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Comments

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I. INTRODUCTION

In the same week Apple released its iPhone 4S,[1] California Governor Jerry Brown prevented the California Legislature from imposing limits on warrantless searches of smartphones and left it with the judicial system.[2] On October 9, 2011, Brown vetoed Senate Bill (SB) 914, which would have prevented police officers from searching an arrestee's smartphone without a search warrant.[3] Brown reasoned that "[c]ourts are better suited to resolve the complex and case-specific issues relating to constitutional search-and-seizure protections."[4] The manner in which California's courts have handled the issue suggests otherwise.[5]

For example, in *California v. Nottoli*, a Santa Cruz Sheriff's Deputy stopped Reid Nottoli for speeding early in the morning on December 6, 2009.[6] The deputy said Nottoli was nervous and sweating, appeared wide-awake, and had glassy and bloodshot eyes that moved quickly.[7] The deputy also noted the driver's rapid heartbeat, breathing, and speech—indications that Nottoli was under the influence of a controlled substance.[8] Even though Nottoli claimed he had consumed caffeinated energy drinks, evidence of which was dispersed throughout the car, the deputy believed Nottoli was intoxicated.[9] The deputy radioed in the stop and then called the watch commander, who informed the deputy that Nottoli had been arrested for drug sales years ago.[10]

After conducting a series of field sobriety tests, the deputy concluded Nottoli was under the influence of a stimulant controlled substance and placed him under arrest.[11] During a subsequent search of Nottoli's car, the deputy found drug paraphernalia, a gun, and a cell phone.[12] The deputy searched the cell phone for

1. Casey Newton, *Apple's iPhone 4S Generates Big 1st-Day Sales*, S.F. CHRON. (Oct. 15, 2011, 3:17 PM), http://articles.sfgate.com/2011-10-15/business/30285202_1_unlimited-data-iphone-terry-stenzel (on file with the *McGeorge Law Review*).

2. Nathan Olivarez-Giles, *Jerry Brown Vetoes Bill Requiring Warrant to Search Cellphones*, L.A. TIMES (Oct. 10, 2011), http://latimesblogs.latimes.com/technology/2011/10/warrant-cellphone-tablet.html (on file with the *McGeorge Law Review*).

3. David Kravets, *Calif. Governor Allows Warrantless Cellphone Searches*, WIRED MAG. (Oct. 10, 2011, 11:09 AM), http://www.wired.com/threatlevel/2011/10/warrantless-phone-searches/ (on file with the *McGeorge Law Review*).

4. Orin Kerr, *Governor Brown Vetoes Bill on Searching Cell Phones Incident to Arrest*, VOLOKH CONSPIRACY (Oct. 10, 2011, 2:29 AM), http://volokh.com/2011/10/10/governor-brown-vetoes-bill-on-searching-cell-phones-incident-to-arrest/ [hereinafter Kerr, *Governor Brown Vetoes Bill*] (on file with the *McGeorge Law Review*).

5. *See infra* Part II.B (discussing the development and rulings of the U.S. Supreme Court).

6. 130 Cal. Rptr. 3d 884, 891 (Ct. App. 2011).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 892.

12. *Id.* at 893.

additional evidence of drug use.[13] What he found was a photograph of two men holding assault rifles, which are "difficult to obtain legally in California."[14] Another officer also conducted a search of the photos, text messages, and e-mails on Nottoli's cell phone, finding additional evidence of illegal weapons and marijuana cultivation.[15] Subsequent tests revealed Nottoli was not under the influence of stimulants, and prosecutors did not charge Nottoli for driving under the influence.[16] However, the original stop for speeding allowed the deputy to search Nottoli's cell phone, which led to the discovery of evidence of other crimes—a search the Court of Appeal for the Sixth District in California upheld as valid under the search incident to lawful arrest doctrine (SILA).[17] Based on evidence obtained from that cell phone search, prosecutors charged Nottoli with possession of marijuana for sale, cultivation of marijuana, possession of a deadly weapon, possession of a controlled substance, possession of an assault weapon, possession of a destructive device, and possession of a blowgun.[18]

The *Nottoli* court's interpretation of *California v. Diaz*, which upheld a warrantless search of a cell phone ninety-minutes after an arrest,[19] expanded the scope of searches under SILA.[20] Now, law enforcement officers are able to search through an arrestee's cell phone for any evidence, even if the cell phone is not related to the crime for which the suspect is arrested.[21] Courts have expanded the SILA doctrine to encompass cell phones by analogizing them to pagers,[22] address books,[23] and cigarette packs.[24] In the process, courts have not recognized the greater invasion of privacy stemming from a SILA search of cell phones compared to "analogous" items.[25] As more Americans upgrade from basic cell

13. *Id.*

14. *Id.*

15. *Id.* at 894.

16. *Id.* at 893–94. It should be noted that test results did show a presumptive positive for THC and opiates. *Id.*

17. *Id.* at 907.

18. *Id.* at 889.

19. California v. Diaz, 244 P.3d 501, 511 (Cal. 2011), *cert. denied*, No. 10-1231, 2011 WL 4530138 (U.S. Oct. 3, 2011) (denying a motion to suppress text messages retrieved from a cell phone as a search incident to a lawful arrest in a case involving the sale of ecstasy).

20. *Nottoli*, 130 Cal. Rptr. 3d at 907.

21. Kravets, *supra* note 3; *see also Nottoli*, 130 Cal. Rptr. 3d at 907 (finding "deputies had unqualified authority . . . to search the passenger compartment of the vehicle and any container found therein") (internal citations omitted).

22. United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996) (analogizing a cell phone to a pager).

23. Luke M. Milligan, *Analogy Breakers: A Reality Check on Emerging Technologies*, 80 MISS. L.J. 1319, 1319–20 (2011) ("Government lawyers regularly claim that cell phones should be treated like 'address books' because they share a functional role: aggregating contact information of friends and associates.").

24. *Diaz*, 244 P.3d at 505–06 (upholding a warrantless search after finding the arrestee's cell phone was akin to the cigarette package in the defendant's coat in *United States v. Robinson*, 414 U.S. 218 (1973)—a case in which the U.S. Supreme Court upheld a warrantless search under SILA).

25. Milligan, *supra* note 23, at 1329 ("While the iPhone is (arguably) functionally analogous to the litigation bag (both are mobile containers which store documents), the doctrine's application to iPhones

phones[26] to smartphones,[27] evolving technology continues to advance beyond past courts' analogies.[28] As cell phones become all-encompassing gadgets,[29] the California Legislature should step in where the California courts have not.[30] The California Legislature needs to enact a statute with enough concessions to satisfy law enforcement unions[31] and enough teeth to remove smartphones from SILA, which has failed to protect the "wealth of private information" those devices now have the ability to contain.[32]

This Comment argues that the California Legislature should limit SILA to exclude cell phones from these warrantless searches. It proposes a rule that narrows warrantless searches of smartphones to situations where the suspect, or his agents, may destroy or hide the evidence of the crime for which law enforcement arrested the suspect. The search must be limited to the relevant areas of the smartphone; and finally, law enforcement must treat a password-protected cell phone like locked luggage.[33]

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exponentially increases the amount of private information obtainable by the government without cause or a warrant.").

26. See Jessica Dolcourt, *Best Basic Phones*, CNET (Sept. 4, 2012, 7:30 AM), http://reviews.cnet.com/best-basic-phones/ (on file with the *McGeorge Law Review*), for an examination of basic cell phones that include calling, texting, and picture features but do not access the Internet.

27. Brian Dolan, *Study: 42 Percent of U.S. Uses a Smartphone*, MOBI HEALTH NEWS (Jan. 20, 2010), http://mobihealthnews.com/6178/study-42-percent-of-u-s-uses-a-smartphone/ (on file with the *McGeorge Law Review*) (finding the percentage of U.S. consumers who owned a smartphone rose from fifteen percent in October 2006 to forty-two percent by the end of 2009); *see also* Liane Cassavoy, *What Makes a Smartphone Smart?*, http://cellphones.about.com/od/smartphonebasics/a/what_is_smart.htm (last visited Nov. 14, 2011) (on file with the *McGeorge Law Review*) (noting smartphones' abilities to use e-mail, connect to the Internet and data networks, edit documents, and use an operating system that runs applications differentiates them from traditional cell phones).

28. Milligan, *supra* note 23, at 1330 (finding that past precedents, when applied to emerging technologies, eventually lose their usefulness with each subsequent comparison, leaving them "but faintly recognizable in any of its alleged progeny").

29. *See* Jared Newman, *What Smartphones Will Be Like in 2012*, PC WORLD (Nov. 10, 2011), http://www.pcworld.com/article/243590/what_smartphones_will_be_like_in_2012.html (on file with the *McGeorge Law Review*) (noting the latest smartphones are equipped with better processors, higher-resolution screens and cameras, and faster networks and will include the capability to wave the phone in front of a payment kiosk instead of using a credit card); *see also iPhone 4S Technical Specifications*, APPLE, http://www.apple.com/iphone/specs.html (last accessed Nov. 10, 2011) (on file with the *McGeorge Law Review*).

30. *See* Kerr, *Governor Brown Vetoes Bill*, *supra* note 4 ("[L]egislatures have a major institutional advantage over courts in this setting. They can better assess facts, more easily amend the law to reflect the latest technology, are not stuck following precedents, can adopt more creative regulatory solutions, and can act without a case or controversy. For these reasons, legislatures are much better equipped than courts to strike the balance between security and privacy when technology is in flux.").

31. *See* Kravets, *supra* note 3 (speculating that Governor Jerry Brown's veto was aimed at pleasing law enforcement unions that supported his campaign and opposed SB 914).

32. Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 SANTA CLARA L. REV. 183, 200–01 (2010).

33. *See* United States v. Chadwick, 433 U.S. 1, 11 (1977), *abrogated by* California v. Acevedo, 500 U.S. 565 (1982) (suppressing evidence police obtained after conducting a warrantless search of a double-locked footlocker).

Part II details the ebb and flow of SILA, beginning with its modern adoption in *Chimel v. California* as an exception[34] to the general rule that warrantless searches are per se unreasonable under the Fourth Amendment.[35] This Part traces how the United States Supreme Court expanded SILA from its original justifications of police officer safety and evidence preservation, how the Court has applied the exception to various objects, and how lower courts have expanded SILA to encompass cell phones.[36] Part III examines the types of items to which courts have analogized cell phones while applying SILA, how developing smartphone technology outpaces courts' reasoning, and how the judicial system has failed to protect the private information smartphones store. Part III also argues the legislature is better equipped than the judicial system to protect privacy rights in evolving technologies, and the ubiquitous use of smartphones necessitates a forward-looking rule.[37] Finally, Part IV summarizes California Senator Mark Leno's first attempt to protect cell phones from warrantless searches and explains why it failed to satisfy Governor Brown and the law enforcement unions that support the Governor. It proposes a modified rule that would still protect smartphone users' private data from warrantless searches with enough concessions to satisfy the needs and concerns of law enforcement officials.

