Police Cell Phone Searches: Where's The Privacy

John O. Hayward
POLICE CELL PHONE SEARCHES:  
WHERE’S THE PRIVACY?  
By John O. Hayward* 

I see no principled basis for distinguishing a warrantless search of a cell phone from the search of other types of personal containers found on a defendant’s person...¹ 

ABSTRACT & OUTLINE

Abstract 
Legal academicians are in a dither that law enforcement, using the exception of a search incident to a lawful arrest, are conducting warrantless searches of cell phones found on the person of those they take into custody. They regard such searches as violating the arrestees’ expectation of privacy, although courts that have considered the matter, by an overwhelming majority, have found lawful arrest trumps any expectation of privacy. This paper examines the legal precedent for searches incident to a lawful arrest being an exception to the Fourth Amendment’s prohibition against unreasonable searches and seizures, inquires into the expectation of privacy and exactly how, and if, cell phones fall under its umbrella, and analyzes two leading cases in this area to determine which is more consistent with U.S. Supreme Court opinions and the better rule of law.

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I. INTRODUCTION

In the Canadian film Chloe (2009) a wife casually picks up her husband’s cell phone and accesses it only to discover a surprising message from a young woman with whom he had spent the previous night. While some may be concerned that their cell phones may contain incriminating evidence of their moral peccadilloes, legal academicians are in a dither that law enforcement, using the exception of a search incident to a lawful arrest, have been conducting warrantless searches of cell phones found on the person of those they take into custody. They regard such searches as violating the arrestees’ expectation of privacy, although courts that have considered the matter, by an overwhelming majority, have found lawful arrest trumps any expectation of privacy. This paper examines the legal precedent for searches incident to a lawful arrest being an exception to the Fourth

2 The film is an adaptation of the French film Nathalie (2003) where the betrayed wife also learns of her husband’s infidelity by accessing his cell phone messages. Philandering spouses should know better than to leave evidence of their dalliances in so easily accessible a location.


6 See Gershowitz, supra note 4, at 1137, fn. 66. Federal Appellate Circuits where searches have been allowed are the Fourth, Fifth, Seventh, Tenth and Eleventh. The states of Arizona, California, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Minnesota, Missouri, and Virginia have also permitted searches as well as the Virgin Islands. The cases are warrant: United States v. Pineda-Areola, 372 F. App’x 661, 663 (7th Cir. 2010) (explaining that dialing the phone number associated with an arrestee is not a search, but that even if it were, it would be permissible to search the phone of an arrestee incident to arrest); United States v. Fuentes, 368 F. App’x 95, 99 (11th Cir. 2010) (per curiam) approving search incident to arrest of cell phone; United States v. Murphy, 552 F.3d 405, 410-12 (4th Cir. 2009) (upholding search incident to arrest of cell phone and rejecting argument that phones with larger storage capacity should be treated differently than early-generation cell phones); United States v. Young, 278 App’x 242, 246 (4th Cir. 2008) (per curiam) approving search incident to arrest of cell phone because, even though search was not authorized by warrant being executed, police inevitably would have arrested defendant and would have been entitled to search the phone incident to arrest); Newhard v. Borders, 649 F. Supp. 2d 440, 448-49 (W.D. Va. 2009) (noting that the Fourth Circuit approves searching cell phones incident to arrest and granting officers qualified immunity for doing so); Brady v. Gonzalez, No.
Amendment’s prohibition against unreasonable searches and seizures,\(^7\) inquires into the expectation of privacy and exactly how, and if, cell phones fall under its umbrella, and analyzes two leading cases in this area to determine which is more consistent with U.S. Supreme Court opinions and the better rule of law. At the outset it should be noted that the Supreme Court has ruled that any expectation of privacy in one’s cell phone can be sharply limited, if not eliminated, by workplace policies and procedures.\(^8\)
II. ORIGIN OF SEARCH INCIDENT TO ARREST EXCEPTION

A. Search of the Person

The seminal case allowing a search of the person incident to a lawful arrest is *Chimel v. California*. In *Chimel*, police officers armed with an arrest warrant but not a search warrant, were admitted to petitioner's home by his wife, where they awaited petitioner's arrival. When he entered, he was served with the warrant. Although he denied the officers' request to "look around," they conducted a search of the entire house "on the basis of the lawful arrest." At petitioner's trial on burglary charges, items taken from his home were admitted over objection that they had been unconstitutionally seized. His conviction was affirmed by the California appellate courts, which held, despite their acceptance of petitioner's contention that the arrest warrant was invalid, that, since the arresting officers had procured the warrant "in good faith," and since, in any event, they had had sufficient information to constitute probable cause for the arrest, the arrest was lawful. The U. S. Supreme Court held that an arresting officer may search the arrestee’s person to discover and remove weapons and to seize evidence to prevent its concealment or destruction, and may search the area “within the immediate control “ of the person arrested, meaning the area from which he might gain possession of a weapon or destructible evidence. The Court also held that although the reasonableness of a search incident to arrest depends upon "the facts and circumstances -- the total atmosphere of the case," those facts and circumstances must be viewed in the light of established Fourth Amendment principles, and the only reasoned distinction is one between (1) a search of the person arrested and the area within his reach, and (2) more extensive searches. Thus the legal principle was established that the search of a person incident to a lawful arrest did not require a warrant to comport with the Fourth Amendment.

