
*Fourth Amendment — Search and Seizure —
Searching Cell Phones Incident to Arrest — Riley v. California*

To enforce the Fourth Amendment’s prohibition on unreasonable searches, the Supreme Court has traditionally prohibited warrantless searches “subject only to a few specifically established and well-delineated exceptions.”¹ However, the Court has in recent years increasingly broadened these exceptions to the mounting concern of privacy advocates.² Last Term, in *Riley v. California*,³ the Court ostensibly broke from this trend when it examined whether one exception — searches incident to custodial arrest — applied to the digital contents of cell phones. After weighing the government’s minimal interests in these searches against the unique privacy interests at stake, the Court declined to extend the search-incident-to-arrest exception and held instead “that officers must generally secure a warrant before conducting such a search.”⁴ Although privacy advocates applauded *Riley* for endorsing a rule that protects digital privacy, the *Riley* Court relied unnecessarily on a reasonableness balancing test borrowed from other recent Fourth Amendment cases. In doing so, it signaled the continued rise of a Fourth Amendment mode of analysis that may not protect privacy as much in the future.

In *Riley*, the Court considered two cases presenting “a common question.”⁵ In the first case, a San Diego police officer arrested David Riley after discovering firearms stashed in a sock under his car’s hood.⁶ While searching Riley incident to his arrest, an officer found evidence of Riley’s association with the “Bloods” street gang.⁷ Suspicions aroused, the police seized and searched Riley’s smart phone without a warrant, uncovering further evidence of gang ties.⁸ They also discovered records that placed Riley’s phone at a shooting three weeks earlier.⁹ The trial court judge denied a motion to suppress after finding that the search fell within the scope of the search-incident-to-arrest exception.¹⁰ Riley was convicted of assault with a semiautomatic firearm, shooting at an occupied vehicle, and attempted murder.¹¹

¹ *Katz v. United States*, 389 U.S. 347, 357 (1967).

² See, e.g., Erin Murphy, *The Supreme Court, 2012 Term — Comment: License, Registration, Cheek Swab: DNA Testing and the Divided Court*, 127 HARV. L. REV. 161, 183–91 (2013).

³ 134 S. Ct. 2473 (2014).

⁴ *Id.* at 2485.

⁵ *Id.* at 2480.

⁶ *People v. Riley*, No. Do59840, 2013 WL 475242, at *1 (Cal. Ct. App. Feb. 8, 2013).

⁷ See *Riley*, 134 S. Ct. at 2480.

⁸ See *id.*

⁹ See *Riley*, 2013 WL 475242, at *1–2.

¹⁰ See *id.* at *3.

¹¹ *Id.* at *1.

The California Court of Appeal affirmed. In two paragraphs, Judge McDonald disposed of Riley's cell phone search claims on the basis of the California Supreme Court's decision in *People v. Diaz*,¹² which held that "a warrantless search of the text message folder of a cell phone" taken from a person during his arrest was constitutional under the search-incident-to-arrest exception.¹³ The *Riley* panel agreed with the trial court that *Diaz* controlled.¹⁴

Over half a decade earlier and 2,500 miles away, Brima Wurie was arrested shortly after consummating a drug deal outside a "Lil Peach" convenience store.¹⁵ After taking Wurie's cell phone, officers observed several missed calls from "my house."¹⁶ Without a warrant, the officers flipped the phone open and jotted down the caller's number.¹⁷ After tracking the number to an apartment, the officers executed a search warrant and found a drug dealer's bonanza: the "hidden mother cache" included drugs, a gun, and cash.¹⁸ Wurie was charged with distribution of crack cocaine, possession of crack cocaine with intent to distribute, and felony possession of a firearm and ammunition.¹⁹ After his motion to suppress was denied because the cell phone search occurred incident to his arrest, Wurie was convicted on all counts.²⁰

