THE STICKINESS PRINCIPLE AND SEARCHES INCIDENT TO ARREST

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“Law is a way of reimagining the real.”¹ – Cultural Anthropologist Clifford Geertz

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Sept. 24, 2014

Abstract: In Fourth Amendment decisions, different concepts, facts and assumptions about reality are often tethered together in judicial decisions, creating a Stickiness Principle. In particular, form and function historically were viewed as an identity, not a dichotomy. For example, containers carried things, watches told time, and telephones were used to make voice calls. Advancing technology, though, began to fracture this identity and the broader Stickiness Principle.

In June 2014, Riley v. California and its companion case, United States v. Wurie, offered the Supreme Court an opportunity to begin untethering form and function and dismantling the Stickiness Principle. Riley presented the question of whether cell phone searches incident to a lawful arrest were constitutional. The Court, which had clung to pre-digital concepts such as physical trespass well into the 21st Century, appeared ready to explore how technology is reshaping historically understood conceptions of privacy. From a broader perspective, the case offers an initial step in reconciling pre-digital rules based on outdated spatial conceptions of physical things with the changing realities of a technology driven world.

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I. INTRODUCTION

A Stickiness Principle often shapes fourth Amendment jurisprudence, where different concepts, facts and assumptions about reality often stick together. One illustration is the stickiness of form and function, often associated with physical reality.² Historically, form and function have been viewed as an identity, creating rules affected by form as much as functionality. For example, sunglasses block the sun. Wrist watches tell time. Cars provide transportation.³ Privacy mostly dwelt within the bright-line boundaries of the physical world, such as doors and walls. When digital privacy has been at issue, particularly regarding the protection of information from disclosure to the government, the Supreme Court often stuck to spatial notions of long-established physical world understandings, such as trespass.⁴

Yet technological advances have presented new realities. Imbuing traditional forms with new functions have reshaped cultures and understandings. As Jony Ive, the Apple

¹ Clifford Geertz, Local Knowledge 14 (Basic Books 1983).
² Another illustration is the notion that disclosure of information to a third party is generally a complete waiver of privacy regarding that information is another example.
³ While these items also provided a layer of fashion, in the legal world they were one-dimensional.
⁴ Trespass protects the property right to exclude others. It is a cause of action that strongly supports the idea of private property.
designer behind the iMacs and iPod, noted: “Look at that chair, we understand it because its form and function are the same thing, which is how the manufactured world has been for hundreds of years . . . . And then incredibly and relatively recently, there’s this opportunity but with a set of problems to create objects whose forms don’t hint at what they do. And they’re packed with incredible sophistication and capability.”

This paper argues that the Supreme Court needs to begin the arduous process of untethering form from function to emphasize functionality over formalism in Fourth Amendment cases involving advanced technology. *Riley v. California,* and its companion case, *United States v. Wurie,* offered the Supreme Court precisely this opportunity to begin untethering form and function and to inform the “reasonableness” of searches.

*Riley* and *Wurie* involved challenges to warrantless police searches of cellphones incident to lawful arrests. In *Riley* and *Wurie* the Court’s decision required it to categorize the cell phone — was it the equivalent of a container, written records, a corded phone, or something else altogether? A unanimous Supreme Court agreed that a warrantless search incident to a lawful arrest of a suspect’s cell phone was not constitutionally justified pursuant to the search incident to a lawful arrest exception precisely because the container form of the phone did not cabin its extraordinary data functions. In doing so, the Court took a big step forward in accepting new realities and the untethering of form and function in a rapidly changing world of technology.

This paper is divided into four sections. After this introduction, it provides some background on the advancing realities of technology and the *Riley* decision. It then advances an untethered conception of the Fourth Amendment as an individual right to autonomy and a collective regulatory check on governmental access, gathering and analysis of information, using function as the base-line as to what is reasonable under Fourth Amendment searches. The paper then concludes.

