

DESTINED TO COLLIDE: MODERN PROTESTS AND WARRANTLESS CELL PHONE SEARCH EXCEPTIONS

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Can you hear me now? Good.

– Verizon Wireless Spokesman¹

I. INTRODUCTION

Cell phones provide individuals with the ability to access information and collaborate in real time from almost anywhere. As a result, it is little wonder that as of June 2012, the number of cell phone subscribers in the United States reached 321.7 million.² With this newfound connectivity, the impact of mobile phones and social media goes beyond one's personal³ and professional life.⁴ Modern protest movements—like Occupy

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¹ jwyong5, *Verizon Wireless "Test Man Launch,"* YOUTUBE (Jan. 26, 2009), <http://www.youtube.com/watch?v=OPwPo-IAQ-E> (A Verizon Wireless commercial from 2002 that depicts a Verizon employee going to many different locales to test the network, providing a quick visualization that Verizon cell phones can be used practically anywhere).

² *U.S. Wireless Quick Facts*, CTIA, http://www.ctia.org/consumer_info/index.cfm/AID/10323 (last visited Feb. 16, 2013).

³ See Jennifer Inzetta, *What Happened to Romance?*, COLLEGECANDY (Mar. 24, 2012), <http://collegecandy.com/2012/03/24> (providing an anecdotal account of one blogger's contempt for social media in her dating relationships). But see Tom R. Tyler, *Is the Internet Changing*

Wall Street—utilize social media on the Internet and cell phones to communicate in ways that sacrifice privacy for the benefits of decentralization and increased member participation.⁵ These tools allow protesters to discuss tactics, share news, and adjust to changing situations in real-time.⁶ Current search and seizure jurisprudence, however, permits law enforcement⁷ to search the digital content of cell phones without a warrant once an individual is placed under arrest⁸—no matter how unrelated the search is to the arrest. The result is less certainty that information stored on a cell phone will remain private, and modern political protests become vulnerable to being stopped in their infancy. In the wake of the Occupy Wall Street protests and attendant mass arrests,⁹ the potential for government abuse of cell phone searches incident to arrest may ultimately lead to an abridgement of speech. The strongest remedy calls for the Supreme Court to update the search incident to arrest doctrine to exclude warrantless cell phone searches.

The Supreme Court, however, recently denied certiorari to a case that would have developed national jurisprudence regarding warrantless cell phone searches.¹⁰ Now, instead of a national solution, state legislatures and courts must work to find the correct balance between the privacy interests of the individual and the need for law enforcement to access relevant evidence. In some jurisdictions like California, the limits placed on legislatures through prior state legislation prevent effective legislative remedies.¹¹ Until the Supreme Court issues a judicial decision preventing

Social Life? It Seems the More Things Change, the More They Stay the Same, 58 J. SOC. ISSUES 195 (2002) (arguing that because the Internet provides a new platform to do the same things one would do offline, the impact is not as fundamentally transformative as is typically believed).

⁴ See generally GERARD GOGGIN, CELL PHONE CULTURE: MOBILE TECHNOLOGY IN EVERYDAY LIFE 3–5 (2006) (providing a list of cell phone studies that examine the role this new technology plays in society).

⁵ See Adrian Chen, *Meet the Guy Who Snitched on Occupy Wall Street to the FBI and NYPD*, GAWKER (Oct. 15, 2011, 4:47 PM), <http://gawker.com/5850054/meet-the-guy-who-snitched-on-occupy-wallstreetto-the-fbi-and-nypd>.

⁶ See *infra* Part IV.

⁷ The general term “law enforcement” is used to include over 18,000 agencies in the United States, of which 15,000 are municipal police departments. See ERWIN CHERMERINSKY AND LAURIE L. LEVENSON, CRIMINAL PROCEDURE: ADJUDICATION 3 (2008).

⁸ A search that occurs immediately after an individual is placed under arrest is called a “search incident to arrest.” See *infra* Part II.B.

⁹ See Associated Press, *Hundreds Arrested in ‘Occupy’ Protests*, L.A. TIMES (Oct. 16, 2011, 11:02 PM), <http://www.latimes.com/news/nationworld/nation/la-na-occupy-wall-street-20111017,0,7374570.story> [hereinafter *Hundreds Arrested in ‘Occupy’ Protests*].

¹⁰ *People v. Diaz*, 244 P.3d 501 (Cal. 2011), *cert. denied*, 132 S. Ct. 94 (2011).