The First Circuit reversed the denial of Wurie's motion to suppress and vacated his conviction.²¹ Writing for a divided panel, Judge Stahl²² held that the digital contents of a cell phone cannot be searched incident to arrest.²³ He began by examining the rationales for the exception, which the Court in *Chimel v. California*²⁴ had established as protecting officers from dangerous weapons and preventing the destruction of evidence.²⁵ Judge Stahl reasoned that the case "turn[ed] on whether the government can demonstrate that warrantless cell phone searches, as a category, fall within the boundaries laid out in *Chimel*."²⁶ But the government did not claim that officer safety was at issue, and its concerns

¹² 244 P.3d 501 (Cal. 2011).

¹³ *Id.* at 502.

¹⁴ *Riley*, 2013 WL 475242, at *6.

¹⁵ See *United States v. Wurie*, 612 F. Supp. 2d 104, 106 (D. Mass. 2009).

¹⁶ *Id.* (internal quotation marks omitted).

¹⁷ *Id.*

¹⁸ *Id.* at 107.

¹⁹ *Id.* at 105.

²⁰ *Id.* at 109–11.

²¹ See *United States v. Wurie*, 728 F.3d 1, 1 (1st Cir. 2013).

²² Judge Stahl was joined by Judge Lipez. Dissenting, Judge Howard argued that Wurie's case "fit[] easily within existing precedent" because the police could have unquestionably seized the information's physical analogue. *Id.* at 16 (Howard, J., dissenting).

²³ *Id.* at 12–13 (majority opinion).

²⁴ 395 U.S. 752 (1969).

²⁵ See *id.* at 762–63.

²⁶ *Wurie*, 728 F.3d at 7.

about evidence destruction were overblown.²⁷ As a result, “such a slight and truly theoretical risk” was “insufficient” to justify warrantless cell phone searches, especially when “[w]eighed against the significant privacy implications.”²⁸

The Supreme Court reversed the California Court of Appeal in *Riley* and affirmed the First Circuit in *Wurie*.²⁹ Writing for the Court, Chief Justice Roberts³⁰ held that the “answer to the question of what police must do before searching a cell phone seized incident to an arrest is . . . simple — get a warrant.”³¹

To assess the reasonableness of this category of searches, the Court conducted a balancing analysis. First, it examined the government’s interests and found them wanting. The Court openly acknowledged that in *United States v. Robinson*,³² it had rejected case-by-case analysis of whether the two *Chimel* rationales were present, but the *Riley* Court explained that it was instead examining a “particular category of effects”: cell phones’ digital data.³³ Starting with officer safety, Chief Justice Roberts noted that digital content — unlike physical objects — could not directly endanger the police.³⁴ Having dispatched with the first *Chimel* rationale, Chief Justice Roberts turned to the second: evidence preservation. The government had identified “two types of evidence destruction unique to digital data — remote wiping and data encryption.”³⁵ The Court dismissed both concerns: neither problem was “prevalent,”³⁶ and each could be addressed through other means.³⁷

Chief Justice Roberts then turned to the other half of the scale: the defendants’ privacy interests. While an arrestee has diminished privacy interests, that “does not mean that the Fourth Amendment falls out of the picture entirely.”³⁸ Where cell phones are concerned, privacy

²⁷ See *id.* at 10–11.

²⁸ *Id.* at 11.

²⁹ *Riley*, 134 S. Ct. at 2495.

³⁰ Chief Justice Roberts was joined by every member of the Court save for Justice Alito.

³¹ *Riley*, 134 S. Ct. at 2495. *Riley* did not address “the question whether the collection or inspection of aggregated digital information amounts to a search under other circumstances.” *Id.* at 2489 n.1. The Court thus gingerly skirted the legal morass posed by the NSA’s metadata programs — for now. See Tim Edgar, *A Failure of Protocol*, LAWFARE (June 25, 2014, 7:48 PM), <http://www.lawfareblog.com/2014/06/a-failure-of-protocol> [<http://perma.cc/742M-9MUL>].

