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Warrantless Cell Phone Searches in the Age of Flash Mobs

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I. INTRODUCTION

Most of us cannot picture life without a cell phone. From its humble origins in the early 1970s[1] to the proliferation of modern smartphones, cell phones have become a ubiquitous part of American life. Today, cell phones contain a vast array of information which users should reasonably expect to be free from governmental intrusion.[2] Cell phones store private information and communications, including pictures detailing personal affairs.[3] We certainly all have some expectation of privacy in the contents of our cell phones.[4] But this rapid advance in technology, while bringing

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[1] Tom Farley, *The Cell Phone Revolution*, AMERICAN HERITAGE: INVENTION & TECHNOLOGY, Winter 2007, at 14–15 (identifying world's first cell phone as introduced by Motorola in 1973).

[2] *See* United States v. Zavala, 541 F.3d 562, 577 (5th Cir. 2008); United States v. Finley, 477 F.3d 250, 259 (5th Cir. 2007); State v. Smith, 920 N.E.2d 949, 955 (Ohio 2009).

[3] Newhard v. Borders, 649 F.Supp.2d 440, 444 (W.D. Va. 2009). In *Newhard*, the plaintiff alleged that police officers conducted a warrantless search of his cell phone and discovered nude pictures of himself and his girlfriend in "sexually compromising positions." *Id.* The court avoided ruling on the constitutionality of the warrantless search of the cell phone and instead ruled that the individual officers were entitled to qualified immunity because the law was not "clearly established" at the time that the search was unconstitutional. *Id.* at 447. For further discussion of the constitutionality of warrantless cell phone searches such as the one in *Newhard*, see Ashley B. Snyder, Comment, *The Fourth Amendment and Warrantless Cell Phone Searches: When is Your Cell Phone Protected?*, 46 WAKE FOREST L. REV. 155, 155–56 (2011).

[4] *Finley*, 477 F.3d at 259; *Smith*, 920 N.E.2d at 955.

many benefits to modern life, does not come without previously unexplored legal consequences, particularly within the realm of the Fourth Amendment and warrantless searches of cell phones.[5]

An interesting phenomenon recently has developed in American cities—using cell phone communications, particularly text messaging, to cause riots known colloquially as "flash mobs."[6] Though harmless in its origin, the modern day flash mob involves criminals using cell phones to gather other like-minded individuals at a specific location to wreak havoc on private citizens and law enforcement.[7] As the flash mob phenomenon grows, police officers must be vigilant in discovering whether those whom they have arrested have recently sent text messages inviting perpetrators to the scene. Officer safety is inevitably jeopardized when they arrest individuals without knowing as to whether the arrestees have sent a flash mob communication calling for an ambush.[8]

This article examines the constitutionality of police officers searching the contents of cell phones incident to a lawful arrest for the limited purpose of discovering whether a text message, phone call, or other communication has been made in the time before the arrest. None of the courts that have addressed the constitutionality of cell phone searches incident to lawful arrests have considered the threat to officers of flash

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[5] *See* Adam M. Gershowtiz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 29–30 (2008) (noting the legal repercussions affecting modern cell phones). Numerous courts have been asked to review the constitutionality of cell phone searches incident to arrest. *See* Adam M. Gershowitz, *Password Protected? Can a Password Save Your Cell Phone From a Search Incident to Arrest?*, 96 IOWA L. REV. 1125, 1129, 1137–38 n.66 (2011) (collecting cases).

[6] *See* Kevin O'Neil, *Flash Mobs Ride CTA to Commit Crimes, Mayhem on Near North Side*, CHICAGONOW (Jun, 5, 2011), http://www.chicagonow.com/cta-tattler/2011/06/flash-mobs-ride-cta-to-commit-crimes-mayhem-on-near-north-side/ ("[M]obs of teenagers . . . use . . . cell phones to meet up . . . and commit crimes ranging from assaults to shoplifting and general mayhem."). A flash mob is generally defined as "a group of people who gather through social media networks to perform an innocuous and often meaningless public act." Lauren Claycomb, Note, *Regulating Flash Mobs: Seeking a Middle Ground Approach that Preserves Free Expression and Maintains Public Order*, 51 UNIV. LOUISVILLE L. REV. 375, 378 (2013).

[7] *See, e.g.*, Pat Galbincea, *Flash Mob Ordinances Become Law in Cleveland minus Mayor Frank Jackson's Signature*, CLEVELAND PLAIN DEALER (Dec. 13, 2011, 5:56 AM), http://blog.cleveland.com/metro/2011/12/flash_mob_ordinances_become_la.html (discussing Cleveland City Council's attempt to outlaw cell phone usage in flash mobs); O'Neil, *supra* note 6 (discussing use of cell phones to coordinate mob action in Chicago); *Combating Tech-Fueled Flash Mobs a New Problem for Police*, HOMELAND SECURITY NEWS WIRE (Aug. 23, 2011), http://www.homelandsecuritynewswire.com/combating-tech-fueled-flash-mobs-new-problem-police (discussing use of technology such as cell phones in contributing to flash mob problems in Washington, D.C., Maryland, and San Francisco).

[8] For a comprehensive discussion on whether flash mobs concern First Amendment free speech implications, *see* Hannah Steinblatt, Note, *E-Incitement: A Framework for Regulating the Incitement of Criminal Flash Mobs*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 753, 755–60 (2012).

mob communications as a justification.[9] This article posits that officer safety justifies cell phone searches at the time of arrests, but only insofar as necessary to discover whether a flash mob communication has been sent.

Part II of this article documents the modern development of cell phones and the threats that police officers face on a daily basis, particularly with respect to the recent phenomenon of flash mob communications. The police cannot protect and serve to their fullest when their lives are continually threatened. Flash mob communications present life-altering dangers to police officers. The Fourth Amendment should allow for limited searches of arrestees' cell phones at the time of lawful arrests.