II. FROM *CHIMEL* TO *DIAZ*: CHARTING THE DEVELOPMENT OF SILA, BEGINNING WITH COINS AND ENDING WITH CELL PHONES

Part A details the beginning of the modern SILA doctrine and the rationales behind it and then traces SILA's subsequent development. Part B examines the U.S. Supreme Court's attempt to narrow SILA. Part C lays out the limited impact of those attempts, while Part D outlines how courts have applied SILA to cell phones.

A. The Development and Expansion of SILA

The U.S. Supreme Court adopted the modern version of SILA in *Chimel v. California*.[38] In *Chimel*, the Court found it reasonable to allow officers to search an arrestee and the area within the arrestee's reach for weapons and evidence

34. 395 U.S. 752, 762–63 (1969) (finding SILA was justified by a reasonable search for weapons and to prevent the arrestee from hiding or destroying evidence).

35. Arizona v. Gant, 556 U.S. 332, 338 (2009) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

36. *See infra* Part II.A–B (detailing the expansion of SILA).

37. *See infra* Part III.A–B (explaining why current rules have not adequately protected cell phones from police search).

38. 395 U.S. at 763.

without a warrant.[39] The Court justified its interpretation of SILA with law enforcement safety and preservation of evidence.[40] In *Chimel*, the police obtained an arrest warrant for the defendant following the burglary of a coin shop.[41] When the defendant arrived at his house, police arrested him and then conducted a forty-five-minute search of his home—without a search warrant—going so far as to search drawers in the defendant's bedroom.[42] The officers seized a number of coins, medals, and tokens that the prosecution used at trial.[43] The Court held that absent the constitutional justifications of officer safety or evidence preservation, a warrantless search, like the one in *Chimel*, resembled the general warrant searches the Fourth Amendment aimed to eradicate;[44] therefore, this search could not be justified under SILA.[45]

The Court's initial conception of SILA remained consistent with the principle of "particular justification," which requires officers to obtain a search warrant under the Fourth Amendment before searching a person or place, subject to narrowly tailored exceptions.[46] The government must justify warrantless searches in each case, and the scope must be limited to the government's particular need for the search.[47] Therefore, when the government attempts to apply a warrant exception to a new set of facts, the exception must narrowly serve the original justifications for the exception.[48] *Chimel*'s version of SILA addressed the needs of evidence preservation and officer safety.[49] In theory, any

39. *Id.*

40. *Id.* at 762–63.

41. *Id.* at 753.

42. *Id.* at 753–54.

43. *Id.*

44. A general warrant traditionally gave law enforcement officers "broad discretion or authority to search and seize unspecified places or persons. A general warrant lacks a sufficiently particularized description of the person or thing to be seized or the place to be searched. General warrants are unconstitutional because they do not meet the Fourth Amendment's specificity requirements." *General Warrant Law & Legal Definition*, USLEGAL.COM, http://definitions.uslegal.com/g/general-warrant/ (last visited Feb. 17, 2013) (on file with the *McGeorge Law Review*).

45. *Chimel*, 395 U.S. at 767–68 (citing United States v. Kirschenblatt, 16 F.2d 202 (2d Cir. 1926)). Some other exceptions to the general rule requiring a warrant include the emergency doctrine, consent, and third-party exposure. United States v. Jones, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) (concerning an exception for information exposed to a third party); 2 Wayne R. LaFave, SEARCH & SEIZURE § 4.1(b) (5th ed. 2012). The emergency doctrine allows a warrantless search where getting a warrant would result in losing the evidence. *Id.* A person also can lose her Fourth Amendment expectation of privacy by exposing information to third parties, thus eliminating the warrant requirement. *Jones*, 132 S. Ct. at 957. Closely related to the third-party exception, a person also can consent to a search, thus waiving the warrant requirement. 2 LaFave, *supra*, § 4.1(b).

46. Catherine Hancock, *State Court Activism and Searches Incident to Arrest*, 68 VA. L. REV. 1085, 1095–96 (1982).

47. *Id.*

48. Douglas M. Smith, Comment, Ohio v. Robinette*: Per Se Unreasonable*, 29 MCGEORGE L. REV. 897, 900 (1998).

49. *Chimel*, 395 U.S. at 762–63.

subsequent application of SILA should be limited to those twin aims.[50] However, as the next section shows, the Court has not tethered subsequent applications of SILA to those original government needs.[51]

1. Moving Away from Chimel*'s Original Justifications*

Four years after *Chimel*, the Court expanded SILA to permit warrantless searches of closed containers on an arrestee's person and expanded its rationale for permitting warrantless SILA searches by using a reasonableness standard.[52] In *United States v. Robinson*, the Court held that an officer's search of the cigarette pack the officer found in the arrestee's jacket pocket, turning up fourteen capsules of heroin, passed constitutional muster.[53] The Court created a bright-line rule, holding that a search of an arrestee's person was "reasonable" and thus did not require the original justifications from *Chimel*.[54]

United States v. Edwards[55] relaxed the temporal requirement that a SILA search be contemporaneous with the arrest.[56] The *Edwards* Court held that items immediately associated with an arrestee's person can be searched "even though a substantial period of time has elapsed" between the arrest and search.[57] *Edwards* allowed lower courts to uphold warrantless searches of arrestees' cell phones

50. *Id.*

51. Justin M. Wolcott, *Are Smartphones Like Footlockers or Crumpled Up Cigarette Packages? Applying the Search Incident to Arrest Doctrine to Smartphones in South Carolina Courts*, 61 S.C. L. REV. 843, 845–47 (2010).

52. United States v. Robinson, 414 U.S. 218, 235–37 (1973).

53. *Id.* at 235.

54. *Id.*

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; *that intrusion being lawful, a search incident to the arrest requires no additional justification*.

Id. (emphasis added); *see also* Wolcott, *supra* note 51, at 846 (finding that *Robinson* "eroded Fourth Amendment protections" the Court created in *Chimel*).

55. 415 U.S. 800, 808 (1974).

56. Chimel v. California, 395 U.S. 753, 764 (1969) (quoting Preston v. United States, 376 U.S. 364 (1964)).

> The rule allowing *contemporaneous searches* is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime-things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent *where a search is remote in time or place from the arrest*.

Id. (internal quotations omitted) (emphasis added).

57. *Edwards*, 415 U.S. at 807. "Immediate possession" means property within the arrestee's immediate possession—essentially what a person carries with him or her when moving from one place to another. *Id.* at 803–04.

well after their arrests, meaning neither the contemporaneous requirement nor the twin justifications of SILA were present during the subsequent searches.[58]

The Court did limit the reach of SILA in *United States v. Chadwick*, holding that once officers have exclusive possession over luggage or other personal property not "*immediately associated with* [*a*] *person*," the search is "no longer an incident of the arrest."[59] *Chadwick* involved a footlocker that law enforcement officials seized during an arrest and searched ninety-minutes later.[60] The Court found the search was "remote in time or place from the arrest" and, therefore, invalid under SILA.[61] But after *Chadwick*'s narrow approach to SILA, limited by *Chimel*'s twin justifications of evidence preservation and officer safety, the Court once again strayed from in subsequent decisions premised on a general reasonableness analysis of the search.[62]

2. The Court Finding SILA More Reasonable

After *Chadwick* restricted *Robinson*,[63] the Court wandered even further away from the principle of particular justification used in *Chimel*.[64] *New York v. Belton*[65] played a central role in that departure. *Belton* began with a traffic stop for speeding.[66] The officer smelled burnt marijuana and spotted an envelope he believed contained more of the drug.[67] The officer placed the vehicle's four occupants under arrest and ordered them to stand separate from one another outside of the vehicle.[68] The officer then searched the car and discovered cocaine in the pocket of a leather jacket.[69] Despite the fact the suspects were under arrest, standing away from the vehicle, and could not have reached the jacket, the Court found that the passenger compartment of an automobile was within the area an arrestee could reach.[70] Citing *Robinson* and striving to create an easy-to-apply rule, the Court sacrificed *Chimel*'s twin justifications for a reasonableness

58. *See infra* Part II.D.1 (reviewing cases in which courts used SILA to uphold warrantless searches of cell phones).

59. United States v. Chadwick, 433 U.S. 1, 15 (1977), *abrogated by*, California v. Acevedo, 500 U.S. 565 (1991).

60. *Id.* at 3–5.

61. *Id.*

62. *See infra* Part II.A.2 (detailing the Supreme Court's finding SILA more reasonable).

63. *Chadwick*, 433 U.S. at 15.

64. Chimel v. California, 395 U.S. 752, 762–63 (1969) (holding the twin justifications for SILA are officer safety and evidence preservation).

65. 453 U.S. 454 (1981).

66. *Id.* at 455.

67. *Id.* at 455–56.

68. *Id.*

69. *Id.*

70. *Id.* at 459–60.

analysis by allowing warrantless searches of an arrestee's automobile and any containers found within.[71]

Two decades later, in *Thorton v. United States*, the Court extended *Belton* to permit an officer to search a vehicle when an arrestee was a "recent occupant" of the vehicle.[72] The Court validated a warrantless search of an automobile where the officer confronted and arrested the defendant after the defendant exited his car.[73] While concurring in the judgment in *Thornton*, Justice Scalia noted that *Belton* could not be explained as a direct application of *Chimel* and involved a much broader interpretation of SILA.[74] Justice Scalia advocated limiting *Belton*'s broad holding to searches where an officer reasonably believed "evidence relevant to the crime of arrest might be found in the vehicle."[75] Despite Justice Scalia's approach and *Chimel*'s justifications for SILA, with the broad holdings of *Robinson*, *Belton*, and *Thornton*, lower courts "have taken a broad approach and upheld searches of numerous small containers incident to arrest" and "not hesitated to apply the search incident to arrest doctrine in new situations unforeseen by the Supreme Court."[76]

B. An Attempt to Return to the Twin Justifications of Chimel

In *Arizona v. Gant*, the Court attempted to clarify the approach to SILA established by *Chimel* and *Belton*.[77] There, an officer arrested the defendant for driving with a suspended license.[78] While the arrestee sat in the back of a police car, the officer searched the arrestee's car and located cocaine.[79] The Court noted that lower courts' and police academies' broad reading of *Belton* allowed a warrantless search of an automobile regardless of the reason for the arrest and whether he had access to the vehicle.[80] Justice Stevens' majority opinion[81] took a narrow view of *Belton*, however, and held that a warrantless search of a vehicle

71. *Id.* at 459 (noting that a search under *Robinson* not only fit within a Fourth Amendment exception but was also a reasonable search under the Fourth Amendment).