II. BACKGROUND

A. NEW REALITIES

‘Ceci n’est pas une pipe.’ French for "This is not a pipe." (part of Rene Magritte’s painting, “The Treachery of Images,” (1929), where the statement “This is not a Pipe” is painted in French immediately below a large pipe.)

Geertz’s conceptualization of law “reimagining the real”8 captures how privacy rules in modern America, particularly those rules associated with the Fourth Amendment to the Constitution. The rules are applied and intertwined with evolving understandings of police techniques and reasonable expectations resulting from technological, social and cultural advances.

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7 134 S.Ct. 2473 (2014).
8 Geertz, supra at ____.
The idea of privacy as secrets, whispered in a corner behind physical walls and doors so that no one can listen, is fast becoming a quaint anachronism. Instead, “The world isn’t run by weapons anymore, or energy, or money. It’s run by little ones and zeroes, little bits of data. It’s all just electrons.”

Advertisers, private companies and the government engage in widespread data collection at the click (or double-click) of a mouse or screen button, and analysis, using such tools as cell phone location information, Internet tracking data, camera observations, cookies and drones, occurs regularly through complicated software programs thereafter.

1. The Information Society

The data-production from everyday things alone indicates that we live in an information-driven society, where technology has created new threads of connection and observation. The quantity, quality and ease of information gathering, including surveillance and governmental access, continues to grow exponentially.

The metadata from Internet use, cell phone location data and other sources, including hyper-local observations, are fed into computers for complex analysis and combined with other surveillance information. This information, while perhaps gathered and utilized outside the private space protected by physical walls and doors, could still present a fairly intimate picture of the subject individuals over time, creating almost a remote key to what is occurring within the house or building, as well as without.

The information society also has impacted police investigative techniques. From physical in-person surveillance of yesterday, to the ATM cameras and informants of today, tomorrow’s police “might sit in an office or vehicle as their metal agents methodically search for interesting behavior to record and relay.” For example, the federal government is developing the Biometric Optical Surveillance System (BOSS), which will have tremendous capabilities for identifying people from distances of up to 100 meters. To supplement the information acquired directly, the government obtains considerable amounts of information through the consent of third parties.

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9 Sneakers (Universal Pictures 1992).
10 The need for stacks of boxes or file cabinets has largely disappeared, with the replacements quantified in bytes.
11 See, e.g., Quentin Hardy, Big Data’s Little Brother, N.Y. Times, Nov. 12, 2013, at B1 (“Collecting data from all sorts of odd places and analyzing it much faster than was possible even a couple of years ago has become one of the hottest areas of the technology industry. . . . Now Big Data is evolving, becoming more “hyper” and including all sorts of sources.”)
13 This off-the-wall versus through-the-wall distinction was advanced in Kyllo v. United States, 533 U.S. 27 (2001), where the Court found that the police unconstitutionally used an infrared heat detection device to determine whether heat lamps were being used in the house to grow marijuana. Id. at 40.
17 Another way the government obtains information is through warrants and requests under FISA. See Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1885 (2010).
2. Cell Phone Reality

Riley was decided within this information society context. The number of cell phone users is growing exponentially. In June 2010, there were 292.8 million cell phone users in the United States alone. While the cell phone was initially and primarily used to make telephone calls, it has transformed into a multifunctional tool that is more accurately labeled a pocket super-computer. “Smart” phones have Internet access, which can provide numerous applications, from scanning bar codes, getting directions through a GPS system, to keeping appointments in a calendar and more. The amount of information processed on these smart phone devices is expected to increase forty-seven times from in just the next five years. These devices can store and disseminate huge amounts of data, photos, financial records, emails, instant messages, and notes and other information.

The information cell phones store and utilize also can be very personal, from information relating to personal health, family, personal photos and critical decisions relating to autonomy (e.g., abortion, illness, doctors and even personal hygiene). When viewed in the aggregate, the apps contained on phones, the notes it contains, the emails and text messages, and the calendar, listing all professional and personal appointments, can create a detailed and intimate picture of a person. This picture might be more complete than even what is known by friends and business colleagues.