B. Search of Closed Containers on the Person

In 1973 the question arose whether the police could search closed containers on the person of the arrestee. The high court answered in the affirmative in the case of *United States v. Robinson*. In that case, as a result of a previous check of Robinson’s operator’s permit, a police officer had probable cause to arrest him for driving while his license was revoked. The officer then made a full custody arrest for the offense. Following prescribed procedures, the officer searched Robinson’s person and in the course of the search found in a coat pocket a cigarette package that contained heroin. At trial the heroin was admitted into evidence and Robinson was convicted of a drug offense. On appeal, his conviction was reversed on the ground that the heroin was obtained as a result of a search in violation of the Fourth Amendment. The state appealed to the U. S. Supreme Court, which reversed the Court of Appeals, holding that in the case of a lawful arrest, a full search of the person is not only an exception to the Fourth Amendment’s warrant requirement, but is also a


9 See supra note 3.
10 395 U.S. at 762-763.
11 Id. at 765-766.
12 Id.
13 414 U.S. 218.
14 Id.
“reasonable” search under that Amendment.\textsuperscript{15} The Court further held that a search incident to a valid arrest is not limited to a frisk of the suspect’s outer clothing and removal of such weapons as the arresting officer may, as a result of such frisk, reasonably believe and ascertain that the suspect has in his possession, and the absence of probable fruits or further evidence of the particular crime for which the arrest is made does not narrow the standards applicable to such a search.\textsuperscript{16} The Justices went on to rule that a custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment and, a search incident to the arrest requires no additional justification, such as the probability in a particular arrest situation that weapons or evidence would, in fact, be found upon the suspect’s person.\textsuperscript{17} Further, the Court reasoned, it does not matter that the arresting officer did not have any fear of the defendant or that he himself did not suspect that the defendant was armed.\textsuperscript{18} Having in the course of a lawful search come upon the crumpled package of cigarettes, he was entitled to inspect it, and when his inspection revealed the heroin capsules, the was entitled to seize them as “fruits, instrumentalities, or contraband” probative of criminal conduct.\textsuperscript{19} Therefore, \textit{Robinson} lays the legal foundation for searches of containers found upon persons lawfully arrested.

Another search of the arrestee’s person occurred in \textit{Thornton v. United States},\textsuperscript{20} where a man in a vehicle aroused a police officer’s suspicion by avoiding driving near the officer’s car.\textsuperscript{21} Consequently, the officer checked the plates on the vehicle and discovered that they were issued for a different car.\textsuperscript{22} Before the police officer could stop the vehicle, however, the suspect pulled into a parking lot, exited the automobile, and walked away from it before the officer approached him.\textsuperscript{23} After approaching the suspect, the police officer conducted, with the suspect’s consent, a pat-down search and discovered marijuana and cocaine in the suspect’s pocket.\textsuperscript{24} After the officer arrested the suspect for drug possession, the officer proceeded to search the passenger compartment of the suspect’s vehicle, discovering a handgun under the seat.\textsuperscript{25} Although the issue the Court was asked to decide in \textit{Thornton} was whether the search of the passenger compartment required a warrant (the Court decided it didn’t),\textsuperscript{26} the legality of the officer’s search of defendant’s person was never questioned. Thus containers\textsuperscript{27} found on an arrestee’s person have come to be known as “containers immediately associated with the person of the arrestee.”\textsuperscript{28}

\textsuperscript{15} \textit{Id.} at 224.
\textsuperscript{16} \textit{Id.} at 227, citing \textit{Terry v. Ohio}, 392 U.S. 1 (1968).
\textsuperscript{17} \textit{Id.} at 235.
\textsuperscript{18} \textit{Id.} at 236.
\textsuperscript{20} \textit{541 U.S. 615} (2004).
\textsuperscript{21} \textit{Id.} at 617-618.
\textsuperscript{22} \textit{Id.} at 618.
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} \textit{Id.}
\textsuperscript{25} \textit{Id.}
\textsuperscript{26} \textit{Id.} at 623-624. In so deciding, the Court relied on \textit{New York v. Belton}, 453 U.S. 454 (1981) (search of vehicle passenger compartment allowed even though arrestee was not in vehicle at the time of the search). \textit{Belton} has been limited by \textit{Arizona v. Gant}, 556 U.S. 332 (2009) where the Court ruled that the case did not authorize a vehicle search incident to a lawful arrest after the arrestee had been secured and could not access the interior of the vehicle.
\textsuperscript{27} Courts have wrestled with “containers” of all sizes and shapes. In addition to the “crumpled up cigarette package of \textit{Robinson, supra} note 13, warrantless searches of a wallet (United States v. Molinaro, \textit{877 F.2d} 1341, 1346 (7th Cir. 1989)) and an address book (United States v. Rodriguez, \textit{995 F.2d} 776, 778 (7th Cir. 1993)) found on the person of an arrestee have been held to be valid as incident to a lawful arrest, whereas similar searches of a footlocker near the person of the arrestee (United States v. Chadwick, \textit{433 U.S. 1}, 3-4 (1977) and a suitcase in the trunk of an automobile
C. Cell Phones as Closed Containers

Some courts have analogized cell and smart phones to containers found on the person. In *United States v. Finley*, the United States Court of Appeals for the Fifth Circuit upheld a district court's denial of the defendant's motion to suppress call records and text messages retrieved from his cell phone. In reaching its decision, the court reasoned that a cell phone or pager is personal property “immediately associated” with the arrestee, thus treating cell phones and pagers similar to wallets or address books.

On the other hand, in *United States v. Park*, the United States District Court for the Northern District of California allowed a defendant's motion to suppress a warrantless search of his cell phone. In reaching its decision, the court applied the reasoning in *United States v. Chadwick*. It compared laptops to modern cell phones because, like laptops, “modern cellular phones have the capacity for storing immense amounts of private information.” The court stated that persons have lesser privacy interests in address books or pagers found on their persons, which contain less personal information. Because the search of the cell phone's contents was not based on exigent circumstances, the court held that the search did not qualify under the search incident to arrest exception and stated that the officers should have obtained a warrant before conducting a search.

D. Pagers - Search Incident to Arrest Trumps Expectation of Privacy

Even where courts find that persons has a reasonable expectation of privacy in the information stored in their electronic device, they have ruled that the search incident to a lawful arrest overcomes the expectation of privacy. For example, in *United States v. Chan*, a federal district court compared a pager to a personal address book saying that people have a “reasonable expectation of privacy...”

