Boston College Law Review

Volume 55
Issue 6 *Electronic Supplement*

Article 6

2-10-2014

The Search for a Limited Search: The First Circuit Denies the Search of Cell Phones Incident to Arrest in *United States v. Wurie*

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Recommended Citation
Evan O'Connor, *The Search for a Limited Search: The First Circuit Denies the Search of Cell Phones Incident to Arrest in United States v. Wurie*, 55 B.C.L. Rev. 59 (2014), http://lawdigitalcommons.bc.edu/bclr/vol55/iss6/6

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THE SEARCH FOR A LIMITED SEARCH: THE FIRST CIRCUIT DENIES THE SEARCH OF CELL PHONES INCIDENT TO ARREST IN *UNITED STATES v. WURIE*

Abstract: On May 17, 2013, the U.S. Court of Appeals for the First Circuit in *United States v. Wurie* held that the warrantless search of a cell phone was not justified by the search-incident-to-arrest exception to the Fourth Amendment and was thus an illegal search. In doing so, the court declined to agree with other federal appeals court solutions regarding this issue; most notably, the Fifth Circuit's 2007 decision in *United States v. Finley* and the Seventh Circuit's 2012 decision in *United States v. Flores-Lopez.* This Comment argues that the approaches taken by courts on both sides of the issue have severe vulnerabilities. It also posits that, on review, the U.S. Supreme Court should adopt a test that limits the police search to information that can be found on the phone without accessing the internet. By drawing a line regarding the searchable information in a phone, this test provides a more effective method of balancing the various concerns this issue raises.

INTRODUCTION

Since the late 1960s, the U.S. Supreme Court has held that warrantless searches of a defendant's person can be legal under the Fourth Amendment if the searches are performed incident to an arrest.[1] The advent of smartphones, however, has created a unique and complicated challenge to this well-established legal doctrine.[2] With the growth and spread of advanced cell phones, courts have been forced to tackle the question of whether the exception to the Fourth Amendment's general prohibition of warrantless searches extends to these devices.[3] Although many courts have

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[1] *See* Chimel v. California, 395 U.S. 752, 763 (1969). *See generally* U.S. CONST. amend. IV (providing U.S. citizens with the right to be free from "unreasonable searches and seizures"). The search-incident-to-arrest exception is justified by concerns of police officer safety and a desire to prevent destruction of evidence. *Chimel*, 395 U.S. at 762–63.

[2] *See* J. Patrick Warfield, *Putting a Square Peg in a Round Hole: The Search-Incident-to-Arrest Exception and Cellular Phones*, 34 AM. J. TRIAL ADVOC. 165, 166–67 (2010) (explaining the difficulty of adapting search and seizure law to new technology while balancing Fourth Amendment privacy concerns).

[3] *See, e.g.*, United States v. Flores-Lopez, 670 F.3d 803, 804 (7th Cir. 2012) (addressing this question when police searched through a phone to obtain its number); United States v. Finley, 477 F.3d 250, 254 (5th Cir. 2007) (addressing this question when police searched through an arrestee's

agreed that the exception does extend to cell phones, courts have not come to a consensus over the justification behind such an extension.[4] Furthermore, several courts have taken the opposite stance, albeit with a similar divergence in their reasoning.[5]

In 2013, the U.S. Court of Appeals for the First Circuit, in *United States v. Wurie*, held that the search-incident-to-arrest exception did not authorize the warrantless search of information on a cell phone seized from an arrestee's person.[6] The court decided that the preservation of evidence concerns underlying the exception were too minimal to justify such an invasive search of a device that carries a heightened expectation of privacy.[7] Like other courts that have confronted the issue, the First Circuit devised a bright-line rule that applies to any kind of search, on any cell phone.[8]

Part I of this Comment introduces the development of the search-incident-to-arrest exception to the Fourth Amendment and provides the factual and procedural background to *Wurie*.[9] Part II explores the differing approaches courts have taken in reaching conclusions regarding how the exception applies to cell phone searches.[10] Finally, Part III discusses common vulnerabilities that appear in courts' analyses on both sides of the issue.[11] In

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call records); United States v. Quintana, 594 F. Supp. 2d 1291, 1295–96 (M.D. Fla. 2009) (addressing this question when police searched through a phone's text messages and photographs).

[4] *Compare Flores-Lopez*, 670 F.3d at 809 (analyzing the policies underlying the search-incident-to-arrest exception—including preservation of evidence concerns—in extending the exception to the warrantless search of a cell phone), *with Finley*, 477 F.3d at 259–60 (rejecting the need to conduct a more in-depth examination of the search-incident-to-arrest exception's underlying policies in extending the exception), *and* People v. Diaz, 244 P.3d 501, 505–06 (Cal. 2011) (relying on the categorization of cell phones as containers in extending the exception).

[5] *Compare* United States v. Park, No. CR 05–375 SI, 2007 WL 1521573, at *9, *12 (N.D. Cal. May 23, 2007) (placing cell phones under the immediate area of control branch of search-incident-to-arrest analysis and concluding that the resulting analysis failed to justify the search), *with* Smallwood v. State, 113 So. 3d 724, 738 (Fla. 2013) (refusing to characterize searches of cell phones with traditional search-incident-to-arrest definitions and instead relying on the level of intrusiveness to find that the exception did not apply), *and* State v. Smith, 920 N.E.2d 949, 955 (Ohio 2011) (holding that the warrantless searches of cell phones are outside the scope of the search-incident-to-arrest exception because of a higher expectation of privacy accompanying the devices).

[6] 728 F.3d 1, 12 (1st Cir. 2013), *cert. granted*, 82 U.S.L.W. 3104 (U.S. Jan. 17, 2014) (No. 13-212).