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18 The number of mobile-only Internet users is anticipated to increase five times from what it is today. Wireless Quick Facts, CTIA – THE WIRELESS ASS’N, http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts (last visited )

19 Id.

20 The capabilities of smartphones include: sending and receiving phone calls, e-mails, instant messages, and texts; connecting to Bluetooth devices, the Internet, GPS, and Wi-Fi; taking digital photos, listening to MP3s, and playing videos; and, storing an organizer, scheduler, and address book. R. Kelly Rainer Jr. & Casey G. Cegielski, Introduction to Information Systems—Supporting and Transforming Business 242 (2011), available at http://www.cse.hcmut.edu.vn/~chauvtn/ebusiness_systems/Texts/0470473525%20Supporting%20and%20Transforming%20Introduction%20to%20Inform (http://perma.cc/RBN3-UH4P) (explaining that while “[n]ot all of these new devices have all these capabilities...they are heading rapidly in that direction.”).


23 See, e.g., Orin Kerr, Foreword: Accounting for Technological Change, 36 HARV. J.L. & PUB. POL’Y 403 (2013). “Much of the information stored in a person’s cellular phone is deeply personal. The information can include photographs, text messages, e-mails, personal notes, records of visited websites, and many other kinds of personal information.”

24 For example, see State v. Earls, 70 A.3d 630, 632 (N.J. 2013) (the case explains how cell phones identify themselves with nearby cell towers every seven seconds and explaining that this real-time data can be collected and used to reconstruct a phone’s movement over time).

3. Separation of Form and Function

Today’s born-digital generation has grown up with mobile cell phones as a rooted part of culture and society: telephone land lines are becoming anachronistic for many households, both for economic and surplusage reasons.\(^26\) The mobility and elasticity of information used and stored in cell phones provides another important distinction from the singular use of land lines. The cell phone not only stores information sent to it by others, but sends out location information on a regular basis. This in and out information makes these phones portals, through which information can be aggregated and evaluated by Big Data, computers specially programmed to assess bytes of information.\(^27\) These aggregations are often invisible to the human eye.\(^28\) Thus, phones are no longer phones, but important communication centers, data centers and a locus for the digital culture.

If a phone is not just a phone anymore, its multifunctional nature still requires it to be categorized for different legal purposes, including searches incident to a lawful arrest. With its breadth, categorization will become increasingly difficult. This is especially true as its Internet and Cloud interconnectivity expand exponentially. It is not simply the specific functionality that obfuscates the phone’s nature, but rather its impact on larger culture and society.\(^29\) These phones thus can be a data storage container, a broad communication device; or even more broadly construed as a portal or link to information past, present, and future; or, some combination of these and other analogues.\(^30\) In short, a cell phone is a repository of information and activities.

4. Phones In Other Forms: the Internet of Things

The separation of form and function can be even more clearly seen in the development of “smart” things.\(^31\) There is now a commercially produced “smart” watch,\(^32\) in


\(^{29}\) James Manyika et al., *Disruptive Technologies: Advances that Will Transform Life, Business, and the Global Economy 2-3* (2013), available at http://www.mckinsey.com/~/media/mckinsey/dotcom/insights%20and%20publications/mgi/disruptive%20technologies/mgi_disruptive_technologies_full_report_may2013.ashx, <http://perma.cc/N9AP-28RW>. These technologies are transformative because they contribute to social change, where new ways of doing things supplant the status quo, “rendering old skills...irrelevant.” Id. at 1. In fact, mobile Internet and Cloud technologies are advancing at an explosive rate and, together, have created a culture of users who “go about their daily routines with new ways of knowing, perceiving, and even interacting with the physical world.” Id. at 6.

\(^{30}\) Weak analogues obfuscate predictable rules, particularly with advancing technology issues.