(Arkansas v. Sanders, 442 U.S. 753 (1979) (both cases overruled in part by California v. Acevedo, 500 U.S. 565 (1991)) were found to be unreasonable because of a heightened expectation of privacy.

28 See 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §5.5(a), at 176 (3d ed. 1996) (“However, the Robinson search-incident-to-arrest authority was deemed to extend to containers on the person and containers such as a person which are ‘immediately associated’ with the person.”) (footnotes omitted).

29 477 F.3d 250 (5th Cir. 2007).
30 Id. at 260.
31 Id. at 260, fn. 7 (quoting United States v. Chadwick, 433 U.S. 1, 15 (1977)); see also United States v. Brookes, No. CRIM 2004-0154, 2005 WL 1940124, at 3 (D.V.I. June 16, 2005) (upholding a search of a cell phone and comparing a pager and cell phone to a wallet or address book); United States v. Cote, No. 03CR271, 2005 WL 1323343, at 6 (N.D. Ill. May 26, 2005) (citing United States v. Rodriguez, 995 F.2d 776, 778 (7th Cir. 1993)) (upholding search of cell phone and analogizing it to a wallet or address book as items immediately associated with the person of the arrestee), cited in Wolcott, supra note 4, at 856, fn. 132.
32 United States v. Lynch, 908 F. Supp. 284, 287-88 (D. V.I. 1995)(citing Robinson and holding that searches of pagers are like wallets and address books and so should be governed by Robinson not Chadwick.
34 Id. at 5, 12.
35 Id. at 6, 8, see supra note 27.
36 Id. at 8.
37 Id. at 9.
38 Id. at 8.
expectation of privacy in the contents of [a] pager's memory.” The defendant urged the court to follow Chadwick, but the court refused to recognize it as controlling. It reasoned that the search of the pager in Chan was close in time and space to the arrest and that the pager was seized when it was on Chan’s person, whereas in Chadwick, the footlocker was seized from the trunk of a car, and its search was remote in time and space. As a result, the court held that the warrantless search of the pager was permitted under the search incident to arrest doctrine.

Similarly, in United States v. Ortiz, the United States Court of Appeals for the Seventh Circuit justified a warrantless search of a pager. The court found that incoming calls could destroy stored phone numbers. Accordingly, when early pagers are compared to address books, they fit comfortably within the original Chimel rationale, i.e. a warrantless search is permitted to preserve evidence or protect the arresting officer. Thus we see that the Chan and Ortiz decisions stand for the propositions that 1) the search incident to arrest doctrine trumps an expectation of privacy in older electronic “containers,” and 2) early electronic “containers” should be treated no differently than any other container.

E. Are “Smart Phones” Too Smart for the Search Incident to Arrest Exception?

The overwhelming majority of courts have agreed with the above propositions but some have not. Those in disagreement have based their opposition on the increased functionality of certain cell phones [i.e. “smart phones”] and the heightened expectation of privacy derived from their improved utility. While early cell phones were similar to address books or letters in an envelope, the text messaging capability of smart phones can be compared to sending and receiving hundreds of letters and reading the contents of each letter.

For example, in the Finley case mentioned earlier, the Fifth Circuit regarded text messages similar to the contents of any other container because the cell phone was an item immediately

40 Id. at 534-535.
41 Id. at 535-536 (citing U.S. v. Chadwick, 433 U.S. 1, 12-15 (1977).
42 Id.
43 Id. at 536.
44 84 F. 3d 977 (7th Cir. 1996).
45 Id. at 983-984
46 Id. at 984 (“Because of the finite nature of a pager's electronic memory, incoming pages may destroy currently stored telephone numbers in a pager’s memory. The contents of some pagers also can be destroyed merely by turning off the power or touching a button.”).
48 Chan at 534-536 and Ortiz at 984.
49 See supra note 6.
50 See Wolcott, supra note 4 at 857-858.
51 Id. Without doubt some “smart phones” are very smart indeed. See Jana L. Knott, Is There An App For That? Reexamining The Doctrine Of Search Incident To Lawful Arrest In The Context Of Cell Phones, 35 OKLA. CITY U. REV. 445, 455 (2010) (“Today, cell phones store everything from address books, calendars, voicemail, and text messages to photos, music, movies, e-mail accounts, Internet history, and social networking profiles. Additionally, some of today’s smart phones even include word processing applications, GPS navigation, and built-in projectors. Even those cell phones not considered “smart phones” are capable of storing massive amounts of information and can be equipped with an address book, a call log, text messaging capabilities, a camera, e-mail, and Internet. Even the most basic types of cell phones now support voice and text messaging and contain address and date book functions.” (citations omitted)).
52 477 F. 3d 250 (5th Cir. 2007), see supra note 29.
associated with the arrestee's person. After Finley had made a controlled drug purchase, police searched him and found a cell phone. They searched the phone, and found text messages related to drug use and trafficking. Finley argued that the search of his cell phone was unlawful and that his cell phone could be seized but not searched. The court held that he had a reasonable expectation of privacy in the cell phone’s call records and text messages and so could challenge the search. However, the court decided that the search was lawful, giving as its justification the rationales put forth in Robinson and Belton and in effect holding that the text messages in the cell phone [the “electronic container”] are no different than the contents of any other container.