72. Thornton v. United States, 541 U.S. 615, 622 (2004) (internal quotations omitted).

73. *Id.* at 618, 623–24.

74. *Id.* at 631–32 (Scalia, J., concurring).

75. *Id.* at 632.

76. Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 35–36 (2008).

77. Arizona v. Gant, 556 U.S. 332 (2009).

78. *Id.* at 335.

79. *Id.*

80. *Id.* at 341–42, 344.

81. Justice Scalia concurred, creating a five-Justice majority. However, Justice Scalia also advocated abandoning the *Belton-Thornton* line of cases and allowing a SILA search of the passenger compartment of a vehicle only where the officer had reason to believe evidence of the crime for which the suspect was arrested would be found in the automobile. Justice Scalia noted he could not command a majority to overrule *Belton* and *Thornton*, so he concurred with Justice Stevens' rule, finding it the lesser of two evils, to at least narrow SILA's application. *Id.* at 335.

incident to a lawful arrest was constitutional only when "an arrestee is within reaching distance of the vehicle or it is *reasonable to believe the vehicle contains evidence of the offense of arrest*."[82] The Court expressed concern with a rule that allowed officers to search any container in an automobile even when the arrestable offense was merely a traffic violation.[83] The *Gant* Court held the search unreasonable, and explained that when an arrest involves a traffic violation, it is not reasonable for officers to believe that a vehicle contains evidence of that offense.[84]

To counter the lower courts' broad application of *Belton*, *Gant* seemingly reattached SILA to *Chimel*'s justifications of evidence preservation and officer safety,[85] as opposed to the reasonableness analysis that seemed to permeate the Supreme Court's expansion of SILA.[86] And if *Gant* applies broadly, then the analogies courts have drawn between the cigarette package in *Robinson* and the footlocker in *Chadwick* to determine whether the search of the item is valid under SILA become irrelevant once the defendant is secured and the item (for our purposes, a cell phone) does not involve evidence relating to the arrest.[87]

C. Gant*'s Limited Impact*

Even absent such an exigency, lower courts, at least in the context of cell phones, have cabined *Gant*'s holding to SILA searches of automobiles,[88] meaning the analogies drawn between *Robinson* and *Chadwick* remain relevant in

82. *Id.* at 346 (emphasis added).

83. *Id.* at 344.

84. *Id.*

85. Orso, *supra* note 32, at 208–09 (arguing that *Gant's* limited holding should apply in non-vehicle contexts, as well).

86. *See* United States v. Robinson, 414 U.S. 218, 235 (1973) (finding that an arrest with probable cause is a reasonable under the Fourth Amendment; therefore, a SILA search "requires no additional justification"); New York v. Belton, 453 U.S. 454, 462 (1981) (holding the passenger compartment of a vehicle to be "within the arrestee's immediate control" for the purposes of a SILA search even when the arrestee is no longer in the car); Thornton v. United States, 541 U.S. 615, 623–24 (2004) (extending a bright line rule that allows a SILA search of a vehicle if the arrestee was merely "[a] recent occupant" of the vehicle).

87. Orso, *supra* note 32, at 208–09.

88. California v. Diaz, 244 P.3d 501, 507 n.9 (Cal. 2011), *cert. denied*, 132 S. Ct. 94 (U.S. 2011) (finding *Gant* was not relevant because it involved a search of an area within the immediate control of an arrestee, not a search of the arrestee's person); Smallwood v. Florida, 61 So. 3d 448, 452–54 (Fla. Dist. Ct. App. 2011) (finding *Gant*, on which defendant relied for appeal, inapplicable to a search of appellant's person, though the court noted it shared the same privacy concerns as *Gant*); United States v. Hill, No. CR 10-00261 JSW, 2011 WL 90130, at *8 (N.D. Cal. Jan. 10, 2011) (finding the rule in *Robinson* to apply to a warrantless search of arrestee's iPhone, not *Gant*, because the phone was in the defendant's pocket); Fawdry v. Florida, 70 So. 3d 626, 630 (Fla. Dist. Ct. App. 2011) (holding that *Gant* was not relevant because the search took place in a home, not a vehicle, and the defendant was carrying the cell phone on his person); *see also* United States v. Curtis, 635 F.3d 704, 713 (5th Cir. 2011) (noting that other circuits were divided over whether *Gant* was limited to vehicular searches but declining to answer the question, holding a search of arrestee's cell phone was valid under the good-faith exception of the exclusionary rule instead).

practice. However, *Belton* allows officers to consider anything, including containers, inside the passenger compartment of a vehicle to be within the scope of the rule in *Robinson*, regardless of whether the arrestee can actually reach the item.[89] Since the majority of SILA searches of cell phones occur in the context of a vehicle stop, a broad reading of *Belton*,[90] coupled with a narrow reading of *Gant*, renders the distinction between *Chadwick* and *Robinson* irrelevant in an automobile context.[91]

California v. Nottoli[92] illustrates this point. After the defendant was handcuffed and placed in the police car, the officer found the arrestee's cell phone in the car's cup holder.[93] The California appellate court stated *Gant* left the scope of a *Belton* search unchanged[94] and found officers had authority under the U.S. Supreme Court's SILA precedents to search the defendant's car and any containers therein.[95] The California court found that *Gant* still empowered officers with the broad search power of *Belton*, if the officers reasonably believed evidence *might* be found in the vehicle (not necessarily the cell phone).[96]

In *Notolli*, the defendant was pulled over for speeding; he never was charged with driving under the influence; the energy drinks in the vehicle explained the defendant's level of alertness; he was not carrying the cell phone on his person; and he was in the back of a police car when police seized and searched his phone.[97] Even then, the California appellate court still found these circumstances within the limits of *Robinson* and *Gant*.[98] Thus, the court allowed police to search the cell phone of a person arrested for driving on an expired license without a warrant[99] even though, as Justice Stevens noted in *Gant*, police cannot "expect to find evidence in the passenger compartment" of such an offense.[100]

While some commentators thought *Gant* would require courts to offer more protection to cell phones from warrantless searches,[101] the trend among courts has been the opposite.[102] The California Supreme Court continued the departure from

89. *Belton*, 453 U.S. at 460.

90. Arizona v. Gant, 556 U.S. 332, 347, 351 (2009).

91. California v. Nottoli, 130 Cal. Rptr. 3d 884, 898–900 (Ct. App. 2011).

92. *Id.*

93. *Id.* at 892–93.

94. *Id.* at 904.

95. *Id.* at 904–05.

96. *Id.*

97. *Id.* at 890–93.

98. *Id.* at 904–05.

99. *Id.* at 892.

100. Arizona v. Gant, 556 U.S. 332, 344 (2009). In *Nottoli*, police later admitted the arrestee "was not sufficiently impaired to require involvement of" the California Highway Patrol and "was not arrested for driving under the influence." *Nottoli*, 130 Cal. Rptr. 3d at 893.

101. Orso, *supra* note 32, at 208–09.

102. *See infra* Part II.D.1 (reviewing cases in which courts used SILA to uphold warrantless searches of cell phones).

Chimel's original justifications in *Diaz*.[103] The court in *Diaz* upheld a warrantless search of the defendant's cell phone ninety-minutes after his arrest for participating in an ecstasy buy.[104] After initially questioning the defendant, officers searched his cell phone for text messages related to the buy and then confronted the defendant with those texts to elicit a confession.[105] The *Notolli* court followed suit by allowing a search of a cell phone when there was no possibility the phone contained evidence related to the arrestee's expired license.[106] Thus, both the *Diaz* and *Notolli* courts demonstrated that *Gant's* impact on California courts is minimal, and lower courts in other states have similar narrowed *Gant's* limitation on SILA searches of cell phones.[107]

D. SILA Applied to Cell Phones

The first section details the cases, and the reasoning behind them, that found warrantless searches of cell phones valid, while the second section surveys courts that did not uphold warrantless searches of cell phones.

1. Warrantless Searches Found Valid

Although the U.S. Supreme Court has not applied SILA to a case involving a cell phone, the supreme courts of California[108] and Ohio[109] and two federal circuits[110] have weighed in on the matter. The U.S. Court of Appeals for the Fifth Circuit addressed the topic first in *United States v. Finley*, a case involving a warrantless search of the defendant's cell phone after a controlled methamphetamine buy.[111] The suspect participated in a sale of methamphetamine to a police source at a truck stop and then was pulled over after leaving the scene.[112] Police arrested the suspect and seized his cell phone.[113] DEA agents later searched the cell phone while questioning the defendant at a separate location and found texts and call records related to the drug sale.[114] Citing *Robinson*[115] and

103. California v. Diaz, 244 P.3d 501 (Cal. 2011), *cert. denied*, 132 S. Ct. 94 (2011).

104. *Id.* at 502–03.

105. *Id.*

106. California v. Nottoli, 130 Cal. Rptr. 3d 884, 890–93 (Ct. App. 2011).

107. *See infra* Part II.D.1 (reviewing cases in which courts used SILA to uphold warrantless searches of cell phones).

108. *Diaz*, 244 P.3d at 501.

109. Ohio v. Smith, 920 N.E.2d 949 (Ohio 2009), *cert. denied*, 131 S. Ct. 102 (2010).

110. United States v. Murphy, 552 F.3d 405 (4th Cir. 2009), *cert. denied*, 129 S. Ct. 2016 (2009); United States v. Finley, 477 F.3d 250 (5th Cir. 2007).

111. 477 F.3d at 253.

112. *Id.* at 253–54.