[7] *See id.*

[8] *Id.* (indicating that the search-incident-to-arrest exception can never justify the warrantless search of cell phones); *see also Finley*, 477 F.3d at 260 (concluding that the search-incident-to-arrest exception justifies all searches of cell phones when accompanied by a lawful arrest). *But see Flores-Lopez*, 670 F.3d at 809 (declining to extend its ruling beyond similar facts due to the reluctance to address the question of increasingly invasive phone searches).

[9] *See infra* notes 13–38 and accompanying text.

[10] *See infra* notes 39–64 and accompanying text.

[11] *See infra* notes 65–94 and accompanying text.

contrast to the bright-line rules adopted by many courts—including the First Circuit in *Wurie*—this Comment posits that a more nuanced approach better balances the policies underlying the search-incident-to-arrest exception with Fourth Amendment concerns: the U.S. Supreme Court should permit warrantless searches of cell phones, but limit them to information that does not require Internet access.[12]

I. LEGAL LANDSCAPE BEHIND THE SEARCH-INCIDENT-TO-ARREST EXCEPTION AND WARRANTLESS SEARCHES OF CELL PHONES

A. *Fourth Amendment and the Development of the Exception*

The Fourth Amendment protects the right of American citizens to be free from unreasonable searches and seizures against their person, homes, and property.[13] Consequently, warrantless searches and seizures are per se unreasonable, unless a specific exception applies.[14] One such exception is the search-incident-to-arrest exception, which can be conducted after a lawful arrest has been made.[15] The current search-incident-to-arrest analysis, however, is a fairly recent phenomenon and is still developing.[16]

The U.S. Supreme Court has clarified that the search-incident-to-arrest exception only applies to the extent necessary to further evidentiary and

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[12] *See infra* notes 82–94 and accompanying text.

[13] U.S. CONST. amend. IV; *see also* Blane M. Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave it Birth*, 85 N.Y.U. L. REV. 905, 907–09 (2010) (explaining that the amendment arose out of American colonial reaction to British search and seizure practice, including infamous writs of assistance, which granted easy access to warrantless searches of person and property). Although the framers of the Constitution likely did not foresee this result, the Fourth Amendment has become the foundation for regulating our entire system of law enforcement. Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1516 (2010).

[14] Arizona v. Gant, 556 U.S. 332, 338 (2007) (*quoting* Katz v. United States, 389 U.S. 347, 357 (1967)). *See generally id.* (explaining that warrantless searches are those that are conducted without judicial oversight).

[15] *Gant*, 556 U.S. at at 339 (quoting *Chimel*, 395 U.S. at 763). The freedom of police officers to conduct a warrantless search of the arrestee's person immediately after an arrest has been a pillar of the American and English criminal procedure traditions. *See* Weeks v. United States, 232 U.S. 383, 392 (1914) (recognizing that English and American law have uniformly maintained this right); *see also* Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 387 (2001) (describing how the exception evolved from a limited right, in line with the framers' reluctance to grant discretionary authority to law enforcement, into today's broader interpretation).

[16] *See* George M. Deryl III, *A Case of Doubtful Certainty: The Court Relapses into Search Incident to Arrest Confusion in* Arizona v. Gant, 44 IND. L. REV. 395, 396 (2011) (highlighting new challenges that will develop in Fourth Amendment jurisprudence and positing that recent decisions have created ambiguities).

safety concerns.[17] In 1969, in *Chimel v. California*, the Court thus limited the application of the exception to the arrestee's person or the arrestee's immediate area of control.[18] The Court reasoned that searches of evidence found on the arrestee's person or in their immediate area of control were justified by concerns of officer safety and the destruction of evidence.[19] Accordingly, the Court later clarified that, unlike items found on the arrestee's person, items in the arrestee's immediate area can no longer be searched when the items come under the exclusive control of the police.[20]

Nevertheless, under some circumstances, searches incident to arrest can be sufficiently justified by the *theoretical* concerns of preservation of evidence and police officer protection, even if those concerns are not necessarily present in fact.[21] In 1973, in *United States v. Robinson*, the U.S. Supreme Court held that a search incident to a custodial arrest was legal even without specific concerns that the arrestee posed a threat to the officers or that any evidence was at risk.[22] In the custodial arrest context, therefore, justifications are presumed to be present.[23] In other contexts, however, it may be necessary to show the existence of the justifications in fact, rather than merely relying on theoretical support.[24]

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[17] *Chimel*, 395 U.S. at 762–63. *See generally* James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417, 1421–26 (describing the development of the pre-*Chimel* analysis of the exception in the Supreme Court).

[18] 395 U.S. at 762–63.

[19] *Id.* at 763.

[20] *See* United States v. Chadwick, 433 U.S. 1, 15 (1977), *abrogated on other grounds by* California v. Acevedo, 433 U.S. 565 (1991).

[21] United States v. Robinson, 414 U.S. 218, 235 (1973) (explaining that all custodial arrests would be treated alike for purposes of whether the justifications were present).

[22] *Id.* at 236. In this case, the police searched a cigarette box on the arrestee's person, which contained heroin. *Id.* at 223. The Court held that the police could always search closed containers found on the arrestee's person incident to an arrest. *Id.* at 236.

[23] *See id.* at 235. Custodial arrests include both formal arrests and "restraint[s] on freedom of movement of the degree associated with a formal arrest." New York v. Quarles, 467 U.S. 649, 655 (1984) (internal quotation marks omitted).

[24] *See Chadwick*, 433 U.S. at 14; Preston v. United States, 376 U.S. 364, 367 (1964). For example, the U.S. Supreme Court's 1977 opinion *United States v. Chadwick* did not involve a custodial arrest, and so there was a need to point elsewhere for justification. *See* 433 U.S. at 14 (holding that a search of an arrestee's footlocker was illegal where the locker had been in exclusive police custody for an hour and a half, removing any evidentiary or safety concerns); *see also Preston*, 376 U.S. at 367 (holding that, outside of a custodial arrest, if there is no possibility that an arrestee could reach into an area that officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply).