A similar result was reached in United States v. Wurie. In that case, after observing a cocaine transaction in a parking lot, police arrested Wurie for distributing crack cocaine. When they searched him at the police station, they found two cell phones on his person. They examined the call logs of one of the phones, and when it rang, flipped it open and observed a “wallpaper” of a young woman and a baby. The officers then found the phone number associated with “my house” in the call log. After tracing the number through a Web site, they had an address. They then secured a search warrant, and after searching the residence, discovered crack cocaine, a gun, drug paraphernalia, and cash. Appealing his conviction, Wurie sought to suppress the evidence acquired from the cell phone search. The U.S. District Court for the District of Massachusetts, citing Finley, commented that “It seems indisputable that a person has a subjective expectation of privacy in the contents of his or her cell phone.” The court noted with approval that other courts have held that the search incident to arrest exception applies to searches of the contents of cell phones. Stating that the search of Wurie's cell phone was limited and citing cases where wallets were searched incident to arrest, the court held that the search was reasonable, noting that there was no difference between a warrantless search of a cell phone and a warrantless search of other containers. The court compared wallets and cell phones, holding that a limited and cursory search of a cell phone

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53 477 F. 3d at 260.
54 Id. at fn. 7, citing Chadwick, 433 U.S. at 15, supra note 27.
55 Id. at 253-254.
56 Id. at 260.
57 Id. at 259.
58 414 U.S. at 223-224, supra note 13.
59 453 U S. at 460-461, supra note 26.
60 Finley at 259-260.
62 Id. at 106.
63 Id.
64 Id.
65 Id. at 106-107.
66 Id. at 107.
67 Id. at 105.
68 Id. at 109.
70 Id. at 110.
was reasonable and that the search incident to a lawful arrest exception could overcome the reasonable expectation of privacy.\footnote{Id. at 109-110.}

Likewise, in \textit{United States v. Murphy},\footnote{552 F. 3d 405 (4th Cir. 2009).} law enforcement officers searched a cell phone with functions apparently similar to those of a smart phone.\footnote{Id. at 409-412.} Murphy was convicted of narcotics and currency-related offenses after police stopped the vehicle he was riding in for speeding.\footnote{Id. at 407.} He urged the court to distinguish between older and modern cell phones based on their storage capacity,\footnote{Id. at 411.} and argued that the court should suppress evidence obtained from the warrantless phone search because evidence that the information on the phone was volatile in nature was lacking and, therefore, there was no threat that the evidence would be destroyed.\footnote{Id. at 409-411.} The United States Court of Appeals for the Fourth Circuit wasn’t persuaded, reasoning that the need to preserve evidence justifies the retrieval of call records and text messages without a warrant during a search incident to arrest.\footnote{Id. at 411.} The court rejected as unworkable Murphy’s argument that officers should be able to conduct warrantless searches incident to arrest only of cell phones with small storage capacities\footnote{Id.} because it would not be possible for them to differentiate between a small and large capacity cell phones.\footnote{Id.} Moreover, the court declared that information on a large capacity cell phone could still be volatile because even those phones have limited storage space and an incoming call or message could destroy valuable evidence.\footnote{Id.}

In this commentator’s view, the court rightly rejected all arguments seeking to limit police cell phone searches incident to lawful arrests based on the capacity of the phone. Not only is such a distinction unworkable as the court correctly points out,\footnote{Id.} but who is to decide what constitutes “large” or “small” capacity, and furthermore, as smart phones become ever “smarter” (i.e. increased capacity and functionality), will today’s “large” capacity phones become “small” by tomorrow’s standards? Do we really want law enforcement and the courts to enter into such a morass? I think not.

\textit{F. Are “Smart Phones” Like Laptop Computers and Luggage?}

In rejecting warrantless cell phone searches incident to arrest, some courts have declared “the line between cell phones and personal computers has grown increasingly blurry.”\footnote{United States v. Park, No. CR 05-375 SI, 2007 WL 1521573, at 8 (N.D. Cal. 2007). As technology advances, the differences between electronic devices will also become blurred. See Shira Ovide & Don Clark, \textit{Beneath Microsoft’s Surface}, WALL STREET JOURNAL, June 20, 2012, at B1 (describing Microsoft’s Surface Tablet with a detachable keyboard that makes it rival a laptop computer).} They are also aware that smart phones are very different from early cell phones and hold greater amounts of personal information.\footnote{Id. noting that smart phones are capable of sending and receiving e-mail and text messages, as well as having photo-} They have recognized that smart phones now resemble a mobile computer.
more than an early cell phone, and while courts have often applied the search incident to arrest
document to cell phones, they have not applied it to computers. Moreover, when comparing the
type and volume of information contained on a smart phone to that stored on a computer and
considering the heightened level of expectation of privacy in information stored on a computer, the
similarities are obvious. Some legal analysts have compared the amount of personal information
that can be contained in a laptop computer to the type of information often stored in luggage drawing
the conclusion that smart phones are like laptops and luggage, and thus should be exempted from
warrantless searches incident to lawful arrests. Several cases have addressed the situation where
police have searched a laptop without a warrant or incident to arrest (excluding border search cases
where law enforcement searched laptops without any reasonable suspicion under the border search
document). Typically in order to search a computer, police obtain a separate warrant, a blanket
warrant or affix an affidavit to the warrant specifically including the computer or computer
records. They may also secure consent of the computer’s owner to search the computer (which
must be more than general consent to search the home or premises). Nonetheless, comparing smart
phones to computers has not prevented the vast bulk of courts from allowing cell phone searches
incident to arrests.

Therefore, according to Finley, Wurie, and Murphy and the vast amount of cases
agreeing with them, the increased functionality of smart phones with their heightened expectation
of privacy was insufficient to trounce the Fourth Amendment’s search incident to lawful arrest
exception. Before we examine more closely the rationales for and against the expectation of privacy
and why it should or should not defeat the search incident to arrest exception, let’s examine more
closely the “expectation of privacy” upon which the argument is based.

graphic, video, instant messaging and Internet capabilities). The court also noticed that one’s most private thoughts
and conversations can be recorded and stored on smart phones. Id. However, the same can be said of a personal diary
that many individuals routinely keep.

See supra note 6.

See Matthew E. Orso, Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment

See Park supra note 72, at 8.

Orso supra note 75, at 213.

See Wolcott supra note 4, at 860 (“Implicit in this rationale is the fact that a laptop is more analogous to luggage
than to a wallet, because searching a laptop may reveal the same type and volume of highly personal information
that would be revealed by searching luggage. As a result, if a court analogizes a smart phone to a laptop, it is proper
that the smart phone also be analyzed under the footlocker and luggage analysis.”)

See Orso, supra note 75, at 215.

