on the cell phone inside the apartment.[51] The officers secured the apartment and obtained a warrant to search its contents.[52] Inside, the police located narcotics and other "drug paraphernalia, a firearm and ammunition, and cash."[53]

Subsequently, Wurie was charged with possession of narcotics with intent to distribute and "being a felon in possession of a firearm and ammunition."[54] Like Riley, Wurie moved to suppress any evidence obtained from the warrantless search of his cell phone.[55] The District Court denied the motion, and Wurie was convicted on all counts.[56] The First Circuit reversed the lower court's denial of

43. *Id.*
44. *Id.*
45. *Id.* at 2481–82.
46. *Id.* at 2481.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 2482.
55. *Id.*
56. *Id.*

Wurie's motion to suppress and the Supreme Court granted certiorari.[57]

IV. THE SUPREME COURT'S REASONING—CONSIDERING THESE TWO CASES TOGETHER

The Supreme Court considered these two cases together because they presented a common issue: the reasonableness of a warrantless search of a cell phone incident to an arrest.[58] In a unanimous opinion,[59] the Supreme Court ultimately concluded that warrantless searches of cell phones are unreasonable under the Fourth Amendment and thus the evidence obtained via the searches of the cell phones incident to the arrests was suppressed in both cases.[60] Chief Justice Roberts made this conclusion explicit: "Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant."[61]

The Supreme Court came to this conclusion for three reasons. First, it addressed the two rationales for warrantless searches incident to arrest found in *Chimel*.[62] In applying *Chimel*, the Court asked "whether application of the search incident to arrest doctrine to this particular category of effects would 'untether the rule from the justifications underlying the *Chimel* exception.'"[63] With respect to the first rationale, to protect law enforcement safety, the Court concluded, "[d]igital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape."[64] Law enforcement retains the ability to inspect the exterior of the phone to ensure there is no potential use as a

57. *Id.*

58. *Id.*

59. Justice Alito wrote a concurring opinion, agreeing that law enforcement must obtain a warrant before searching a cell phone, but disagreeing that the search incident to arrest doctrine is based on the rationales discussed in *Chimel*. *Id.* at 2495 (Alito, J., concurring). He also called on the legislature to help balance privacy interests against the needs of law enforcement. *Id.* at 2496–97. He emphasized that "it would be very unfortunate if privacy protection in the twenty-first century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment" and that "[l]egislatures, elected by the people, are in a better position than we are to assess and respond to the changes that have already occurred and those that almost certainly will take place in the future." *Id.* at 2497–98.

60. *Id.* at 2495 (majority opinion).

61. *Id.*

62. *Id.* at 2485–88.

63. *Id.* at 2485 (quoting Arizona v. Gant, 556 U.S. 332, 343 (2009)).

64. *Id.*

weapon, but the search ends there.[65] The United States and California argued that the digital data could protect law enforcement's safety in other indirect ways, by alerting law enforcement that other co-conspirators are en route to the scene of arrest.[66] However, the Court determined that although the government does have a strong interest in protecting its officers, permitting a warrantless cell phone search would expand the concern in *Chimel* that the arrestee himself would use a weapon against the officer.[67]

With respect to the second *Chimel* rationale, destruction of evidence, California and the U.S. government argued that cell phone data is susceptible to destruction by either remote wiping or data encryption.[68] However, the Supreme Court rejected this argument for several reasons. First, it determined that again the government had expanded the justifications in *Chimel* by relying on remote actions of third parties destroying or obfuscating evidence, rather than the arrestee himself concealing evidence.[69] Second, the Supreme Court found few examples of such remote wiping or data encryption that had destroyed evidence after a person was arrested.[70] Finally, the Court concluded that law enforcement has sufficient means to counter the threat of remote wiping and data encryption.[71] Thus, the Court concluded that neither of the *Chimel* rationales was furthered by searching the digital data on a cell phone.