113. *Id.*

114. *Id.*

115. *Id.* at 260 (citing United States v. Robinson, 414 U.S. 218, 236 (1973)) (upholding a warrantless

United States v. Ortiz, which upheld a warrantless search of a pager,[116] the Fifth Circuit upheld the search of the cell phone under SILA.[117] The approach (analogizing to a pager) and result (upholding a warrantless search) of the Fifth Circuit is one that most lower courts have followed in subsequent cases involving warrantless searches of cell phones.[118]

The U.S. Court of Appeals for the Fourth Circuit, in *United States v. Murphy*, upheld the warrantless searches of three defendants' cell phones following a traffic stop that turned up cocaine, counterfeit currency, fakes IDs, and nearly $15,000.[119] The law enforcement officers did not search the seized cell phones until they returned to a DEA office, at which point they discovered text messages identifying one of the arrestees as a drug supplier.[120] In upholding the search, the Fourth Circuit declined to delineate between simple cell phones and those with large storage capacity and functionality.[121]

Diaz came next, also a case involving the alleged sale of drugs.[122] The arrestee drove a co-defendant to buy ecstasy.[123] Officers did not search the arrestee's cell phone until they transported the defendant back to the sheriff's station—ninety-minutes after the initial arrest.[124] The arrestee admitted his role in the sale when shown his incriminating text messages.[125] In upholding the search, the Supreme Court of California utilized a bright-line rule for SILA searches of cell phones immediately associated with the arrestee's person,[126] like the cigarette pack in *Robinson*.[127] The California Supreme Court found cell phone searches valid under the Fourth Amendment even if they do not fit within the original justifications of the SILA exception.[128] The Court rejected arguments that the scope of a SILA search should be tailored to the nature of the object searched or that a search of a cell phone should be distinguished from a search of a cell

search of a cigarette package).

116. 84 F.3d 977, 984 (7th Cir. 1996).

117. *Finley*, 477 F.3d at 260.

118. Orso, *supra* note 32, at 203.

119. United States v. Murphy, 552 F.3d 405, 407–09 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 2016 (2009).

120. *Id.* at 409.

121. *Id.* at 411–12.

122. California v. Diaz, 244 P.3d 501, 502 (Cal. 2011), *cert. denied*, 132 S. Ct. 94 (2011).

123. *Id.* at 502.

124. *Id.* at 502–03.

125. *Id.* at 503.

126. *Id.* at 509.

127. *Id.*

128. *Id.* (noting the *Robinson* Court adopted the "straightforward, easily applied, and predictably enforced rule that a full [warrantless] search of the person is constitutionally permissible, and [rejected] the suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest") (internal quotation marks omitted) (quoting United States v. Robinson, 414 U.S. 218, 235 (1973)).

phone's contents.[129] Citing *Robinson*, the Court noted "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."[130]

Finally, in response to the defendant's and dissenting judge's argument that developing cell phone technology necessitated a new rule, the majority stated, "[i]f, as the dissent asserts, the wisdom of the high court's decision 'must be newly evaluated' in light of modern technology . . . then that reevaluation must be undertaken by the high court itself."[131] The U.S. Supreme Court denied certiorari in *Murphy* and *Diaz*.[132] The lower courts that followed suit in upholding cell phone searches pursuant to SILA—especially in drug cases—are numerous.[133]

2. Warrantless Searches Found Invalid

Not every court agrees with the bright-line approach to SILA and cell phones, and two notable decisions have attempted to narrow the reach SILA has in the area of cell phones.[134] In *United States v. Park*, police surveillance of an indoor marijuana cultivation operation led to the arrest of the defendants and warrantless searches of their cell phones at the police station.[135] The *Park* court found that this type of warrantless search did not fit within the original SILA justifications.[136] Thus, the court declined to follow the Fifth Circuit's adoption in *Finley* of a bright-line rule regarding cell phones associated with an arrestee's person.[137] *Park* held that the vast amount of information cell phones contain necessitates treating them like a container within an arrestee's immediate control, like in *Chadwick*; therefore, once police have exclusive control over a cell phone, officers need a warrant to search that phone.[138]

Ohio v. Smith also involved an arrest for drug dealing and a search of the defendant's cell phone at the police station.[139] Like the *Park* court, the Supreme Court of Ohio found that the purposes of the officer's search did not fit within the traditional justifications of SILA.[140] However, these cases are outliers, and the

129. *Id.* at 508.

130. *Id.* (quoting *Robinson*, 414 U.S. at 235).

131. *Id.* at 511 (internal quotations omitted).

132. Diaz v. California, 132 S. Ct. 94 (2011); Murphy v. United States, 129 S. Ct. 2016 (2009).

133. *See* Orso, *supra* note 32, at 203 (citing numerous cases to support the assertion that a majority of lower courts have upheld SILA searches of arrestee's cell phones).

134. *Infra* notes 135–40.

135. No. CR 05-375 SI, 2007 WL 1521573, at *2 (N.D. Cal. May 23, 2007).

136. *Id.* at *8–9.

137. *Id.*

138. *Id.* at *9.

139. 920 N.E.2d 949, 950–51 (Ohio 2009).

140. *Id.* at 955; *see also* United States v. Wall, No. 08-60016-CR, 2008 WL 5381412 (S.D. Fla. Dec. 22, 2008), *aff'd*, 343 F. App'x 564 (11th Cir. 2009) (finding a text message on a cell phone is akin to a sealed letter,

majority of lower courts have had little trouble analogizing traditional SILA searches to the modern world of cell phones.[141]

E. How Gant*'s Holding Applies to Smartphones with Remote-Wipe Programs*

New exigencies associated with emerging technologies could further justify warrantless searches of an arrestee's smartphone[142]—even under *Gant*'s narrowing of SILA.[143] Users can now equip their smartphones with remote-wipe programs that allow someone to send a signal to the phone from a computer, prompting the device to erase all of its data.[144] Because one of the original rationales of SILA is the preservation of evidence,[145] the threat of remotely erasing a phone still would be present when police take a person into custody. Indeed, at least one court has upheld a search of a cell phone based on officers' fears that a phone's contents might be erased.[146] However, police can disable this function by turning off the phone, placing it in a container that blocks the signal, or removing the battery, thus negating the exigency.[147] Therefore, police *should* still have to obtain a warrant to search a smartphone in most situations under a broad reading of *Gant*,[148] but that has not always been the case in practice.[149] The U.S. Court of Appeals for the Seventh Circuit recently accepted this exigency argument in *United States v. Flores-Lopez* in allowing a warrantless search of a cell phone to retrieve its number.[150]

requiring a warrant); United States v. Quintana, 594 F. Supp. 2d 1291, 1300 (M.D. Fla. 2009) (finding a warrantless search of a cell phone to be invalid because the defendant was arrested for driving with a suspended license and the search was for drug-related evidence).

141. Orso, *supra* note 32, at 203.

142. *Infra* notes 134–40 (examining how officers could still search cell phones under *Gant*'s holding).

143. Arizona v. Gant, 556 U.S. 344, 351–52 (2009).

144. Jamie Lendino, *How to Remotely Disable Your Lost or Stolen Phone*, PCMAG (Apr. 12, 2012), http://www.pcmag.com/ article2/0,2817,2352755,00.asp#fbid=ehwTo0NI8Qw (on file with the *McGeorge Law Review*); *see also* Ben Grubb, *Remote Wiping Thwarts Secret Service,* ZDNET (May 18, 2010, 4:43 PM), http://www.zdnet.com.au/remote-wiping-thwarts-secret-service-339303239.htm (on file with the *McGeorge Law Review*) (detailing how accomplices of arrestees can remotely erase the arrestee's seized cell phone).

145. Chimel v. California, 395 U.S. 752, 762–63 (1969).

146. United States v. Young, Nos. 05CR63-01-02, 2006 WL 1302667, at *13 (N.D. W.V. May 9, 2006) (finding that the cell phone could be set to erase text messages in a case involving heroin trafficking, thus creating a sufficient exigency to support a warrantless search of the phone); *see also* United States v. Zamora, No. 1:05 CR 250 WSD, 2006 WL 418390, at *4 (N.D. Ga. Feb. 21, 2006) (upholding a warrantless search in a case involving the manufacture of methamphetamine because the phone might be enabled to erase the incoming call log periodically and officers could not determine if the function was turned on and would kick in before police could obtain a warrant).

147. Grubb, *supra* note 144.

148. Orso, *supra* note 32, at 208 (arguing that if lower courts apply *Gant* generally, a warrantless search of an arrestee's cell phone would be invalid once officers secured the arrestee out of reach of her cell phone).

149. United States v. Flores-Lopez, 670 F. 3d 803, 809–10 (7th Cir. 2012).

150. *Id.* ("We said it was conceivable, not probable, that a confederate of the defendant would have wiped the data from the defendant's cell phone before the government could obtain a search warrant; and it could be argued that the risk of destruction of evidence was indeed so slight as to be outweighed by the invasion

III. HOW COURTS HAVE FAILED TO PROTECT PRIVACY INTERESTS IN CELL PHONES

This section analyzes the progression courts have followed to apply SILA to cell phones. It then details how the reasoning has broken down in the smartphone context and why legislatures, not courts, are better suited to adapt search-and-seizure rules to emerging technologies.

A. The Analogies that Bring SILA and Cell Phones Together

Analogizing is a necessity for legal reasoning, especially as courts attempt to fashion precedent to new technologies that old rules did not originally conceptualize.[151] While necessary, the process is far from fail proof as courts have struggled to grasp the purpose and development of new technologies.[152] Problems arise when a court finds that an object traditionally covered by a rule has something in common with a new technology, and the court then creates another functional category under that rule for the new technology.[153] As courts continue to create additional categories based on finding one or two traits in common, they eventually "deviate over time (and often subconsciously) from the intended arc of precedent" through the use of what one commentator calls "mono-logical reasoning."[154]

In a cell phone context, one can trace a line from *Robinson*'s cigarette package to modern defendants' cell phones to illustrate the point.[155] After the *Robinson* Court found the warrantless search of a cigarette pack valid under SILA,[156] subsequent courts upheld searches of various other items located in arrestees' pockets like wallets,[157] address books,[158] diaries,[159] day planners,[160]

of privacy from the search.").

151. Milligan, *supra* note 23, at 1323.

152. *See* City of Richmond v. S. Bell Tel. & Tel. Co., 174 U.S. 761, 773 (1899) (citing a number of courts that found telephone communications to be the same as telegraph communications and thus regulated by the same laws); *see also* Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 244–45 (1915) (finding movies to be mere entertaining pictures made for profit, not deserving of First Amendment protection); Olmstead v. United States, 277 U.S. 438, 466 (1928) (finding that because wire taps did not involve a physical trespass, they did not violate the Fourth Amendment).

153. Milligan, *supra* note 23, at 1329–30.

154. *Id.* (noting that over time, this type of reasoning creates an "'operator' effect: where the essence of past decisions is but faintly recognizable in any of its alleged progeny").

155. *See infra* notes 156–63 (detailing how courts have applied SILA to different scenarios).

156. United States v. Robinson, 414 U.S. 218, 236 (1973).

157. United States v. Molinaro, 877 F.2d 1341, 1346–47 (7th Cir. 1989) (finding that *Robinson* stood for the proposition that a SILA search encompasses personal property found in an arrestee's pockets and citing numerous cases that reached the same conclusion).