\(^{31}\) The Supreme Court eventually will need to address the question of watch and glasses searches, as well as the search of other devices that are part of the Internet of Things – data driven “smart” devices that allow for
which Dick Tracy’s cartoon reality is now functional. The watch tells time, but again is multi-functional: it contains computing functions and has the capability of making phone calls as well. While it might be worn as a watch, such an item is functionally less a watch than simply another form of interconnective device. “Smart” glasses have been developed as well. For example, Google has created Google Glass, worn like a pair of eyeglasses, but calling it that would be a misnomer, given it is so much more of a multifunctional device than a monochromatic tool. Google Glass can record what the wearer sees, can send a message by telling it to do so, can share what is seen, and can produce directions on the glass.

Cell phone technology continues to expand. For example, Near-Field Communication (NFC) allows direct cell phone-to-cell phone communication. Other expanding technologies include a Bluetooth health-device protocol that connects a phone to heart monitors and cardio equipment; mobile security through CarrierIQ; smart skin phones that take any digital image and display it across the skin of the phone; and a combination phone, laptop tablet and digital camera.

remote operation and adjustment to context. In this way, the Supreme Court will have to deal less with form than with function.


33 The advertisement for a “Pebble” smart watch indicates its versatility:

Pebble is the first watch built for the 21st century. It’s infinitely customizable, with beautiful downloadable watch faces and useful internet-connected apps. Pebble connects to iPhone and Android smart phones using Bluetooth, alerting you with a silent vibration to incoming calls, emails and messages. While designing Pebble, we strove to create a minimalist yet fashionable product that seamlessly blends into everyday life.

Pebble, http://getpebble.com (last visited, October 2, 2013). The Web Site indicated there were “85,000 users and counting.”


36 This technology permits cell phones to communicate directly with each other. The phones are held back-to-back and the phones can swap information, such as browser pages. A significant use is to allow one device to read another to make a commercial transaction. Companies such as McDonald’s and Walgreens have adopted some NFC-equipped terminals for use with this technology. John Brandon, 8 Groundbreaking Mobile Tech Advancements for 2012, POPULAR MECHANICS (Jan. 28, 2013), www.popularmechanics.com/technology/gadgets/news/8-groundbreaking-mobile-tech-advancements-for-2012#slide-1 (last viewed ).


Phones and Privacy

To protect the phone’s data, features included remote tracing or wiping of information. Newer phones have an activation lock that requires a password for reactivation, and a custom message displayed even after a remote erase.41 This feature is designed to deter theft of the phone for resale.42 The iPhone 5s features a fingerprint-scanning touch identification,43 although its security value has been questioned because of potential copying and access.44

Specific computing functions of the phone have the potential to create huge amounts of data. One example is tracking the phone’s location. Cellular telephones are routinely tracked by cell phone companies to enhance signals.45 This tracking provides the phones with the best signal possible. The devices can now be tracked within feet of their location. This data, known as historical cell phone location information,46 provides a fairly accurate picture of the movements of the cell phone throughout a day – and its owner. The huge quantities that can be stored and accessed from databases provide new opportunities and sedimentary layers for historical sleuthing,47 as well as information preservable in perpetuity.48

Portable substitutes for towers, including Stingrays,49 are also utilized to track phones. Stingrays, a form of International Monitor Surveillance Instruments (IMSI), are devices that mimic cell phone towers to collect location data on nearby cell phones.50 Data