¹¹ See *infra* Part II.C.

warrantless cell phone searches, law enforcement and protesters will be in a constant cat-and-mouse game in which protesters utilize new technologies to communicate while law enforcement seeks ways to penetrate those networks to gain information.

Within the context of modern protests, this Note examines how the Supreme Court's failure to establish a bright-line rule regarding warrantless cell phone searches incident to arrest may begin to erode other criminal procedure rights—like the protection against unreasonable searches and seizures¹²—that the Court has worked so valiantly to protect. This Note does not, however, discuss the potential ramifications of warrantless cell phone searches on the First Amendment.¹³

Part II of this Note looks at law enforcement's ability to arrest an individual for a minor offense, allowing for a search incident to arrest to commence. It then examines the search incident to arrest doctrine and its applicability to cell phone searches, with a focus on the divergent interpretations of cell phone search doctrine between California and Ohio. Part III explores the California State Legislature's attempt at protecting an arrestee's cell phone data, and posits two reasons as to why it failed. Part IV begins with an overview of the evolution of social networks in organizing the masses, showing that cell phones and the Internet are merely natural progressions of centuries-old practices. It then looks more specifically to cell phone use at the Occupy Wall Street protests and how the movement emerged on Twitter, illustrating the initial fragility of online movements. It also examines the potential consequences in the context of civil disobedience in failing to protect cell phones from warrantless searches, and the solutions protesters are using to adapt.

¹² U.S. CONST. amend. IV. *See also infra* Part II.B.

¹³ A relevant example of the convergence between social media and the First Amendment occurred during the Occupy Wall Street protests in 2011. When Occupy Wall Street protester Jeff Rae tweeted from his cell phone, "I will tweet until I'm cuffed ;)," (Jeff Rae (@jeffrae), *I will tweet until cuffed ;*), TWITTER (Oct. 1, 2011, 1:27 PM), <https://twitter.com/jeffrae/status/120233439797579776>), on the day he and other protesters illegally blocked off the Brooklyn Bridge, he did not anticipate that Manhattan prosecutors would later use his tweets to show his intention of breaking the law. Tamer El-Ghobashy, *Protesters See Tweets Used Against Them*, WALL ST. J. (Mar. 22, 2012, 10:48 AM), <http://online.wsj.com/article/SB10001424052702304724404577293960265255318.html>; *see also* Joseph Ax, *Twitter Gives Occupy Protester's Tweets to U.S. Judge*, REUTERS (Sept. 15, 2012, 1:47 AM), <http://in.reuters.com/article/2012/09/14/net-us-twitter-occupy-idINBRE88D01S20120914> (providing an update to Jeff Rae's legal case). Yet, because Mr. Rae had been lawfully arrested and charged, the adversarial process had begun and the prosecutor was entitled to subpoena that information to help prove the government's case. *See id.* Because the cell phone was not searched for tweets during the arrest, the cases discussed in this Note are not applicable to Mr. Rae's case.

Finally, Part V concludes by urging the Supreme Court to adopt a separate category for cell phone searches incident to arrest to protect legitimate privacy interests of all cell phone users, including activists.

II. CELL PHONES & THE SEARCH INCIDENT TO ARREST DOCTRINE

A. THE MINOR OFFENSE ARREST PROBLEM

The ability of law enforcement to arrest for minor offenses brings new opportunities for abuse within the search incident to arrest doctrine.¹⁴ The Supreme Court held in *Atwater v. City of Lago Vista*,¹⁵ “[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”¹⁶ Some minor offenses that have resulted in arrests include failing to obtain a license to operate a telemarketing business, eating on a subway, littering, and failing to have a bicycle bell attached to a bicycle.¹⁷ Thus, even if the arrest is for a minor offense, the search incident to arrest doctrine allows law enforcement to search the individual—including the individual’s cell phone—without a warrant or probable cause.¹⁸ This legal search could provide officers with a myriad of information, including information from any cell phone application, document data, call history, e-mails, pictures, movies, Facebook friends, Twitter contacts and messages, address book contacts, text messages, financial reports, attorney-client privileged information, and much more.¹⁹

The breadth of individuals affected by minor arrests and the subsequent warrantless searches incident to arrest extends well beyond the criminal underworld of drug dealers, robbers, and murderers. Imagine that

¹⁴ See Jason M. Katz, *Atwater v. City of Lago Vista: Buckle-Up or Get Locked-Up: Warrantless Arrests for Fine-Only Misdemeanors under the Fourth Amendment*, 36 AKRON L. REV. 491, 493–95, 544 (2003).