Part III will examine the evolution of the search incident to arrest exception to the Fourth Amendment's warrant requirement. In 2009, the U.S. Supreme Court issued its opinion in *Arizona v. Gant*,[10] which analyzed the search incident to arrest exception to the Fourth Amendment's general rule barring warrantless searches. In *Gant*, the Court made clear that a warrantless search incident to arrest is lawful under the Fourth Amendment only if one of two rationales, detailed in *Chimel v. California*,[11] are satisfied: the search is necessary to ensure (1) officer safety or (2) preservation of evidence.[12]

Part IV discusses the general consensus of the state and federal courts

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[9] *See* United States v. Finley, 477 F.3d 250 (5th Cir. 2007); United States v. Gomez, 807 F.Supp.2d 1134 (S.D. Fla. 2011); Newhard v. Borders, 649 F.Supp.2d 440 (W.D. Va. 2009); United States v. McGhee, No. 8:09CR31, 2009 WL 2424104 (D. Neb. July 21, 2009); United States v. Wurie, 612 F.Supp.2d 104 (D. Mass. 2009); United States v. Quintana, 594 F.Supp.2d 1291 (M.D. Fla. 2009); People v. Diaz, 244 P.3d 501 (Cal. 2011); State v. Smith, 920 N.E.2d 949 (Ohio 2009); State v. Carroll, 778 N.W.2d 299 (Wis. 2010); Smallwood v. State, 61 So. 3d 448 (Fla. Dist. Ct. App. 2011).

[10] Arizona v. Gant, 556 U.S. 332 (2009).

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

[12] *Gant*, 556 U.S. at 339, 347. The Court in *Gant* also adopted Justice Scalia's concurring opinion in *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring), in which Justice Scalia stated that a warrantless search of an automobile incident to arrest is proper under the Fourth Amendment "when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." The *Gant* Court explicitly held that this third justification—a reasonable belief that evidence of the offense of arrest will be discovered with a search—applies only in the unique realm of vehicle searches. *Gant*, 556 U.S. at 343 ("Although it does not follow from *Chimel*, we also conclude that *circumstances unique to the vehicle context* justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'") (emphasis added) (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring)). Because this article considers searches of cell phones in all contexts, not just vehicle stops, the analysis herein will consider only the first two *Chimel* justifications for a search incident to lawful arrest. Moreover, in most cases, it would not be reasonable to believe that the search of a cell phone will lead to evidence of the offense of arrest. Instead, a cell phone search will usually be conducted to find evidence of additional crimes committed by the arrestee. Drug cases, however, are one area where evidence located on cell phones will be probative of the drug offense causing the arrest because of the heavy use of cell phones in drug transactions. *See Quintana*, 594 F.Supp.2d at 1300 ("Where a defendant is arrested for drug related activity, police may be justified in searching the contents of a cell phone for evidence related to the crime of arrest . . . .").

holding that searches of cell phones incident to lawful arrests are constitutionally permissible. Part IV also addresses two recent cases that diverge from the general legal trend;[13] these cases incorrectly analyzed the issue under pre-*Gant* precedent, such as *New York v. Belton*,[14] which focused on whether a cell phone is sufficiently analogous to a "container;"[15] prior to *Gant*, containers could be searched without a warrant.[16] This article posits that courts should not focus on the container analysis; rather, the focus should be on the twin rationales reaffirmed in *Gant*: whether the search is necessary to avoid the destruction of evidence and to ensure officer safety.[17] This article argues that limited searches of cell phones to determine whether flash mob communications were made immediately prior to arrest are lawful under the officer safety justification. However, given the vast array of personal information stored in cell phones, the Fourth Amendment should forbid a warrantless search that strays past the boundary of looking for recent flash mob communications.[18] Limiting the search of cell phones in this manner strikes a reasonable balance between ensuring officer safety and guarding citizens' privacy.

Part V argues that it is distinctly possible that an arrestee can communicate with his criminal cohorts instantly via a cell phone, risking the lives of police officers at the scene of the arrest. For this reason, limited warrantless cell phone searches for purposes of locating flash mob communications at the time of lawful arrests should be recognized as a valid search incident to arrest under the Fourth Amendment.

II. MODERN CELL PHONES AND FLASH MOB COMMUNICATIONS

A. Modern Day Cell Phones

The modern day cell phone has its origins in two inventions, which, in

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[13] *See Smith*, 920 N.E.2d at 949, 956 (Ohio 2009); Schlossberg v. Solesbee, 844 F.Supp.2d 1165, 1171 (D. Or. 2012).

[14] New York v. Belton, 453 U.S. 454, 460–61 (1981). For an excellent discussion on the leading cases addressing cell phone searches incident to arrests under *Belton*'s "container" analysis, *see* Chelsea Oxton, Note, *The Search Incident to Arrest Exception Plays Catch Up: Why Police May No Longer Search Cell Phones Incident to Arrest Without a Warrant*, 43 CREIGHTON L. REV. 1157, 1196–204 (2010).

[15] *Compare* People v. Diaz, 244 P.3d 501, 511 (Cal. 2011) (holding that a warrantless search of a cell phone at time of arrest is valid), *with* State v. Smith, 920 N.E.2d 949, 956 (2009) (holding that a "warrantless search of data within a cell phone seized incident to a lawful arrest is prohibited by the Fourth Amendment when the search is unnecessary for the safety of law-enforcement officers and there are no exigent circumstances").

[16] Arizona v. Gant, 556 U.S. 332, 340–41 (2009) (recognizing that in *Belton*, the Court held that containers are automatically subject to search contemporaneous with lawful arrest).

[17] *Id*. at 335.

[18] *See* Quon v. Arch Wireless Operating Co., 529 F.3d 892, 905 (9th Cir. 2008) (finding that individuals have reasonable expectation of privacy in text messages stored on cell phones).

some respects, are becoming increasingly obsolete: the land-line telephone, invented by Alexander Graham Bell in the 1870s,[19] and the radio, invented by Guglielmo Marconi in the early 1900s.[20] Motorola is generally credited with inventing handheld cellular phones in the early 1970s.[21] These early mobile phones did nothing more than allow the user to place a phone call; the devices did not even receive incoming calls.[22] Cell phone technology has advanced exponentially, such that modern day cell phones have little resemblance to their arcane forefathers.[23]

Today's cell phones can store massive amounts of information, much of which users likely consider private.[24] For example, "even the most basic cell phones have the capacity to store significant amounts of personal and private information, including telephone numbers, photos, and the dates and times of incoming and outgoing messages."[25] Nearly all current cell phones have text messaging capabilities.[26] Today's cell phones contain such a "wealth of digitized information" that they bear almost no resemblance to older, outdated information-storing electronic devices, such as pagers.[27]

The cell phone has captivated the United States and the world. It is hard to imagine life without one. Countless numbers of Americans of all ages go about their daily routines with cell phones in their hands. To be sure, the number of cell phone users in America has dramatically increased from an impressive 141.8 million in 2002 to an astounding 255 million in 2007.[28]

B. Cell Phones and Crime: Flash Mob Communications

Although cell phones have provided society with many benefits, they

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[19] GERARD GOGGIN, CELL PHONE CULTURE: MOBILE TECHNOLOGY IN EVERYDAY LIFE 20 (Routledge 2006).

