CONSTITUTIONAL LAW — FOURTH AMENDMENT — FIRST CIRCUIT HOLDS THAT THE SEARCH-INCIDENT-TO-ARREST EXCEPTION DOES NOT AUTHORIZE THE WARRANTLESS SEARCH OF CELL PHONE DATA. — *United States v. Wurie*, 728 F.3d 1 (1st Cir. 2013), *reh'g en banc denied*, No. 11-1792, 2013 WL 4080123 (1st Cir. July 29, 2013).

Under the Fourth Amendment,[1] warrantless searches are per se unreasonable unless they fall into one of a few "specifically established and well-delineated exceptions."[2] In *Chimel v. California*,[3] the Supreme Court explained that, because of the need to protect officer safety and to prevent the destruction or concealment of evidence, law enforcement can, incident to an arrest, search "the arrestee's person and the area 'within his immediate control.'"[4] Recently, in *United States v. Wurie*,[5] the First Circuit held that warrantless searches of cell phone data fall outside the scope of the search-incident-to-arrest exception because they serve neither *Chimel* purpose.[6] The court's approach departed from the existing doctrine governing searches of the arrestee's person, which grew out of the Supreme Court's broad holding in *United States v. Robinson*[7] that "in the case of a lawful custodial arrest," a "full search of the person" requires "no additional justification" other than the arrest itself.[8] Because the assumptions underlying this permissive rule do not apply in the context of cell phone searches, the Supreme Court should clarify that *Robinson* does not reach these searches.

In 2007, Brima Wurie was arrested for distributing crack cocaine, and two cell phones were taken from him at the police station.[9] Five to ten minutes later, police officers noticed that one of the phones was

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[1] The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

[2] Arizona v. Gant, 129 S. Ct. 1710, 1716 (2009) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

[3] 395 U.S. 752 (1969).

[4] *Id.* at 763. In *Chimel*, the Supreme Court held that a search of the arrestee's entire house was unreasonable because it "went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him." *Id.* at 768.

[5] 728 F.3d 1 (1st Cir. 2013), *reh'g en banc denied*, No. 11-1792, 2013 WL 4080123 (1st Cir. July 29, 2013).

[6] *See id.* at 13.

[7] 414 U.S. 218 (1973). In *Robinson*, the Court held that pursuant to a lawful arrest, the arresting officer was permitted to search the defendant's person and inspect the contents of the crumpled cigarette package he found. *See id.* at 236. This power came from "the traditional and unqualified authority of the arresting officer to search the arrestee's person." *Id.* at 229.

[8] *Id.* at 235.

[9] *Wurie*, 728 F.3d at 1–2.

repeatedly receiving calls from a number identified as "my house."[10] The officers opened the phone and saw its "wallpaper" — "a photograph of a young black woman holding a baby."[11] They then pushed two buttons to identify the phone number in the call log associated with the "my house" label.[12] Using an online directory, the police traced that number to a residence, where they saw someone who looked like the woman from the wallpaper through the window.[13] The officers entered the apartment to "freeze" it while waiting for a search warrant; after the warrant arrived, the officers found more crack cocaine and a gun in the apartment.[14]

After being indicted on drug and firearm charges, Wurie filed a motion to suppress the evidence obtained through the warrantless search of his cell phone.[15] The district court denied the motion, finding that the search incident to his arrest was "limited and reasonable."[16] The court saw "no principled basis for distinguishing a warrantless search of a cell phone from the search of other types of personal containers found on a defendant's person," which is constitutional under Supreme Court precedent.[17] The jury found Wurie guilty on all counts, and he was sentenced to 262 months in prison.[18]

The First Circuit reversed and remanded. Writing for a divided panel, Judge Stahl[19] concluded that "warrantless cell phone data searches are *categorically* unlawful under the search-incident-to-arrest exception."[20] The court began by establishing that Supreme Court precedent required a bright-line rule that would be easy for law enforcement to apply.[21] Next, it held that every warrantless search incident to an arrest that does not serve either *Chimel* purpose — ensuring law enforcement safety or preventing the destruction or concealment of evidence — is inherently unreasonable.[22] According to Judge Stahl,

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[10] *Id.* (internal quotation marks omitted). This cell phone was a "flip" phone, not a smartphone. *See* United States v. Wurie, 612 F. Supp. 2d 104, 106 (D. Mass. 2009).