¹⁵ *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). Note that the Court did not prohibit states from adding their own protections against arrests for minor offenses.

¹⁶ *Id.* at 354.

¹⁷ Katz, *supra* note 14 at n.14 (listing cases where arrests have occurred for very minor crimes).

¹⁸ See *People v. Diaz*, 244 P.3d 501, 503 (Cal. 2011), *cert. denied*, 132 S. Ct. 94 (2011).

¹⁹ See Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 28 (2008) [hereinafter Gershowitz, *iPhone Meets the Fourth Amendment*] (hypothesizing that an arrest for a minor offense could yield lots of data for law enforcement).

an attorney is stopped and arrested for failing to secure her and her children's seatbelts, like in *Atwater*.²⁰ Even if it is clear that the cell phone does not contain any information relating to the arrest, her cell phone could still be legally searched incident to the arrest. If she had confidential e-mails from a client describing an event on her phone, the attorney-client privilege could be compromised. While law enforcement is generally trustworthy, one can imagine the quick spread of a particularly prurient story if, for instance, the client is a public figure or the arrest occurs in a small town.²¹ Further, modern protests can potentially be compromised through arrests for minor offenses.²² If individuals fear their cell phone data could be compromised by an arrest for a minor offense, they may communicate and store less information on their cell phones, thereby stunting the benefits cell phone technology can provide.²³

Admittedly there are reasonable justifications to allow law enforcement to arrest an individual for a minor offense, despite the breadth of search capabilities permitted to law enforcement that accompany minor arrests. First, if the Court limited arrests to only offenses that were "jailable," it would require law enforcement to know the intricacies of "complex penalty schemes," and some penalties vary based on a variety of circumstances that are "difficult (if not impossible) to know at the scene of an arrest."²⁴ Second, state legislatures can and do provide their citizens with more protections than those provided by the Supreme Court.²⁵

²⁰ See *Atwater*, 532 U.S. at 324 ("Atwater was charged with driving without her seatbelt fastened, failing to secure her children in seatbelts, driving without a license, and failing to provide proof of insurance. She ultimately pleaded no contest to the misdemeanor seatbelt offenses and paid a \$50 fine; the other charges were dismissed.").

²¹ See Gershowitz, *iPhone Meets the Fourth Amendment*, *supra* note 19 at 44 n. 92 (citing Brian Rogers & Matt Stiles, *County DA Wants Court to Seal Revealing Emails: Correspondence Brings to Light His Close Relationship With Secretary*, HOUS. CHRON., Dec. 27, 2007 at A1, "describing romantic emails from the Harris County District Attorney to his secretary that were intended to be produced under seal as part of a civil rights lawsuit but that were nevertheless released into the public domain.").

²² See *infra* Part IV.

²³ See *infra* Parts IV.C, V.

²⁴ *Atwater*, 532 U.S. at 348. The Court provided examples of difficult or impossible things to know at the scene of the arrest: "Is this the first offense or is the suspect a repeat offender? Is the weight of the marijuana a gram above or a gram below the fine-only line? Where conduct could implicate more than one criminal prohibition, which one will the district attorney ultimately decide to charge? And so on." *Id.* at 348-49.

²⁵ *Id.* at 343 ("[T]he legislative tradition of granting warrantless misdemeanor arrest authority and the judicial tradition of sustaining such statutes against constitutional attack . . . for more than a century now, has almost uniformly recognized the constitutionality of extending warrantless arrest power to misdemeanors without limitation to breaches of the peace.").

Finally, all fifty states have authorized arrests for minor offenses in certain contexts, which made the Supreme Court's holding in *Atwater* seem less controversial.²⁶

As a result, while the aforementioned cell phone privacy problem stems from the arrest, the main problem is not the ability to arrest for minor offenses. Rather, as discussed in Part IV, remedying how cell phones are *treated* in a subsequent search incident to arrest is the best focus. If law enforcement were required to obtain a warrant before the cell phone search, that additional hurdle would prevent unnecessary cell phone searches from occurring in the first place.