³² 414 U.S. 218 (1973).

³³ *Riley*, 134 S. Ct. at 2485.

³⁴ See *id.* Similarly, there was no reason to believe that cell phones regularly alerted officers to the impending arrival of the arrestee’s confederates. See *id.*

³⁵ *Id.* at 2486.

³⁶ *Id.*

³⁷ See *id.* at 2487–88. For example, police could impede remote wiping by either turning the phone off or isolating it from radio waves. *Id.* at 2487. And in emergencies, Chief Justice Roberts advised that “there remain more targeted ways to address” the problem — by, for example, relying on the exigency exception to the warrant requirement. *Id.*

³⁸ *Id.* at 2488.

interests are at their apogee: Quantitatively, cell phones have an “immense storage capacity” that houses a vast array of information moored far into the owner’s past.³⁹ Qualitatively, cell phones may reveal “detailed information about all aspects of a person’s life” through browsing history, geolocation data, and apps.⁴⁰ Together, these factors belied the government’s assertion that searching cell phone data was “materially indistinguishable” from searching physical items.⁴¹

Finally, the *Riley* Court rejected a series of narrower holdings proposed by the government. First, the government had urged the Court to import a rule from *Arizona v. Gant*⁴² that permitted “a warrantless search of an arrestee’s cell phone whenever it is reasonable to believe that the phone contains evidence of the crime of arrest.”⁴³ But the *Gant* standard would have “no practical limit at all” in the cell phone context due to the quantitative and qualitative factors that made cell phones repositories of individuals’ private lives.⁴⁴ Alternatively, the government proposed an “analogue test” that would allow officers to search “cell phone data if they could have obtained the same information from a pre-digital counterpart.”⁴⁵ But this test also lacked real limits, given the expansive functionality of most cell phones.⁴⁶

In a brief concurrence in part, Justice Alito questioned the historical legitimacy of *Chimel*’s twin rationales.⁴⁷ He argued that the rationales could not “explain the rule’s well-recognized scope,”⁴⁸ and suggested that the search-incident-to-arrest exception might also rest on “the need to obtain probative evidence.”⁴⁹ Nevertheless, Justice Alito accepted the majority’s rule because “we should not mechanically apply the rule used in the predigital era to the search of a cell

³⁹ *Id.* at 2489.

⁴⁰ *Id.* at 2490. Complicating things further, cell phones store much of their data remotely, and police officers may not be able to limit their search to locally stored information, as the government conceded was necessary. *See id.* at 2491.

⁴¹ Brief for the United States at 26, *Riley*, 134 S. Ct. 2473 (No. 13-212). Chief Justice Roberts retorted: “That is like saying a ride on horseback is materially indistinguishable from a flight to the moon.” *Riley*, 134 S. Ct. at 2488.

⁴² 556 U.S. 332 (2009).

⁴³ *Riley*, 134 S. Ct. at 2492.

⁴⁴ *Id.* Given this reality, “[i]t would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone.” *Id.* The same lack of “meaningful constraints” also proved fatal to another proposed rule that limited the officer’s search to “those areas of the phone where an officer reasonably believes that information relevant to the crime, the arrestee’s identity, or officer safety will be discovered.” *Id.*

⁴⁵ *Id.* at 2493.

⁴⁶ *Id.*

⁴⁷ *See id.* at 2495–96 (Alito, J., concurring in part and concurring in the judgment).

⁴⁸ *Id.* at 2496.