[11] *Wurie*, 728 F.3d at 2.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] United States v. Wurie, 612 F. Supp. 2d 104, 110 (D. Mass. 2009).

[17] *Id.*

[18] *Wurie*, 728 F.3d at 2.

[19] Judge Stahl was joined by Judge Lipez.

[20] *Wurie*, 728 F.3d at 12.

[21] *Id.* at 6; *see also id.* at 12 (finding "little room for a case-specific holding, given the Supreme Court's insistence on bright-line rules in the Fourth Amendment context").

[22] *See id.* at 10. The majority saw the divide between searches based on safety or evidentiary concerns and searches that find no justification in *Chimel* as the key to understanding Supreme Court precedent. In particular, where the scope of a search is "commensurate with its [*Chimel*] purposes," it will be reasonable and self-limiting. *Id.* at 9 (quoting Arizona v. Gant, 129 S. Ct. 1710, 1716 (2009)) (internal quotation marks omitted). However, "categories of searches that can-

warrantless searches of cell phone data can never be justified under *Chimel*. First, although the police should be allowed to examine a phone to ensure that it is not a weapon, there is "no reason to believe that officer safety would require a further intrusion into the phone's contents."[23] Second, the court concluded that the risk of evidence destruction is "slight and truly theoretical."[24] Hence, the search-incident-to-arrest exception did not apply.

Further, Judge Stahl rejected the government's position that *Robinson* drew a distinction between searches of the arrestee's person and searches of the area within his immediate control,[25] and that therefore, "a cell phone, like any other item carried on the person, can be thoroughly searched incident to a lawful arrest."[26] First, the court explained that the precedent cited by the government "surely meant to reference similar language in *Robinson*," and *Robinson* explicitly named the *Chimel* rationales as the justifications for the search-incident-to-arrest exception.[27] Second, the court noted that when *Robinson* was decided, no one could have foreseen that most people would carry on their person "an item containing not physical evidence but a vast store of intangible data."[28] The broad "nature and scope" of the cell phone search distinguishes it from the "reasonable, self-limiting" search in *Robinson*.[29] Finally, Judge Stahl argued that *Robinson* itself accords with *Chimel* because the search of the cigarette package preserved the destructible heroin capsules within.[30]

Judge Howard dissented. In his view, Wurie had suffered no constitutional violation because the intrusion into his phone was less inva-

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not ever be justified under *Chimel*" are "general, evidence-gathering searches" that require a warrant. *Id.* at 10.

[23] *Id.*; *see also* Orin S. Kerr, *Foreword: Accounting for Technological Change*, 36 HARV. J.L. & PUB. POL'Y 403, 405 (2013) ("The first rationale is plainly inapplicable. No one thinks that an electronic search through a cell phone might reveal a dangerous weapon.").

[24] *Wurie*, 728 F.3d at 11. The government raised the possibility that Wurie's phone could have been remotely wiped while the officers waited for a warrant, but the court found that the practical risk was minimal. Further, the government had workable options to prevent remote wiping, such as immediately copying the cell phone's contents to be searched only if the original data were to disappear. *Id.*

[25] *See, e.g.*, United States v. Sheehan, 583 F.2d 30, 32 (1st Cir. 1978) ("[T]he Supreme Court has made it increasingly clear that a lawful arrest justifies a special latitude of both search and seizure of things found on the arrestee's person.").

[26] *Wurie*, 728 F.3d at 6. The court's use of "thoroughly" could not have meant "without limit" because, for example, the government does not claim the right to search remote information stored "in the cloud." *Id.* at 8 n.8. Rather, the government asked the court "to categorically permit warrantless searches of cell phones found on the person incident to arrest, provided that the search conforms to the Fourth Amendment's core reasonableness requirement." Brief for the United States at 30–31, *Wurie*, 728 F.3d 1 (No. 11-1792).

