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# Symposium: Surprising Unanimity, Even More Surprising Clarity

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**Editor's Note :** At 9:30 a.m. on Monday we expect orders from the June 27 Conference, followed by the opinions at 10:00 a.m. We will begin live-blogging at this link at approximately 9:15. The only remaining undecided cases of the Term are *Burwell v. Hobby Lobby* and *Harris v. Quinn.*

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# Symposium: Surprising unanimity, even more surprising clarity

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This week the Supreme Court issued a unanimous opinion in *Riley v. California* and *United States v. Wurie* that forbids law enforcement officers from searching cell phones incident to arrest without a warrant. The decision was exactly what many commentators and Fourth Amendment experts were hoping for. Nevertheless, it was still surprising on three fronts: (1) the Court's unanimity; (2) its strong resistance to splitting the baby and adopting a compromise position that would have pleased law enforcement; and (3) the sweeping language and sheer clarity of the bright-line rule forbidding all warrantless cell phone searches incident to arrest.

First, although Justice Alito authored a short concurring opinion counseling that the Court proceed with caution, the decision in *Riley* was for all intents and purposes unanimous. This was a surprise to almost all Fourth Amendment experts and Court watchers. For over a decade, Justice Scalia has taken the position that the search incident to arrest doctrine should be linked in part to whether it would be reasonable to believe evidence of the crime of arrest could be found during a search. Only five years ago – in *Arizona v. Gant* — the Court adopted Justice Scalia's position for searches incident to arrest of automobiles. The *Gant* decision figured prominently in the briefing of *Riley* and *Wurie* and was discussed repeatedly during oral argument. Yet, neither Justice Scalia (nor Justices Thomas or Ginsburg, who joined the opinion in *Gant*) wrote separately to endorse the *Gant* framework for cell phones.

This stands in stark contrast to the Court's recent Fourth Amendment decisions about whether or not the government has conducted a search. In the recent "Is it a search?" cases, Justices have written separately to advocate for different standards. For instance, last Term in *Florida v. Jardines*, Justice Scalia wrote for the majority that a dog sniff on the porch of a house was a search and pressed his view that the standard should be whether there has been a physical trespass to property. Justice Kagan agreed with the outcome, but concurred separately in *Jardines* and continued to endorse the reasonable expectation of privacy test. Similarly, in the 2012 decision in *United States v. Jones,* Justice Sotomayor concurred and dropped the bombshell that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."

In light of all the jockeying for control of the underlying methodology of Fourth Amendment interpretation, the unanimity in *Riley* is rather startling. Perhaps the reason for broad agreement among the Justices is simply that warrantless cell phone searches are so invasive as to merit their own rule. A better explanation, however, might be that the case was argued in April – late in the Term – and that there simply was not enough time for groups of Justices to coalesce around different, more nuanced approaches to the case. (If the short timing is the explanation for the clear and unanimous opinion in *Riley*, that suggests the Court should shorten its Term even further and head home in February or March rather than June!)

The second surprise in the cellphone cases was the Court's ability to resist the temptation to split the baby. The *Riley* case involved a "smart phone," while the defendant in *Wurie* was found with an older flip phone. The Court could have crafted a rule allowing warrantless searches of the older technology (which is often used by drug dealers to arrange narcotics purchases), while disallowing searches of smart phones that hold more data. The Court avoided the temptation to wade into the morass of which phones should get greater Fourth Amendment protection.