⁴⁹ *Id.* at 2495.

phone.”⁵⁰ That said, Justice Alito also indicated that he “would reconsider the question presented here if either Congress or state legislatures . . . enact legislation that draws reasonable distinctions.”⁵¹

In its immediate aftermath, *Riley* was greeted with near-universal praise for its pro-privacy rule. But the Court reached this holding only by departing from search-incident-to-arrest precedent. In particular, it ventured beyond the most simple basis for a pro-privacy rule: recognizing the yawning chasm between cell phone searches and *Chimel*'s rationales. While the Court did acknowledge this inconsistency, it coupled that explanation with an analysis of privacy interests. A relative stranger to search-incident-to-arrest doctrine, this balancing approach did not spawn serious mischief in *Riley* but may portend less privacy-protective rules when applied to other cases challenging the constitutionality of warrantless searches and seizures. Indeed, the Court has used a similar balancing approach to issue several less pro-privacy opinions in recent years. *Riley* may have set forth a categorical rule only because of intuitively appealing privacy interests and want of a more moderate alternative. Accordingly, *Riley* likely does not augur a watershed turn toward privacy, and instead stands more as a testament to the Court's increasing willingness to determine Fourth Amendment protections through an indeterminate reasonableness test.

Upon its release, *Riley* was quickly praised as “a sweeping victory for privacy rights.”⁵² Commentators suggested that the Court had “entered the digital age and fundamentally changed how the Constitution protects our privacy.”⁵³ In particular, observers commended the “simple and blunt” rule that “seemingly left no wiggle room for future cases” — a stark departure from the Court's usually muddled Fourth Amendment jurisprudence.⁵⁴ In part for this reason, analysts concluded that *Riley* would likely have far-flung consequences.⁵⁵ One scholar

⁵⁰ *Id.* at 2496.

⁵¹ *Id.* at 2497.

⁵² Adam Liptak, *Major Ruling Shields Privacy of Cellphones*, N.Y. TIMES, June 25, 2014, <http://www.nytimes.com/2014/06/26/us/supreme-court-cellphones-search-privacy.html> [<http://perma.cc/W7R4-AFPT>].

⁵³ Stephen Vladeck, *How the Supreme Court Changed America This Year*, POLITICO MAGAZINE (July 1, 2014), <http://www.politico.com/magazine/story/2014/07/how-the-supreme-court-changed-america-this-year-108497.html> [<http://perma.cc/4KU4-CXCC>]; see also, e.g., Richard Re, *Symposium: Inaugurating the Digital Fourth Amendment*, SCOTUSBLOG (June 26, 2014, 12:37 PM), <http://www.scotusblog.com/2014/06/symposium-inaugurating-the-digital-fourth-amendment> [<http://perma.cc/LCK8-3W96>] (heralding “the inauguration of a new era”).

⁵⁴ Adam Gershowitz, *Symposium: Surprising Unanimity, Even More Surprising Clarity*, SCOTUSBLOG (June 26, 2014, 11:02 AM), <http://www.scotusblog.com/2014/06/symposium-surprising-unanimity-even-more-surprising-clarity> [<http://perma.cc/Y9T4-MDNV>].

⁵⁵ See Marc Rotenberg & Alan Butler, *Symposium: In Riley v. California, A Unanimous Supreme Court Sets Out Fourth Amendment for Digital Age*, SCOTUSBLOG (June 26, 2014, 6:07 PM), <http://www.scotusblog.com/2014/06/symposium-in-riley-v-california-a-unanimous-supreme>

declared: “*Riley* is the privacy gift that keeps on giving.”⁵⁶

These paeans laud *Riley*'s outcome but miss its unusual reasoning. The *Riley* Court could have arrived at the same rule using the simpler path that *Chimel* provided. *Chimel* established two rationales for searches incident to arrest: officer safety and evidence preservation.⁵⁷ But as *Riley* itself showed, neither rationale “has much force with respect to digital content on cell phones.”⁵⁸ This should have been enough: when “both justifications for the search-incident-to-arrest exception are absent[,] . . . the rule does not apply.”⁵⁹ But rather than stop there, the *Riley* Court plowed forward and engaged in what one scholar aptly described as “a rather unusual excursus.”⁶⁰ Importing an element foreign to its jurisprudence in this area, the Court held that the search-incident-to-arrest exception rests not only on government interests, “but also on an arrestee’s reduced privacy interests.”⁶¹ Accordingly, the Court balanced the government’s attenuated interests against any intrusion into privacy occasioned by a cell phone search.