[27] *Wurie*, 728 F.3d at 12.

[28] *Id.*

[29] *Id.* at 9–10.

[30] *See id.* at 9.

sive than circuit precedent allowed. The police searched the phone "only for the limited purpose" of retrieving a single phone number, and in *United States v. Sheehan*,[31] the First Circuit approved the copying of a list of several names and phone numbers taken from the arrestee's wallet.[32] Moreover, Judge Howard considered "[t]he fact that 'my house' repeatedly called Wurie's cell phone" to be "an objective basis for enhanced concern that evidence might be destroyed" by Wurie's confederates, and thus provided an independent justification for the search.[33]

Unlike the majority, Judge Howard agreed with the government that a clear distinction existed between searches of items on the arrestee's person and items only within his reach; in particular, the former are "either not subject to the *Chimel* analysis" or subject only to a lower level of it.[34] *Robinson* held that where a suspect is arrested based on probable cause, the police have the "unqualified authority . . . to search the person of the arrestee."[35] Further, even supposing that a *Chimel* rationale is required, Judge Howard found unconvincing the majority's attempt to exclude cell phones, reasoning that "evidence in a cell phone is just as destructible as the evidence in a wallet."[36] In fact, "cell phones arguably pose a greater *Chimel* risk than most other items because, unlike cigarette packages or wallets," remote wiping could destroy the evidence on a phone "even after the police have assumed exclusive control."[37] Acknowledging that cell phone searches raise valid privacy concerns, Judge Howard suggested that it is possible to define "limits of constitutional behavior while searching cell phones" without resorting to the "all-or-nothing approach adopted by the majority."[38] However, because *Robinson* "certainly encompass[es]

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[31] 583 F.2d 30 (1st Cir. 1978).

[32] *Id.* at 32.

[33] *Wurie*, 728 F.3d at 17 (Howard, J., dissenting). This argument seems to invoke the exigent circumstances exception. Both of the cases Judge Howard cited to support this "additional reason for affirmance" were based on that exception. *Id.* (citing United States v. Gomez, 807 F. Supp. 2d 1134, 1139 (S.D. Fla. 2011); and United States v. De La Paz, 43 F. Supp. 2d 370, 375–76 (S.D.N.Y. 1999)). As the majority noted, the government did not contend that the exigent circumstances exception applied. *Id.* at 1 (majority opinion).

[34] *Id.* at 18 (Howard, J., dissenting); *see also id.* at 19 ("*Robinson* may not have rejected *Chimel* in the context of searches of an arrestee and items on the arrestee, but it did establish that these searches differ from other types of searches incident to arrest.").

[35] *Id.* (quoting United States v. Robinson, 414 U.S. 218, 225 (1973)) (internal quotation mark omitted). That authority derives from the "reduced expectations of privacy caused by the arrest." *Id.* (quoting United States v. Chadwick, 433 U.S. 1, 16 n.10 (1977)) (internal quotation marks omitted).

[36] *Id.* at 20.

[37] *Id.*

[38] *Id.* at 17, 21. Citing *United States v. Flores-Lopez*, 670 F.3d 803, 809 (7th Cir. 2012), which balanced the arrestee's privacy interests with the *Chimel* rationales for searching his phone, Judge Howard argued that a "reasonableness analysis would restrain certain types of cell phone searches under *Robinson*." *Wurie*, 728 F.3d at 22 (Howard, J., dissenting).

the search in this case," Judge Howard would have left "the question of what constitutes an unreasonable cell phone search . . . for another day."[39] The First Circuit denied rehearing en banc.[40]

Wurie's approach of requiring a *Chimel* rationale even for searches of the arrestee's person is contrary to both *Robinson*'s broad language and subsequent development of the search-incident-to-arrest doctrine. Lower courts, including the First Circuit, have often upheld such searches even where neither *Chimel* rationale is present. While these searches did not previously intrude too far into an arrestee's privacy, the arrival of cell phones has undermined the assumption that the searches would automatically be limited and reasonable. Because that assumption fails, the Supreme Court should clarify that *Robinson* does not govern cell phone searches.