United States v. Arnold, 523 F.3d 941 (9th Cir. 2008) (court doesn’t distinguish between search of a laptop and its
electronic contents and suspicionless border searches of travelers’ luggage that the Supreme Court has allowed),
amended by 533 F.3d 1003 (9th Cir. 2008). The border search doctrine allows law enforcement officers to search
containers at the border without “particularized suspicion.” Id at 945.


United States v. Carey, 172 F.3d 1268, 1274 (10th Cir. 1999) (holding that consent to search the apartment did not
allow police to search the computer).

See supra note 6.

477 F. 3d 250 (5th Cir. 2007), see supra note 52.


552 F. 3d 405 (4th Cir. 2009), supra note 72.

See supra note 6.
III. JUST WHAT IS THE “EXPECTATION OF PRIVACY”?

A. Overview

Probably no term in American jurisprudence is more widely used and discussed as well as bandied about by the general public than “privacy.” Yet, privacy appears nowhere in the U.S. Constitution and its origin in the U.S. legal system can be attributed to a law review article published in 1890. Nearly forty years later one of the authors of that influential article, Louis Brandeis, dissenting in *Olmstead v. United States*, described privacy in these words:

The makers of our Constitution undertook to secure conditions favorable to the pursuit

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102 277 U.S. 438 (1928). In *Olmstead* federal agents placed a listening device just above the ceiling of a room without it physically penetrating the space of the room. In a 5-4 decision, the Court held that the use of wiretapped private telephone conversations obtained by federal agents without a warrant and without the device physically intruding upon the wiretapped space (in violation of state law), did not constitute a violation of the defendant’s Fourth and Fifth Amendments rights. The so-called “trespassing” doctrine of *Olmstead* was held not longer controlling in *Katz v. United States*, 389 U.S. 347 (1967), infra Part III.B. Many commentators regard *Olmstead* as one of the Supreme Court decisions that hastened the repeal of the Eighteenth Amendment prohibiting the manufacture, transportation, and sale of alcoholic beverages. See DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION (1979) at 35 (arguing *Olmstead* was one of the decisions that showed Prohibition would have far reaching ramifications for legal rights, creating an image of government prepared to engage in more aggressive and intrusive policing practices to enforce a particular law while at the same time giving the impression of widespread disregard for that law).
of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.103

Today legal scholars recognize three rights associated with privacy.104 First, one grounded in the Fourth Amendment's guarantee of "freedom from government intrusion into an individual's home or on to an individual's person";105 second, one emanating from the "penumbras" of several amendments to the Constitution vis-a-vis the Fourteenth Amendment's Due Process Clause,106 which concern the liberty and autonomy "to make certain crucial personal decisions";107 and third, one stemming primarily from statutory enactments and the law of torts, which safeguard "the ability of a person to restrict dissemination of personal information."108 The social sciences and humanities (primarily philosophy) have defined even more meanings of privacy.109 Collectively, the multiplicity of meanings ascribed to privacy has caused it to become "a concept in disarray"; one that not only defies simple explication, but also which all-too-frequently provides a framework too vague "to guide adjudication and lawmaking."110

B. Katz v. U.S. – Creation of Expectation of Privacy

Whatever the basis and reach of the nebulous "right to privacy" may be, the Fourth Amendment to the U.S. Constitution provides a clear substantive right designed to protect people's privacy in their persons, homes, papers, and effects.111 The U.S. Supreme Court laid down the judicial framework for the Fourth Amendment in Katz v. United States,112 holding that it protects "people, not places,"113 and presenting a two-pronged test for determining whether the Amendment's

103 Id. at 478.
104 Fradella et al., supra note 73, at 292.
105 Id. citing Erwin Chemerinsky, Rediscovering Brandeis's Right to Privacy, 45 BRANDEIS L.J. 643, 645 (2007).
106 For the text of the Fourth Amendment, see supra note 7.
107 Id. citing Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (striking down laws prohibiting married couples’ use of birth control devices as violating their “right to marital privacy”).
108 Id. citing Chemerinsky, supra note 78, at 646. See also Lawrence v. Texas, 539 U.S. 558 (2003) (invalidating laws that criminalized same-sex sodomy on the grounds of a Fourteenth Amendment Due Process liberty interest).
109 Id. citing Chemerinsky, supra note 78, at 649; see also Ken Gormley, One Hundred Years of Privacy, 1992 WIS. L. REV. 1335 (1992) (arguing that the law embraces five distinct concepts of privacy: the privacy of Warren and Brandeis (tort privacy), Fourth Amendment privacy, First Amendment privacy, fundamental-decision privacy, and state constitutional privacy).
110 Fradella et al., supra note 73, at 292.
112 Id. citing Mary Helen Wimberly, Note, Rethinking the Substantive Due Process Right to Privacy: Grounding Privacy in the Fourth Amendment, 60 VAND. L. REV. 283 (2007) (describing an approach to privacy rights based on the search and seizure provision of the Fourth Amendment).
113 Id. at 347 (1967) (holding that conversations recorded with a listening device placed outside a telephone booth without first obtaining a warrant violated the search and seizure provisions of the Fourth Amendment).
114 Id. at 351.
protections applied in a given case: first, the person seeking the Fourth Amendment's protection must "have exhibited an actual (subjective) expectation of privacy," and second, that subjective expectation of privacy must "be one that society is prepared to recognize as reasonable." While this approach has been criticized as permitting the government to deny privacy simply by letting everyone know that in certain situations they don’t have any, perhaps a more serious concern is that the Court has never attempted to determine in any systematic way how "society" might objectively view privacy rights in a particular search and seizure context, even though the rationale of Katz explicitly rests on such societal judgments. Katz, therefore, invites scrutiny of the legitimacy of judicial decision-making by premising its application on an appeal to "objective," societal beliefs concerning the reasonability of privacy expectations while leaving the determination to judges. But reasonable expectations "are those supported by larger society or representative of the expectations held by larger society." The commentators then suggest that research could help inform the courts about how "society" conceptualizes privacy, "thereby providing not only a more sound basis for determining whether an expectation of privacy is ‘objectively reasonable,’ but also increasing public perceptions of the legitimacy of judicial decision-making in the Fourth Amendment context." No doubt this is a lofty purpose, but as regards cell phones, it’s clear from the volume of commentary that legal scholars regard them as being subject to an “expectation of privacy” and a few courts agree. However, in the context of a search incident to a lawful arrest, the cases overwhelmingly demonstrate that whatever the expectation of privacy, it must give way to the search incident to a lawful arrest exception of the Fourth Amendment. Legal analysts have argued mightily to create an exemption to the search incident to a lawful arrest exception based primarily on the functionality and amount of data and information modern cell and “smart” phones can contain. A tiny handful of courts have agreed. Let’s examine one court’s opinion where the “expectation of privacy” argument prevailed and compare it to another where it did not. Then we’ll weigh the strength of each side’s argument and decide what course of action should be taken if in fact smart phones are to be granted an exemption to the Fourth Amendment’s search incident to a lawful arrest exception.