Second, the Court refused to extend its decision in *Robinson* to the case of cell phones because "[a] search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*."[72] The Court declined to extend *Robinson* for two main reasons. Primarily, it concluded that cell phones are both quantitatively and qualitatively different from other objects an arrestee might keep on his person based on their immense storage capacities.[73] Cell phones collect a variety of information such as addresses, bank statements, and videos, in a single device.[74] By

65. *Id.*
66. *Id.*
67. *Id.* at 2485–86.
68. *Id.* at 2486.
69. *Id.*
70. *Id.*
71. *Id.* at 2487.
72. *Id.* at 2485.
73. *Id.* at 2489.
74. *Id.*

compiling such specific information about all aspects of an arrestee's life, law enforcement can easily reconstruct his personal life dating back several years.[75] This type of expansive search, the Court concluded, was completely distinguishable from a search of a cigarette pack's contents.[76]

Subsequently, the Court refused to extend *Robinson* to cell phones because of the existence of the cloud,[77] which allows law enforcement to access digital information that may not even be stored on the device itself.[78] Thus, a search of cell phones would likely "extend well beyond papers and effects in the physical proximity of the arrestee,"[79] which represents yet another expansion of the search incident to arrest doctrine.

Third, the Supreme Court rejected the U.S. government and California's argument that law enforcement should be able to search a cell phone when "it is reasonable to believe that the phone contains evidence of the crime of arrest," the standard in *Gant*.[80] In so doing, the Court determined that *Gant* is unique to searches of vehicles, not to cell phones carried on the arrestee.[81] Additionally, *Gant* prohibited searches of evidence of past crimes; however, in the context of cell phones, "it is reasonable to expect that incriminating information will be found on a cell phone regardless of when the crime occurred."[82] Thus, the Court refused to extend the reasoning in *Gant* to cell phones, preventing law enforcement from conducting warrantless searches of cell phones even if searching only for evidence of the crime of arrest.[83]

Finally, the Court noted that there may be circumstances where law enforcement's need to search a cell phone outweighs an arrestee's privacy concerns.[84] In those situations, there still remains the exception for exigent circumstances, which will allow the police

75. *Id.* at 2489–90.

76. *Id.* at 2488–89.

77. The cloud is "an off-site storage system" used for storing digital data. Users can access data stored in the cloud from any location or device that has access to the Internet. Jonathan Strickland, *How Cloud Storage Works*, HOW STUFF WORKS, http://computer.howstuffworks.com /cloud-computing/cloud-storage.htm (last visited Jan. 21, 2014).

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

79. *Id.*

80. *Id.* at 2492.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 2494.

to search a cell phone without a warrant if the need is so compelling that it justifies a warrantless search as reasonable.[85] Thus, although the Court concluded that law enforcement must obtain a warrant before searching a cell phone's data, it provided an exception to this general rule to better balance the government's needs against the arrestee's privacy interests.

V. SUPREME COURT TAKES AN IMPORTANT STEP BUT MISSES AN OPPORTUNITY TO ADDRESS OTHER PRESSING ISSUES

The Supreme Court finally addressed technology's impact on the Fourth Amendment and correctly recognized that certain technologies require additional Fourth Amendment protection based on the magnitude of data present on a device using such technologies. However, the Court missed an important opportunity to address greater privacy concerns about warrantless searches of smart devices in general, not simply cell phones. This part discusses both the Supreme Court's advances and its shortcomings, offering a potential solution that could have better addressed growing privacy concerns.

A. The Supreme Court Evolves the Fourth Amendment to Address Modern Concerns

It is no secret that the Supreme Court has been criticized for its failure to understand and address technology and its effects on Fourth Amendment privacy concerns. Specifically, the Court "has long been mocked, sometimes justifiably, as an old-fashioned, tech-phobic institution."[86] Nonetheless, the Supreme Court took an important and significant step in *Riley* toward bringing the Fourth Amendment into the modern era.[87] Notably, the Supreme Court has come a long way since questioning the difference between an email and a pager.[88] Many have described the unanimous decision here as a "resounding victory for digital privacy" and a "'no-duh' moment for

85. *Id.*

86. Farhad Manjoo, *The Tech-Savvy Supreme Court*, N.Y. TIMES BITS (June 26, 2014, 3:58 PM), http://bits.blogs.nytimes.com/2014/06/26/the-tech-savvy-supreme-court/?_php=true&_type=blogs&_r=0.