The *Wurie* decision rests on the principle that a search incident to an arrest must always be justified under the *Chimel* framework.[41] But at its core, *Chimel* is a case about the limits of the *spatial area* that law enforcement may search.[42] Its twin rationales are important because they helped the Court establish the boundary beyond which searches are unreasonable.[43] However, it is ambiguous whether *Chimel* meant that even within the proper physical scope, any search must still plausibly serve one of the two purposes.[44] At the time, this question divided lower courts.[45]

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[39] *Id.*

[40] United States v. Wurie, No. 11-1792, 2013 WL 4080123, at *1 (1st Cir. July 29, 2013). Chief Judge Lynch and Judge Howard issued statements explaining that while en banc review would normally have been appropriate, the better course was to obtain a final answer from the Supreme Court as quickly as possible. *See id.* at *2–3.

[41] *See Wurie*, 728 F.3d at 10 ("[These searches] are only reasonable in the Fourth Amendment sense because they are potentially necessary to preserve destructible evidence or protect police officers.").

[42] *See* Chimel v. California, 395 U.S. 752, 763 (1969).

[43] *See id.* at 762–63. The Supreme Court reaffirmed the importance of the *Chimel* justifications in *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009), which involved the search of a vehicle.

[44] *The Supreme Court, 1973 Term — Leading Cases*, 88 HARV. L. REV. 181, 183 (1974) ("The opinion left uncertain, however, whether a search of the area within the arrestee's reach is always allowable, or instead is allowable only when the officer has some reason to believe that weapons or evidence are in that area.").

[45] *Compare* United States v. Shye, 473 F.2d 1061, 1066 (6th Cir. 1973) ("The Court emphasized in *Chimel* that warrantless searches, whether or not incident to arrest, were the exception, not the rule, and that only the exigencies of preventing harm to the arresting officers, the escape of the suspects, or the destruction of evidence justified search of the arrestee's person and of the area within his immediate control."), *with* United States v. Frick, 490 F.2d 666, 669 (5th Cir. 1973) (permitting the search of an attaché case because it was "within the area of Frick's immediate control"). Although the court in *Frick* did note that the attaché case might have contained weapons or evidence, it entirely failed to explain how Frick, who was one to two feet away and handcuffed, "might gain possession" of a weapon and pose imminent danger to the officers. *See id.* at 673 (Goldberg, J., dissenting) (quoting *Chimel*, 395 U.S. at 763). In dissent, Judge Goldberg lamented that the majority chose "to adopt what amounts both literally and figuratively to a

Whatever the *Chimel* Court's intentions, *Robinson* unambiguously held that searches of items on an arrestee's person require "no additional justification" beyond the arrest itself.[46] On its facts, *Robinson* cannot be reconciled as an application of *Chimel*.[47] As the *Robinson* dissent noted, while inspecting the contents of the cigarette pack preserved destructible evidence and was, in Judge Stahl's words, "at least theoretically necessary"[48] to protect the arresting officer, the arrestee could only destroy the heroin capsules or use a hidden weapon against the officer if he still held the packet in his hands.[49] Once law enforcement had seized the item, the risk of evidence destruction became de minimis.[50] Furthermore, because the *Robinson* Court said that no additional justification was necessary, the opinion was devoid of factual inquiry into whether the search served one of the *Chimel* purposes.[51] That the *Robinson* opinion paid little attention to the *Chimel* rationales undermines the *Wurie* court's attempt to explain away the case as simply an application of *Chimel*.

Lower courts, including the First Circuit, have read *Robinson* to mean that no *Chimel* justification is required for searches of items on

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yardstick test" under which "the reason for the exception to the warrant requirement — the possibility of serious physical destruction at the time of arrest — is evidently considered irrelevant." *Id.*

46 United States v. Robinson, 414 U.S. 218, 235 (1973); *see also* Thornton v. United States, 541 U.S. 615, 631–32 (2004) (Scalia, J., concurring in the judgment) ("In [*Robinson*] we held that authority to search an arrestee's person does not depend on the actual presence of one of *Chimel*'s two rationales in the particular case; rather, the fact of arrest alone justifies the search." (citation omitted)).