[20] *Id.* at 24.

[21] Oxton, supra note 14, at 1159 (citing JARICE HANSON, 24/7: HOW THE INTERNET AND CELL PHONE CHANGE THE WAY WE LIVE, WORK, AND PLAY 24, 25 (2007); RICHARD WORTH, GREAT INVENTIONS: THE TELEPHONE AND TELEGRAPH 40–41 (2006).

[22] NATIONAL GEOGRAPHIC SOCIETY, 1000 EVENTS THAT SHAPED THE WORLD: HISTORY SERIES 2008, 936 (2008).

[23] Mireille Dee, Note, *Getting Back to the Fourth Amendment: Warrantless Cell Phone Searches*, 56 N.Y.L. SCH. L. REV. 1129, 1133 (2011).

[24] Oxton, *supra* note 14, at 1162; Dee, *supra* note 23, at 1133.

[25] Dee, *supra* note 23, at 1133.

[26] *Id.*

[27] State v. Smith, 920 N.E.2d 949, 954 (Ohio 2009).

[28] Brian Andrew Stillwagon, Note, *Bringing An End To Warrantless Cell Phone Searches*, 42 GA. L. REV. 1165, 1172 (2008).

can be used for more sinister purposes as well, such as flash mobs.[29] A flash mob is defined as "a public gathering of many strangers, organized via the Internet or mobile phone, who perform a pointless act and then disperse again."[30] Though originally conceived in 2003 as a form of entertainment consisting of a mass gathering of dancers and singers,[31] flash mobs are now used to organize crime.[32] Text messages are used as a means to communicate for the purpose of organizing a criminal activity.[33] Cell phones have been used to incite criminal flash mobs in major cities across America.[34] In the summer of 2011, Chicago witnessed a surge in flash mob crimes.[35] Flash mob communications resulted in four robberies within ten minutes in an upscale neighborhood in Chicago's downtown.[36] Cell phones provide the perfect medium with which to send out flash mob communications.[37]

With the use of cell phones, "criminal flash mobs are an increasingly common threat to the police force and to society."[38] Controlling flash mob communications has proven to be difficult for law enforcement[39] because of the "secretive, spontaneous and fleeting nature" of such communications.[40] For example, suppose immediately prior to an arrest, a criminal quickly sends a text message to his friends who are nearby, detailing his location and asking for assistance. The police will have no idea that a flash mob communication has been delivered, and the consequences could be devastating to officer safety. An ambush of the arresting officers is certainly possible. This article therefore maintains that, to ensure officer safety, a limited warrantless search of a cell phone

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[29] *Id.* at 1173 ("Society has been dramatically transformed with the help of [cell phone] technological innovations, but [u]nfortunately, those who commit crime have not missed the computer revolution.") (internal quotation marks omitted).

[30] *Flash Mob Definition*, OXFORD DICTIONARIES, http://oxforddictionaries.com/definition/english/flash%2Bmob?q=flash+mob (last visited Mar. 26, 2013).

[31] Lauren Claycomb, Note, *Regulating Flash Mobs: Seeking A Middle Ground Approach That Preserves Free Expression And Maintains Public Order*, 51 U. LOUISVILLE L. REV. 375, 375, 378–79 (2012).

[32] Steinblatt, *supra* note 8, at 755.

[33] *Id.* at 755–56.

[34] *Id.* at 760–63.

[35] Annie Vaughan, *Teenage Flash Mob Robberies on the Rise*, FOX NEWS (June 18, 2011), http://www.foxnews.com/us/2011/06/18/top-five-most-brazen-flash-mob- robberies.

[36] *Id.*

[37] O'Neil, *supra* note 6 ("[M]obs of teenagers . . . use . . . cell phones to meet up . . . and commit crimes ranging from assaults to shoplifting and general mayhem.").

[38] Steinblatt, *supra* note 8, at 764.

[39] *Id.* Regulating flash mob communications may be more difficult than simply passing criminal legislation; such communications may implicate First Amendment free speech concerns. *Id.* at 756 ("Quelling [flash mob related] violence is a desirable goal, but criminalizing the speech that leads to it may amount to a First Amendment violation.").

[40] *Id.* at 764.

incident to arrest—only to discover whether a flash mob communication has been sent—should be constitutional. This interpretation is consistent with the Supreme Court's development of the law regarding the search incident to arrest doctrine.

III. HISTORICAL DEVELOPMENT OF THE SEARCH INCIDENT TO ARREST EXCEPTION TO THE FOURTH AMENDMENT

The modern day search incident to arrest doctrine has its roots in *Chimel v. California*.[41] In that case, California law enforcement officers were dispatched to the home of a burglary suspect with a warrant authorizing the suspect's arrest.[42] When the suspect arrived home, the officers executed the arrest warrant and asked for his consent to search the home.[43] Notwithstanding the suspect's refusal to consent, the officers conducted a search of the entire house, including various rooms and

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[41] Chimel v. California, 395 U.S. 752 (1969). Although *Chimel* is the foundational case for the development of the search incident to arrest analysis for the past 40 years, the Supreme Court first articulated this exception to the Fourth Amendment's warrant requirement in *Weeks v. United States*, 232 U.S. 383 (1914). *Weeks*, however, discussed the search incident to arrest as dictum, wherein the Court stated:

> What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime.

Id. at 392. In *Weeks*, the Court stated in dictum that the government is entitled to search the arrestee at the time of the arrest. This dictum eventually took on a dramatic transformation over the years. Eleven years later, the Court held that a search of an arrestee may encompass not just evidence that is on the arrestee, but also any evidence of the crime that is in his control at the time of the arrest. Carroll v. United States, 267 U.S. 132, 158 (1925). Relying on *Carroll*, the Court a few months later further expanded the search incident to arrest exception when it stated that the right to search an arrestee and "the place where the arrest is made . . . is not to be doubted." Agnello v. United States, 269 U.S. 20, 30 (1925) (*citing Carroll*, 267 U.S. at 158; *Weeks*, 232 U.S. at 392).