114 Id. at 361 (Harlan, J. concurring). For an early case discussing the “expectation of privacy,” see Hester v. United States, 265 U.S. 57 (1924).
115 Fradella et al, supra note 73, at 293, citing Chemerinsky, supra note 78, at 650 ("government seemingly can deny privacy just by letting people know in advance not to expect any"). This argument can be made regarding cell phone privacy in search incident to arrest scenarios. See Wolcott, supra note 4, at 850 (referencing Harlan, J. dissenting in United States v. White, 401 U.S. 745, 786 (1971) to the effect that government can influence the citizen’s subjective expectation of privacy).
117 Id. at 293-294.
118 See supra, note 4.
119 See Finley, supra note 52; Wurie, supra note 96; Park, supra note 33; also United States v. Carroll, 537 F. Supp. 2d 1290 (N.D. Ga. 2008) (court determined expectation of privacy was relevant in determining whether search of defendant’s Blackberry which police found in his backpack at the time of his arrest was reasonable; held that because backpack was within defendant’s reach at the time of his arrest and search was contemporaneous with arrest, search was constitutional).
120 See note 6 supra.
121 See supra note 4.
122 See Swingle, supra note 4, at 36, fn. 6 listing 5 cases.
C. State v. Smith – Cell Phone Not “Container” & Expectation of Privacy Trumps Search Incident to Arrest

In State v. Smith, police questioned a woman in a hospital because of a drug overdose. She agreed to call her drug dealer, whom she identified as the defendant, to arrange for the purchase of crack cocaine at her residence. Later police arrested defendant at the woman’s residence. During the arrest, police searched the defendant and found a cell phone on his person. At some point the police officers searched the cell phone and discovered that the call records and phone numbers confirmed that the defendant’s cell phone had been used to speak with the woman. The police did not have either a warrant to search the cell phone or defendant’s consent to do so. This evidence was introduced at trial where the defendant was convicted of trafficking and possession of cocaine, partly on evidence obtained from the cell phone search. He appealed his conviction in part on the refusal of the trial court to suppress evidence obtained from the search of his cell phone. The Ohio Court of Appeals upheld his conviction and he then appealed to the Ohio Supreme Court.

In a 4-3 decision, the Ohio Supreme Court reversed holding that a cell phone is not a “closed container” for purposes of a Fourth Amendment analysis because it is not an object falling under the “traditional” definition of the term, i.e., “physical objects capable of holding other physical objects.” The majority was then faced with the task of describing what it was, and so launched into a discussion of the varieties of cell phones. To quote:

Since cell phones are not closed containers, the question becomes how they should be classified. Given the continuing rapid advancements in cell phone technology, we acknowledge that there are legitimate concerns regarding the effect of allowing warrantless searches of cell phones, especially so-called smart phones, which allow for high-speed Internet access and are capable of storing tremendous amounts of private data. While it is apparent from the record that Smith's cell phone could not be called a smart phone with advanced technological capability, it is clear from the record that Smith's cell phone had phone, text messaging, and camera capabilities. While the dissent argues that Smith's phone is merely a "conventional one," we note that in today's advanced technological age many "standard" cell phones include a variety of features above and beyond the ability to place phone calls. Indeed, like Smith's phone, many cell phones give users the ability to send text messages and take pictures. Other modern "standard" cell phones can also store and transfer data and allow users to connect to the Internet.

Stepping back from the precipice of having law enforcement engage in a technological assessment of each and every cell phone found on an arrestee’s person in order to determine whether

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124 Id. at 950.
125 Id.
126 Id. at 950-951.
127 Id. at 951.
128 Id.
129 Id.
130 Id. at 950.
131 Id. at 954.
132 Id at 954, citing New York v. Belton, 453 U.S. 454, 460 (1981) (a "container" means "any object capable of holding another object.").
133 Id. (citation omitted).
it is subject to the search incident to lawful arrest exception of the Fourth Amendment, the majority comments that

Because basic cell phones in today's world have a wide variety of possible functions, it would not be helpful to create a rule that requires officers to discern the capabilities of a cell phone before acting accordingly. [Indeed!]

The majority next discusses the “expectation of privacy” and its application to cell phones:

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

But cell phones are neither address books nor laptop computers. They are more intricate and multifunctional than traditional address books, yet they are still, in essence, phones, and thus they are distinguishable from laptop computers. Although cell phones cannot be equated with laptop computers, their ability to store large amounts of private data gives their users a reasonable and justifiable expectation of a higher level of privacy in the information they contain.

Finally, the majority announces that because “a person has a high expectation of privacy in a cell phone’s contents, police must then obtain a warrant before intruding into the phone’s contents.” They cite no authority to support this proposition and the question can rightly be raised as to what other objects having a “high expectation of privacy” would be immune in Ohio from the search incident to arrest exception of the Fourth Amendment?