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41 The iOS7 software offers these features on the new iPhone 5s. See Wilson Rothman, Activation Lock May Be Most Important iOS7 Feature, NBC NEWS, Sept. 18, 2013, available at http://www.nbcnews.com/tech/security/activation-lock-may-be-most-important-ios-7-feature-f4B11187477.
42 Id. As several leading prosecutors have noted: in the months ahead, it is our hope that Activation Lock will prove to be an effective deterrent to theft, and that the widespread use of this new system will end the victimization of iPhone users, as thieves learn that the devices have no value on the secondary market. We are particularly pleased that – because Activation Lock is a feature associated with Apple’s new operating system as opposed to a new device – it will be available to consumers with older phone models who download the free upgrade.” Joint Statement by San Francisco District Attorney, George Gascon and New York Attorney General Eric T. Schneiderman. Id.
46 Id.
47 The data is equivalent to sedimentary layers of rock, although developing at lightning speed in a more visible fashion.
48 A person can blast information worldwide almost instantaneously, with the power to change reputations, elections and even governments. The data created can create a trail for others, years and decades later, to follow and refresh.
50 Stingrays track phones within a given range, and obtain information about phones not targeted. Government investigators, including the FBI, have been using stingrays since the 1990s. See Declan McCullagh, FBI
from all cell phones within a given range are received, including phones not targeted. Police departments in several states have used IMSI imitator devices in crime interdiction.

**B. THE FOURTH AMENDMENT AND RILEY**

1. Fourth Amendment Doctrine

The seminal cases that that built current Fourth Amendment doctrine are based on a tethered view of form and function. The cases use mostly physical spatial relations to form their tests and understandings upon which the tests are built.

*Katz v. United States*\(^{51}\) provided the baseline test for what constitutes a search under the Fourth Amendment. In the years right after its pronouncement, it appeared to be a progressive analysis, not rooted in the physical walls and doors of the prior century. Instead, it synced with the digital era, prohibiting electronic surveillance in a phone booth without consent because that would violate subjective and objective expectations of privacy. Yet, as forward looking as it was, the case still revolved around the physical walls of the now anachronistic phone booth, essentially providing a bright line and visible barrier that gave notice of privacy for all others to see. The Court’s use of physical notice has been stuck to search issues for decades, in alignment with the Stickiness Principle.

The search incident to a lawful arrest exception to the warrant preference owes its existence to *Chimel v. California*.\(^{52}\) That exception allows police to search a person and the area within her wingspan contemporaneously with a lawful arrest. The rationale for this exception is two-fold: the imminence of destruction of evidence; or the safety of officer.

The case of *United States v. Jones*\(^{53}\) offered the Court an opportunity to directly deal with advancing technology and perhaps adapt the *Katz* test to newer technologies. Instead, the Court, through Justice Scalia, retreated, utilizing a long-standing physical trespass test from the case of *Olmstead v. United States*\(^{54}\) to provide the essence of the ruling. *Olmstead* provided some bright lines and therefore some appealing clarity when it used a trespass test associated with longstanding prohibitions derived from Eighteenth Century trespass law. There, trespasses were visible and understandable within the physical boundaries of land and common sense.

Not all of the justices in *Jones* subscribed to the approach used by Justice Scalia. Justices Alito and Sotomayor, in their concurrences in *United States v. Jones*.\(^{55}\) Observed

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\(^{51}\) 389 U.S. 347 (1967).
\(^{54}\) 277 U.S. 438 (1928).
\(^{55}\) 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring); *Id.* at 961 (Alito, J., concurring). The case involved the placement of a GPS device on a private individual’s car. *Id.* at 948 (majority opinion). Writing for the majority,
that electronic surveillance can form a mosaic of intrusion even when tracking in a sustained manner in a public place. Pursuant to this “mosaic theory,” a privacy violation does not require a physical trespass.

2. RILEY and WURIE

Riley\textsuperscript{56} builds on the well-established precedent, confronting remote GPS technology essentially for the first time. In Riley, several men standing near Riley’s car shot at the car of a rival gang member. Riley was implicated as one of the shooters.\textsuperscript{57} Subsequently, Riley was driving in San Diego, California, when he was stopped for having an expired tag on his car. He also had a suspended driver’s license. He was arrested and based on department policy, his car was impounded.\textsuperscript{58} An inventory search of the car yielded several handguns that were linked to a prior shooting. Riley was arrested for possession of the handguns, which were loaded.\textsuperscript{59}