After the *Weeks/Carroll/Agnello* trilogy, the Court began to go back and forth on its analysis on the search incident to arrest. Broad governmental authority to search was granted in *Marron v. United States*, 275 U.S. 192 (1927), then limited in *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 347–48 (1931), and *United States v. Lefkowitz*, 285 U.S. 452, 455–56 (1932). The limitations on the search incident to arrest exception then were abandoned in *Harris v. United States*, 331 U.S. 145, 151 (1947), only to be restricted yet again one year later in *Trupiano v. United States*, 334 U.S. 669, 708 (1948), where the Court held that the search incident to arrest exception is a "strictly limited right." *Id.* Yet only two years later, the Court reversed its course and again broadened the search incident to arrest exception when it upheld the search of an entire apartment, not just the immediate vicinity of the arrestee. United States v. Rabinowitz, 339 U.S. 56, 60 (1950). Finally, in 1969, the Court overruled *Rabinowitz* in *Chimel* and laid down the principles of the modern day search incident to arrest exception.

[42] *Chimel,* 395 U.S. at 753.

[43] *Id.*

objects in them.[44] The officers retrieved evidence of the proceeds of the burglary, which were used against the suspect at his criminal trial.[45]

In reversing the conviction, the Court surveyed its prior Fourth Amendment case law and concluded that the search had far exceeded any possible scope that the Framers had envisioned.[46] Relying on Justice Frankfurter's dissent in *United States v. Rabinowitz*,[47] the Court stressed that exceptions to the Fourth Amendment's warrant requirement should be very narrow.[48] Indeed, the Court noted that the Framers included the warrant requirement in the Bill of Rights after witnessing the abuses of unreasonable searches and seizures that had been perpetrated upon the colonists, which the Court deemed to be one of the primary reasons for the American Revolution.[49] Considering the grave importance of the warrant requirement, the Court held that "[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape."[50] The Court went on to suggest that "it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction."[51]

Notwithstanding the Framers' intent to limit warrantless searches, the Court also recognized that a simple search of the arrestee will not always satisfy the twin rationales of officer safety and evidence preservation; thus, the Court also extended the holding by stating that "the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule."[52] Accordingly, the *Chimel* Court held that a warrantless police search of the arrestee incident to a lawful arrest, along with the arrestee's immediate vicinity, comports with the Fourth Amendment as long as the purpose of the search is to ensure officer safety and evidence preservation.[53]

Four years later, the Court again addressed the search incident to arrest exception in *United States v. Robinson*.[54] In *Robinson*, a police officer pulled over the defendant to arrest him for driving on a revoked license.[55] Upon exiting the vehicle, the officer advised the defendant that he was

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[44] *Id.* at 753–54.
[45] *Id.* at 754.
[46] *Id.* at 754–61.
[47] United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).
[48] California v. Chimel, 395 U.S. 752, 760–61 (1969).
[49] *Id.*
[50] *Id.* at 762–63.
[51] *Id.* at 763.
[52] *Id.*
[53] *Id.* at 762.
[54] U.S. v. Robinson, 414 U.S. 218 (1973).
[55] *Id.* at 220.

under arrest and proceeded to conduct a search of the defendant.[56] During the search, the officer reached into the defendant's pocket and pulled out a crumpled cigarette package.[57] Although there was no reason to believe that the cigarette package contained a weapon or evidence of the crime of driving on a revoked license,[58] the officer opened the package and discovered heroin inside.[59] The heroin was used against the defendant at his trial, allowing the government to obtain a conviction.[60] The D.C. Court of Appeals reversed the conviction, holding that the search violated the Fourth Amendment, and the government appealed.[61]

In reversing the judgment of the Court of Appeals, the Supreme Court departed from the traditional understanding that a search incident to arrest was an *exception* to the Fourth Amendment's warrant requirement.[62] Instead, the Court held that the Fourth Amendment provides the government with "an affirmative authority to search" incident to a lawful arrest, thus providing the government with the *entitlement* to perform a lawful search after arrest.[63] The Court held that *Chimel*'s twin rationales were irrelevant in determining whether the officer's search was reasonable under the Fourth Amendment because the fact of the arrest standing alone gave rise to lawful authority to search through the cigarette pack.[64] Once a lawful arrest is made, the Court held that the officer has free reign to search the suspect regardless of whether there is a concern for officer safety or suspicion that evidence related to the arrest may be found.[65]

U.S. v. Robinson signaled a rather extreme departure from the Court's traditional Fourth Amendment analysis. Indeed, only four years prior in *Chimel*, the Court had stressed the importance to the Framers of the Fourth Amendment's warrant requirement.[66] In *Robinson*, the Framers' concerns gave way to the supposed necessity of law enforcement to search for evidence of the crime, even though a crumpled cigarette package could not

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[56] *Id.* at 220–22.

[57] *Id.* at 223.

[58] *Id.* at 227, 236.

[59] *Id.* at 223.

[60] *Robinson*, 414 U.S. at 223.

[61] *Id.* at 223–24.

[62] *Id.* at 226.

[63] *Id.* ("Since the statement in the cases speak not simply in terms of an exception to the warrant requirement, but in terms of an affirmative authority to search, they clearly imply that such searches also meet the Fourth Amendment's requirement of reasonableness.").

[64] *Id.* at 235 ("The authority to search the person incident to a lawful custodial arrest . . . 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.").

[65] See *id.* at 236 ("Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the respondent or that he did not himself suspect that the respondent was armed.") (footnote omitted).

[66] Chimel v. California, 395 U.S. 752, 760–61 (1969).

contain evidence related to the defendant's crime.[67] *Robinson* is also notable for its allowance of a search of a container—the cigarette package—even in the absence of any basis to believe that the container contained a weapon or evidence of the crime.[68]

In 1981, the Court considered the case of *Belton v. New York*.[69] On April 9, 1978, a New York State Trooper pulled over a car containing four individuals who were speeding on the New York Thruway.[70] After learning that none of the occupants owned the vehicle, the officer ordered the men out of the vehicle and separated all of them.[71] The officer smelled marijuana emanating from the car and saw an envelope marked "Supergold" in plain view inside the vehicle.[72] The officer arrested the occupants for possession of marijuana, and he then proceeded to search the entire passenger compartment of the car.[73] The officer unzipped the passenger's jacket pockets, which had been left inside the car, and discovered cocaine, which was subsequently used to convict Roger Belton.[74]

The Supreme Court was called upon to answer the following question: "When the occupant of an automobile is subjected to lawful custodial arrest, does the constitutionally permissible scope of a search incident to arrest include the passenger compartment of the automobile in which he was riding?"[75] In affirming Belton's conviction, the Court noted that, although *Chimel* had required the presence of one of two rationales, officer safety or reasonable possibility of destruction of evidence, the Court said that history and practice had taught that: "The protection of the Fourth . . . Amendment 'can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'"[76]

Thus, the Supreme Court held that a bright line test was appropriate in determining whether a search incident to lawful arrest comported with the Fourth Amendment.[77] The Court held that "when a policeman has made a

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[67] United States v. Robinson, 414 U.S. 218, 227 (1973).