B. *Factual and Procedural History of* United States v. Wurie

In *Wurie*, the First Circuit confronted the issue of whether the search-incident-to-arrest exception applies to searches of cell phones.[25] On the evening of September 5, 2007, police arrested Brima Wurie for the suspected sale of drugs.[26] When Wurie arrived at the station, but before he was booked, the police discovered a cell phone on his person.[27] The officers searched through the cell phone's call log and contacts folder to determine Wurie's home phone number.[28] Using that number, the officers determined Wurie's address, which they then searched, finding contraband.[29]

Wurie was charged with possession with intent to distribute, distributing cocaine base, and being a felon in possession of a firearm and ammunition.[30] Wurie filed a motion to suppress the evidence obtained as a result of the warrantless search of his cell phone.[31] The U.S. District Court for the District of Massachusetts denied Wurie's motion to suppress, concluding that the search of the phone number associated with the "my house" contact was no different than the search of other personal containers found on the defendant's person.[32] Thus, the court found that the search fell within the search-incident-to-arrest exception.[33] A jury ultimately found Wurie guilty of all three counts and he was sentenced to 262 months in prison.[34]

On appeal, a divided panel of the First Circuit reversed the denial of the motion to suppress, vacated Wurie's conviction, and remanded the case for further proceedings.[35] The court held that the search-incident-to-arrest exception did not authorize the warrantless search of data on a seized cell phone because Wurie was not a threat to an officer and there was not an

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[25] 728 F.3d at 1.

[26] United States v. Wurie, 612 F. Supp. 2d 104, 106 (D. Mass. 2009), *rev'd*, 728 F.3d 1.

[27] *Id.* at 107.

[28] *Id.* The police had noticed that Mr. Wurie's phone was repeatedly receiving calls from a number classified as "my house." *Id.* The officer searched through the phone's call log and contacts folder to determine the number associated with that contact. *Id.*

[29] *Id.*

[30] *Id.* at 105.

[31] *Id.* During the search of Mr. Wurie's apartment, the police seized 215 grams of crack cocaine, an illegal firearm, ammunition, and drug paraphernalia. *Id.*

[32] *Id.* at 110.

[33] *Id.*

[34] *Wurie*, 728 F.3d at 2.

[35] *Id.* at 13. The First Circuit denied the government's motion for a rehearing en banc because only an authoritative holding from the Supreme Court could mend the growing split amongst the lower courts. United States v. Wurie, 724 F.3d 255, 256 (1st Cir. 2013). On January 17, 2014, the Supreme Court granted the government's writ of certiorari to review the First Circuit's holding. United States v. Wurie, No. 13-212, 2013 WL4402108, at *1 (U.S. Jan. 17, 2014).

interest in preserving evidence on his cell phone.[36] In particular, the court described the alternative ways in which police officers could preserve the evidence of an arrestee's cell phone.[37] For example, an officer could turn off the phone, place it in a protective enclosure, or copy the memory without looking at it.[38]

II. THE VARYING APPROACHES TAKEN BY COURTS ON BOTH SIDES OF THE ISSUE

Thus far, courts facing the issue of cell phone searches incident to arrest have split regarding whether or not they should be allowed.[39] Regardless of the ultimate conclusion, courts on both sides of the issue have adopted different approaches behind their decisions.[40] Section A outlines the various approaches taken by courts that have upheld the warrantless searches of cell phones as valid searches incident to arrest.[41] Section B then explores the various approaches taken by courts that have refused to extend the search-incident-to-arrest exception to warrantless cell phone searches.[42]

A. *The Different Reasoning Behind Courts' Decisions to Allow Warrantless Searches of Cell Phone Data*

Many courts have allowed warrantless searches of cell phone data after a lawful arrest, but have nevertheless taken different routes in reaching that decision.[43] Some courts apply a strict search-incident-to-arrest analysis.[44]

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[36] *Wurie*, 728 F.3d at 12. The court reviewed the district court's legal conclusion regarding the search of the cell phone de novo. *Id.* at 2 (citing United States v. Kearney, 672 F.3d 81, 88–89 (1st Cir. 2012) (reviewing a lower court's legal conclusion about a warrantless cell phone search de novo, while noting that factual findings would be reviewed only for clear error)).

[37] *Id.* at 11.

[38] *Id.*

[39] *See infra* notes 43–64 and accompanying text.

[40] *See infra* notes 43–64 and accompanying text.

[41] *See infra* notes 43–50 and accompanying text.

[42] *See infra* notes 51–64 and accompanying text.

[43] *Compare, e.g.*, United States v. Flores-Lopez, 670 F.3d 803, 809 (7th Cir. 2012) (holding that warrantless searches of cell phones are permissible after weighing the risks of the evidence against the invasiveness), *with* United States v. Young, 278 F. App'x 242, 245 (4th Cir. 2008) (holding that evidentiary concerns that generally face cell phones always justify searches), *and* Commonwealth v. Phifer, 979 N.E.2d 210, 216 (Mass. 2012) (upholding a search of a cell phone due to the high probability of evidence and potential threats to that evidence). *See generally* Sara M. Corradi, *Be Reasonable! Limit Warrantless Smart Phone Searches to* Gant*'s Justification for Searches Incident to Arrest*, 63 CASE W. RES. L. REV. 943, 948–51 (2013) (describing recent cases regarding warrantless searches of smartphones).