B. REVIEW OF THE SEARCH INCIDENT TO ARREST DOCTRINE

The Fourth Amendment protects citizens against “unreasonable searches and seizures,”²⁷ a concept that has necessarily evolved with advances in technology.²⁸ Over time, the Supreme Court has determined that warrantless searches are “*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”²⁹ The search incident to lawful arrest is one such exception that allows police to search the arrested individual with few exceptions.³⁰ The rationale for allowing the search without a warrant is to both protect the officer from the arrestee and protect against the destruction of evidence.³¹ However, the Court established limits on the scope of the search and prevented the police from searching “any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself.”³² Later, in *United States v. Robinson*,³³ the Court clarified its prohibition on searching closed areas and held that, during a search incident to arrest, the police may search through an arrestee's closed

²⁶ *Id.* at 344.

²⁷ U.S. CONST. amend. IV.

²⁸ See Ric Simmons, *From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1307–21 (2002) (analyzing the evolution of search and seizure jurisprudence).

²⁹ *Katz v. United States*, 389 U.S. 347, 357 (1967). The term “*per se*” means “[o]f, in, or by itself; standing alone, without reference to additional facts.” BLACK’S LAW DICTIONARY 1267 (9th ed. 2009).

³⁰ *United States v. Robinson*, 414 U.S. 218, 224 (1973).

³¹ See *Chimel v. California*, 395 U.S. 752, 763 (1969).

³² *Id.*

³³ *Robinson*, 414 U.S. 218.

containers.³⁴ The Court summarized the legal syllogism for the search incident to arrest exception as: “[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. It is the fact of the lawful arrest which establishes the authority to search.”³⁵

From this framework, the high courts in California and Ohio have split.³⁶ The California Supreme Court, due to limitations voters placed on the judicial branch in 1982, uses established United States Supreme Court jurisprudence, analogizing cell phones to closed containers found on the arrestee that can be searched incident to arrest.³⁷ On the other hand, Ohio places cell phones into a separate protected category that makes a warrantless cell phone search *per se* unreasonable in an Ohio jurisdiction.³⁸

C. CALIFORNIA’S CURRENT INTERPRETATION OF WARRANTLESS CELL PHONE SEARCHES

The California Supreme Court adopted precedent from three United States Supreme Court decisions to determine how to classify a cell phone during a search incident to arrest.³⁹ First, in *United States v. Robinson*,⁴⁰ the Supreme Court held that police can open closed containers found on the arrestee during a lawful search incident to arrest.⁴¹ In *Robinson*, a

³⁴ *Id.*; see also Gershowitz, *iPhone Meets the Fourth Amendment*, *supra* note 19, at 33–34.

³⁵ *Robinson*, 414 U.S. at 235.

³⁶ Compare *People v. Diaz*, 244 P.3d 501 (Cal. 2011) (holding that a warrantless cell phone search is permitted incident to arrest), *cert. denied*, 132 S. Ct. 94 (2011), with *State v. Smith*, 920 N.E.2d 949 (Ohio 2009) (holding that law enforcement must obtain a search warrant to examine the contents of a cell phone collected incident to arrest), *cert. denied*, 131 S. Ct. 102 (2010).

³⁷ See *Diaz*, 244 P.3d at 504.

³⁸ See *Smith*, 920 N.E.2d at 954–55.

³⁹ See *Diaz*, 244 P.3d at 504.

⁴⁰ See *Robinson*, 414 U.S. at 218.

⁴¹ Note that in 1975 the California Supreme Court rejected the holding in *Robinson*, and instead relied on its own interpretation of a search incident to arrest found in *People v. Norman*, 538 P.2d 237 (Cal. 1975). In *Norman*, the court held that the police could not conduct a full search of the arrested person unless they had probable cause to believe that the items being searched contained evidence of the crime the arrestee was being arrested for, or contained contraband and weapons. With the passage of the Victims’ Bill of Rights in 1982, discussed *infra* Part III.A, the broader protection granted to California defendants reverted to the Supreme Court’s interpretation in *Robinson*. See also Barry Latzer, *California’s Constitutional Counterrevolution*, in CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY

police officer performed a pat down on the arrestee subsequent to a valid arrest for driving with a revoked operator's permit, and found a crumpled cigarette package in the arrestee's pocket.⁴² The officer knew there were no cigarettes in the container but opened it anyway, discovering fourteen heroin capsules.⁴³ The Supreme Court held the search was valid despite the search having no relation to the arrested offense and the cigarette container being closed.⁴⁴