87. Millhiser, *supra* note 2.

88. Manjoo, *supra* note 86.

American justice."[89] The Supreme Court appears to recognize that the long-standing search incident to arrest doctrine, almost a century old, may be outdated in today's digital society.[90] It determined that this exception to the general warrant requirement has limits, and it set the limit at cell phones.[91]

Legal scholars have proffered several theories as to why the Supreme Court is finally addressing technology. Some scholars wondered whether the Justices were imagining what it would be like for law enforcement to search through their cell phones without a warrant.[92] Others have speculated that the Justices were engaging in what one scholar refers to as equilibrium-adjustment, where courts "respond to . . . new facts by adjusting legal rules to restore the preexisting balance of police power."[93] When "changing technology . . . expands police power, threatening civil liberties, courts can tighten Fourth Amendment rules to restore the status quo."[94] Thus, pursuant to this theory, the Supreme Court likely may have seen an expansion of police power that undermined privacy concerns implicated by warrantless searches of cell phones.[95]

Furthermore, the Justices who initially created and developed this doctrine could not have understood how it would affect privacy concerns in a society in which "many people carry a small device in their pocket that can access years worth of their emails and text messages, that can reveal a suspect's finances and romantic partners, and that may contain extensive photo and video evidence of how they lead their lives."[96] Cell phones' Global Positioning Systems

89. Sarah Jeong, *The Supreme Court Finally Understands Technology—And It's About Damn Time*, GUARDIAN (June 25, 2014, 2:36 PM), http://www.theguardian.com /commentisfree/2014/jun/25/supreme-court-cellphones-john-roberts-precedent-privacy.

90. Millhiser, *supra* note 2.

91. *See* Riley v. California, 134 S. Ct. 2473, 2493 (2014).

92. Linda Greenhouse, Op-Ed., *The Supreme Court Justices Have Cellphones, Too*, N.Y. TIMES, June 25, 2014, at A27, *available at* http://www.nytimes.com/2014/06/26/opinion/linda -greenhouse-the-supreme-court-justices-have-cellphones-too.html?hp&action=click&pgtype =Homepage&module=c-column-top-span-region&region=c-column-top-span-region&WT.nav= c -column-top-span-region&_r=0.

93. Orin Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 482 (2011–2012) [hereinafter *Equilibrium-Adjustment Theory*]; Orin Kerr, *Are* Jones *and* Riley *Explained by the Justices Imagining Themselves as Targets?*, WASH. POST VOLOKH CONSPIRACY (June 26, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014 /06 /26/are-jones-and-riley-explained-by-the-justices-imagining-themselves-as-targets/.

94. *Equilibrium-Adjustment Theory*, *supra* note 93, at 482.

95. *See id.*

96. Millhiser, *supra* note 2.

(GPS) also pose significant privacy concerns not present at the drafting of the Fourth Amendment.[97] With current technology, as long as a cell phone is turned on, it "registers its position with cell towers every few minutes, whether the phone is being used or not."[98] Additionally, cell phone carriers maintain records of this location data, allowing the government to obtain a user's location details, including the friends he visits, what doctor he sees, and even how often he attends church.[99] *Chimel* considered the search of a three-bedroom house, and *Robinson* analyzed the search of a cigarette pack's contents.[100] But *Riley* considered the propriety of searches of devices that carry far more information than could ever fit on an arrestee's person or in areas within his immediate control in its physical form. Society is rapidly entering a digital age, and new technological devices "defy the rationales for old rules, demanding changes in the law."[101] In *Riley*, the Supreme Court finally demonstrated that it understood this notion, recognizing that cell phones are both quantitatively and qualitatively different from other items typically searched incident to an arrest.[102]

B. The Supreme Court Failed to Fully Protect Additional Privacy Rights Relevant to the Modern Era

The Supreme Court correctly recognized that cell phones present unique privacy issues not readily apparent at the time the Founding Fathers drafted the Fourth Amendment. However, the Court failed to address privacy concerns that arise from non–cell phone smart devices, which will likely be an issue in the coming years. Thus, the Supreme Court missed an opportunity to address smart devices in general, as opposed to the limited issue of cell phones. This section discusses both the problems with the Supreme Court's limited

97. *How the Government Is Tracking Your Movements*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/how-government-tracking-your-movements (last visited Oct. 1, 2014).

