SEARCHING CELL PHONES INCIDENT TO ARREST

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In 1914, the Supreme Court stated that the right to search incident to arrest was "always recognized under English and American law."[1] These searches require neither a warrant nor any justification beyond the arrest itself. The issue presented in this Perspective is the extent to which police may read private documents found incident to arrest. While cell phones are a relatively novel technology, it seems that cell phones are simply an efficient way to send and store documents. For what is an email or text message but an electronic form of a letter?

If, incident to arrest, police seize a notebook or a stack of manila files, can they read the contents without a warrant? In *Chimel v. California*, the Court's most detailed explanation of the rationale for the search-incident-to-arrest doctrine, the Court asserts that this type of search is reasonable to prevent the "concealment or destruction" of weapons and evidence.[2] Cases following *Chimel* took divergent paths. In *United States v. Robinson*,[3] the Court held that objects seized incident to arrest can be opened whether or not there was reason to think the object contained evidence or a weapon.[4] Justice Powell, in his concurrence, offered the best explanation of why the object could be opened: "The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest."[5] The same theory explains why a purse can be "searched" via an inventory when a suspect is being booked prior to being jailed.[6]

But in *United States v. Chadwick*,[7] the Court held that once police had seized a double-locked footlocker and taken it to the federal building, a search

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[1] Weeks v. United States, 232 U.S. 383, 392 (1914). The right to search was soon extended to the area within the arrestee's control. *See* Agnello v. United States, 269 U.S. 20, 30 (1925).

[2] Chimel v. California, 395 U.S. 752, 763 (1969).

[3] United States v. Robinson, 414 U.S. 218 (1973).

[4] *Id.* at 235-36.

[5] *See id.* at 237-38 (Powell, J., concurring).

[6] *See* Illinois v. Lafayette, 462 U.S. 640, 648 (1983).

[7] United States v. Chadwick, 433 U.S. 1 (1977).

warrant was necessary to open the footlocker.[8] Unfortunately, the critical holding in *Chadwick* is blurred – the narrow reading of *Chadwick* is that a warrant was required only because the agents chose to take the footlocker to the federal building, which made the search no longer incident to arrest. Justice Blackmun argued in dissent that searching the footlocker at the scene of arrest would have been constitutional.[9] Lower courts have favored *Robinson* and the narrow reading of *Chadwick*, holding that address books, day planners, purses, wallets, and briefcases may be opened and searched incident to arrest if the search is contemporaneous with the arrest.[10]

If a cell phone is merely an efficient way to store documents, perhaps it too can be searched incident to arrest. After all, the Court recently held that the Fourth Amendment does not protect against strip searches made when admitting an arrestee to jail after an arrest for a traffic offense.[11] If our bodies can be poked and prodded based on an arrest for a traffic offense, why not allow the reading of our cell phones, notebooks, and manila folders? Moreover, the *Chadwick* limitation remains a significant check on overreaching. Now that cell phones come standard with coded locking mechanisms, the average police officer is unlikely to be able to unlock most phones and uncover any revealing information. Even the narrow holding of *Chadwick* would preclude a lab tech spending hours poring over the phone.[12]

But even if the police could access the cell phone at the scene of the arrest, there seems something different about the privacy attending documents as opposed to weapons or contraband. If police arrest Robert Louis Stevenson and discover a notebook entitled *The Diaries of Dr. Jekyll*, they could open the diary to see if it is really a diary, but could they read its entire contents without a warrant? I hope the answer to that question is "no." If this is right, then the search of a cell phone incident to arrest might be limited to a cursory search without examining the content of particular messages or applications. Or it might permit more than a cursory search to ascertain that Aunt Betty's Recipes is really that, and not a list of cocaine purchasers.

Thus far, lower courts are split on the cell phone issue. The First Circuit has held that warrantless searches of a cell phone are forbidden because a search is

[8] *Id.* at 15.

[9] *See id.* at 22-23 (Blackmun, J., dissenting).

[10] *See, e.g.*, Curd v. City Court of Judsonia, Ark., 141 F.3d 839, 842-44 (8th Cir. 1998) (upholding the search of a purse); United States v. Eatherton, 519 F.2d 603, 609-11 (1st Cir. 1975) (upholding the search of a briefcase). Courts have permitted police more flexibility (more time) to search items "immediately associated with the person of the arrestee" – for example, a wallet rather than a footlocker. *See, e.g.*, *Curd*, 141 F.3d at 843. Because that distinction is not necessary to my argument, I do not address it in this Perspective.