[44] United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007) (holding that all searches of cell phones are always automatically justified by the search-incident-to-arrest exception); *see* United States v. Murphy, 552 F.3d 405, 411 (4th Cir. 2009) (refusing to consider the invasiveness of the

Under this approach, a search is justified if it occurred pursuant to a lawful arrest.[45] For example, the U.S. Court of Appeals for the Fifth Circuit, in *United States v. Finley* in 2007, upheld a warrantless search of an arrestee's cell phone where police found several messages pertaining to the arrestee's narcotics-trafficking.[46] The court held that as long as the search followed a valid arrest, no further justification was needed.[47]

Alternatively, some courts have preferred a balancing test when upholding searches of cell phones.[48] Most notably, in its 2012 decision of *United States v. Flores-Lopez*, the U.S. Court of Appeals for the Seventh Circuit weighed threats towards the evidence and officer safety against the arrestee's countervailing interest in avoiding an invasive search.[49] Reasoning that a search for the phone's number was only minimally invasive, the court found that the evidentiary concerns outweighed any infringement on privacy.[50]

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search as a possible limitation against cell phone searches); People v. Diaz, 244 P.3d 501, 505–06 (Cal. 2011) (holding that cell phones should be treated as any other container and that their search is automatically justified if conducted incident to arrest).

[45] *Finley*, 477 F.3d at 260; *Diaz*, 244 P.3d at 505–06.

[46] *Finley*, 477 F.3d at 260. The defendant in this case was arrested following a routine traffic stop, where police observed drug paraphernalia in the defendant's van. *Id.* at 253–54. The cell phone was seized immediately upon arrest, but not searched until they arrived at the defendant's residence. *Id.* at 254.

[47] *Id.* at 259–60. In so holding, the court grouped cell phones together with any other type of closed container. *Id.* at 260. The court cited to cases that extended the exception to other types of containers, such as pagers or boxes, without a discussion of any differences between the types. *Id.* The court stated that the police were not limited in what they searched for as they could, "without any additional justification, look for evidence of the arrestee's crime." *Id.* at 259–60. Since its 2007 decision *United States v. Finley*, the U.S. Court of Appeals for the Fifth Circuit has declined to overrule its decision and has continually upheld warrantless cell phone searches incident to arrest. *See* United States v. Rodriguez, 702 F.3d 206, 210 (5th Cir. 2012) (holding that subsequent decisions of the U.S. Supreme Court did not disturb its prior holding in *Finley*); United States v. Curtis, 635 F.3d 704, 714 (5th Cir. 2011) (holding that an officer's search of a defendant's cell phone, including text messages, was justified by the search-incident-to-arrest exception).

[48] *See Flores-Lopez*, 670 F.3d at 809 (weighing the invasiveness of the search with the risks to the evidence before determining that the search of the phone was justified); *Phifer*, 979 N.E.2d at 216 (holding that the search of an arrestee's call list on his cell phone was justified due to the limited invasiveness of the search and the high probability that the phone contained evidence of the crime).

[49] 670 F.3d at 806. The *Flores-Lopez* court feared the possibility of an arrestee wiping the contents of a phone—either locally, by pressing a button and sending an emergency alert to a previously specified person—or remotely, through a mobile–security application. *See id.* at 808; *see also* Jamie Lendino, *How to Remotely Disable Your Lost or Stolen Phone*, PC (Apr. 12, 2012), http://www.pcmag.com/article2/0,2817,2352755,00.asp, *archived at* http://perma.cc/UWY4-UVR3 (listing the various methods for disabling smartphones remotely).

[50] *See Flores-Lopez*, 670 F.3d at 809. The court considered alternative methods the police could use to counter possible threats to preserving cell phone data, such as shutting off the phone or sealing off the network, but found them to be too flawed or burdensome to tip the scales in this

B. *The Different Reasoning Behind Courts Refusing to Extend the Exception to Cell Phones*

Despite a majority of courts permitting the warrantless searches of cell phones, a small number of courts have not extended the search-incident-to-arrest exception to cell phone searches.[51] As with the majority, these courts have applied different reasoning to reach this conclusion.[52]

One court limited the reach of the exception based on the type of information generally stored on cell phones.[53] In 2007, in *United States v. Park*, the U.S. District Court for the Northern District of California reasoned that the type of information stored on a phone is different from the information stored on other items that could be held on one's person, such as a wallet or an address book.[54] Due to the type of information stored on a phone, the court explained that cell phones could not be considered as being held on the person for purposes of a warrantless search.[55] Instead, the court characterized a phone as an item in the arrestee's immediate area.[56] Accord-

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case. *Id.* In so holding, the court did not explain what searches would be so invasive as to tip the scales in favor of the arrestee, but merely left open the possibility that such an upper limit exists. *Id.* at 810. In his dissent to the First Circuit's 2013 *United States v. Wurie* decision, Judge Howard agreed that there could be such an upper limit and suggested that constitutional lines should be placed to prevent a cell phone search from going too far. 728 F.3d 1, 21 (1st Cir. 2013) (Howard, J., dissenting), *cert. granted*, 82 U.S.L.W. 3104 (U.S. Jan. 17, 2014) (No. 13-212).

[51] *See, e.g.*, United States v. Park, No. CR 05–375 SI, 2007 WL 1521573, at *12 (N.D. Cal. May 23, 2007); Smallwood v. State, 113 So. 3d 724, 740 (Fla. 2013); State v. Smith, 920 N.E.2d 949, 955 (Ohio 2011); *see also supra* notes 43–50 (discussing courts that have extended the exception to cell phone searches).

[52] *See Park*, 2007 WL 1521573, at *9 (focusing on the type of information stored in the phone); *Smallwood*, 113 So. 3d at 740 (weighing the privacy concerns against the evidentiary risks involved); *Smith*, 920 N.E.2d at 955 (concentrating on the heightened expectation of privacy of cell phones).

[53] *See Park*, 2007 WL 1521573, at *9.