[68] *Id.* at 235 (holding that "[t]he authority to search the person incident to the lawful custodial arrest . . . does not depend on what a court may later decide was the probability in a particular arrest . . . that . . . evidence would in fact be found upon the [arrestee]").

[69] Belton v. New York, 453 U.S. 454 (1981).

[70] *Id.* at 455.

[71] *Id.* at 455–56.

[72] *Id.*

[73] *Id.* at 456.

[74] *Id.*

[75] *Belton*, 453 U.S. at 455.

[76] *Id.* at 458 (quoting LaFave, *"Case by Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 S. CT. REV. 127, 142) (citation omitted).

[77] *Id.* at 458–60.

lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[78]

Belton is important for additionally holding that "the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach."[79] The Court, however, limited the definition of "container" to "any object capable of holding another object."[80] The Court provided the following as examples of containers: closed or open glove compartments, consoles, luggage, boxes, bags, clothing, and other similar items.[81] A search incident to arrest of the passenger compartment of the vehicle or any containers located therein, the Court held was lawful regardless of the necessity for officer safety or preservation of evidence.[82]

In *Belton*, the Court essentially abandoned its fidelity to the original intent of the Fourth Amendment by opting for a bright line rule of allowing unbridled, warrantless searches.[83] In *Chimel*, the Court stressed that the abuses perpetrated against the colonists through warrantless searches and seizures were the primary impetus of the American Revolution.[84] Indeed, the Framers envisioned that a warrantless search would be the narrow exception, not the broad, bright line rule provided in *Belton*.[85] Nor did *Belton* simply address the question posed of whether the passenger compartment of the car may be searched.[86] Instead, it extended the scope of a search incident to arrest to "containers" inside of the passenger compartment of automobiles.[87] It is under this basis that courts have analyzed the legality of cell phone searches incident to arrest.[88]

For the next thirteen years, the broad rule enunciated in *Belton* was the law of the land. In 2004, however, that rule was stretched even further

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[78] *Id.* at 460 (footnote omitted).

[79] *Id.*

[80] Belton v. New York, 453 U.S. 454, 460 n.4 (1981).

[81] *Id.*

[82] *Id.* at 461 ("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.").

[83] Jeffrey Beck, Arizona v. Gant*: Heightening a Person's Expectation of Privacy in a Motor Vehicle Following Searches Incident to Arrest*, 55 S. D. L. REV. 299, 299 (2010).

[84] Chimel v. California, 395 U.S. 752, 761 (1969).

[85] In *Chimel*, the Court stated that the Fourth "Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence." *Id.*

[86] Belton v. New York, 453 U.S. 454, 455 (1981).

[87] *Id.* at 460–61.

[88] *See infra* notes 106–133 and accompanying text.

with the Court's opinion in *Thornton v. United States*.[89] A police officer from Norfolk, Virginia attempted to pull Marcus Thornton over because the registration connected to his license plate did not match the make and model of his car.[90] Before the officer could curb Thornton's vehicle, Thornton parked in a lot and exited the car.[91] He consented to a pat down search, and the officer discovered narcotics in Thornton's pocket.[92] As a result, the officer placed Thornton under arrest by handcuffing him and placing him in the backseat of the police vehicle.[93] The officer then searched Thornton's car and found a handgun, which was used against Thornton at trial.[94]

The Supreme Court addressed the issue in *Thornton* as follows: whether in the vehicle context, a search incident to arrest of the passenger compartment of a car is limited to "where the officer makes contact with the occupant while the occupant is inside the vehicle," (the facts of *Belton*) or "whether [a search incident to arrest] applies . . . when the officer first makes contact with the arrestee after the latter has stepped out of his vehicle."[95] The Court extended the *Belton* rule and held that, even if the arrestee is outside of the vehicle and placed under arrest in the backseat of a police vehicle, the police still have authority under the Fourth Amendment to conduct a search of the passenger compartment of the vehicle.[96]

The Court held that the search of Thornton's car was justified on the ground that the Fourth Amendment demanded a "clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment…."[97] The Court maintained that Thornton's arrest presented "identical concerns regarding officer safety and the destruction of evidence as [did] the arrest…" of the four individuals in *Belton*.[98]

The rationale for the Court's holding is shocking. Thornton was handcuffed and placed in the backseat of the police vehicle prior to the officer's search.[99] It boggles reason to believe that Thornton could have accessed his car and destroyed evidence or compromised the officer's

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[89] Thornton v. United States, 541 U.S. 615, 622–23 (2004).
[90] *Id.* at 617–18.
[91] *Id.* at 618.
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Thornton*, 541 U.S. at 617.
[96] *Id.* at 620–24.
[97] *Id.* at 623.
[98] *Id.* at 621.
[99] *Id.* at 618.

safety.[100] In essence, the *Thornton* Court held that whenever an arrestee is a recent occupant of a vehicle, officers have authority under the Fourth Amendment to search the passenger compartment of the vehicle, notwithstanding the unlikeliness that either of *Chimel*'s twin rationales (*i.e.*, evidence preservation and officer safety) will be implicated.[101] This broad rule remained in place for the next five years.

In 2009, the Supreme Court issued its most recent decision analyzing the search incident to arrest doctrine in *Arizona v. Gant*.[102] In that case, officers approached Rodney Gant at a residence that they believed was used to traffic narcotics.[103] Gant advised the police that the owner of the home was not present; the officers subsequently learned that Gant had an outstanding warrant for driving with a suspended license.[104] Upon their return to the residence later that evening, the officers observed Gant driving his vehicle into the driveway, at which point they arrested him for driving with a suspended license.[105] The officers handcuffed Gant and secured him in a patrol car.[106] After Gant was secure and unable to gain access to his car, the officers conducted a search incident to arrest of the compartment of the car where they found cocaine.[107] Gant was subsequently prosecuted, convicted, and sentenced to three years in prison.[108]

During the state court proceedings, Gant moved to suppress the admittance of the cocaine, arguing that the warrantless search uncovering the narcotics was illegal.[109] In affirming the Arizona Supreme Court's judgment reversing Gant's conviction, the U.S. Supreme Court revisited the search incident to arrest doctrine.[110] In conducting its analysis, the Court reconsidered whether *Belton*'s bright line rule which allowed a search incident to arrest anytime there is a lawful arrest should continue to define the search incident to arrest exception to the Fourth Amendment's warrant requirement.[111] The Court started its analysis by reaching back to

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[100] The Court rationalized that "[t]he stress is no less merely because the arrestee exited his car before the officer initiated contact, nor is an arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle." *Id.* at 621. Yet at the same time the Court contradicted itself by admitting that "[i]t [was] unlikely in this case that [Thornton] could have reached under the driver's seat for his gun once he was outside of his automobile." *Id.* at 622.