This sort of “reasonableness balancing” barely figures in search-incident-to-arrest precedent. The Court’s seminal cases naturally stood against the backdrop of individual privacy, but until recently,⁶² the Court fixed the scope of the search-incident-to-arrest exception without regard to the *degree* to which privacy was affected.⁶³

Take *Chimel*. The *Riley* Court suggested that the police needed a warrant in *Chimel* “[b]ecause a search of the arrestee’s entire house was a substantial invasion beyond the arrest itself.”⁶⁴ But the *Chimel* Court expressly disclaimed the “unconfined analysis”⁶⁵ of whether it

-court-sets-out-fourth-amendment-for-digital-age [http://perma.cc/X4WE-QH8G] (foreseeing consequences for “the NSA’s bulk record collection program, access to cloud-based data, and the third-party doctrine”). More sober observers cautioned that “it would be triumphalism of the most foolish and shortsighted variety to conclude that new technology brings out the best in the Supreme Court,” but even they could not resist hailing the decision as “a landmark in the protection of personal data.” Noah Feldman, *Justices Don’t Want Their Smartphones Searched*, BLOOMBERGVIEW (June 25, 2014, 11:24 AM), <http://www.bloomberglaw.com/articles/2014-06-25/justices-don-t-want-their-smartphones-searched> [http://perma.cc/YML3-C57M].

⁵⁶ Re, *supra* note 53.

⁵⁷ *Chimel v. California*, 395 U.S. 752, 762–63 (1969).

⁵⁸ *Riley*, 134 S. Ct. at 2484.

⁵⁹ *Arizona v. Gant*, 556 U.S. 332, 339 (2009). Or, for the more classically inclined, *cessante ratione legis cessat ipsa lex*.

⁶⁰ Feldman, *supra* note 55.

⁶¹ *Riley*, 134 S. Ct. at 2488.

⁶² See *Gant*, 556 U.S. at 344–45 (considering the degree of privacy interests).

⁶³ For example, even the First Circuit admitted that “the Supreme Court has never found the constitutionality of a search of the person incident to arrest to turn on the kind of item seized or its capacity to store private information.” *United States v. Wurie*, 728 F.3d 1, 9 (1st Cir. 2013).

⁶⁴ *Riley*, 134 S. Ct. at 2488.

⁶⁵ *Chimel v. California*, 395 U.S. 752, 765 (1969).

would be “reasonable’ to search a man’s house when he is arrested in it,”⁶⁶ both because it was not “relevant to Fourth Amendment interests,” and because “Fourth Amendment protection in this area would approach the evaporation point” under this type of analysis.⁶⁷ In fact, it was the *dissent* that urged reasonableness balancing.⁶⁸

Similarly, in *Robinson*, the Court stated that the search-incident-to-arrest exception was “based upon the need to disarm and to discover evidence” — with no mention of competing privacy interests.⁶⁹ Even the *Riley* Court admitted that *Robinson* had “focused primarily” on the “heightened government interests at stake.”⁷⁰ And once again, it was the dissent that marched under the banner of privacy interests: it complained that the majority had forsaken “the individual’s interest in remaining free from unnecessarily intrusive invasions of privacy.”⁷¹

While the *Riley* Court’s embrace of reasonableness balancing departs from traditional search-incident-to-arrest doctrine, it perfectly matches the Roberts Court’s broader approach to the Fourth Amendment.⁷² In case after case, the Roberts Court has liquidated bright-line rules about when a search is unreasonable and welcomed the “ascendance of ‘reasonableness balancing’ as a dominant mode of constitutional inquiry.”⁷³ In theory, reasonableness balancing invites recognition

⁶⁶ *Id.* at 764.