47 *See Wurie*, 728 F.3d at 19 (Howard, J., dissenting) ("Indeed, the Court could not rely on a *Chimel* justification in *Robinson* . . . .").

48 *Id.* at 9 (majority opinion).

49 *See Robinson*, 414 U.S. at 256 (1973) (Marshall, J., dissenting) ("[E]ven if the crumpled-up cigarette package had in fact contained some sort of small weapon, it would have been impossible for respondent to have used it *once the package was in the officer's hands*." (emphasis added)). Under this view, cell phones are no different because once the phone is taken, the arrestee can no longer easily erase any data. *Cf.* United States v. Flores-Lopez, 670 F.3d 803, 808–09 (7th Cir. 2012) (describing technology that wipes a cell phone's content with the push of a single button).

50 *See Wurie*, 728 F.3d at 20 (Howard, J., dissenting) ("Perhaps what is meant is that the cell phone data is no longer destructible once it is within the exclusive control of law enforcement officers. But even accepting that the likelihood of destruction is reduced to almost zero . . . this is equally true of cigarette packages, wallets, address books, and briefcases."); Bryan Andrew Stillwagon, Note, *Bringing an End to Warrantless Cell Phone Searches*, 42 GA. L. REV. 1165, 1196 (2008) ("An arrestee . . . may access the phone's memory to destroy evidence of a crime, but [this risk is] eliminated by seizing the phone.").

51 According to the *Wurie* majority, "the Court clearly stated in *Robinson* that '[t]he authority to search the person incident to a lawful custodial arrest' is 'based upon the need to disarm and to discover evidence.'" *Wurie*, 728 F.3d at 12 (alteration in original) (quoting *Robinson*, 414 U.S. at 235). However, that reading overstates the importance *Robinson* placed on the *Chimel* rationales. What the Court actually said was that "[t]he 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 . . . ." *Robinson*, 414 U.S. at 235. The Court merely referred to the *Chimel* rationales without seriously considering them.

an arrestee. In *Sheehan*, the First Circuit upheld the photocopying of a list of names and phone numbers found in the arrestee's wallet and spent a single sentence on the permissibility of the search: "Appellant concedes, *as he must*, that his arrest was lawful and that *therefore* the search of his wallet was legal."[52] Without ever considering the twin rationales of *Chimel*, the court accepted as incontrovertible the logical step from lawful arrest to valid search. Other courts have done the same.[53] The *Wurie* court's approach is thus in tension with the bright-line rule in *Robinson*.

Nonetheless, the First Circuit convincingly established that *Robinson* was based on assumptions that no longer hold. That warrantless searches of items on the arrestee's person did not require a *Chimel* rationale presented a far smaller threat to Fourth Amendment protections before the widespread adoption of cell phones. When *Robinson* was decided, physical items on the arrestee's person, such as wallets and cigarette packages, could only contain a limited amount of information or physical evidence.[54] Therefore, "*Robinson* allowed a full search but also a narrow one," and any searches allowed by *Robinson* that exceeded the scope envisioned by *Chimel* could be considered the necessary cost of having a bright-line rule that "avoided litigation over relatively small factual variations."[55] In any event, for the vast majority of cases, the result under *Robinson* would be the same as under *Chimel*,[56] and for the rest, the intrusion, though certainly greater, still would not be excessive.[57]

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[52] United States v. Sheehan, 583 F.2d 30, 31 (1st Cir. 1978) (emphases added).