[54] *Id.*

[55] *See id.* The court noted that cell phones, unlike other objects held on the person—e.g., pagers or address books—contain a vast amount of personal information. *Id.* at *8. For example, individuals can record some of their "most private thoughts and conversations on their cell phones through email and text, voice and instant messages." *Id.* The court observed that the extensive scope of this information reached beyond the type of information that is otherwise typically carried on the person, i.e., the type of information previously subject to the search-incident-to-arrest doctrine. *See id.* As a result, the court held that the cell phone cannot be considered to be held on the person for purposes of a search-incident-to-arrest analysis. *Id.* at *9.

[56] *Id.* at *9. Recall that the distinction between items found on the person and those found in the immediate area has legal significance in the search-incident-to-arrest analysis. *See supra* notes 18–20 and accompanying text. For example, unlike items found on the person, items in the immediate area can only be searched if they have not yet come under the exclusive control of the police. United States v. Chadwick, 433 U.S. 1, 15 (1977), *abrogated on other grounds by* California v. Acevedo, 433 U.S. 565 (1991). As a result, by categorizing a cell phone as an item in the ar-

ingly, the court held that the exception did not apply because the phone was in the exclusive control of the police at the time.[57] Although stopping short of excluding all warrantless phone searches, the court set a foundation upon which future courts could expand.[58]

A second approach declines to extend the exception because of the perception that there is a high expectation of privacy associated with the modern cell phone.[59] According to courts that follow this approach, this higher expectation of privacy is a function of modern cell phones' features and the quality and quantity of information stored on them.[60]

Finally, a hybrid approach weighs the heightened expectation of privacy against the possible threats toward the evidence stored on a cell phone to conclude that the exception does not apply.[61] Under this approach, courts—including the First Circuit in *Wurie*—reason that the information stored on a cell phone is often personal information that, without the phone, is otherwise off-limits during a search incident to arrest.[62] Moreover, weighing this heightened expectation of privacy against the typical interests that justify the exception, these courts conclude that the potential threats against evi-

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restee's immediate area, the court made it significantly easier to invalidate the search. *See id.*; *Park*, 2007 WL 1521573, at *9.

[57] *See Park*, 2007 WL 1521573, at *4 (reasoning that the phone was in exclusive police control because it was not searched until after the defendant was booked). It has been argued that the timing differences between *Finley* and *Park*—where the *Finley* search occurred immediately and the *Park* search occurred an hour and a half after the arrest—enabled the *Park* court's different conclusion and limited the decision's usefulness as a victory for privacy rights advocates. *See* Ashley B. Snyder, *The Fourth Amendment and Warrantless Cell Phone Searches: When Is Your Cell Phone Protected?*, 46 WAKE FOREST L. REV. 155, 170 (2011) (describing the *Park* analysis as a forerunner for other decisions, but expressing doubt as to its standing as precedent for the proposition that warrantless phone searches cannot be justified by the search-incident-to arrest exception).

[58] *See Park*, 2007 WL 1521573, at *8; *see also id.* (describing the line between cell phones and computers as "increasingly blurry").

[59] United States v. Wall, No. 08-60016-CR, 2008 WL 5381412, at *3 (S.D. Fla. Dec. 22, 2008), *aff'd*, 343 F. App'x 564 (11th Cir. 2009); *Smith*, 920 N.E.2d at 955.

[60] *See* Schlossberg v. Solesbee, 844 F. Supp. 2d 1165, 1170 (D. Or. 2012); *Smith*, 920 N.E.2d at 955. *See generally Wurie*, 728 F.3d at 8 (discussing the features of a cell phone that create serious privacy concerns, including information of a highly personal nature, such as photographs, text messages, audio recordings, web search and browser history, bank account records, medical records, as well as direct access to the home, via a linked camera). In the 2011 case *State v. Smith*, the Ohio Supreme Court refused to distinguish between smartphones and more conventional phones because it concluded that even standard phones were advancing to have features and capabilities that create the same privacy concerns. *Smith*, 920 N.E.2d at 954.

[61] *See Wurie*, 728 F.3d at 12; *Smallwood*, 113 So. 3d at 738.

[62] *Wurie*, 728 F.3d at 8–9 (listing the personal information stored on a cell phone, including photographs, text messages, audio recordings, browsing history, calendar appointments, web search history, purchases, financial information, and medical history); *Smallwood*, 113 So. 3d at 738 (comparing searches of cell phones to searches of home offices with access to cabinet drawers and desks).

dence are minimal and can be easily mitigated.[63] Thus, after weighing the respective interests, courts applying the hybrid approach hold that warrantless cell phone searches cannot be justified by the search-incident-to-arrest exception.[64]

III. THE COMMON FLAWS IN THE REASONING OF BOTH SIDES AND AN OVERLOOKED ALTERNATIVE: THE INTERNET TEST

A. *The Flaws in the Reasoning of Both Sides*

All of the approaches that courts utilize to analyze whether the search incident-to-arrest-exception applies to cell phones suffer from serious flaws in their reasoning.[65] The strict incident-to-arrest analysis, which automatically applies the exception to cell phone searches incident to an arrest, fails to take into account the original justifications for the search-incident-to-arrest exception.[66] Attempting to justify an automatic application to cell phones by classifying them as containers is also problematic, as it relies too heavily on a narrow categorization of cell phones.[67] In fact, the case law has

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[63] *Wurie*, 728 F.3d at 11 (explaining that any fears about remote wiping of the phone's information could be mitigated by shutting off the phone, copying the phone's contents, or placing the phone in a protective enclosure); *Smallwood*, 13 So. 3d at 740 (determining that the police could not have access to "the most private and personal details of an arrestee's life" through cell phone searches simply because the phone can be carried in "a person's pocket" and explaining that there was no actual danger of the phone's information being remotely wiped).

[64] *Wurie*, 728 F.3d at 12; *Smallwood*, 13 So. 3d at 740.