⁶⁷ *Id.* at 765.

⁶⁸ *See id.* at 772–75 (White, J., dissenting).

⁶⁹ *United States v. Robinson*, 414 U.S. 218, 235 (1973).

⁷⁰ *Riley*, 134 S. Ct. at 2488. Nevertheless, *Riley* insisted that *Robinson* really had taken privacy interests into account because it approvingly quoted then-Judge Cardozo’s view that “[s]earch of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion.” *Id.* (quoting *People v. Chiagles*, 142 N.E. 583, 584 (N.Y. 1923)). Although the *Riley* Court suggested that this language somehow confirmed the reduced privacy interests at stake in a custody situation, Judge Cardozo’s opinion is better read as simply affirming when it is appropriate — as a matter of law — to conduct a search incident to arrest. In the previous sentence, Judge Cardozo had noted that “[s]earch of the person is unlawful when the seizure of the body is a trespass, and the purpose of the search is to discover grounds as yet unknown for arrest or accusation.” *Chiagles*, 142 N.E. at 584. He then went on to explain that this “distinction” is founded not upon a privacy analysis, but rather, on a “shrewd appreciation of the *necessities of government.*” *Id.* (emphasis added).

⁷¹ *Robinson*, 414 U.S. at 254 (Marshall, J., dissenting).

⁷² As one scholar summarized, “tendrils of freestanding reasonableness have curled up in recent cases in contexts that cannot be described as ‘exceptional.’” Murphy, *supra* note 2, at 185. Scholars have long debated whether the Warrant Clause of the Fourth Amendment establishes a baseline of reasonableness, or whether it should be understood independently of the Reasonableness Clause. For the conjunctive view, see Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Carol S. Steiker, Response, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994). For the disjunctive view, see AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* (1997); TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* (1969).

⁷³ Murphy, *supra* note 2, at 183. This trend diverges from other areas of Fourth Amendment doctrine. For example, while the Court has increasingly engaged in reasonableness balancing to decide whether a search or seizure is unreasonable, it has returned to property-based bright line

of a defendant's privacy interests. In practice, though — and in contrast to *Riley* — many reasonableness balancing cases have not favored privacy rights unequivocally.

Two Terms ago, for example, the Court held in *Maryland v. King*⁷⁴ that the government may reasonably collect arrestees' DNA without a warrant or individualized suspicion.⁷⁵ It weighed the "need for law enforcement officers in a safe and accurate way to process and identify the persons . . . they must take into custody"⁷⁶ against a minimal intrusion and diminished expectations of privacy.⁷⁷ Over a vigorous dissent, the Court concluded that this balance tipped in favor of the state.

One year before that, the Court applied a similar methodology in *Florence v. Board of Chosen Freeholders*.⁷⁸ It considered whether it was "reasonable" for detention centers to conduct an extensive strip search of all new detainees — regardless of whether their offenses were serious or reasonable suspicion was present.⁷⁹ As in *King*, the majority tussled with the dissent over the legitimacy of the government's interests and the extent of the intrusion on individual privacy, but concluded that the procedures at issue "struck a reasonable balance between inmate privacy and the needs of the institutions."⁸⁰

As these examples and others⁸¹ suggest, *Riley* may prove anomalous in its embrace of defendant privacy interests for at least two reasons. First, the *Riley* Court dealt with privacy interests both widely shared and intuitively appealing. Second, the Court was unable to find a compromise position short of the categorical rule it adopted.

First, *Riley* may have been an unusually pro-privacy decision because of its facts. Reasonableness balancing tends to value privacy most in cases where government interests are low but privacy interests are high and universally shared.⁸² Cell phone searches implicate privacy interests that are not only substantial, but also ubiquitous.⁸³ As

rules in deciding whether the police conducted a "search" in the first place. *See, e.g.*, *Florida v. Jardines*, 133 S. Ct. 1409 (2013); *United States v. Jones*, 132 S. Ct. 945 (2012).