[53] *See, e.g.*, United States v. Johnson, 846 F.2d 279, 282–83 (5th Cir. 1988) (upholding the search of a briefcase because it "was within Johnson's reaching distance, and, therefore, under his immediate control," *id.* at 283, and stating without qualification that "[l]aw enforcement officers may, pursuant to a valid arrest, search any container on the person or within his reach," *id.* at 282); People v. Diaz, 244 P.3d 501, 509–11 (Cal. 2011) (upholding the search of text messages in a cell phone based on *Robinson*); *see also* Stillwagon, *supra* note 50, at 1204 ("The courts seem to have misconstrued the search-incident-to-arrest exception over time by allowing searches to take place when the original justifications for those searches no longer were present."). Some courts, while not rejecting the *Chimel* rationales altogether, have cited *Robinson* and then remarked on the evidence-preservation justification of *Chimel* without showing that the evidence was truly at risk of destruction or concealment. *See, e.g.*, United States v. Finley, 477 F.3d 250, 259–60 (5th Cir. 2007); United States v. Molinaro, 877 F.2d 1341, 1347 (7th Cir. 1989). This technique is also in contrast to the *Wurie* court's approach of requiring the government to prove more than "a slight and truly theoretical risk of evidence destruction." *Wurie*, 728 F.3d at 11.

[54] *See* Kerr, *supra* note 23, at 404.

[55] *Id.*

[56] *See Wurie*, 728 F.3d at 12 ("When the Court decided *Robinson* in 1973 and *Chadwick* in 1977, any search of the person would almost certainly have been the type of self-limiting search that could be justified under *Chimel*.").

[57] *See* Kerr, *supra* note 23, at 404 ("A search incident to arrest was not likely to veer so far from the legitimate interests that justified its scope.").

However, the vital assumption that the full search would also be a narrow one no longer holds when cell phones are the target. The broad scope of information that cell phone searches could uncover severely threatens the arrestee's privacy.[58] Cell phones, and particularly modern smartphones, "store much more personal information . . . than could ever fit in a wallet, address book, [or] briefcase."[59] Precisely because *Robinson*'s underlying assumptions do not hold, it makes sense not to treat the arrestee's cell phone "like any other item carried on the person"[60]: the scope of warrantless searches of cell phone data is far greater than what the *Robinson* Court could have envisioned.[61] Thus, although *Robinson* would allow the search at issue in *Wurie* as a search of the arrestee's person, the Supreme Court should reexamine the assumptions underlying that decision and clarify that *Robinson* should not be read to cover searches of cell phones and other devices containing virtual, rather than physical, evidence.

Today, we live in "a world in which the vast majority of arrestees . . . carry[] on their person an item containing not physical evidence but a vast store of intangible data — data that is not immediately destructible and poses no threat to the arresting officers."[62] As the judiciary adapts the requirements of the Fourth Amendment to the twenty-first century, correctly applying precedent requires being mindful of the assumptions upon which prior cases rest.[63] In *Robinson*, the Supreme Court reached a decision that made sense in its day, given the reasonable understanding that the full search was narrowly cabined to the physical evidence on the arrestee's person. Because that assumption fails in the context of cell phone searches, the Court should now limit the applicability of *Robinson*'s broad rule.

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[58] *See Wurie*, 728 F.3d at 11 (finding "significant privacy implications inherent in cell phone data searches").

[59] *Id.* at 9.

[60] *Id.* at 6; *see also* United States v. Park, No. CR 05-375 SI, 2007 WL 1521573, at *9 (N.D. Cal. May 23, 2007) ("The Court recognizes that subsequent cases have extended *Chimel*'s reach beyond its original rationales. However, . . . this Court is unwilling to further extend this doctrine to authorize the warrantless search of the contents of a cellular phone — and to effectively permit the warrantless search of a wide range of electronic storage devices — as a 'search incident to arrest.'" (citation omitted)).

[61] *See* Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 SANTA CLARA L. REV. 183, 207 (2010) ("Where scope is virtual rather than spatial, the sheer volume of digital information available within what was traditionally considered a limited 'grab area' raises new privacy concerns and requires a new articulation of the proper scope of a cellular phone's search incident to arrest.").

[62] *Wurie*, 728 F.3d at 12.

[63] *See* Kerr, *supra* note 23, at 403 ("Laws are enacted with a background understanding of the facts. When those facts change, the effect of the old legal rules can change along with them.").