[65] *See* Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 SANTA CLARA L. REV. 183, 187, 219 (2010) (criticizing the courts' attempts to adopt "'an ill-fitting bright-line rule to the iPhone and its peers'" (quoting Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 46 (2008)); Chelsea Oxton, *The Search Incident to Arrest Exception Plays Catch Up: Why Police May No Longer Search Cell Phones Incident to Arrest Without a Warrant*, 43 CREIGHTON L. REV. 1157, 1219 (2010) (concluding that it is undesirable and inappropriate to apply ill-fitting bright-line rules that grant the police broad powers when searching advanced devices); *see also* Samuel J. H. Beutler, Note, *The New World of Mobile Communication: Redefining the Scope of Warrantless Cell Phone Searches Incident to Arrest*, 15 VAND. J. ENT. & TECH. L. 375, 396 (2013) (explaining that the courts, through their reliance on all-or-nothing solutions, have overlooked numerous creative solutions to this problem). *See generally* Gershowitz, *supra*, at 45–49 (detailing the shortcomings of a polarized stance on this issue).

[66] *Compare* Chimel v. California, 395 U.S. 752, 763 (1969) (indicating that the justifications behind the search-incident-to-arrest exception are the preservation of evidence and officer safety), *with* United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007) (applying the strict approach and holding that all searches of cell phones are always automatically justified by the search-incident-to-arrest exception), United States v. Young, 278 F. App'x 242, 245 (4th Cir. 2008) (same), *and* United States v. Wurie, 728 F.3d 1, 11–12 (1st Cir. 2013), *cert. granted*, 82 U.S.L.W. 3104 (U.S. Jan. 17, 2014) (No. 13-212) (applying the hybrid approach and analyzing whether evidentiary concerns were present to justify searches-incident-to-arrest of a cell phone).

[67] *See* Arizona v. Gant, 556 U.S. 332, 345 (2009) (discussing the problems with relying heavily on a container classification). *Compare Finley*, 477 F.3d at 260 (justifying the automatic appli-

never made it clear that such a classification is sufficient to warrant a search incident to arrest.[68]

Moreover, the decisions rejecting warrantless cell phone searches also suffer from critical weaknesses.[69] Take, for example, the approach that focuses on the type of information stored on cell phones to classify a phone as an object in the immediate area, as opposed to on the arrestee's person.[70] This method refuses to recognize the reality of what a cell phone is and how it is generally carried.[71] Cell phones are small items that are usually carried on the person, either in pockets or handbags, rather than kept in the immediate area.[72] Additionally, the approach that invalidates searches because of the high expectation of privacy is flawed because it lumps all of the information stored on a cell phone together.[73] This approach fails to recognize that there are different expectations of privacy for different functions of the phone.[74]

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cation of the search-incident-to-arrest exception in part by classifying cell phones as containers), *with* United States. v. Robinson, 414 U.S. 218 *passim* (1973) (crafting a modern analysis of the search-incident-to-arrest doctrine without mentioning the necessity or sufficiency of classifying a searched item as a container). For example, a definition of container that includes cell phones is far from settled in the Supreme Court's jurisprudence. *See* New York v. Belton, 453 U.S. 454, 460 (1981) (defining a container as anything that is physically capable of holding another object); *see also* State v. Smith, 920 N.E.2d 949, 954 (Ohio 2011) (concluding that the traditional definition of container includes only objects that are capable of holding other objects).

[68] *See Gant*, 556 U.S. at 345 (explaining that any rule that automatically allows the search of containers represents a major privacy threat). *See generally Robinson*, 414 U.S. 218, *passim* (omitting any mention of a need to classify an item as a container).

[69] *See* Gershowitz, *supra* note 65, at 45–49; Orso, *supra* note 65, at 219–20; Beutler, *supra* note 65, at 396.

[70] *See* United States v. Chadwick, 433 U.S. 1, 15 (1977), *abrogated on other grounds by* California v. Acevedo, 433 U.S. 565 (1991); United States v. Park, CR 05–375 SI, 2007 WL 1521573, at *9 (N.D. Cal. May 23, 2007). The distinction between a search of the arrestee's person and the search of the arrestee's immediate area is significant with respect to the timing of the search incident to arrest. *Chadwick*, 433 U.S. at 14; Snyder, *supra* note 57, at 168.

[71] *See* Yanqing Cui et al., *A Cross-Culture Study on Phone Carrying and Personalization*, *in* USABILITY AND INTERNATIONALIZATION: HCI AND CULTURE 483, 483, 491 (Nuray Aykin ed., 2007) (illustrating that most men and women carry their cell phones on their person, whether in trousers or bags)

[72] *See id.* at 483, 491.

[73] *See* Orso, *supra* note 65, at 187 (arguing that, because different information on phones have different expectations of privacy, the two types of information should be treated differently); *cf. Smith*, 920 N.E.2d at 955 (holding that all cell phones have a heightened expectation of privacy that protects them from searches incident to arrest).

[74] *See* Orso, *supra* note 65, at 187 (explaining that different types of information on cell phones carry with them different expectations of privacy); Beutler *supra* note 65, at 401–02 (explaining that the information found in traditional cell phone functions, such as an address book or call log, is of the kind commonly found in incidents to arrest, and therefore has different privacy expectations than the information found in nontraditional cell phone functions, such as web browsing or banking—which is information that is not typically found during these searches); *id.*

The balancing approach, which weighs the arrestee's privacy interests against evidentiary threats, suffers from the very same flaw: it treats the privacy interests of all cell phone searches the same, regardless of whether the court interprets the test in favor of or against the warrantless search of cell phones.[75] Because searches of cell phones vary in terms of invasiveness, a one-size-fits-all balancing test is inadequate.[76] For example, searching through a phone's contact list is far less invasive than searching through medical or financial records on a phone.[77]

These considerations demand a more nuanced test to determine the applicability of the search-incident-to-arrest exception to cell phone searches.[78] Although courts on both sides have expressed that a bright-line test provides clarity to police officers with regard to their duties and limitations in the field, a bright-line test need not be all-or-nothing.[79] A middle-ground solution can achieve clarity while respecting the privacy concerns of the

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at 402 (explaining that advanced phone functions resemble the capabilities of computers and therefore carry a similar heightened expectation of privacy, unlike traditional phone functions).