Second, in *United States v. Edwards*, the Court held that once an individual is in custody, a delay between the arrest and a warrantless search does not invalidate the search.⁴⁵ In *Edwards*, officers arrested a man for breaking into a local post office.⁴⁶ After about ten hours, police entered his jail cell and asked him to change his clothes, believing they were material evidence to the break-in.⁴⁷ The officers subsequently examined his old clothes for paint chips from the post office.⁴⁸ The examination exposed the post office paint chips, and the defendant argued that the warrantless search and seizure was invalid because "the administrative process and the mechanics of the arrest [had] come to a halt."⁴⁹ The Supreme Court upheld the warrantless search, holding that once a suspect is lawfully placed in custody:

[T]he effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other. . . . The result is the same where the property is not physically taken from the defendant until sometime after his incarceration.⁵⁰

Third, in *United States v. Chadwick*, the Court held that a defendant's luggage or property not on the person during an arrest cannot be searched without a warrant, because the aforementioned justifications for the search

CONTROVERSIES AND HISTORICAL PATTERNS 149, 160 (G. Alan Tarr, ed., 1996).

⁴² *Robinson*, 414 U.S. at 223.

⁴³ *See id.*

⁴⁴ *Id.* at 236.

⁴⁵ *United States v. Edwards*, 415 U.S. 800, 800 (1974).

⁴⁶ *Id.* at 801.

⁴⁷ *Id.* at 802.

⁴⁸ *Id.*

⁴⁹ *Id.* (citing *United States v. Edwards*, 474 F.2d 1206, 1211 (6th Cir. 1973), *rev'd* 415 U.S. 800 (1974)).

⁵⁰ *Id.* at 807-08.

incident to arrest exception are not met.⁵¹ In *Chadwick*, the defendants had transferred their double-locked footlocker from a train to their automobile when they were arrested by federal narcotics agents.⁵² The agents had probable cause to arrest the defendants, and the agents subsequently seized the locker under the search incident to arrest doctrine.⁵³ An hour and a half later, once back at the federal building, the agents conducted a warrantless search of the locker and discovered marijuana.⁵⁴ The defendants moved to suppress the evidence, arguing that the footlocker search was *per se* unreasonable because it did not fall under a recognized exception to the warrant requirement.⁵⁵ The Court agreed, and clarified that a warrantless search incident to arrest was meant to protect the officers from danger and prevent the destruction of evidence.⁵⁶ Since the locked locker was under the “exclusive control” of the agents and no exigent circumstances⁵⁷ existed, the search incident to arrest doctrine did not apply because “there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, [and, therefore,] a search of that property is no longer incident of the arrest.”⁵⁸

In *People v. Diaz*, the California Supreme Court effectively combined the three aforementioned search incident to arrest doctrines and applied them to warrantless cell phone searches.⁵⁹ Defendant Diaz was lawfully arrested after he sold ecstasy to an undercover officer.⁶⁰ During the search incident to arrest, the sheriff collected the contraband and transported Diaz to the sheriff’s station for an interview.⁶¹ Once at the station, the sheriff seized Diaz’s cell phone that was in his pocket, and

⁵¹ See *United States v. Chadwick*, 433 U.S. 1, 15 (1977).

⁵² *Id.* at 1.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* Specifically, defendants argued that the search did not fall under the automobile exception and that the search was not incident to arrest. *Id.*

⁵⁶ *Id.* at 14.

⁵⁷ An “exigent circumstance” is a situation in which law enforcement “must take immediate action to effectively make an arrest, search, or seizure for which probable cause exists, and thus may do so without obtaining a warrant. Exigent circumstances may exist if (1) a person’s life or safety is threatened, (2) a suspect’s escape is imminent, or (3) evidence is about to be removed or destroyed.” BLACK’S LAW DICTIONARY 277 (9th ed. 2009).

⁵⁸ *Id.* at 15.

⁵⁹ See *People v. Diaz*, 244 P.3d 501, 503–04 (Cal. 2011), *cert. denied*, 132 S. Ct. 94 (2011).

⁶⁰ *Id.* at 502.