98. *Id.*

99. *Id.*

100. United States v. Robinson, 414 U.S. 218, 223 (1973); Chimel v. California, 395 U.S. 752, 754 (1969).

101. Byron Kish, *Cellphone Searches: Works Like a Computer, Protected Like a Pager?*, 60 CATH. U. L. REV. 445, 473 (2011); Mason Clutter, *Symposium: The Court Starts to Catch Up with Technology*, SCOTUSBLOG (June 26, 2014, 12:48 PM), http://www.scotusblog.com/2014/06/symposium-the-court-starts-to-catch-up-with-technology/; Richard Re, *Symposium: Inaugurating the Digital Fourth Amendment*, SCOTUSBLOG (June 26, 2014, 12:37 PM), http://www.scotusblog.com/2014/06/symposium-inaugurating-the-digital-fourth-amendment/.

102. Riley v. California, 134 S. Ct. 2473, 2489 (2014).

decision and one way it could have better protected growing privacy interests.

1. Problems with *Riley*

The Supreme Court's decision in *Riley* suffers from three main flaws: (1) it does not address the increasingly pressing concern of smart devices as opposed to only cell phones; (2) it provides little guidance on how to apply *Riley*'s reasoning to searches incident to arrest of these other devices; and (3) it has the potential to confuse lower courts about when adherence to pre-digital precedent is unnecessary. The first problem stems from the Supreme Court's limitation of its decision to cell phones. In general, as smartphones become more affordable, the number of people trading their ordinary cell phones for smartphones has increased exponentially.[103] Specifically, the percentage of Americans that have a cell phone that is not a smartphone has dropped 33 percent since 2005.[104] Additionally, while only 25 percent of Americans over the age of sixty-five have a smartphone, 88 percent of eighteen to twenty-nine year-olds report having a smartphone.[105] The percentage of Americans who also own other smart devices, such as iPads,[106] Kindles,[107] iPods,[108] and Apple Watches[109] has likewise continued to grow since 2005.[110]

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103. *Smartphone Users Worldwide Will Total 1.75 Billion in 2014*, EMARKETER (Jan. 16, 2014), http://www.emarketer.com/Article/Smartphone-Users-Worldwide-Will-Total-175-Billion-2014/1010536.

104. Bruce Drake, *Americans with Just Basic Cell Phones Are a Dwindling Breed*, FACTANK (Jan. 9, 2014), http://www.pewresearch.org/fact-tank/2014/01/09/americans-wi1th-just-basic-cell-phones-are-a-dwindling-breed/.

105. *Id.*

106. An iPad is a tablet with a 9.7 inch screen equipped with Wi-Fi and optional 3G or 4G cellular access. It is "[d]esigned for Web browsing, e-mail, e-book reading and entertainment" and can hold up to "128 gigabytes of data." *Definition of: iPad*, PCMAG, http://www.pcmag.com/encyclopedia/term/61359/ipad (last visited Oct. 1, 2014).

107. A Kindle is a 6.5 inch by 4.5 inch eReader that is WiFi enabled and has a storage capacity of approximately two gigabytes, the equivalent of 1,500 books, and additional unlimited storage in the cloud. *Definition of: Kindle*, PCMAG, http://www.pcmag.com/encyclopedia/term/58565/kindle (last visited Oct. 1, 2014).

108. An iPod, specifically the newest model known as an iPod Touch, is "essentially an iPhone without the phone," equipped with WiFi and significant storage capacity. *Definition of: iPod Touch*, PCMAG, http://www.pcmag.com/encyclopedia/term/58324/ipod-touch (last visited Oct. 1, 2014).