[101] Thornton v. United States, 541 U.S. 615, 622–23 (2004).

[102] *See generally* Arizona v. Gant, 556 U.S. 332 (2009).

[103] *Id.* at 335.

[104] *Id.* at 335–36.

[105] *Id.* at 336.

[106] *Id.*

[107] *Id.*

[108] *Gant*, 556 U.S. at 337.

[109] *Id.*

[110] *Id.* at 335–38.

[111] *Id.* at 338.

Chimel, noting that "the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy."[112] It is these twin rationales, which *Belton* seemed to ignore, that provides the basis for conducting a warrantless search incident to arrest. Under the facts in *Gant*, it was inconceivable that the officers would have to search the car for their own safety.[113] Nor was it possible that Gant, who was handcuffed and secured in a police car, could possibly destroy any evidence of the crime of driving with a suspended license for which he was arrested.[114] Accordingly, because neither of *Chimel*'s twin rationales of officer safety and preservation of evidence was in play, the search incident to arrest exception did not apply.[115]

The evolution of the search incident to arrest doctrine is traced full circle, starting with *Chimel*'s twin rationales of officer safety and evidence preservation, through *Belton*'s bright line rule allowing officers to search compartments and containers whenever there is a lawful arrest, and finally to *Gant*, which in turn reverted back to *Chimel*'s twin rationales. Searches of cell phones incident to lawful arrests should be analyzed under the *Chimel/Gant* analysis. As discussed above, flash mob communications pose a real threat to officer safety.[116] This threat provides a valid basis with which officers may search a cell phone. Surprisingly, courts that have considered the constitutionality of cell phone searches incident to lawful arrests have ignored officer safety as a justification.[117] Instead, they reached their conclusions based on the outdated "container" analysis

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[112] *Id.* at 339.

[113] *Id.* at 344.

[114] Arizona v. Gant, 556 U.S. 332, 344 (2009).

[115] The *Gant* Court also provided a third basis to support a lawful search incident to arrest in the vehicle context: where it is reasonable to believe that evidence of the crime for which the arrestee was arrested will be present in the automobile. *Id.* at 343. Justice Scalia first argued in favor of this basis as an exception to the general warrant requirement in automobile cases in his concurring opinion in *Thornton v. United States*, 541 U.S. 615, 632 (Scalia, J., concurring). Though it included Justice Scalia's reasoning in its holding, the Court noted that "[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. *Gant*, 556 U.S. at 343–44 (citing Atwater v. Lago Vista, 532 U.S. 318, 324 (2001); Knowles v. Iowa, 525 U.S. 113, 118 (1998)). With that said, this article does not discuss Justice Scalia's additional reason supporting a search incident to arrest because, being limited to only the automobile context, it is too narrow to consider.

[116] *See supra* notes 29–40 and accompanying text.

[117] *See generally* Silvan v. Briggs, 309 Fed. App'x. 216, *available at* 2009 WL 159429 (10th Cir. Jan. 23, 2009); Schlossberg v. Solesbee, 844 F.Supp.2d 1165 (D. Or. 2012); United States v. Gomez, 807 F.Supp.2d 1134 (S.D. Fla. 2011); State v. Smith, 920 N.E.2d 949 (Ohio 2009); People v. Nottoli, 130 Cal. Rptr. 3d 884 (Cal. Ct. App. 2011); Hawkins v. State, 704 S.E.2d 886 (Ga. Ct. App. 2011); State v. James, 288 P.3d 504 (Kan. Ct. App. 2012).

espoused in *Belton*.[118] Thus, the Supreme Court should take up the issue to settle the search incident to arrest doctrine in this area and hold that officer safety justifies limited cell phone searches for flash mob communications.

IV. OFFICER SAFETY JUSTIFIES LIMITED SEARCHES OF CELL PHONES INCIDENT TO ARREST

Most courts have held that searches of cell phones incident to lawful arrests are *per se* constitutional post-*Gant*.[119] These cases do not rely upon officer safety as a rationale for upholding cell phone searches[120] and fail to recognize the privacy concerns associated with unfettered authority to search all contents of a cell phone.[121] The problem of unfettered discretion to search cell phones will be discussed, but first, this article will address the two cases post-*Gant* holding that warrantless cell phone searches incident to arrest are unconstitutional. Simply put, the analyses conducted by these courts was wrong.

A. The Ohio Supreme Court: State v. Smith[122]

The Ohio Supreme Court is the first major court to hold that, post-*Gant*, warrantless cell phone searches incident to arrest are

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[118] *See, e.g*., United States v. Rodriguez, 702 F.3d 206, 209 (5th Cir. 2012); United States v. Curtis, 635 F.3d 704, 712 (5th Cir. 2011); People v. Nottoli, 130 Cal. Rptr. 3d 884, 904–07 (Cal. Ct. App. 2011); Fawdry v. State, 70 So. 3d 626, 628–30 (Fla. Dist. Ct. App. 2011); Hawkins v. State, 704 S.E.2d 886, 890–92 (Ga. Ct. App. 2010).

[119] There are many cases holding that the Fourth Amendment is no bar to a warrantless search of a cell phone incident to a lawful arrest. *See, e.g*., Silvan v. Briggs, 309 Fed. App'x. 216, 225 (10th Cir. 2009); United States v. Gomez, 807 F.Supp.2d 1134, 1142–50 (S.D. Fla. 2011); State v. James, 288 P.3d 504 (Kan. Ct. App. 2012); People v. Nottoli, 130 Cal. Rptr. 3d 884, 904–08 (Cal. Ct. App. 2011); Hawkins v. State, 704 S.E.2d 886, 891–92 (Ga. Ct. App. 2011); *See also* Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 SANTA CLARA L. REV. 183, 205 (2010) ("Most courts have agreed [that] . . . Supreme Court case law . . . support[s] warrantless cellular phone searches incident to arrest."); Gershowitz, *supra* note 5, at 1139 ("Approximately thirty other courts have agreed with the reasoning in [United States v. Finley, 477 F.3d 350 (5th Cir. 2007)] and upheld searches of cell phones incident to arrest.").