More significantly, the Court refused to adopt the *Gant* formulation in which police can search without a warrant if there is reason to believe evidence of the crime of arrest would be found. The *Gant* compromise was alluring because it appeared to restrict police searches for low-level crimes such as traffic violations while still permitting officers to search the cellphones of drug dealers and other criminals who frequently use text messages to conduct unlawful activities. The *Gant* compromise was illusory, however, because in a digital age there is reason to believe evidence of a huge number of low-level crimes could be found on a cell phone. In addition to text messages and email correspondence, cell phones hold incriminating photos; Facebook status updates about minor offenses; Google Wallet payments for alcohol that could be linked to drunk driving; and, most importantly, location data. Perhaps Chief Justice Roberts knew (or his law clerks or his teenage children showed him) how clicking on his iPhone's "Settings" icon, followed by "Privacy," then "Location Services," followed by "System Services" and then "Frequent Locations" would show the exact addresses where he had been for the last six weeks and how many

hours and minutes he had spent at each place. This location data would be a treasure trove of evidence for police with suspicions or hunches about a particular suspect. The Chief Justice thus went out of his way to note that "a *Gant* standard would prove no practical limit at all when it comes to cell phones" because "[t]he sources of potential pertinent information are virtually unlimited."

Once again, it is hard to say what motivated the Justices to reject the *Gant* compromise position and instead offered such robust Fourth Amendment protection for cell phones. After all, the Court does not afford a fraction of the level of protection recognized in *Riley* to other Fourth Amendment areas such as *Terry* frisks and automobile searches. One answer might be that it is hard for the Justices to understand the embarrassment that comes from being subjected to a *Terry* frisk or an automobile search. By contrast, the Chief Justice identified a lot of cell phone applications – "apps for Democratic Party news and Republican Party news; . . . apps for sharing prayer requests; . . . apps for planning your budget; apps for every conceivable hobby or pastime . . ." – that might be found on the Justices' own phones and which they might be embarrassed to reveal to others. The refusal to split the baby in *Riley* might simply be attributable (subconsciously or not) to the Court's desire to protect people like them, meaning the middle class or the elite.

Finally, the *Riley* decision is surprising for how ironclad it appears to be. The Court announced a flat prohibition of warrantless cell phone searches incident to arrest and seemingly left no wiggle room for future cases. In quite blunt language, Chief Justice Roberts explained that "[o]ur answer to the question of what police must do before searching a cell phone seized incident to arrest is accordingly simple – get a warrant." Although the Court frequently claims to favor bright-line rules in the criminal procedure area so as to give police adequate guidance, the Court's decisions and standards are rarely as simple and blunt as this week's decision in *Riley*.

For instance, last Term in *Missouri v. McNeely*, the Court rejected a categorical rule that would have allowed police to conduct warrantless blood draws in drunk driving cases under the theory that blood alcohol dissipates. Instead, the Court offered the completely unclear guidance to police that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." Concurring only in part in *McNeely*, an exasperated Chief Justice Roberts explained — quite correctly — that "[a] police officer reading this Court's opinion would have no idea—no idea—what the Fourth Amendment requires of him, once he decides to obtain a blood sample from a drunk driving suspect who has refused a breathalyzer test." Yet, the Chief Justice's own proposed standard in *McNeely* – that exigent circumstances exist if an officer could reasonably conclude that there is not time to get a warrant – hardly seems like the hallmark of clarity.

When summarizing Fourth Amendment jurisprudence at 30,000 feet, criminal procedure professors often remark sarcastically that the Fourth Amendment requires police "to get a warrant, except when they can't." The clarity and bright-line nature of the decision in *Riley* is therefore a breath of fresh air.

And unlike other Fourth Amendment decisions, it does not appear there will be much room for police to wiggle out of the rule in *Riley*. For instance, after *Arizona v. Gant* scaled back police authority to search vehicles incident to arrest, commentators quickly recognized that police could conduct the same automobile searches by couching their actions under the inventory exception, rather than the search incident to arrest doctrine. In *Riley*, the Court notes that police can still rely on the exigency exception to search cell phones without a warrant. But, unlike the "search incident to arrest" exception or the inventory doctrine, the exigency rationale requires the police to demonstrate probable cause for the search. Of the hundreds of warrantless cell phone search decisions over the last decade, very few could have been justified under an exigency rationale. The *Riley* decision thus combines sweeping language with a clear bright-line rule that police will be unable to wiggle out of by turning to another exception to the warrant requirement.

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Posted in *Riley v. California*, Cell phone privacy symposium, Merits Cases

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