109. The Apple Watch, Apple's most recent product line meant to track fitness, connects to users' cell phones, thus allowing users to receive and send messages and receive and make phone calls as well as access other apps, and of course, tell time. *Apple Watch Unveiled: Starts at $349,*

These statistics indicate that society is increasingly using smartphones, leaving ordinary cell phones behind, and relying more heavily on other forms of smart devices. Thus, by limiting its decision to cell phones, rather than extending it to smart devices, the Supreme Court left open the question of whether law enforcement can search other technological devices pursuant to the search incident to arrest doctrine. Given the increase in the number of Americans that use other forms of smart devices and the decision's limitation to cell phones, litigation will undoubtedly occur over searches incident to arrest of these other devices, without much guidance from the Supreme Court.[111]

The Supreme Court's decision suffers from another flaw: it is not easily applicable to these new forms of technology over which litigation will likely ensue. By considering the *Riley* and *Wurie* cases together, the Supreme Court made it more difficult to apply its reasoning universally to other technologies.[112]

In *Riley*, the Supreme Court failed to acknowledge the important distinction between smartphones and other cell phones.[113] Specifically, the cell phone in *Riley* was an iPhone equipped with smart technology whereas the cell phone in *Wurie* was a non-smart ordinary flip phone.[114] The Supreme Court's main reasoning in refusing to apply the search incident to arrest doctrine to cell phones was the colossal amount of information stored on these devices that is both quantitatively and qualitatively different from other items typically searched incident to arrest.[115] It recognized that because of their complex technology, cell phones "could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers."[116]

However, what the Supreme Court did not consider is that these characteristics are only typical of smartphones and other smart

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Coming Early 2015 (Hands-On), CNET (Sept. 11, 2014, 4:42 PM), http://www.cnet.com/products/apple-watch/.

110. Drake, *supra* note 104.

111. Noah Marks, *Unfortunately, Resolving* Wurie *Perfunctorily May Weaken* Riley, HARV. L. & POL'Y REV. (June 25, 2014), http://www3.law.harvard.edu/journals/hlpr/2014/06/riley/.

112. *Id.*

113. *Id.*

114. Riley v. California, 134 S. Ct. 2473, 2481 (2014); Marks, *supra* note 111.

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

116. *Id.*

devices, not the flip phone found in *Wurie*.[117] Specifically, ordinary cell phones or flip phones are "not commonly used as newspapers or televisions, and most are not Wi-Fi enabled, come with minimal memory, have few or no apps, have limited contacts, and cannot effectively surf the web, sync with the cloud, or download files."[118] Additionally, the Court failed to consider that such characteristics, while not typical of an ordinary cell phone, are common to many other smart devices increasingly used by many Americans, such as iPads and iPods.

By considering the two cases together and failing to address the differences between a cell phone and a smartphone, the Supreme Court made it difficult to discern what the important factors are in determining whether law enforcement may search a specific device incident to an arrest.[119] It would be reasonable for a court to assume that the ability to make and receive phone calls is dispositive, given the Court's grouping together of the general category of cell phones.[120]

Another possibility, however, is for a court to assume that there is a spectrum between the privacy interests at stake in an ordinary cell phone versus a smartphone, under which devices that fall somewhere in between could not be searched incident to an arrest without a warrant. Many of the other smart devices such as the Kindle, Apple Watch, and iPad implicate fewer privacy concerns than the iPhone in *Riley*, but more privacy concerns then the cell phone in *Wurie*.[121] Perhaps courts could hold that these other devices are not searchable without a warrant because the arrestee's privacy interests in these devices are somewhere between the two devices discussed in *Riley*. Applying this case to other smart devices will likely perplex courts because the Supreme Court did not address the important distinction between an ordinary cell phone and a smartphone.