158. United States v. Rodriguez, 995 F.2d 776, 778 (7th Cir. 1993) (finding the photocopying of the defendant's address book to be permissible in the absence of a warrant).

159. United States v. Frankenberry, 387 F.2d 337, 339 (2d Cir. 1967).

purses,[161] and pagers.[162] All of those items were personal property associated with a person and could contain similar types of private information—a parallel that allowed the courts to make short, logical jumps from one item to the next. When cell phone cases made their way into courts, judges had ample precedent to bring cell phones into the SILA fold.[163]

However, this type of reasoning breaks down when courts fail to consider the relevant *differences* between objects.[164] As one commentator noted:

> (1) Litigation bags have certain functions X, Y, and Z; (2) iPhones differ functionally from litigation bags (for instance, they offer functions A and B) but share functions X, Y, and Z; (3) The law permits warrantless searches of litigation bags found within an arrestee's grab area; (4) Because iPhones share functions X, Y, and Z with litigation bags, the law should permit warrantless searches of iPhones found within an arrestee's grab area.[165]

This type of thinking focuses on similarities while failing to consider the greater amount of information cell phones store and the number of people who use them.[166] As Justice Sotomayor discussed in her concurring opinion in *United States v. Jones*, the traditional rule that a person loses a Fourth Amendment expectation of privacy in data exposed to third parties is "ill suited to the digital age."[167] Justice Sotomayor opined that the amount of information users convey to their cell phone companies and Internet providers should cause the Court to step back and reconsider its disclosure rule in the future.[168] In a similar vein, one commentator proposes that courts need to recognize that their analogies breakdown in situations where the extractable information from the new technology far exceeds that contained in the object creating the precedent.[169] When the analogy breaks down, courts should undertake a "fresh analysis" of the emerging technology.[170]

160. United States v. Vaneenwyk, 206 F. Supp. 2d 423, 425 (W.D.N.Y. 2002).

161. United States v. Gonzalez-Perez, 426 F.2d 1283, 1287 (5th Cir. 1970).

162. United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996); *see also* United States v. Chan, 830 F. Supp. 531, 536 (N.D. Cal. 1993) (holding that while a person has an expectation of privacy in a pager, an arrestee loses that expectation during a valid exercise of police officers' SILA power).

163. *See* United States v. Wurie, 612 F. Supp. 2d 104, 110 (D. Mass. 2009) (finding no way to distinguish a cell phone from a wallet or address book); *see also* United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007) (comparing cell phones to valid, warrantless searches of pagers).

164. Cass R. Sunstein, *On Analogical Reasoning Commentary*, 106 HARV. L. REV. 741, 746 (1993).

165. Milligan, *supra* note 23, at 1329.

166. *Id.* at 1329–30.

167. 132 S. Ct. 945, 958 (2012) (Sotomayor, J., concurring).

168. *Id.*

169. Milligan, *supra* note 23, at 1335.

170. *Id.*

One can see this type of approach under the Fourth Amendment in the context of thermal imaging scans, addressed in *Kyllo v. United States*.[171] Prior to *Kyllo*, the U.S. Supreme Court allowed surveillance of a home so long as the portion of the house police observed was in plain view and officers were not trespassing.[172] The Court then upheld enhanced aerial photographs of an industrial complex[173] and standard photographs of a defendant's backyard,[174] noting that "[n]othing in the Fourth Amendment prohibited police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them . . . ."[175] Lower courts had also upheld warrantless surveillance with the aid of a flashlight[176] or binoculars.[177]

Logically, the facts of *Kyllo*—observation of the outside of a home, using a thermal imaging device, where the officer was standing in a public place[178]—would seem a natural extension of permissible observation under Fourth Amendment precedent from the use of cameras, flashlights, and binoculars to thermal imaging scanners.[179] Indeed, the U.S. Courts of Appeals for the Fifth,[180] Seventh,[181] Eighth,[182] Ninth,[183] and Eleventh[184] Circuits found a thermal scan of a home did not constitute a search.

However, Justice Scalia noted that the technological advances diminished the Fourth Amendment's privacy protections and, while the scan in *Kyllo* was crude and did not compromise the defendant's privacy in this specific case, the Court needed a forward-looking rule to cover "more sophisticated systems" that were sure to follow.[185]

171. 533 U.S. 27 (2001).

172. California v. Ciraolo, 467 U.S. 207, 213 (1986) ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.").

173. Dow Chem. Co. v. United States, 476 U.S. 227, 239 (1986).

174. *Ciraolo*, 467 U.S. at 214–15.

175. United States v. Knotts, 460 U.S. 276, 282 (1983).

176. United States v. Dunn, 480 U.S. 294 (1987) (holding that looking into a barn with the aid of a flashlight was not a search); Texas v. Brown, 460 U.S. 730 (1983) (finding that using a flashlight to look into a car was not a search).

177. United States v. Dubrofsky, 581 F.2d 208, 211 (9th Cir. 1978); Fullbright v. United States, 392 F.2d 432, 434 (10th Cir. 1968).

178. Kyllo v. United States, 533 U.S. 27, 29–30 (2001).

179. *Id.* at 42 (Stevens, J., dissenting) (arguing the search in *Kyllo* was valid because it only involved "nothing more than off-the-wall surveillance by law enforcement officers to gather information exposed to the general public from the outside of petitioner's home").

180. United States v. Ishmael, 48 F.3d 850 (5th Cir. 1995).

181. United States v. Myers, 46 F.3d 668 (7th Cir. 1995).

182. United States v. Pinson, 24 F.3d 1056 (8th Cir. 1994).

183. United States v. Kyllo, 190 F.3d 1041, 1046 (9th Cir. 1999), *rev'd*, 533 U.S. 27 (2001).

184. United States v. Robinson, 62 F.3d 1325 (11th Cir. 1995).

185. *Kyllo*, 533 U.S. at 33–34, 36, 40.

Justice Scalia could have found that thermal imaging scans and aerial photography each involved using technology to take a picture of the outside of a building that is within public view (similarities of X and Y in the previous example),[186] ignored the differences in what each type of surveillance actually revealed (differences A and B),[187] and added thermal imaging as a category of surveillance that is not considered a search under the Fourth Amendment. Instead, Justice Scalia acknowledged that thermal imaging scans are much more intrusive because they actually reveal what is happening inside the home—information that could not be attained from simply looking at a house from the street.[188] Because thermal imaging invaded the homeowner's privacy in a way that aerial surveillance did not, Justice Scalia undertook a "fresh analysis"[189] of an emerging technology, creating a new rule to govern thermal imaging.[190]

Recently, in *United States v. Jones*, Justice Sotomayor also acknowledged that traditional rules finding no expectation of privacy in data voluntarily disclosed to third parties also should be re-examined because people now expose a large amount of information to third parties during the course of day-to-day tasks.[191] Because our electronic devises transmit far more information about us than they did in the past (Internet browsing history, cell phones that show our location and movement, medications purchased online, et cetera), Justice Sotomayor suggested the old rules developed in an era of rotary phones no longer comport with the modern age.[192] While *Jones* dealt with GPS tracking devices, Sotomayor's logic applies to smartphones as well, furthering the argument that old rules often do not adequately cover rapidly developing technologies.[193]

B. Where Courts Have Come Up Short

Kyllo's approach is useful when analyzing the issue of SILA searches and smartphones. While the majority of SILA cell phone cases involved older phones with rudimentary functions like call logs, contact lists, and text messages,[194]

186. Milligan, *supra* note 23, at 1329.

187. *Id.*

188. *Kyllo*, 533 U.S. at 38.

189. Milligan, *supra* note 23, at 1335.

190. *Kyllo*, 533 U.S. at 40 (holding that when the government "uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant").

191. 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) (Justice Sotomayor's concurrence provided the deciding vote for the five-justice majority, joining Justice Scalia's majority opinion, along with Chief Justice Roberts and Justices Thomas and Kennedy.).

192. *Id.*

193. *Id.*

194. *See* California v. Diaz, 244 P.3d 501, 502 (Cal. 2011), *cert. denied*, 132 S. Ct. 94 (2011) (involving text messages); Ohio v. Smith, 920 N.E.2d 949, 950 (Ohio 2009), *cert. denied*, 131 S. Ct. 102 (2010) (involving a search of call records and phone numbers); United States v. Wurie, 612 F. Supp. 2d 104, 106–07 (D. Mass.

smartphones have become all-encompassing gadgets.[195] Today, a smartphone contains text messages, e-mail, Internet, photos, video, calendars, social networking, music, movies, GPS navigation, barcode readers, applications for virtually anything, and, of course, a telephone feature.[196] Smartphones also now function as credit cards that users can swipe in front of a kiosk to pay a bill.[197] They can turn off the lights in one's house,[198] unlock one's car remotely,[199] or even monitor one's blood pressure.[200] The only limit to smartphones' capabilities seems to be the imagination of their manufacturers.

Kyllo and the previous discussion of analogical reasoning[201] provide an analytical framework for the ever-expanding capabilities of smartphones.[202] Smartphones are like wallets in that they can contain documents[203] like receipts,

2009) (involving a search of the call records and caller ID); United States v. Finley, 477 F.3d 250 (5th Cir. 2007) (involving a search of call records and text messages); United States v. Park, No. CR 05-375 SI, 2007 WL 1521573, at *2 (N.D. Cal. May 23, 2007) (looking through a contact list); Hawkins v. Georgia, 704 S.E.2d 886 (Ga. App. 2010) (involving a search of text messages).

195. *See generally* Newman, *supra* note 29 (noting the newest smart phones will be faster, with better screens and cameras and will include the capability to wave the phone in front of a payment kiosk instead of using a credit card); *see also* APPLE, *supra* note 29.

196. Amanda Gornot, *What Are the Functions of a Smart Phone?*, EHOW, http://www.ehow.com/info_8068722_ functions-smartphone.html (last visited Dec. 29, 2011) (on file with the *McGeorge Law Review*); *How to Choose the Best Smart Phone Navigation App,* CONSUMER REPORTS (Dec. 21, 2011, 3:30 PM), http://news.consumerreports.org/cars/2011/12/how-to-choose-the-best-smart-phone-navigation-app.html (on file with the *McGeorge Law Review*).

197. Jared Newman, *Beyond Google Wallet: A Look at the Competition*, PC WORLD (Sept. 19, 2011, 2:27 PM), http://www.pcworld.com/article/240261/beyond_google_wallet_a_look_at_the_competition.html (on file with the *McGeorge Law Review*) (looking at the competition Google Wallet faces in the market as Visa, Apple, and Isis develop their own smart phone payment programs).

198. *Throw Out Your Remotes*, BLACKBERRY, http://www.blackberry.com/newsletters/connection/personal/i509/remotes.shtml (last visited Dec. 29, 2011) (on file with the *McGeorge Law Review*).