⁷⁴ 133 S. Ct. 1958 (2013).

⁷⁵ *Id.* at 1980.

⁷⁶ *Id.* at 1970.

⁷⁷ *Id.* at 1979.

⁷⁸ 132 S. Ct. 1510 (2012).

⁷⁹ *See id.* at 1520.

⁸⁰ *Id.* at 1523.

⁸¹ *See, e.g.*, *Missouri v. McNeely*, 133 S. Ct. 1552, 1569–70 (2013) (Roberts, C.J., concurring in part and dissenting in part); *Bailey v. United States*, 133 S. Ct. 1031, 1048 (2013) (Breyer, J., dissenting); *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011); *Arizona v. Gant*, 556 U.S. 332, 344–47 (2009); *Samson v. California*, 547 U.S. 843, 848 (2006); *see also* *Murphy*, *supra* note 2, at 185–86.

⁸² *Cf.* Steiker, *supra* note 72, at 850.

⁸³ Chief Justice Roberts put it best: "[M]odern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley*, 134 S. Ct. at 2484.

several commentators quickly pointed out, the *Riley* Justices would “understand in an immediate sense precisely what it would mean for their privacy if one of their phones was to be taken and searched.”⁸⁴ As a result, *Riley* may have turned on the Court’s “own sense of what is intuitively private.”⁸⁵

But the same balancing approach may minimize privacy interests when they are not widely shared and therefore less likely to garner judicial empathy, especially when those interests are closely linked with society’s “disfavored groups.”⁸⁶ Past “reasonableness” cases reflect this pattern — in *King*, for example, the Justices had little to fear from DNA identification tests limited to those arrested for “serious offenses.”⁸⁷ Even in *Florence*, where the Court refused to impose a similar limitation, members of the majority took pains to limit the Court’s holding to arrestees whose detention has been reviewed by a judicial officer.⁸⁸

Second, *Riley* may have been pro-privacy for lack of a better alternative. *Riley*’s handwringing about the lack of limiting principles reflects a broader and ceaseless search by the Roberts Court for doctrinal middle grounds. The Court has often wavered when weighing compelling government interests against severe intrusions on individual privacy, and been reluctant to revert to either extreme.⁸⁹ Instead, it prefers adopting limiting principles that will plant its decision in the middle of the road. In *King*, the Court limited its holding to cases involving “an arrest supported by probable cause . . . for a serious offense”⁹⁰ and where the statute “guard[ed] against further invasion of privacy.”⁹¹ Similarly, *Florence* sought to narrow the scope of its balancing act, lest the Court lose its purchase on the slippery slope of the Fourth Amendment’s reasonableness clause. In separate concurrences, Chief Justice Roberts and Justice Alito echoed the primary opinion by “emphasiz[ing] the limits of today’s holding.”⁹²

⁸⁴ Feldman, *supra* note 55.

⁸⁵ *Id.*

⁸⁶ Steiker, *supra* note 72, at 850. Society “will almost always fear the robbers more than the cops, but this fact does not necessarily mean that everything the cops do is ‘reasonable.’” *Id.*; see also Michael J. Klarman, *Social Reform Litigation and Its Critics: An Essay in Honor of Ruth Bader Ginsburg*, 32 HARV. J.L. & GENDER 251, 290 (2009) (“[C]ourts are never at the vanguard of social reform”); cf. Feldman, *supra* note 55 (noting that the Justices’ intuitive empathy is unlikely to extend to the NSA’s metadata programs).

⁸⁷ *Maryland v. King*, 133 S. Ct. 1958, 1965 (2013).

⁸⁸ See *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1522–23 (2012); see also *id.* at 1525 (Alito, J., concurring).

⁸⁹ Cf. *Amsterdam*, *supra* note 72, at 388 (noting the temptation of reasonableness balancing).