The dissent takes the majority to task, remarking that

The majority needlessly embarks upon a review of cell phone capabilities in the abstract in order to announce a sweeping new Fourth Amendment rule that is at odds with decisions of other courts that have addressed similar questions.

It points out that the arrest was lawful, and that defendant’s cell phone search resembled police officers’ searches of traditional address books. Therefore, it would uphold the constitutionality of the search.

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134 See Chimel, supra note 9.
135 Smith at 954.
136 Id. at 955.
137 Id.
138 Id.
139 Id. at 956.
140 Id. at 957.
141 Id.
D. *People v. Diaz* – Cell Phone as “Property” & Search Incident To Arrest Trumps Expectation of Privacy

The majority’s arguments in *People v. Diaz*\(^\text{142}\) seem to this commentator to demonstrate persuasively that cell phones, no matter how smart, are included in the search incident to arrest exception of the Fourth Amendment, and so the vast majority of courts that have so held have ruled correctly.\(^\text{143}\)

In *Diaz*, police observed defendant participating in a drug deal and arrested him. On his person at the time of his arrest was a cell phone.\(^\text{144}\) About 90 minutes after his arrest, police searched the contents of the cell phone without a warrant and discovered information indicating that the defendant had participated in the sale of a controlled substance.\(^\text{145}\) Once shown this information, the defendant admitted he was a participant in the sale and was charged with selling a controlled substance.\(^\text{146}\) At trial he moved to suppress the information from the cell phone search but the motion was denied.\(^\text{147}\) He was convicted and his appeal was denied.\(^\text{148}\) The Calif. Supreme Court then granted his petition for review.\(^\text{149}\)

After reviewing the relevant law concerning the search incident to lawful arrest exception to the Fourth Amendment,\(^\text{150}\) the court stated that the “key question in this case is whether defendant’s cell phone was "personal property ... immediately associated with [his] person"?\(^\text{151}\) The court holds it was, and consequently the warrantless search of his cell phone was valid.\(^\text{152}\) It compares the search to the warrantless searches of the cigarette package in *Robinson*\(^\text{153}\) and the clothing taken from the defendant in *Edwards*.\(^\text{154}\) The U.S. Supreme Court held both searches to be constitutional.\(^\text{155}\) The court then deals with defendant’s arguments to treat the cell phone differently from the cigarette package. Essentially these arguments are that the validity of warrantless searches of items of personal property seized in a lawful arrest should depend on 1) the character of the item, or 2) the expectation of privacy associated with the item, or 3) the quantity of information contained in the item. The court reviewed each of these arguments in turn.

1. **Character of the Item**

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\(^{142}\) 244 P.3d 501 (2011). The case was a 5 - 2 decision.  
\(^{143}\) See note 6 supra.  
\(^{144}\) 244 P. 3d at 502.  
\(^{145}\) *Id.* at 502-503.  
\(^{146}\) *Id.* at 503.  
\(^{147}\) *Id.*  
\(^{148}\) *Id.*  
\(^{149}\) *Id.*  
\(^{150}\) *Id.* at 503-505.  
\(^{151}\) *Id.* at 505, citing United States v. Chadwick, 433 U.S. 1, 15 (1977) (search of footlocker near the arrestee required a warrant), see supra note 27.  
\(^{152}\) *Id.*  
\(^{154}\) United States v. Edwards, 415 U.S. 800 (1974) (defendant was arrested attempting to break into a post office; the next morning his clothes were exchanged for new ones; approximately 10 hours after his arrest police examined his old clothes and found evidence linking him to the break-in; held search of defendant’s clothes without a warrant did not violate the Fourth Amendment as it was incident to a lawful arrest).  
\(^{155}\) *Robinson* at 235 and *Edwards* at 808.
The court pointed out that the validity of a warrantless search incident to a lawful arrest does not depend on character of the item. As the court commented, “The relevant high court decisions do not support the view that whether police must get a warrant before searching an item they have properly seized from an arrestee's person incident to a lawful custodial arrest depends on the item's character, including its capacity for storing personal information.” It remarked that a delayed warrantless search "of the person" which includes property "immediately associated with the person" at the time of arrest, but excludes property that is only "within an arrestee's immediate control," is valid because of "reduced expectations of privacy caused by the arrest." It then cited Robinson for the proposition that if a “custodial arrest is lawful, then a ‘full’ search of the arrestee's person ‘requires no additional justification.'” Next it relied on Edwards which holds that "once the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other." The court declared “Nothing in these decisions even hints that whether a warrant is necessary for a search of an item properly seized from an arrestee's person incident to a lawful custodial arrest depends in any way on the character of the seized item.”

Thus Diaz confirmed what these U.S. Supreme Court cases have made quite clear, namely, that the validity of a warrantless search incident to a lawful arrest does not depend on the character of the container.

2. Expectation of Privacy Associated with the Item

156 244 P. 3d at 506.
157 Id. (italics in original).
158 Id. citing Chadwick, 433 U.S. at 16, fn. 10.
159 Id. at 15.
160 Id. at 16, fn. 10.
161 Id.
162 414 U.S. 218, supra note 13.
163 Id. citing Robinson at 235.
164 415 U.S. 800, supra note 154
165 Diaz, at 506-507, citing Edwards at 807.
166 Id at 507.
167 456 U.S. 798, 825 (1982) (held that if police have probable cause to believe a lawfully stopped car contains contraband, they may conduct a warrantless search of any compartment or container in the car that may conceal the object of the search).
168 Ross at 822.
169 Id. at 507, citing Ross at 824.
The court then dealt with the argument that the validity of the warrantless search depends on the expectation of privacy associated with the item.170 First, it remarked that the Supreme Court in Ross rejected the view of several lower court judges who had concluded that, based on differing expectations of privacy, the warrantless search of a brown paper bag in Ross's stopped car was valid, but the warrantless search of a zippered leather pouch was not.171 It then pointed out that in New York v. Belton172 the U.S. Supreme Court rejected the proposition that whether a particular container may be searched without a warrant depends on the extent of the arrestee's reasonable expectation of privacy in that container, explaining: "[A]ny container ... [in] the passenger compartment ... may ... be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have."173 It commented further that in Arizona v. Gant,174 the high court limited Belton, by holding that police may not search containers in a vehicle's passenger compartment "incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle," unless "it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle."175 At the same time, the court reaffirmed Belton's holding that "whether a particular container may be searched does not depend on its character or the extent of the arrestee's expectation of privacy in it."176