[120] For example, the Fourth Circuit has held that "officers may retrieve text messages and other information from cell phones and pagers seized incident to an arrest" in order to preserve evidence. United States v. Murphy, 552 F.3d 405, 411 (4th Cir. 2009). Because cases relying upon the "evidence preservation" rationale of *Gant* already permit searches of cell phone communications, I will not discuss them further. Instead, this Article explains why the cases holding cell phone searches incident to arrest are unconstitutional have been wrongly decided; further, this Article suggests that a limited search of cell phones for purposes of officer safety will satisfy any Fourth Amendment concerns.

[121] Dee, *supra* note 23, at 1158–59; Orso, *supra* note 119, at 207 ("[T]he sheer volume of digital information available within [cell phones] raises new privacy concerns and requires a new articulation of the proper scope of a cellular phone's search incident to arrest.").

[122] State v. Smith, 920 N.E.2d 949 (Ohio 2009).

unconstitutional.[123] In 2007, Wendy Northern was interrogated by police at a hospital following a drug overdose, and she confessed the identity of her drug dealer—Antwaun Smith.[124] Northern called Smith on her cell phone to set up a drug transaction, which the police recorded.[125] Later that evening, the police arrested Smith at his home and searched him.[126] The police found a cell phone and searched its contents without a warrant for call records and phone numbers.[127] The search revealed that Smith's cell phone had been used to set up the drug transaction with Northern.[128] The trial court relied on the information gathered from the cell phone and a jury convicted Smith of drug crimes.[129]

On appeal, Smith challenged the constitutionality of the warrantless search of his cell phone incident to his arrest.[130] Relying on *New York v. Belton*,[131] the Ohio Supreme Court analyzed at length the issue of whether a cell phone can be characterized as a "closed container."[132] The court noted that if a cell phone is considered a closed container, then searching its contents incident to a lawful arrest is constitutionally permissible even absent a warrant.[133] Given that "modern cell phones are capable of storing a wealth of digitized information wholly unlike any physical object found within a closed container," the court held that a cell phone is not a "closed container" under the meaning articulated in *Belton* and, thus, is not subject to the search incident to arrest exception.[134] Consequently, the court suppressed the contents of the cell phone as evidence and remanded for a new trial.[135]

The court's erroneous analysis is evident immediately from the fact that, while citing *Gant* perfunctorily,[136] it did not discuss the rationales for the search incident to arrest exception espoused in *Gant* and *Chimel* any

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[123] Joshua A. Engel, *Doctrinal Collapse: Smart Phones Cause Courts to Reconsider Fourth Amendment Searches of Electronic Devices*, 41 U. MEM. L. REV. 233, 236 (2010) ("The Ohio Supreme Court is the first court to recognize that the technological sophistication and nature of modern cell phones has created a heighted expectation of privacy that renders previous doctrinal interpretations, like the container doctrine, obsolete.").

[124] *Smith*, 920 N.E.2d at 950.

[125] *Id.*

[126] *Id*.

[127] *Id.* at 950–51.

[128] *Id.* at 950.

[129] *Id.* at 950–51.

[130] State v. Smith, 920 N.E.2d 949, 951 (Ohio 2009).

[131] New York v. Belton, 453 U.S. 454 (1981).

[132] *Smith*, 920 N.E.2d at 953–54.

[133] *Id.* at 954.

[134] *Id.* at 954–55.

[135] *Id.* at 956.

[136] *Id.* at 952.

further.[137] *Gant* specifically rejected *Belton's* container analysis and held that *Chimel's* twin rationales of officer safety and evidence preservation authorized a warrantless search incident to arrest.[138] The Ohio Supreme Court completely ignored the fact that officer safety could justify a warrantless search of Smith's cell phone, a justification that would have found support in *Gant*.[139] Indeed, had Smith texted or called accomplices upon witnessing officers arriving at his residence, his accomplices could have ambushed the officers and prevented Smith's lawful arrest. Thus, the court should have followed recent Supreme Court precedent[140] and held that Smith's cell phone search was constitutional. As discussed previously, the age of flash mob communications compels such an interpretation of the Fourth Amendment. To hold otherwise is to ignore Supreme Court precedent and turn a blind eye to the very real threat that flash mob communications pose to officer safety.

B. The United States District Court of Oregon: Schlossberg v. Solesbee[141]

The federal District Court in Oregon recently tackled the issue of whether warrantless searches of cell phones incident to arrest are constitutional.[142] Joshua Schlossberg sued Officer Bill Solesbee, in part, pursuant to 42 U.S.C. § 1983 for searching his camera without a warrant.[143] During the ensuing discussion, Officer Solesbee noticed Schlossberg holding a camera recording their conversation.[144] Officer Solesbee then tackled Schlossberg, arrested him, and took possession of the camera.[145] As part of a search incident to arrest, Officer Solesbee viewed the contents of the camera without a warrant.[146]

The District Court analogized Schlossberg's camera to a modern-day cell phone and analyzed the Fourth Amendment in that context.[147] Similar to *Smith*, the *Schlossberg* court focused its discussion on whether a camera/cell phone can be considered a "closed container" for purposes of

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[137] *Id.* at 952–55. Notably, the United States Supreme Court decided *Gant* nearly eight months before the Ohio Supreme Court decided *Smith*. *Compare* Arizona v. Gant, 556 U.S. 332 (2009), *with Smith*, 920 N.E.2d 949 (2009).

[138] *Gant*, 556 U.S. at 339, 347, 351.

[139] *Id*. at 338–39 (holding that officer safety must be considered when determining constitutionality of warrantless search incident to arrest).

[140] *E.g.*, *id*.

[141] Schlossberg v. Solesbee, 844 F.Supp.2d 1165 (D. Or. 2012).

[142] *Id*. at 1166–70.

[143] *Id.* at 1166.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Schlossberg*, 844 F.Supp.2d at 1167–70.

the rule announced in *Belton*.[148] Like *Smith*, the court failed to acknowledge *Belton*'s abrogation by *Gant*.[149] Thus, the court did not pay any attention to whether officer safety would have been jeopardized had officers not been able to search Schlossberg's camera. The fact that a camera, as opposed to a cell phone, was at issue is of no moment because the court analyzed the Fourth Amendment claim in the context of cell phone searches.[150] Just like *Smith*, the *Schlossberg* court missed one of the two rationales underlying the search incident to arrest doctrine: officer safety.