The officer searching Riley seized possession of Riley’s smartphone from one of his pants pockets. The officer accessed some information on the phone linked Mr. Riley to gang activity.\textsuperscript{60} The phone was accessed again two hours later by a different officer, seeking additional information about gang activity. The officer looked at videos captured on the phone and a picture of Riley in front of a car that had been involved in a shooting at an earlier time.\textsuperscript{61}

The appellate court focused on the location of the cell phone when it was found, noting that the “key question is whether Riley’s cell phone was “immediately associated” with his “person” when he was stopped.”\textsuperscript{62} Because the Court found it was immediately associated with his person, that triggered the exception regardless of “whether or not an exigency still existed.”\textsuperscript{63}

In United States v. Wurie,\textsuperscript{64} Riley’s companion case before the U.S. Supreme Court, the defendant was arrested for selling drugs and taken to the police station, where two cell phones and keys were found on him. On one cell phone, there was an external caller ID screen that flipped open.\textsuperscript{65} The phone was not a “smart phone,” meaning it did not have Internet connectivity and mini-computer capabilities.\textsuperscript{66} The police observed the phone

\textsuperscript{56}Id. at 952.
\textsuperscript{57} Id. at ___.
\textsuperscript{58} Id. at ___.
\textsuperscript{59} Id. at ___.
\textsuperscript{60} Specifically, the officer found some words either in the contacts list or text messages that were preceded by the letters “CK,” which apparently meant “Crip Killers,” a term used by members of the gang the Bloods. Id. at ___.
\textsuperscript{61} Id. at ___.
\textsuperscript{62} Id. People v. Diaz, 244 P.3d 501,505, (2011).
\textsuperscript{63} Id.
\textsuperscript{64}728 F.3d 1 (1st Cir. 2013).
\textsuperscript{65} Id at 2.
\textsuperscript{66} The limited nature of the cell phone under consideration perhaps could be important in a case to reach the Supreme Court, since these phones would not have the same level of connectivity, informational storage capacity, or technological capacity.
repeatedly receive calls from what appeared to be on the external screen a caller labeled “my house.”67 The officers opened the phone and saw on the wallpaper a picture of a woman and a child.68 The officers pressed a button to access the phone’s call log to see who had just called.69 The officers typed the phone number into the white pages phone directory to yield an address for the telephone number, which happened to be near where the defendant had parked his car.70 The defendant moved to suppress the evidence resulting from the search of the cell phone. Judge Stahl focused on whether exigent circumstances existed to justify the search.71 Without such circumstances, the Court of Appeals reversed the denial of Brima Wurie’s motion to suppress and vacated his conviction.72

The Court emphasized that a cell phone was far more than a mere container or wallet, saying:

_We suspect that the eighty-five percent of Americans who own cell phones …would have some difficulty with the government’s view that “Wurie's cell phone was indistinguishable from other kinds of personal possessions, like a cigarette package, wallet, pager, or address book, that fall within the search incident to arrest exception to the Fourth Amendment's warrant requirement.

Significantly, the Court viewed the cell phone as a specialized computer,73 noting the immense storage capacity of Apple’s iPhone 5 was equivalent to ““four million pages of Microsoft Word documents.””74

The Court also referred to the origins of the Fourth Amendment to advance the specter of discretionary police dragnets within a person’s cell phone:

_Just as customs officers in the early colonies could use writs of assistance to rummage through homes and warehouses, without any showing of probable cause linked to a particular place or item sought, the government’s proposed rule would give law enforcement automatic access to “a virtual warehouse” of an individual’s “most intimate communications and photographs without probable

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67 Id.
68 Id.
69 Id.
70 Id.
71 Id. at 13.
72 Id. at 14.
73 Id. at 8. The Court conceded that the Supreme Court has not distinguished between the types of items found in such searches or “its capacity to store private information” as a litmus test for legitimacy, but said the search of cellular phone devices are qualitatively different:

_In our view, however, what distinguishes a warrantless search of the data within a modern cell phone from the inspection of an arrestee’s cigarette pack or the examination of his clothing is not just the nature of the item searched, but the nature and scope of the search itself. Id. at 9.