⁹⁰ *King*, 133 S. Ct. at 1980.

⁹¹ *Id.* at 1979.

⁹² *Florence*, 132 S. Ct. at 1524 (Alito, J., concurring); see also *id.* at 1523 (Roberts, C.J., concurring); *id.* at 1522–23 (majority opinion).

In *Riley*, similar limitations proved to be a doctrinal holy grail — the enticing object of an ultimately doomed quest. The *Riley* Court was in “a desperate search for middle ground” that would have accommodated some governmental interests at the expense of individual privacy.⁹³ But in his concurrence, Justice Alito admitted that he “d[id] not see a workable alternative” to the majority’s rule.⁹⁴ This confession may help explain *Riley*’s sweeping, pro-privacy outcome — ultimately, the Court may have skipped over the middle ground because it could not find a place to land. Every alternative option either had “no practical limit,”⁹⁵ or “would launch courts on a difficult line-drawing expedition.”⁹⁶ If so, then *Riley* may have come out cleanly in favor of privacy, but not for lack of trying.

Four decades ago, a prescient scholar warned against a turn to reasonableness. Despite its allure, he cautioned that “if some discipline is not enforced, if some categorization is not done, if the understandable temptation to be responsive to every relevant shading of every relevant variation of every relevant complexity is not restrained, then we shall have a [F]ourth [A]mendment with all of the character and consistency of a Rorschach blot.”⁹⁷ As the Roberts Court’s “reasonableness” cases suggest, a Rorschach Fourth Amendment is useful for diagnosing the pathologies of society and for conjuring sharp lines and borders where none exist. But a sliding scale approach is less useful for protecting individual privacy, often lapsing into “more slide than scale.”⁹⁸ *Riley* was a victory for privacy advocates, and an easy case under reasonableness balancing. The Court is unlikely to be as solicitous of defendants’ rights in future cases if it continues to rely on the same approach.

⁹³ S.M., *There’s No App for That*, THE ECONOMIST (April 30, 2014, 2:01 PM), <http://www.economist.com/blogs/democracyinamerica/2014/04/mobile-phone-privacy> [<http://perma.cc/PCT6-NE5M>]. In oral arguments, the Justices repeatedly demanded an “in-between rule.” Transcript of Oral Argument at 38, *Riley*, 134 S. Ct. 2473 (No. 13-132) (Breyer, J.), http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-132_h315.pdf [<http://perma.cc/4AQL-XTZP>].

⁹⁴ *Riley*, 134 S. Ct. at 2497 (Alito, J., concurring in part and concurring in the judgment).

⁹⁵ *Id.* at 2492 (majority opinion).

⁹⁶ *Id.* at 2493.

⁹⁷ Amsterdam, *supra* note 72, at 375; *see also* *Dunaway v. New York*, 442 U.S. 200, 213 (1979) (warning how “the protections intended by the Framers could all too easily disappear” under reasonableness balancing).

⁹⁸ Amsterdam, *supra* note 72, at 394. Indeed, this slide may have already begun. In *King*, for instance, the Court proclaimed that “the necessary predicate of a valid arrest for a serious offense is fundamental.” 133 S. Ct. 1958, 1978 (2013). But such limitations are unstable; they rest only on the Court’s abstract sense of “reasonableness.” *See, e.g.*, *Haskell v. Harris*, 745 F.3d 1269, 1271, 1273–74 (9th Cir. 2014) (en banc) (Smith, J., concurring in the judgment). Even the Court itself has had difficulty halting the decay. As the State searched for a limiting rationale in *Riley*’s oral arguments, Justice Kennedy — the author of *King* less than a year earlier — dismissed a “distinction . . . between serious and nonserious offenses” because he did not “think that [it] exists in our jurisprudence.” Transcript of Oral Argument, *supra* note 93, at 41. So much for “fundamental.”