[11] Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington, 132 S. Ct. 1510, 1517-18 (2012).

[12] *See* Orin S. Kerr, *Foreword: Accounting for Technological Change*, 36 HARV. J.L. & PUB. POL'Y 403, 405 (2013) (raising such a concern).

not "necessary to protect arresting officers or preserve destructible evidence."[13] This analysis puts the emphasis on the instrumental reasons to allow the search rather than the loss of privacy occasioned by the arrest. Other courts follow *Robinson* and allow at least a partial search of the cell phone incident to arrest based on the loss of privacy theory.[14]

Donald Dripps has argued recently that the history of the Fourth Amendment suggests a fundamental distinction between documents (papers) and other items (effects) that might be seized incident to arrest,[15] whereas Adam Gershowitz has argued that cell phones do not deserve different Fourth Amendment treatment, at least under current doctrine.[16] If Dripps is right on this point, and I think he is, courts should treat cell phones, manila files, and day planners differently from contraband and weapons seized incident to arrest. In this world, it would not matter when the cell phone is searched. Documents are documents and require a warrant before they can be read.

John Entick was a printer who angered King George III with one of his pamphlets.[17] On November 11, 1762, the King sent messengers to Entick's print shop with a warrant to search for and seize "his books and papers," resulting in a seizure of 100 printed pamphlets and 100 charts.[18] Lord Camden declared this a violation of fundamental English law, writing: "Papers are the owner's goods and chattels; they are his dearest property; and are so far from

[13] United States v. Wurie, 728 F.3d 1, 13 (1st Cir. 2013), *cert. granted*, 82 U.S.L.W. 3104 (U.S. Jan. 17, 2014) (No. 13-212); *see also* United States v. Park, No. CR-05-375 SI, 2007 WL 1521573, at *8 (N.D. Cal. May 23, 2007) (holding that since the cell phone was searched for investigative purposes rather than to ensure safety or the preservation of evidence, the search of the phone required a warrant); State v. Smith, 920 N.E.2d 949, 956 (Ohio 2009) ("We hold that the warrantless search of data within a cell phone seized incidental to a lawful arrest is prohibited by the Fourth Amendment when the search is unnecessary for the safety of law-enforcement officers and there are no exigent circumstances.").

[14] *See, e.g.*, United States v. Flores-Lopez, 670 F.3d 803, 809-10 (7th Cir. 2012) (Posner, J.) (upholding a search only to find a telephone number stored in a cell phone); United States v. Finley, 477 F.3d 250, 259-60 (5th Cir. 2007) (finding the cell phone could be searched because it was incident to a valid arrest); United States v. Valdez, No. 06-CR-336, 2008 WL 360548, *3 (E.D. Wis. Feb. 8, 2008) (basing its ruling of a valid search on the fact that the arresting officer could have been reasonably worried about destruction of evidence).

[15] Donald A. Dripps, *"Dearest Property": Digital Evidence and the History of Private "Papers" as Special Objects of Search and Seizure*, 103 J. CRIM. L. & CRIMINOLOGY 49, 53 (2013) ("[C]ourts interpreting the Fourth Amendment have legitimate textual and historical grounds for treating 'papers' and their modern counterparts with more respect than other 'effects.'").

[16] Adam M. Gershowitz, *Password Protected? Can a Password Save Your Cell Phone from a Search Incident to Arrest?*, 96 IOWA L. REV. 1125 (2011).

[17] Entick v. Carrington, 19 How. St. Tr. 1029 (1765).

[18] *Id*. at 1030.

enduring a seizure, that they will hardly bear an inspection . . . ."[19] Entick won a substantial judgment against the King's messengers. Why should cell phones be considered less private than Entick's print shop?

[19] *Id.* at 1066. *Entick* can be read in two ways: Either the warrant was too general, or papers simply cannot be seized even with a warrant. The latter reading would require a seismic shift in Supreme Court doctrine, so for my purposes I read *Entick* to require a specific warrant.