74 Id. at 8. The Court stated, “Apple’s iPhone 5 comes with up to sixty-four gigabytes of storage, see Apple, iPhone, Tech Specs, http://www.apple.com/iphone/ specs.html (last visited May 16, 2013), which is enough to hold about ‘four million pages of Microsoft Word documents.” Id. at 8.
cause” if the individual is subject to a custodial arrest, even for something as minor as a traffic violation.75

The critical issue in the Supreme Court was whether the police actions regarding petitioner’s cellphone constituted an unreasonable search.76 Under the Fourth Amendment, as applied to the states through the Incorporation Doctrine of the 14th Amendment, some reasonable searches are permitted without a warrant. One type of reasonable search is an exception to the warrant preference, the search incident to a lawful arrest. It is clear in this case that the officers engaged in a search.77 Examining the data contained within a cell phone without permission is an apt illustration of an invasion of privacy society would recognize as reasonable and a person would subjective expect to be private as well.

The unanimity of the ruling of the Supreme Court provides several significant inferences. First, the Court comfortably applied the rationales and parameters of the search incident exception – whether the search was needed to prevent the imminent destruction of evidence or to protect the officers’ safety. This analysis reflected the prevailing law and the Fourth Amendment as a regulatory limit on government investigation into criminal activity. Second, the Court had the clarity of experience in describing and analogizing the realm of the cell phone. The justices understood its power and its distinctiveness, especially from other “containers.” The Court was able to utilize appropriate metaphors and analogues, the phone as a supercomputer, precisely because it separated form and function. This was in stark contrast to Jones, where it stuck to the safe bright lines of physical trespass and not the functionality and intrusiveness of GPS tracking.

The capacities of the cell phone78 also offered the specter of indiscriminate searches reminiscent of the general warrants of the British colonial era.79 This specter, once the cell phone was seen as a portal into the intimate details of a person’s life, permitted the justices to line up behind limitations on potential fishing expeditions within the programs of a single phone.

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75 Id. at 9 (citing Matthew E. Orso, Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence, 50 SANTA CLARA L. REV. 183, 211 (2010).) “We are reminded of James Otis’s concerns about ‘plac[ing] the liberty of every man in the hands of every petty officer.’ Michael, supra, at 908 (citation and internal quotation marks omitted).” Id. at 9.
76 Riley, 134 S.Ct. at 2482.
77 Under Katz v. United States, a search occurs if the government violates both a subjective and reasonable expectation of privacy.
78 The cell phone as a super computer indicates its expansive capacity as a gathering, storage and analysis device.
79 The existence of general warrants in Britain and colonial America was one of the central motivations behind the adoption of the Fourth Amendment.
III. THE SIGNIFICANCE OF UNTETHERING FORM AND FUNCTION – MOVING AWAY FROM THE STICKINESS PRINCIPLE

Riley shows that technology can fit within existing legal parameters, but that those parameters have to adapt to new realities. Even if Katz remains the prevailing test, what counts as a “reasonable expectation of privacy” will necessarily change with the untethering of form and function. Essentially, this paper suggests that tests for searches and warrant exceptions primarily based on functionality – not form -- are critical in negotiating these new realities.

Why Untethering Is Important

The use of functionality will illuminate the dual nature of the Fourth Amendment – creating an individual right to autonomy and a “zone of privacy” requiring a warrant, probable cause finding, or special circumstance before government penetration of the zone, as well as a regulatory limit on governmental access, collection, storage and analysis of information relating to digital privacy.

If functionality prevails, it is then easier to observe that privacy today is portable. If so, the idea of presumptive government access to information, just because it somehow becomes public, ignores the new realities and cultures of advancing technology.