[75] *See* Orso, *supra* note 65 at 187 (explaining that varying degrees of privacy expectations attach to different types of cell phone information, which may lead to different Fourth Amendment conclusions about the legality of a search); Beutler, *supra* note 65, at 401 (explaining that information associated with traditional versus nontraditional cell phone functions have differing privacy expectations); *cf. Wurie*, 728 F.3d at 8–9 (mentioning many characteristics of advanced phones, such as access to bank records, medical records, and home cameras—without discussing the availability of these applications on more basic phones).

[76] *See* Gershowitz, *supra* note 65, at 45–49; Orso, *supra* note 65, at 187; Beutler, *supra* note 65, at 401.

[77] *See* Beutler, *supra* note 65, at 401 ("[An] appropriate test for the scope of a cell phone search incident to arrest should concern the function of a cell phone."); *see also* Orso, *supra* note 65, at 187 (explaining that information such as text messages and photographs are far more private than lists of recently dialed phone numbers or address books).

[78] *See supra* notes 65–77 and accompanying text (discussing the bright-line approaches taken by courts and rejecting each approach as flawed).

[79] *See Wurie*, 728 F.3d at 21 (Howard, J., dissenting) (explaining that a possible solution to cell phone searches can be more moderate than an all-or-nothing approach); Beutler, *supra* note 65, at 396 (highlighting some of the creative possibilities that have been overlooked in favor of these all-or-nothing approaches); *supra* notes 82–94 (discussing a more nuanced approach). *But see Wurie*, 728 F.3d at 6, 12–13 (majority opinion) (highlighting that a bright-line test provides clarity); United States v. Flores-Lopez, 670 F.3d 803, 809 (7th Cir. 2012) (same). The courts' fear of a more nuanced position stems from the concern that it would be too difficult for police to implement in the field. *See Wurie*, 728 F.3d at 6, 12–13 (expressing distaste for highly subjective and fact-specific rules because of their inherent difficulty for officers to apply); Beutler, *supra* note 65, at 401 (explaining that the best rule for searches of cell phones incident to arrest requires simplicity for police in the field).

arrestee.[80] Moreover, a middle-ground solution avoids the flaws common to both extremes.[81]

B. *The Internet Test*

Drawing the line at information that is available without accessing the Internet creates an easy rule while safeguarding the privacy concerns of the arrestee.[82] Under this approach, the phone's contact list, photos, call log, and text messages would be searchable by the police, whereas e-mail, browsing history, and most mobile applications would not.[83]

The Supreme Court should adopt this bright-line rule, which addresses both the privacy and evidentiary concerns raised by cell phone searches.[84] The test is not difficult for police to implement.[85] Police can easily determine when an application requires online functionality by disabling the phone's Internet access.[86] Moreover, this test protects the arrestee's privacy concerns.[87] It leaves accessible the kind of information that the search-incident-to-arrest exception has traditionally left available to police, but

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[80] *See Wurie*, 728 F.3d at 21 (Howard, J., dissenting).

[81] *See* Gershowitz, *supra* note 65, at 45–49 (outlining the flaws of an all-or-nothing methodology); *infra* notes 91–94 and accompanying text (illustrating how a middle-ground approach avoids these flaws).

[82] *See Wurie*, 728 F.3d at 12 (explaining the need for an appropriate Fourth Amendment rule to be clear as well as consistent with constitutional rights); *see also* Beutler, *supra* note 65, at 401 (proposing a broader test that distinguishes between computer-like and traditional cell phone functions); *infra* notes 83–90 and accompanying text.

[83] Gershowitz, *supra* note 65, at 56 (distinguishing between information *on* a cell phone and information *in* a cell phone); *see also* Beutler, *supra* note 65, at 400–01 (comparing these advanced phone functions to computer capabilities and arguing for their increased privacy expectations); *id.* at 401–02 (concluding that text messages are similar enough to pager messages that they should be similarly searchable).

[84] *See infra* notes 85–94 and accompanying text; *see also* United States v. Wurie, No. 13-212, 2013 WL4402108, at *1 (U.S. Jan. 17, 2014).

[85] *Compare* Beutler, *supra* note 65, at 399 (calling rules unworkable when they call for difficult tasks for police in categorizing cell phones in legal categories prior to a search), *with* Jim Martin, *How to Turn Off 3G and Mobile Data on an iPhone*, TECHADVISOR (May 16, 2013), http://www.pcadvisor.co.uk/how-to/mobile-phone/3276632/how-turn-off-3g-data-on-iphone/, *archived at* http://perma.cc/R8LE-KK9H (illustrating that disabling a phone's Internet access reveals which applications require online functionality). *See generally Wurie*, 728 F.3d at 12 (concluding that a bright-line rule regarding cell phone searches is necessary to avoid fact-specific and subjective rules that would be difficult for officers in the field to apply).

[86] *See* Martin, *supra* note 85; *see also Disable the Internet Connection on Your Smartphone*, KIOSKEA.NET (Jan. 2013), http://en.kioskea.net/faq/7399-disable-the-internet-connection-on-your-smartphone, *archived at* http://perma.cc/E4Y4-MHGK (providing instructions on how to disable cell phone internet access).