⁶¹ *Id.*

placed it with the other evidence from the arrest.⁶² The sheriff searched Diaz's text messages, and found one relating to the sale of ecstasy.⁶³ During the interview, the message was shown to Diaz, which led to a confession.⁶⁴ Diaz moved to suppress both the text message and the statements he made after being confronted with the text messages, as a fruit of a poisonous search.⁶⁵ He argued that since a cell phone is not a container or clothing item routinely worn on the individual, it is more like the footlocker in *Chadwick* than the clothes in *Edwards* or the cigarette package in *Robinson*.⁶⁶ He also argued that cell phones contain more information than a typical container and should therefore be subject to similar heightened protections that the Court gave to the seized locker in *Chadwick*.⁶⁷

However, the California Supreme Court rejected both of Diaz's arguments and held that a cell phone is a container subject to a warrantless search incident to arrest.⁶⁸ First, the Court ruled that a cell phone can be seized incident to an arrest like the seizures of the cigarette package in *Robinson* and the clothes in *Edwards*, because all three were found on the arrestee's person.⁶⁹ Although the sheriff waited until Diaz was brought to the station to seize his cell phone, *Edwards* allows law enforcement to seize and search the arrestee's items without a warrant, despite the delay between the arrest and search.⁷⁰ The court rejected the idea that cell phones are different than clothes and cigarette packs, noting that the character of the seized item is irrelevant.⁷¹ Second, the *Diaz* Court rejected the notion that a cell phone has heightened privacy expectations simply

⁶² *Id.*

⁶³ *Id.* at 503.

⁶⁴ *Id.*

⁶⁵ *Id.* The "fruit of a poisonous search" is also known as the "fruit of the poisonous tree doctrine." It is a doctrine in criminal procedure that means "evidence derived from an illegal search, arrest, or interrogation is inadmissible because the evidence (the 'fruit') was tainted by the illegality (the 'poisonous tree')." BLACK'S LAW DICTIONARY 740 (9th ed. 2009). Here, Diaz argued that his confession (the "fruit") should be excluded as evidence because the warrantless cell phone search was illegal (the "poisonous tree").

⁶⁶ *Id.* at 506.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 507 ("Nothing in these decisions even hints that whether a warrant is necessary for a search of an item properly seized from an arrestee's person incident to a lawful custodial arrest depends in any way on the character of the seized item.").

because it carries more information than, say, a cigarette package.⁷² Finally, the court was concerned that a bright-line rule based on a device's storage capacity would be too difficult to enforce.⁷³ The court wrote that "[a] warrantless search, incident to lawful arrest, of a cell phone with limited storage capacity does not become constitutionally unreasonable simply because other cell phones may have a significantly greater storage capacity."⁷⁴ The California Supreme Court did not create a separate category for cell phones, remaining consistent with established Supreme Court doctrine on warrantless searches incident to arrest.⁷⁵

D. OHIO'S CURRENT INTERPRETATION OF WARRANTLESS CELL PHONE SEARCHES

In a case decided before *Diaz*, the Ohio Supreme Court in *State v. Smith* adopted a different approach to warrantless cell phone searches than California.⁷⁶ Instead of analogizing a cell phone to a container, the court created a separate category for cell phones.⁷⁷ In contrast to California's application of the *Edwards* definition of a container, Ohio applied the definition in *United States v. Belton*, which defines a container as "any object capable of holding another object."⁷⁸ Under that definition, the *Smith* Court understood that "[e]ven the more basic models of modern cell phones are capable of storing a wealth of digitized information wholly unlike any physical object found within a closed container."⁷⁹

By holding that a cell phone is not a container, the court had to identify what category a cell phone belongs in.⁸⁰ The court displayed a modern understanding of cell phones, regarding them as "multifunctional tools" with technology that holds large amounts of data and encompasses

⁷² The *Diaz* Court quotes from an earlier Supreme Court case, noting that "a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf [has] an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case." *Id.* at 508 (quoting *United States v. Ross*, 456 U.S. 798, 822 (1982)).

⁷³ *See id.*

⁷⁴ *Id.*

⁷⁵ *See id.*

⁷⁶ Compare *State v. Smith*, 920 N.E.2d 949 (Ohio 2009) (referencing the upcoming California Supreme Court decision in *Diaz*), with *Diaz*, 244 P.3d 501.

⁷⁷ *Smith*, 920 N.E.2d at 953–54.

⁷⁸ *United States v. Belton*, 453 U.S. 454, 460 n.4 (1981).

⁷⁹ *Smith*, 920 N.E.2d at 954.