The Intersubjectivity of Objectively Reasonable Expectations of Privacy

Intersubjectivity is a philosophical construct that views human behavior as interdependent, occurring within social relationships and contexts over time. Thus, when the American judicial decision-making culture is viewed through a different prism, using background facts and other environmental information as an amalgam of local knowledge, the idea of judicial decision-making is constantly shifting and discontinuous, particularly as it reflects interactive human relationships. According to one commentator, “The particularities of any one subject – his or her desires, preferences, abilities, fears – are inextricably intertwined with those of the beings encountered throughout the subject’s ongoing development.”

These new realities cause a modified set of understandings about reasonableness, which are by necessity contextual. The digital era has created new cultures – and new forms of information, tilting societies in ways never experienced in the past. It could very

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81 It is like the old Saturday Night Live sketch – Shimmer, serves as both a floor wax and a dessert topping. Saturday Night Live (NBC television broadcast Jan. 10, 1976).
82 The portability is aided by new technologies and the changed focus of relationships occurring over devices more and face-to-face less.
83 Id. at 128.
84 This contextuality depends on the facts of the case and the totality of the circumstances, much like Illinois v. Gates. The socio-cultural underpinnings of the facts, though, matter as well.
85 Even Justice Roberts recognized in the decision that much of the information generated and stored in cell phones did not exist before the digital age.
well be attributed in some small way to the justices’ own comfort with cell phones and their own usage. Justices all have access to or own cell phones. As the “Gamer” reality becomes more prevalent, with drones, and other remote controls from the Internet of Things, the Justices will become more immersed in new realities that create gigabytes of information – information that will become central to challenges under the Fourth Amendment. The tech cultures that have moved into society’s mainstream will become important in how future cases are decided.

Yet, the Riley decision also reflects the limitations of intersubjectivity, particularly when the justices have not incorporated other subcultures and experiences into their own lives. This case has been compared by some commentators to warrantless street searches for drugs and found to provide a class disparity. Noted Law Professor Michael Seidman, "I think the class dimension of this is pretty obvious." 88

The Waiver of Rights

While Riley can be seen as a good start into incorporating digital realities into Fourth Amendment analysis, it is simply a relatively safe start. It is safe because the pervasiveness of the cell phone makes it a technology that fits across cultures and technological boundaries. The growing interfaces between the physical and digital privacy world are still governed by several antiquated cases decided in the bricks and mortar era of the Twentieth Century. For example, In Smith v. Maryland, the Court decided that pen registers on telephones did not implicate the Fourth Amendment because the metadata of telephone numbers were voluntarily disclosed to third parties, and not the content of the calls. Similarly, in United States v. Miller, the Court found that information disclosed to banks was not subject to a Fourth Amendment search analysis because it was voluntarily disclosed to third parties.

These cases have given rise to an all or nothing approach to disclosures of information and privacy. The old realities that form the basis of these cases need updating, especially when the digital culture would auger for a more nuanced approach to the waiver of rights that further recognizes the separation of function and form in the digital world.

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"They all have cellphones, so they really understood this," says Clinton administration acting Solicitor General Walter Dellinger. "This is one area where they could be said to have empathy."

87 The “gamer” generation depicts those playing or comfortable with video games, generally using advanced digital technology.
88 Supra, note 88.
89 442 U.S. 735 (1979).
90 Id. at 2583.
92 Id. at 442-443.
IV. CONCLUSION

*Riley* provided the Supreme Court with the opportunity to set a new benchmark for searches incident to a lawful arrest with a firm footing in the 21st Century. The case recognizes that form should not automatically win out over functionality, which is especially apparent with the container-like supercomputer, the cell phone. There, form does not dictate function. The separation of form and function is occurring more and more often in the digital era, functionality is the primary guidepost for analysis.

While *Riley* is a good first step in incorporating the digital era into the Court’s decisional calculus, it is only a first step and an easy one at that. The Court needs to adapt its *Katz* privacy test to further reflect the new realities brought about by advances in technology.