199. *Remotely Unlock and Start Your Car – Coming Soon to a Smartphone Near You*, INDEPENDENT (LONDON) (July 23, 2010), http://www.independent.co.uk/life-style/motoring/remotely-unlock-and-start-your-car--coming-soon-to-a-smartphone-near-you-2033987.html (on file with the *McGeorge Law Review*).

200. Troy Wolverton, *Smart Phone Functions Seep into All Sectors*, PHYSORG (Jan. 16, 2011), http://www.physorg.com/news/2011-01-smart-functions-seep-sectors.html (on file with the *McGeorge Law Review*).

201. *See supra* Part III.A (explaining how monological reasoning allowed courts to bring emerging technologies under the umbrella of SILA).

202. *See* Chris Morris, *5 Cool Features of the Next Wave of Smart Phones*, YAHOO! PLUGGED IN (Oct. 20, 2011, 8:00 PM), http://games.yahoo.com/blogs/plugged-in/5-cool-features-next-wave-smart-phones-000041688.html (on file with the *McGeorge Law Review*) (discussing smart phones with flexible screens and augmented reality features that allow people to move with the phone to correspond to moving in a video game being used on the phone); *see also* Ginny Miles, *Quad-Core Phones: What to Expect in 2012*, PC WORLD (Dec. 11, 2011, 5:30 PM), http://www.pcworld.com/article/246011/quadcore_phones_what_to_expect_in_2012.html (on file with the *McGeorge Law Review*) (describing the upcoming advances in the 2012 batch of smart phones).

203. Matt Skaggs, *Smartphones That Allow You to Work Excel Documents*, SALON, http://techtips.salon.com/smartphones-allow-work-excel-documents-3493.html (last visited Dec. 29, 2011) (on file with the *McGeorge Law Review*) (detailing which types of smart phones run Microsoft Office, which includes Excel documents).

pictures,[204] and, now, credit cards.[205] Smartphones are like address books in that they contain contact information.[206] Smartphones are like pagers in that they transmit electronic messages and phone numbers.[207] But, while sufficient similarities exist to monologically compare smartphones to categories of items previously encompassed by SILA, the amount of private data contained in a smartphone—like the details of the home revealed by a thermal scan in *Kyllo*[208]—greatly exceeds those other items.[209] Therefore, courts should analyze warrantless searches of cell phones in general—and smartphones in particular—differently.[210] Unfortunately, many courts have not protected privacy interests in new technology,[211] of which *Nottoli*[212] is the latest chapter.

C. Judicial Entrenchment

Some commentators argue that courts are best situated to protect privacy interests in new technology, with cases like *Kyllo* standing as examples of how courts can use the Fourth Amendment to craft technology-specific rules.[213] These commentators argue that if drafting rules for new technologies is left to the legislature, those rules could reflect the will of the majority, rather than the constitutional values the Framers adopted to protect privacy.[214] This perspective places its faith in judicial activism to apply these constitutional values to

204. EHOW, *supra* note 196.

205. Justine Rivero, *No Plastic Needed: Consumers and the Future of Mobile Payments*, HUFFINGTON POST (Sept. 30, 2011), http://www.huffingtonpost.com/justine-rivero/mobile-payment-technology_b_988133.html (on file with the *McGeorge Law Review*).

206. Milligan, *supra* note 23, at 1320; *see also* Gershowitz, *supra* note 76, at 40 (noting that courts have had little trouble analogizing cell phones to address books or envelopes).

207. Milligan, *supra* note 23, at 1324–26; *see also* United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007).

208. Kyllo v. United States, 533 U.S. 27, 38 (2001).

209. Milligan, *supra* note 23, at 1329; *see also* Gershowitz, *supra* note 76, at 40–42 (arguing that valid warrantless searches of iPhones raise concerns because iPhones store vast amounts of data compared even to traditional cell phones in addition to information accessible on smartphones through the Internet that is stored remotely).

210. Milligan, *supra* note 23, at 1335.

211. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 807 (2004) [hereinafter Kerr, *The Fourth Amendment and New Technologies*] ("[C]ourts rarely accept claims to Fourth Amendment protection in new technologies that do not involve interference with property rights, and have rejected broad claims to privacy in developing technologies with surprising consistency. The result is a critical gap between privacy rules the modern Fourth Amendment provides and privacy rules needed to effectively regulate government use of developing technologies.").

212. California v. Nottoli, 130 Cal. Rptr. 3d 884, 891, 907 (Ct. App. 2011).

213. *See* Kerr, *The Fourth Amendment and New Technologies*, *supra* note 211, at 857 (attributing this view to those with a broad interpretation of the Fourth Amendment).

214. *Id.* at 858 ("Because the Fourth Amendment reflects a clear commitment of the Framers to protect privacy, judges should identify the values of privacy in new technologies and translate them in to new Fourth Amendment rules.").

developing technologies.[215] However, in practice the courts have been far more deferential than this ideal requires.[216] When the U.S. Supreme Court has adopted a new rule like *Kyllo*, lower courts have applied it narrowly and usually limit its scope to protecting the home.[217] *Kyllo* is not viewed "as a symbolic endorsement of broad privacy rights in new technologies."[218] Courts are not deviating from a "relatively humble and deferential . . . attitude" in the area of the Fourth Amendment.[219] Rather than utilizing a forward-looking approach when adapting rules to protect privacy rights inherent in the Fourth Amendment, courts seem content to analogize emerging technologies to cigarette packages and the like, allowing our privacy interest to shrink with each subsequent update.[220]

D. Why the Task of Protecting Our Smartphones Best Lies with the Legislature

The Fourth Amendment attempts to strike a balance between legitimate law enforcement goals and the privacy and autonomy of individuals.[221] While courts have drafted rules that served both of those Fourth Amendment goals when technologies are stable, the legislature is better suited for developing rules to govern areas of rapid change,[222] something Justice Alito acknowledged in *United States v. Jones*.[223] One commentator illustrated this point using the example of traffic stops.[224] The issues posed by a traffic stop have remained constant for decades—a passenger's privacy interests in her automobile, the officer's safety concerns regarding weapons in the vehicle, and policy concerns about a driver's ability "to speed away" and "later dispose of the evidence."[225] Courts are able to consider the effects of new rules with the benefit of familiar circumstances and a long period of time for analysis.[226] Through this process, courts developed stable rules that allow officers to stop vehicles for any minor offense and search the

215. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 222–23 (1999).

216. Kerr, *The Fourth Amendment and New Technologies*, *supra* note 211, at 835.

217. *Id.*

218. *Id.* at 837.

219. *Id.* at 838.

220. *See supra* Part III.B (explaining how emerging capabilities of smartphones necessitates treating them differently than other objects analyzed under the Fourth Amendment).

221. Kerr, *The Fourth Amendment and New Technologies*, *supra* note 211, at 861.

222. *Id.* at 861–62.

223. 132 S. Ct. 945, 964 (2012) (Alito, J., concurring) (finding that "[i]n circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way") (citations omitted). Justices Ginsburg, Breyer, and Kagan joined Justice Alito in concurring in the judgment in a case involving GPS tracking devices. *Id.* at 958.

224. Kerr, *The Fourth Amendment and New Technologies*, *supra* note 211, at 862.

225. *Id.* at 863.

226. *Id.* at 863–64.

vehicle and pat down the driver if the officer has reasonable suspicion the driver or passenger has a weapon.[227]

However, judges have difficulties when attempting to draft rules for a shifting landscape.[228] The recent SILA cases involving cell phones illustrate the point.[229] In *Diaz*, the court addressed the issue of a warrantless search of the text message folder of the defendant's cell phone.[230] Although the technology was available in 1993,[231] the court did not address text messages and SILA until more than a decade and a half later.[232] In the meantime, cell phones and the interests and concerns surrounding them changed greatly.[233]

In *Diaz*, the court dismissed the defendant's argument that cell phones should be treated differently than cigarette packs because of their storage capacity.[234] The court noted the record lacked information on the storage capacity of the phone in question and there was no reason to exempt all cell phones from warrantless searches, "including those with limited storage capacities."[235] But this retrospective reasoning renders these judicially created rules obsolete as soon as they are handed down.[236]

The California Supreme Court's stance might have made sense when police searched the defendant's phone in 2007.[237] After all, in 2008, smartphones only made up ten percent of the U.S. cell phone market.[238] But recent statistics show a vastly different landscape from when the officer thumbed through Gregory Diaz's text messages five years ago.[239] In 2011, the number of smartphone users in the United States jumped by 34 million to 95.8 million users[240] and now

227. *Id.*

228. *Id.* at 858.

229. *See* California v. Diaz, 244 P.3d 501, 513–14 (Cal. 2011), *cert. denied*, No. 10-1231, 2011 WL 4530138 (U.S. Oct. 3, 2011) (Werdegar, J., dissenting) (arguing the majority's opinion, which deals with text messages, also applies to smartphones that allow a person to carry more personal data in their pocket than ever before).

230. *Id.* at 503–04.

231. Shawn McClain, *History of Texting on Mobile Phones*, EHOW.COM, http://www.ehow.com/about_6507906_history-texting-mobile-phones.html (last visited Feb. 24, 2012) (on file with the *McGeorge Law Review*).

232. *Diaz*, 244 P.3d at 501.

233. *See supra* Part III.D (explaining why the legislature is better suited to create rules for emerging technologies).

234. *Diaz*, 244 P.3d at 508.

235. *Id.*

236. Kerr, *The Fourth Amendment and New Technologies*, *supra* note 211, at 861–62.

237. *Diaz*, 244 P.3d at 502.

238. Roger Entner, *Smartphones to Overtake Feature Phones in U.S. by 2011*, NIELSEN WIRE (Mar. 26, 2010), http://blog.nielsen.com/nielsenwire/consumer/smartphones-to-overtake-feature-phones-in-u-s-by-2011/ (on file with the *McGeorge Law Review*).

239. *Diaz*, 244 P.3d at 502.