[87] *See* Snyder, *supra* note 57, at 162, 164 (illustrating that the kinds of information protected by this Comment's approach, e.g., information that can be accessed only through the Internet, yield greater privacy concerns for arrestees).

protects thousands of pages of electronic data that would otherwise be outside its reach.[88] Finally, this test does not suffer from serious evidentiary concerns.[89] For example, information requiring Internet access—such as the type of information that would be protected from a search-incident-to-arrest under this approach—is typically not downloaded onto the phone and would thus survive a remote wiping.[90]

Moreover, the Supreme Court should adopt the Internet test because it overcomes many drawbacks that are present in other approaches.[91] The test treats cell phones in a way that is consistent with how people use them in reality, rather than grouping them into poorly fitting legal categorizations or legal fictions.[92] Furthermore, it takes into account the different types of in-

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[88] *See* Beutler, *supra* note 65, at 401 (explaining that basic information on cell phones, such as address books and call lists, are similar to items that have traditionally been subject to searches incident to arrest, whereas more advanced functions, such as e-mail and Internet access, are accompanied by higher expectations of privacy in other settings). The features that fall outside of the Internet's scope either involve minimal privacy concerns or are similar to the other types of information that courts have allowed, such as address books, contacts, call logs, and phone numbers. *Id.*; *see* Smith v. Maryland, 422 U.S. 735, 745 (1979) (holding that there is no expectation of privacy in phone numbers dialed); United States v. Chan, 830 F. Supp. 531, 534 (N.D. Cal. 1993) ("The expectation of privacy in an electronic repository for personal data is . . . analogous to that in a personal address book or other repository for such information."). The features protected against a search under this approach are those that have been traditionally protected by courts both recently and in the past. *See* United States v. Cotterman, 709 F.3d 952, 957 (9th Cir. 2013), *cert. denied*, 82 U.S.L.W. 3095 (U.S. Jan. 13, 2014) (No. 13-186) (explaining that private materials maintain their expectation of privacy even though in digital form); United States v. Warshak, 631 F.3d 266, 287 (6th Cir. 2010) (holding that there is an expectation of privacy in the contents of an e-mail).

[89] *See* Gershowitz, *supra* note 65, at 56 (explaining that the web-based information on a cell phone is not strictly located on the phone, but instead "float[s] around on electronic servers in cyberspace"). *See generally Flores-Lopez*, 670 F.3d at 808 (describing the evidentiary threats to information stored on cell phones, such as remote wiping).

[90] *See* Gershowitz, *supra* note 65, at 56. *See generally* Lendino, *supra* note 49 (listing the various methods for disabling smartphones remotely).

[91] *See* Gershowitz, *supra* note 65, at 45–49 (highlighting problems that arise from the courts' various all-or-nothing solutions); *infra* notes 92–94 and accompanying text; *see also Wurie*, 2013 WL4402108, at *1.

[92] *Compare Robinson*, 414 U.S. *passim* (crafting a modern analysis of the search-incident-to-arrest doctrine without mentioning the necessity or sufficiency of classifying a searched item as a container), *and Smith*, 920 N.E.2d at 954 (concluding that the traditional definition of container includes only objects that are capable of holding other objects), *with Finley*, 477 F.3d at 260 (categorizing cell phones as containers to help justify the automatic application of the search-incident-to-arrest exception). *Compare* Yanqing Cui et al., *supra* note 71, at 483, 491 (illustrating that most men and women carry their cell phones on their person, whether in trousers or bags), *with Park*, 2007 WL 1521573, at *12 (classifying cell phones as "in the arrestee's immediate area" rather than "on their person" to take advantage of the different analysis that comes with the distinction). *See generally* Jana L. Knott, *Is There an App for That? Reexamining the Doctrine of Search Incident to Lawful Arrest in the Context of Cell Phones*, 35 OKLA. CITY L. REV. 445, 480 (2010) (concluding that rationalizing searches based on legal fictions is unacceptable); Snyder, *supra* note 57,

formation on a phone and the different levels of privacy associated with the information.[93] Finally, this test is applicable to all cell phone types, as it addresses the particular functions of each phone, rather than the type of phone.[94]

CONCLUSION

The First Circuit's decision in *United States v. Wurie* is the latest chapter in a long debate amongst courts about whether the search-incident-to-arrest exception should be extended to cover the warrantless searches of cell phones. Thus far, courts have split between two extremes, albeit grounding their decisions in varying rationales. Each of these approaches has serious flaws that weaken its constitutionality or usefulness in the field. Despite the courts' failure to recognize them, nuanced solutions are both permissible and more effective. The U.S. Supreme Court should thus reject both extremes and adopt a bright-line Internet test that limits warrantless cell phone searches to only what can be accessed without the Internet. This test would effectively allow the police to view only information that is traditionally searchable incident to arrest, while preventing them from searching extremely private information. Importantly, this test is easy for police to follow in the field and assuages the privacy concerns of arrestees.

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Preferred Citation: Evan O'Connor, Comment, *The Search for a Limited Search: The First Circuit Denies the Search of Cell Phones Incident to Arrest in* United States v. Wurie, 55 B.C. L. REV. E. SUPP. 59 (2014), http://lawdigitalcommons.bc.edu/bclr/vol55/iss6/6/.

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at 183 (concluding that cell phone technology has evolved to the point that courts should not maintain legal fictions and categorize phones alongside address books and pagers).

[93] *See* Gershowitz, *supra* note 65, at 57 (arguing that information stored on the phone is akin to address books and other searchable items, whereas information acquired via the Internet is much more private, such as medical records); Orso, *supra* note 65, at 187 (highlighting the different expectations of privacy between different types of information on a phone); Beutler, *supra* note 65, at 401 (describing that an appropriate rule should take the different functions of a cell phone into account).

[94] *See* Orso, *supra* note 69, at 223 (describing conventional phones as still requiring workable standards because of their capability of storing large amounts of personal data); Beutler, *supra* note 65, at 401 (concluding that keeping the same rule for conventional phones and smartphones makes it simpler for police).