Third, the Supreme Court, in distinguishing *Robinson* from *Riley*, may have sent a confusing message to lower courts trying to apply pre-digital precedent to digital data. The Supreme Court made

117. Marks, *supra* note 111.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*

clear in *Robinson* that, incident to an arrest, law enforcement "can open containers located on a person or in their immediate grabbable zone without having any independent probable cause to search those containers."[122] However, until recently, many of the cases relying on *Robinson* related to searches of tangible evidence, namely drugs and firearms.[123] In *Riley*, the Supreme Court easily distinguished the cigarette pack and heroin capsules from the digital data stored in a cell phone. However, the Court sent an unfortunate message to lower courts—do not strictly adhere to pre-digital precedent as applied to digital Fourth Amendment questions.[124] Thus, with respect to new technologies other than cell phones, distinct circuit splits are likely to emerge,[125] as courts may feel entitled to certain leeway in adhering or failing to adhere to pre-digital precedent.

Although the Supreme Court correctly decided the issue before it and made important advances in bringing the Fourth Amendment into the modern era, its decision is not as powerful, decisive, and relevant as needed. The Supreme Court took a step back by grouping flip phones, largely a thing of the past, with smartphones and failed to consider the privacy concerns of new and increasing smart devices. Additionally, by considering both the *Wurie* and *Riley* cases together without addressing their important differences, the Court made its decision inapplicable to these other emerging areas of technology, or, if applicable, largely confusing.

2. Potential Solution—Framing the Issue More Broadly

The Supreme Court could have better addressed present and future technology concerns by framing the issue differently to answer a broader question. The Supreme Court framed its decision as answering a common question, whether the police may conduct a warrantless search incident to arrest of a cell phone.[126] However, as discussed above, the Court's consideration of this common question suffers from several flaws that hinder the Supreme Court from fully bringing the Fourth Amendment into the modern era.[127]

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122. United States v. Robinson, 414 U.S. 218, 235 (1973); Gershowitz, *supra* note 3, at 36.
123. Gershowitz, *supra* note 3, at 36.
124. Re, *supra* note 101.
125. *Id.*
126. Riley v. California, 134 S. Ct. 2473, 2480 (2014).
127. See *supra* Part V.B.1.

The Court had an easily available solution; it could have framed the issue more broadly to encompass both cell phones and other smart devices. The issue could and should have been framed as follows: whether law enforcement without a warrant can search a cell phone *or* device equipped with smart technology incident to an arrest. In so doing, it would answer the question of ordinary cell phones, smartphones, and non–cell phone smart devices, such as iPads, Kindles, and the like, thus accomplishing far more than the Court did in its current opinion. Additionally, as mentioned above, there are stated concerns regarding an increase in litigation over the future of warrantless searches;[128] by framing the issue this way, the Court would have addressed and eliminated these concerns.

To do so, the Supreme Court would have had to acknowledge the distinction between Wurie's cell phone and Riley's smartphone but easily could have held that both present significant privacy concerns such that a warrant is always required. By framing the issue in this slightly different way, the Supreme Court could have easily made its decision applicable to any of the aforementioned devices, as well as many new technologies likely to emerge. Thus, had the Supreme Court chosen this route, not only would it have brought the Fourth Amendment into the present day, it would have issued a decision that is equally applicable in the future.

VI. CONCLUSION

In conclusion, the Supreme Court's decision in *Riley v. California* represents a very important step toward bringing the Fourth Amendment into the modern era and providing more protection for individuals against unreasonable searches and seizures. However, the decision simultaneously suffers from several flaws in failing to consider the decision's effect on other non–cell phone smart devices, which are only increasing in usage. By failing to consider these other devices, the Court opened itself to future litigation applying *Riley* to these devices, especially considering the Court's inability to distinguish an ordinary cell phone from a smart phone. Finally, by distinguishing *Riley* from *Robinson*, the Court may have sent an unfortunate and confusing message to lower courts about adhering to pre-digital precedent—sometimes it is not

128. *See* Marks, *supra* note 111.

necessary. All of these concerns could and should have been avoided by framing the issue more broadly, so as to include both cell phones and smart devices. The Supreme Court ultimately came to the correct conclusion in its decision, but it may have created more work for itself in the near future answering this same search incident to arrest question applied to even newer technologies. The next few years will elucidate whether this decision was too limited.