⁸⁰ *See id.*

phones, address books, cameras, Internet devices, and laptops.⁸¹ With that understanding, the court held that cell phone users have a “reasonable and justifiable expectation of a higher level of privacy in the information they contain.”⁸² Finally, the court reasoned that “[o]nce the cell phone is in police custody, the state has satisfied its immediate interest in collecting and preserving evidence. . . . [Therefore,] police must then obtain a warrant before intruding into the phone’s contents.”⁸³ In this way, the *Smith* Court reconciled the search incident to arrest exception found in *Chimel v. California*, while increasing a cell phone user’s right to privacy.⁸⁴

The divergent classifications of cell phones between the California and Ohio courts indicates that, until the Supreme Court decides the issue directly, individual states must determine how to address the issue themselves. In 2011, the California Legislature attempted to deal with the issue by passing a bill prohibiting warrantless cell phone searches, but the bill was vetoed by Governor Jerry Brown.⁸⁵ The bill is examined more closely in Part III.

III. CALIFORNIA’S FAILED LEGISLATIVE REMEDY

Some legal commentators have suggested that because state legislators use cell phones and have personal experience with the amount of information stored on them, they have a vested interest in protecting that privacy.⁸⁶ It was therefore no surprise when—in direct response to the California Supreme Court’s decision in *Diaz*—the California Legislature passed SB914,⁸⁷ an addition to the Penal Code that prohibited warrantless

⁸¹ *Id.* at 955.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *See id.* at 949.

⁸⁵ Amy Gahran, *California Governor Allows Warrantless Search of Cell Phones*, CNN (Oct. 11, 2011), <http://www.cnn.com/2011/10/11/tech/mobile/california-phone-search-veto/index.html> [hereinafter Gahran, *Governor Allows Warrantless Search*].

⁸⁶ See Gershowitz, *iPhone Meets the Fourth Amendment*, *supra* note 19, at 51–53.

⁸⁷ After Governor Brown vetoed SB 914, the California Legislature proposed SB 1434, a modified version of SB 914. SB 1434 prohibited warrantless cell phone location tracking. Although the bill passed the California Legislature, Governor Brown vetoed it on September 30, 2012. See Hanni Fakhoury, *Governor Brown Vetoes California Electronic Privacy Protection. Again.*, ELEC. FRONTIER FOUND. (Oct. 1, 2012), <https://www.eff.org/deeplinks/2012/10/governor-browns-vetoes-california-electronic-privacy-protection-again>. See also Hanni Fakhoury, *CA Location Privacy Bill Passes Assembly*, ELEC. FRONTIER FOUND. (Aug. 22, 2012), <https://www.eff.org/deeplinks/2012/08/ca-location-privacy-bill-passes-assembly-next>.

cell phone searches incident to arrest.⁸⁸ While the law passed the State Assembly with all but four votes, Governor Brown vetoed it.⁸⁹ Considering the bipartisan support for the bill, the Governor's veto was not positively received by legislators or privacy advocates.⁹⁰ Following the veto, Governor Brown released a limited statement saying, "[t]his measure would overturn a California Supreme Court decision that held that police officers can lawfully search the cell phones of people who they arrest."⁹¹ Further, Governor Brown said that "[t]he courts are better suited to resolve the complex and case-specific issues relating to constitutional search-and-seizures protections."⁹² The Governor's vague and short statement is the only evidence of his rationale behind the veto.⁹³ It is possible that, as the former California Attorney General,⁹⁴ Governor Brown is in the unique position to understand the law enforcement community's need for warrantless cell phone searches.

However, two additional theories may explain why the bill ultimately failed. First, the veto of SB914 may be the result of Governor Brown's personal understanding of the chaotic nexus between criminal procedure issues and state politics—stemming from the public's negative response to his prior liberal stances on criminal procedure matters through the people's passage of the 1982 Victims' Bill of Rights⁹⁵ and the unseating of three of his California Supreme Court appointees.⁹⁶ From this backdrop, it was better for him to defer to, rather than oppose the judiciary because, even if SB914 had passed, any evidence that resulted from the warrantless cell phone search could still be admitted since SB914 lacked the "bite" of the exclusionary rule.⁹⁷ In other words, he likely viewed the bill simply as

stop-governor-brown.

⁸⁸ S.B. 914, 2011-2012 S. Sess. (Cal. 2011), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0901-0950/sb_914_bill_20110902_enrolled.pdf (vetoed Oct. 9, 2011).

⁸⁹ Jacob Sullum, *Phone Frisking: Warrantless Searches*, REASON, Feb. 1, 2012, at 15, available at <http://reason.com/archives/2011/12/18/phone-frisking>.

⁹⁰ Gahrn, *Governor Allows Warrantless Search*, *supra* note 85.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See id.*

⁹⁴ *Times Topics: Jerry Brown*, N.Y. TIMES, http://topics.nytimes.com/topics/reference/timestopics/people/b/jerry_brown/index.html (last visited Feb. 16, 2013).