3. Quantity of Information Contained in the Item

Addressing the argument that the sheer quantity of personal information should determine the legality of the search incident to arrest, the court announced that no persuasive explanation has been put forth justifying such a result.177 Quoting Belton, the court reasoned that "if differing expectations of privacy based on whether a container is open or closed are irrelevant to the validity of a warrantless search incident to arrest, then differing expectations of privacy based on the amount of information a particular item contains should also be irrelevant."178 Moreover, the court mentioned that an outcome based on the quantity of personal information determining the validity of a search would be inconsistent with Robinson, Edwards, and Chadwick179 and that the key point of the Supreme Court’s decisions is that a "lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have" in property immediately associated with his or her person at the time of arrest even if there is no reason to believe the property contains weapons or evidence."180 Then under this rule, the court pointed out that “travelers who carry sophisticated cell phones have no greater right to conceal personal information from official inspection than travelers who carry such information in ‘small spatial container[s]’” because "a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf [has] an equal right to conceal his possessions

170 Id.
171 Id. at 507, citing Ross at 802.
173 Id. at 507, citing Belton at 460-461 (italics added by Diaz court).
175 Id. at 507, citing Gant at 335.
176 Id. citing Gant at 345.
177 Id. at 507.
178 Id. at 508, citing Belton, 435 U.S. at 461, supra note 26.
179 Id. at 508.
180 Id. citing Robinson, 414 U.S. at 235, supra note 13.
from official inspection as the sophisticated executive with the locked attaché case”. Therefore, the court reasoned that a warrantless search incident to a lawful arrest of a cell phone with limited storage capacity does not become constitutionally unreasonable simply because other cell phones may have a significantly greater storage capacity. Finally, the court announced that “adopting the quantitative approach … would create difficult line-drawing problems for both courts and police officers in the field.” To quote further:

How would a court faced with a similar argument as to another type of item determine whether the item's storage capacity is constitutionally significant? And how would an officer in the field determine this question upon arresting a suspect? Defendant and the dissent offer no guidance on these questions. Their approach would be “inherently subjective and highly fact specific, and would require precisely the sort of ad hoc determinations on the part of officers in the field and reviewing courts” that the high court has condemned.

Lastly, the court stated that seeking to distinguish between the cell phone itself and its contents is inconsistent with Chadwick, Robinson, and Edwards and would lead to a situation where “no search or seizure incident to a lawful custodial arrest would ever be valid.”

E. Diaz More Consistent with U.S. Supreme Court Decisions & Better Law

Accordingly, after reviewing the Diaz and Smith decisions, this commentator is of the opinion that Diaz is more consistent with U.S. Supreme Court decisions and, furthermore, is a better rule of law because it provides a “straightforward,” "easily applied, and predictably enforced" rule." In response to Diaz, the California legislature passed SB 914, a bill requiring police

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181 Id., citing Ross, 456 U.S. at 822, supra note 167.
182 Id. at 508.
183 Id. at 508.
184 Id. at 508-509, citing Thornton v. United States, 541 U.S. 615, 623 (2004) (held that when a police officer makes a valid custodial arrest of an automobile’s occupant, the officer may search the vehicle’s passenger compartment as a contemporaneous incident to a arrest) and Belton, 453 U.S. at 458-459, supra note 26).
185 Id. at 509 (“Those decisions hold that the loss of privacy upon arrest extends beyond the arrestee's body to include “personal property ... immediately associated with the person of the arrestee” at the time of arrest,” citing Chadwick, 433 U.S. at 15).
186 Id. “…this loss of privacy entitles police not only to "seize" anything of importance they find on the arrestee's body, but also to open and examine what they find.” (italics in original), citing Robinson, 414 U.S. at 236.
187 Id. (“the high court expressly refused to distinguish the contents of the seized item from either the seized item itself or 'the arrestee's actual person.'”). Edwards held that “the police, despite seizing the defendant's clothes and reducing them to police control, did not need to obtain a warrant before subjecting those clothes to laboratory testing”, 415 U.S. at 802-809.
188 Id., citing Belton, 453 U.S. at 461-462, fn. 5.
189 Id. at 509, citing Thornton, 541 U.S. at 623, Robinson, 414 U.S. at 235, Belton, 453 U.S. at 458-459, and Murphy, 552 F.3d 405, 411, supra note 72 (upholding warrantless search incident to arrest and refusing to distinguish cell phones based on their "large" storage capacity because of difficulty quantifying that term "in any meaningful way"). The Diaz court itself recognized that Smith was inconsistent with U.S. Supreme Court decisions (“The Ohio court's focus on the extent of the arrestee's expectation of privacy is, as previously explained, inconsistent with the high court's decisions.”) Id at 511, fn.17.
officers to obtain a warrant before searching through an arrested suspect’s cell phone, but Gov. Jerry Brown vetoed it.¹⁹⁰

IV. CONCLUSION

A tabulation of the cases holding search incident to lawful arrest trumps cell phone expectation of privacy¹⁹¹ and an examination of the rationale for this rule of law as presented in *Diaz*¹⁹² should lead many to conclude, as does this writer, that if you are lawfully arrested with a cell phone on your person, the police may legally search it because in such a scenario, there is no privacy unless the legislature steps in to alter the situation.¹⁹³ So perhaps the best advice to those who yearn for cell phone privacy in search incident to arrest circumstances is to GET OVER IT!


¹⁹¹ See supra note 6.

¹⁹² See supra Section III.C(1)(2)(3).

¹⁹³ See supra note 190.