240. Phil Goldstein, *CTIA: U.S. Smartphone Users Now 95.8 Million*, FIERCE WIRELESS (Oct. 11, 2011), http://www.fiercewireless.com/ctialive/story/ctia-us-smartphone-users-now-total-958-million/2011-10-11 (on file with the *McGeorge Law Review*).

comprise forty-two percent of all mobile phone users in this county.[241] Among the twenty-four-to-thirty-eight-year-old demograpic, fifty-eight percent of mobile users have a smartphone.[242] What is more telling is how people are using all of those smartphones. Eighty-seven percent of smartphone users access the Internet from their phones, while twenty-five percent of users rely primarily on their phones to access the Internet.[243] The ubiquity of smartphones is also changing behavior beyond mere browsing.[244] For example, twenty-eight percent of smartphone owners used their phones to scan product barcodes in 2010 to compare prices or purchase items with their devices.[245] Those numbers mean text messaging is the tip of the privacy iceberg among what will soon be a majority of smartphone users.[246] Unlike a traffic stop—where the concerns and interests have remained steady for decades[247]—smartphones and their capabilities are ever evolving.[248] In 2007, a user's privacy concerns might have been limited to text messages, phone contacts, call histories, and photos. In 2013, those concerns encompass users' Internet browsing history, e-mails, purchases, bank history, videos, past locations, friends, social media commentary . . . the list goes on.[249] Four years from now, who knows?[250]

When technology develops rapidly, judges struggle to keep up. As one commentator stated:

> Courts lack the institutional capacity to easily grasp the privacy implications of new technologies they encounter. Judges cannot readily understand how the technologies may develop, cannot easily appreciate context, and often cannot even recognize whether the facts of the case

241. *comScore Releases the "2012 Mobile Future in Focus" Report*, COMSCORE (Feb. 23, 2012), http://www.comscore.com/Press_Events/Press_Releases/2012/2/comScore_Releases_the_2012_Mobile_Future_in_Focus_Report (on file with the *McGeorge Law Review*).

242. Ryan Kim, *1/4 of Smartphone Users Rely on Their Device for Internet Access*, GIGAOM (July 11, 2011), http://gigaom.com/2011/07/11/14-of-smartphone-users-rely-on-their-device-for-internet-access/ (on file with the *McGeorge Law Review*) (citing a recent study by the Pew Internet & American Life Project).

243. *Id.*

244. *See infra* notes 245–46 (detailing the new ways in which owners use their smartphones).

245. *Compete Smartphone Intelligence Survey Shows Mobile Barcode Scanning Now Mainstream in Retail*, MARKETWIRE (Jan. 6, 2011, 10:57 ET), http://www.marketwire.com/press-release/compete-smartphone-intelligence-survey-shows-mobile-barcode-scanning-now-mainstream-1376718.htm (on file with the *McGeorge Law Review*).

246. *See* Keith Wagstaff, *Nielsen: Majority of Mobile Subscribers Now Smartphone Owners*, TIME (May 7, 2012), http://techland.time.com/2012/05/07/nielsen-majority-of-mobile-subscribers-now-smartphone-owners/ (on file with the *McGeorge Law Review*) (explaining, as of 2012, more than fifty percent of cellular customers use smartphones).

247. Kerr, *The Fourth Amendment and New Technologies*, *supra* note 211, at 862.

248. Newman, *supra* note 29.

249. *Id.*; Cassavoy, *supra* note 27.

250. Abhijit Bangera, *IBM: Mind Controlled Computers and Smartphones by 2017*, GEEK TECH (Dec. 20, 2011), http://geektech.in/archives/6810 (on file with the *McGeorge Law Review*) (speculating that in 2017, users might be able to control their smartphones with their minds).

> before them raise privacy implications that happen to be typical or atypical. Judicially created rules also lack necessary flexibility; they cannot change quickly and cannot test various regulatory approaches. As a result, judicially created rules regulating government investigations tend to become quickly outdated or uncertain as technology changes. The context of legislative rule-creation offers significantly better prospects for the generation of balanced, nuanced, and effective investigative rules involving new technologies.[251]

Balancing the Fourth Amendment issues of privacy and law enforcement regarding smartphone development implicates new privacy interests that continually impact the changing dynamic between officer and suspect.[252] These types of rapidly evolving policy considerations are best left to the legislature, "not by lawyers skilled in reading Supreme Court opinions."[253]

IV. WHY THE CALIFORNIA LEGISLATURE FAILED IN THE PAST AND HOW IT CAN SUCCEED IN THE FUTURE

This Part details a previous legislative attempt to protect smartphones from warrantless searches. It then explains why that previous attempt failed and how to create a legislative coalition to ensure future success in this area.

A. The Life and Death of SB 914

Forty-six days after the California Supreme Court announced its decision in *Diaz*,[254] State Senator Mark Leno responded with SB 914.[255] SB 914 noted that more Californians use "portable electronic devises" every day that store vast amounts of "personal and private information."[256] Because smartphones have Internet access, that personal data accessible through user's devices can be stored on computers across the globe.[257] The bill forbid police from conducting warrantless searches of a suspect's "portable electronic devices," defined as "any portable device that is capable of creating, receiving, accessing, or storing electronic data or communications."[258] Senator Leno noted that absent an immediate threat to police or public safety, police officers could only access the

251. Kerr, *The Fourth Amendment and New Technologies*, *supra* note 211, at 858–59.

252. *Id.* at 864–65.

253. Cass R. Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F. 361, 363 (1996).

254. 244 P.3d 501 (Cal. 2011) *cert. denied*, No. 10-1231, 2011 WL 4530138 (U.S. Oct. 3, 2011).

255. *SB 914*, AROUND THE CAPITOL, http://www.aroundthecapitol.com/billtrack/text.html?bvid=20110SB91498AMD (last visited July 3, 2012) (on file with the *McGeorge Law Review*).

256. S.B. 914, 2011 Cal. Leg., 2011–2012 Sess. (Cal. 2011) (vetoed).

257. *Id.*

258. *Id.*

contents of a seized cell phone by obtaining a warrant.[259] Senator Leno further stated:

> The simple fact that technology allows us to store all this information in our portable phones instead of our homes doesn't give government the right to view them at will. [260] Such an intrusive search is a violation of your privacy, and could allow authorities to incriminate you and others, even if it is not related to your arrest. [261]

SB 914 received support from the American Civil Liberties Union, the California Newspaper Publishers Association, the California Broadcasters Association, the California Public Defenders Association, the California Attorneys for Criminal Justice, the First Amendment Coalition, the Electronic Frontier Foundation,[262] and the endorsement of some commentators, as well.[263] SB 914 cruised through the California Assembly (70–0) and Senate (28–9)[264] and landed on Governor Brown's desk in September 2011.[265]

The only organization opposed to SB 914 in the final bill analysis might be the reason *Diaz* remains good law in California.[266] The Peace Officers Research Association of California (PORAC) opposed the bill, arguing that "[r]estricting the authority of a peace officer to search an arrestee unduly restricts their ability to apply the law, fight crime, discover evidence valuable to an investigation and protect the citizens of California."[267] While Governor Brown said courts were

259. Press Release, Sen. Mark Leno, You and Your Smart Phone Have a Right to Privacy (July 12, 2011), *available at* http://senweb03.senate.ca.gov/focus/outreach/sd03/sd03-ealert-20110712.asp (on file with the *McGeorge Law Review*).

260. *Id.*

261. *Id.*

262. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 914, at 10 (Cal. 2011), *available at* http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0901-0950/sb_914_cfa_20110621_140130_asm_comm.html (on file with the *McGeorge Law Review*).

263. *See* Peter Scheer, *Urging Gov. Brown to Sign SB 914*, CAL. COAST NEWS (Sept. 22, 2011), http://calcoastnews.com/2011/09/urging-gov-brown-to-sign-sb-914/ (on file with the *McGeorge Law Review*) (urging Gov. Brown to sign SB 914, while also acknowledging the sway law enforcement interests who opposed the bill had with the governor); Editorial, *Gov. Brown Should Sign Cellphone Search Law*, L.A. TIMES (Oct. 8, 2011), http://articles.latimes.com/2011/oct/08/opinion/la-ed-cellphone-20111008 (on file with the *McGeorge Law Review*) (arguing the bill would not hamper law enforcement or threaten officers' safety); Ryan Singel, *Gov. Brown: Sign Bill Outlawing Warrantless Smartphone Searches*, WIRED MAG. (Sept. 22, 2011), http://www.wired.com/threatlevel/2011/09/smartphone-warrant/ (on file with the *McGeorge Law Review*) (predicting a veto by the governor even while advocating Brown sign off on SB 914).

264. *Complete Bill History of SB 914*, http://info.sen.ca.gov/pub/11-12/bill/sen/sb_0901-0950/sb_914_bill_20120301_history (last visited July 4, 2012) (on file with the *McGeorge Law Review*).

265. *Id.*

266. *See infra* notes 271–77 and accompanying text (detailing PORAC's significant impact on California politics).

267. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 914, at 9 (Cal. Aug. 23, 2011) (on file with the *McGeorge Law Review*).

better suited to handle constitutional search-and-seizure issues,[268] commentators speculated PORAC and other law enforcement unions influenced the governor's decision to veto SB 914.[269] Subsequently, the California Legislature did not attempt to override of Governor Brown's veto.[270]

The law enforcement unions in general, and PORAC in particular, have supported the governor in the past.[271] PORAC recently gave $38,900 to Brown's campaign, while seven police unions donated at least $12,900 each to Brown, for a total of $160,000 in campaign donations.[272] PORAC boasts 64,000 members[273] and proclaims on its website,

> [n]o other organization can claim the legislative victories that PORAC has achieved. PORAC has the clout to tie up and/or kill legislative issues that are detrimental to peace officers. Through its active involvement and logical presentation of the facts, PORAC is rated as one of the most effective lobbying groups in California.[274]

268. Olivarez-Giles, *supra* note 2.

269. *See* Kravets, *supra* note 3 (asserting Gov. Brown's veto solidified his standing with PORAC); *see also* Bob Egelko, *Leno May Introduce Cell Phone Bill Next Year*, S.F. CHRON. (OCT. 12, 2011), http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/10/11/BA551LGCD2.DTL (on file with the *McGeorge Law Review*) (speculating that Senator Leno would have to satisfy "critical police groups as well as the governor" if he hoped to avoid a future veto on SB 914's successors); Steven Greenhut, *Brown Shows His Union Label*, ORANGE CNTY. REGISTER (Oct. 15, 2011), http://www.ocregister.com/opinion/brown-322053-union-bill.html (on file with the *McGeorge Law Review*) (arguing that Governor Brown "puts the interest of some of the most controversial unions . . . ahead of the rights of citizens"); Peter Scheer, *Brown Caves to Police, Vetoes Bill to Restrict Searches of Cell Phones*, CAL COAST NEWS (Oct. 12, 2011), http://calcoastnews.com/2011/10/brown-caves-to-police-vetoes-bill-to-restrict-searches-of-cellphones/ (on file with the *McGeorge Law Review*) ("The most likely explanation for the veto is that Brown caved to the pressure of law enforcement special interest groups. Their knee-jerk opposition to SB 914 was strong enough to overcome the judgment of large bipartisan majorities in both the Senate and the Assembly. This outcome, overriding the public will, raises the question whether police wield too much political power in California.").