C. *Courts Should Not Follow* Smith *or* Schlossberg

Smith and *Schlossberg* are the only two published cases post-*Gant* that hold a warrantless search of a cell phone is unconstitutional even if made incident to a lawful arrest. This is likely the case only because *Gant* is a relatively recent decision. As more courts consider warrantless cell phone searches, these two erroneously-decided cases could be used as precedent. Unfortunately, these two cases make no mention of the dual goals of the search incident to arrest doctrine articulated in *Gant*: officer safety and evidence preservation. Relevant here, officer safety requires interpreting the Fourth Amendment to mean that police officers may search cell phones, at least for recent communications such as text messages and phone calls, to determine whether a flash mob communication has been sent. Indeed, as the United States Court of Appeals for the Seventh Circuit has recently recognized, "[l]ooking in a cell phone for just the cell phone's phone number does not exceed" constitutional boundaries.[151] If police officers may search cell phones for a phone-number without constitutional injury, then surely a minor extension allowing officers to search for recent communications can be affirmed as constitutional. Any minor harm to privacy is overcome by the countervailing interest in protecting the police officers who risk their lives to protect us.

D. *Limiting Cell Phone Searches to Only Discovery of Flash Mob Communications:* Newhard v. Borders[152]

To ensure that the police do not exceed the scope of searching a cell phone for information unrelated to flash mob communications, courts

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[148] *Id.* at 1169.

[149] *Id.* at 1167–71. Indeed, the court did not even cite *Gant* in its decision, notwithstanding *Gant* being the Supreme Court's most recent articulation of the search incident to arrest exception to the Fourth Amendment's warrant requirement. *Id.* at 1165–71.

[150] *Id.* at 1167–70.

[151] United States v. Flores-Lopez, 670 F.3d 803, 810 (7th Cir. 2012).

[152] Newhard v. Borders, 649 F.Supp.2d 440 (W.D. Va. 2009).

should limit warrantless searches of cell phones incident to arrest to only recent communications via text messaging and phone calls. *Newhard v. Borders* illustrates the potentially disastrous erosion to privacy that will result if police officers are afforded an unfettered right to search cell phones of those they arrest.[153]

In *Newhard*, Nathan Newhard was arrested by the police in the early morning hours of March 30, 2008.[154] He alleged that, as part of the search incident to his arrest, the officer confiscated his cell phone.[155] The police opened the cell phone's pictures folder and discovered nude pictures of Newhard and his girlfriend in sexually compromising positions.[156] Back at the station, officers passed around the cell phone for others to view.[157] Officers unassociated with Newhard's arrest, as well as an ordinary civilian, viewed the private pictures.[158] Understandably, Newhard claimed that such conduct caused him "paranoia and anxiety over how widespread the transmission of the images had become."[159] Newhard sued the police under 42 U.S.C. § 1983,[160] but the court ruled that the officers were entitled to qualified immunity because it was not clearly established law that police officers could not search the contents of cell phones incident to arrest.[161]

Even though Newhard lost on qualified immunity grounds, the allegations in his complaint make plain the dangers of allowing police officers unlimited authority to search citizens' cell phones.[162] Individual privacy interests in the wealth of personal information stored on a cell

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[153] *Id.* at 444.

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id*.

[158] *Newhard*, 649 F.Supp.2d at 444.

[159] *Id*.

[160] Section 1983 "is a federal statutory remedy available to those deprived of rights secured to them by the Constitution and, in a more sharply limited way, the statutory laws of the United States." Philips v. Pitt Cnty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009). To prove a claim under section 1983, the plaintiff must prove that a state actor (1) "deprived [the] plaintiff of a right secured by the Constitution and laws of the United States, and (2) that the deprivation was performed under color of the referenced sources of state law found in the statute." *Id.* (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970)).

[161] Newhard v. Borders, 649 F.Supp.2d 440, 448–50 (W.D. Va. 2009). "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 555 U.S. 223, 231 (2009) (citation omitted). To determine whether a government official is entitled to qualified immunity from a damages claim, a two-part inquiry is employed. *Id*. at 232. The court must determine whether the facts alleged by the plaintiff state a constitutional claim. *Id*. The court also must determine whether the constitutional right alleged to be violated by the defendants was "clearly established" at the time of the defendant's alleged misconduct. *Id*. Courts are not bound to analyze these two prongs in any particular order. *Id*. at 242.

[162] *See Newhard,* 649 F.Supp.2d at 444 (alleging emotional pain from police search of cell phone and dissemination of highly intimate photographs stored on phone).

phone are simply too great to allow the police to search through cell phones at will. Instead, a more workable solution would be to limit the scope of a cell phone search at the time of arrest to only recent phone calls and text messages. This type of information will not be as sensitive as the compromising pictures at issue in *Newhard* but will protect officers by making them aware of any flash mob communications that may have been sent in the moments preceding the arrest. Certainly, the police should have no authority to invade another's privacy by rummaging through their videos, pictures, and other personal data. However, to deny officers the right to protect themselves by looking for flash mob communications could put their lives in jeopardy.

The right to search cell phones for flash mob communications should not be limited to any sort of articulated threat. It would be impossible for an officer to articulate a flash mob threat at the time of a cell phone search, for the search of recent cell phone communications itself will unearth the facts necessary to determine whether a flash mob is arriving. Flash mob communications are a part of American life; arming the police with knowledge as to whether one is currently being planned will make police work more efficient and safe.

V. CONCLUSION

As more Americans carry cell phones at all times, it is inevitable that the courts will continue to grapple with the issue of cell phone searches under the Fourth Amendment. While the vast majority of courts thus far have affirmed an officer's right to search a cell phone incident to a lawful arrest, none have focused on officer safety as a justification. In the age of flash mob communications, however, officer safety should be in the forefront.

The only workable interpretation of the Fourth Amendment is to grant officers the right to search cell phone communications at the time of an arrest. Indeed, such an interpretation is perfectly consistent with *Arizona v. Gant,* the Supreme Court's most recent case analyzing the search incident to arrest doctrine.[163] Perhaps more importantly, this interpretation will continue to respect an individual's core privacy rights in his effects, while protecting those officers who risk their lives to keep us safe.

[163] Arizona v. Gant, 556 U.S. 332 (2009).