270. To override a veto, the California Legislature needs a two-thirds vote in each house within sixty days of the veto. *A Guide for Accessing California Legislative Information on the Internet*, LEG. COUNS. STATE CAL. (Jan. 2009), http://www.leginfo.ca.gov/guide.html (on file with the *McGeorge Law Review*). However, the legislature has not overridden a governor's veto since 1979, and Senator Leno acknowledged, in reference to a separate bill, that the legislature loses power by not exercising its veto-override authority. *Republicans Fail in Rare Attempt to Override Governor's Veto*, L.A. TIMES (Jan. 19, 2012), http://latimesblogs.latimes.com/california-politics/2012/01/jerry-brown-republican-veto-override-fails.html (on file with the *McGeorge Law Review*). Indeed, the week after Governor Brown vetoed SB 914, Senator Leno was discussing reproposing the bill in one year, not overriding the veto. Egelko, *supra* note 269. Because of the unwillingness or inability of the California Legislature to override a governor's veto, this Comment will proceed under the assumption that the only path for a bill protecting cell phones from warrantless searches would be to avoid a veto.

271. *See infra* notes 272–75 (examining PORAC's financial contributions to political candidates in California).

272. Kravets, *supra* note 3.

273. PEACE OFFICERS RESEARCH ASS'N OF CAL., MEMBER SERVICES 5, *available at* http://porac.org/, under the Membership Services tab (on file with the *McGeorge Law Review*).

274. *Legislation*, PEACE OFFICERS RESEARCH ASS'N OF CAL., http://porac.org/political-action/legislation/ (last visited July 3, 2012) (on file with the *McGeorge Law Review*).

A review of PORAC's recent efforts shows that assertion to be accurate. From 2003 to 2010, PORAC invested $1.36 million in proposition campaigns and donated another $1.36 million to political candidates.[275] Ten of the thirteen propositions PORAC supported ended in the result the organization sought, and seventy-one percent of its candidate donations supported winners.[276] The Center on Juvenile and Criminal Justice concluded that PORAC is "a powerful lobbying organization in California" that has used its spending power to "gain favor with state candidates."[277] With specific regard to SB 914's potential successors, one reporter projected that Senator Leno will need to satisfy PORAC and its law enforcement union brethren if the senator hopes to avoid another veto.[278]

B. How to Win over the Unions and Still Protect Privacy

In considering whether to re-introduce SB 914 in the next legislative session, Senator Mark Leno acknowledged his decision may depend on whether he could satisfy unions like PORAC.[279] With that goal in mind, the legislature should pass a statute that allows warrantless searches of cell phones only in situations where officers have a reasonable suspicion the cell phone contains evidence of the crime for which the suspect is being arrested and the evidence could be destroyed if police do not search the phone immediately.

I propose a statute with much the same language as SB 914.[280] However, SB 914 would have eliminated SILA altogether as a means for an officer to warrantlessly search a cell phone,[281] which drew PORAC's aforementioned opposition.[282] I propose amending section (a) of SB 914 to read:

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275. SELENA TEJI, PROMOTING THE "GET TOUGH" CRIME CONTROL AGENDA: THE PEACE OFFICERS RESEARCH ASSOCIATION OF CALIFORNIA (PORAC), CENTER ON JUVENILE AND CRIMINAL JUSTICE 1–3 (Nov. 2011), *available at* http://www.cjcj.org/post/public/policy/porac/s/contribution/california/s/prison/crisis (on file with the *McGeorge Law Review*).

276. *Id.* at 3–4.

277. *Id.* at 8.

278. Egelko, *supra* note 269.

279. *Id.*

280. *SB 914 Bill Text*, OFFICIAL CAL. LEGISLATIVE INFO., http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0901-0950/sb_914_bill_20110902_enrolled.html (last visited Jan. 14, 2013) (on file with the *McGeorge Law Review*). SB 914 proposed:

> (a) The information contained in a portable electronic device shall not be subject to search by a law enforcement officer incident to a lawful custodial arrest except pursuant to a warrant issued by a duly authorized magistrate using the procedures established by this chapter.
>
> (b) As used in this section, "portable electronic device" means any portable device that is capable of creating, receiving, accessing, or storing electronic data or communications.
>
> (c) Except as provided in subdivision (a), nothing in this section curtails law enforcement reliance on established exceptions to the warrant requirement.

Id.

281. *Id.*

282. *See supra* Part IV.A (detailing PORAC's opposition to SB 914).

(a) The information contained in a portable electronic device shall not be subject to search by a law enforcement officer incident to a lawful custodial arrest, except:

i. Pursuant to a warrant issued by a duly authorized magistrate using the procedures established by this chapter, OR

ii. Pursuant to the search incident to lawful arrest doctrine, if the arresting officer has reasonable suspicion the portable electronic device contains evidence of the crime for which the suspect is being arrested and the evidence could be destroyed if the officer does not search the phone immediately. This exception is limited to applications on the portable electronic device where an officer reasonably believes evidence of the crime for which the suspect was arrested exists.

This would return SILA searches of cell phones to the evidence preservation justification of *Chimel*,[283] while still recognizing the legitimate situations police face in which the warrant requirement may hinder a police investigation.[284]

Limiting the search to applications on the phone where an officer reasonably believes the evidence exists prevents general warrant-style searches through a smartphone's contents.[285] This rule will prevent police from fishing through a suspect's phone and should prevent any kind of search in traffic stops for moving violations, driving under the influence, driving with a suspended license, and the like, since cell phones would not reasonably contain evidence of those offenses.[286]

The rule also still grants police enough flexibility to search cell phones for evidence of a specific crime, and preserve that evidence, when officers have reasonable suspicion the phone contains the evidence in question and an exigency warrants an immediate search. It simultaneously addresses the evidence preservation concerns of PORAC,[287] while acknowledging the breadth of private information a smartphone can contain.[288] PORAC has compromised to support

283. *See supra* Part II.A. Note that PORAC did not cite officer safety as a reason for opposing SB 914, just its effect on officers' ability to "fight crime" and "discover evidence." SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 914, at 10 (Cal. Aug. 23, 2011) (on file with the *McGeorge Law Review*).

284. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 914, at 9 (Cal. Aug. 23, 2011) (on file with the *McGeorge Law Review*).

285. Chimel v. California, 395 U.S. 752, 761–63 (1969) (noting the Fourth Amendment was adopted to prevent general warrant searches which placed almost no restrictions on government intrusion).

286. *See generally* Arizona v. Gant, 556 U.S. 332, 353 (2011) (Scalia, J., concurring) (finding an illegal warrantless search of an automobile when the arrestee was apprehended for driving without a license because the object of the search was not evidence of the crime for which the officer arrested the suspect).

287. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 914, at 10 (Cal. Aug. 23, 2011) (on file with the *McGeorge Law Review*).

288. *See supra* Part III.B.

legislation it initially opposed when concessions are made for officers[289] and for politicians caving to public pressure when a PORAC-sponsored stance proved untenable under the limelight of media scrutiny.[290]

This proposed bill puts politicians in a spot where they would have to choose between supporting legislation that addressed PORAC's stated objectives and continuing to oppose a bill that prevented general searches through users' phones.[291] Thus, in a case like *Diaz*, where the officer has reason to believe a seized cell phone contains text messages related to an arrest for selling drugs[292] *and that officer had reason to believe the evidence could be destroyed*, he would have the right to search the text message folder of the phone. In a case like *Notolli*,[293] the officer would need to reasonably believe the suspect was drunk, the phone contained evidence of that intoxication, and the evidence could be lost if the officer had to obtain a warrant before the officer could search the phone (a search limited to the applications the officer believed contained the evidence). Simply arresting someone for driving with a suspended license would no longer give the officer carte blanche authority to search the arrestee's phone.[294]

V. CONCLUSION

Courts have strayed from the original justifications of SILA and extended its application to more situations and items.[295] Consequently, cell phones have come within the scope of SILA, and courts have been content to analogize them to items like cigarette packs rather than acknowledging cell phones are inherently different and deserve fresh analysis and a new rule.[296] Where courts have failed, legislatures can succeed by adopting more nuanced rules and finding the proper balance between evolving technologies and important policy issues.[297] In California, the legislature's rule would have to satisfy the law enforcement

289. George Skelton, *The State Taking Some License with Language Might Save Gun Bill*, L.A. TIMES, Aug. 27, 2001, at 6 (detailing PORAC's support of a handgun permit bill that the organization opposed until legislators carved out exceptions in the bill that exempted officers who had already received equivalent training from taking the tests necessary to receive a handgun license).

290. John Diaz, *Hiding Behind the Shield*, S.F. CHRON., Apr. 13, 2008, at G4 (noting politicians backing away from a bill that would hide officer information, including salaries, from public when faced with the reality existing law already covered the stated rationale of protecting undercover officers).

291. *C.f. id.* (mirroring the situation politicians faced in support of AB 1855 in 2008).

292. California v. Diaz, 244 P.3d 501, 502–03 (Cal. 2011), *cert. denied*, No. 10-1231, 2011 WL 4530138 (U.S. Oct. 3, 2011). It should be noted that in *Diaz* no such exigency was present to give the officer reason to believe the text messages could be lost if the phone was not searched immediately. *See id.*

293. California v. Nottoli, 130 Cal. Rptr. 3d 884, 891 (Ct. App. 2011).

294. Arizona v. Gant, 556 U.S. 332, 353 (2011) (Scalia, J., concurring).

295. *See supra* Part II (detailing the history of the jurisprudence extending SILA to cell phones).

296. *See supra* Part II.D, Part III (discussing the current application of SILA to cell phones, regardless of the technological advances).

297. *See supra* Part III.D (analyzing why the legislature is an effective way to protect the increasing privacy concerns of smartphones).

unions.[298] What Governor Brown's veto of SB 914 demonstrated is the legislature needs a rule that takes into account the concerns of organizations like PORAC.[299] This Comment proposes a rule that attempts to strike a balance by allowing warrantless searches of cell phones where the officers reasonably believe evidence of the crime for which the suspect was arrested will be contained in specific applications on the phone and the evidence will be lost if the officer does not immediately search the phone. The rule prevents officers from generally rummaging through cell phones to find any evidence of illegality, while still taking into consideration law enforcement investigative needs. The rule strikes a pragmatic balance between our expanding privacy concerns in an electronic age and law enforcement's need to fight crime committed with those devices.

298. *See supra* Part IV (providing the history of California's legislative initiatives and the reason for their failures).

299. *Id.*