⁹⁵ *See* Latzer, *supra* note 41, at 165.

⁹⁶ *Id.* at 166. *See also infra* notes 110-29 and accompanying text.

⁹⁷ Bob Egelko, *Bill Wouldn't Limit Evidence from Cops' Cell-Phone Search*, S.F. CHRON., July 8, 2011, at C3. The exclusionary rule is "[a] rule that excludes or suppresses evidence obtained in violation of an accused person's constitutional rights." BLACK'S LAW DICTIONARY 1855 (9th ed. 2009).

a gesture from the legislature to privacy advocates because there was no remedy for a warrantless cell phone search.⁹⁸ The second theory is slightly more pessimistic, suggesting that Governor Brown vetoed the bill to appease law enforcement organizations that make significant contributions to his campaign.⁹⁹ Parts A and B will discuss these theories in turn.

A. SB914 AND THE 1982 VICTIM'S BILL OF RIGHTS

Although textually SB914 prevented warrantless cell phone searches, the main criticism from privacy advocates and commentators is that the proposed bill lacked a remedy such as the exclusionary rule.¹⁰⁰ This meant that any evidence obtained during an illegal search would still be admissible in a prosecution.¹⁰¹ In SB914, the only remedy available for a warrantless cell phone search was a civil suit against the law enforcement officers that conducted the illegal search, which limited the bill's effectiveness in protecting criminal defendants.¹⁰² It is ironic that California—a state that adopted the exclusionary rule¹⁰³ six years before the Supreme Court *Mapp v. Ohio*¹⁰⁴—would pass search and seizure legislation without the necessary “bite” of the exclusionary rule. While the

⁹⁸ See *id.*

⁹⁹ David Kravets, *Calif. Governor Veto Allows Warrantless Cellphone Searches*, WIRED (Oct. 10, 2011, 11:09 AM), <http://www.wired.com/threatlevel/2011/10/warrantless-phone-searches/>.

¹⁰⁰ See Egelko, *supra* note 97.

¹⁰¹ *Id.*

¹⁰² See, e.g., *State v. Young*, 216 S.E.2d 586, 591 (1975) (noting that if the exclusionary rule does not apply, plaintiffs may still seek relief using a civil rights or tort suit for the violation of their constitutional rights).

¹⁰³ *People v. Cahan*, 282 P.2d 905 (Cal. 1955). It is worth reading Justice Traynor's rationale for adopting the exclusionary rule in California, because it stems from his mistrust of law enforcement. “Justice Traynor and his colleagues seemed astounded by how casually and routinely illegally seized evidence was being offered and admitted in the California courts. After noting that Los Angeles police had candidly admitted that they had illegally installed listening devices in the defendants' homes and had described, with equal candor, how they had forcibly entered buildings without bothering to obtain warrants by breaking windows and kicking in doors, Justice Traynor observed: ‘[W]ithout fear of criminal punishment or other discipline, law enforcement officers . . . frankly admit their deliberate, flagrant [unconstitutional] acts. . . . It is clearly apparent from their testimony that [Los Angeles police officers] casually regard [their illegal acts] as nothing more than the performance of their ordinary duties for which the City employs and pays them.’” Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule* 26 HARV. J.L. & PUB. POL'Y 119, 121–22 (2003) (quoting *People v. Cahan*, 282 P.2d 905 (Cal. 1955)).

¹⁰⁴ *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that the exclusionary rule applies to the states through the Fourteenth Amendment).

obvious solution would have been to include a provision applying the exclusionary rule, previous California legislation made it difficult to muster the necessary support. The 1982 Victims' Bill of Rights aligned California's search and seizure doctrine with federal constitutional law, and added a two-thirds vote requirement by each legislative house to apply the exclusionary rule to new legislation.¹⁰⁵ It remains unclear whether support for SB914 would have been as strong if the exclusionary rule were included in the legislation.

Governor Brown's deference to the courts in his veto of SB914 can be partially explained by his experience as governor during the passage of the Victims' Bill of Rights and the subsequent ascension of conservative viewpoints in California criminal jurisprudence.¹⁰⁶ The Victims' Bill of Rights was passed partly in response to California Supreme Court decisions rendered during Governor Brown's first and second terms by his appointees that significantly broadened the use of the exclusionary rule and defendants' rights under the state constitution.¹⁰⁷ One commentator explains the shift as a sort of see-saw with the Supreme Court—when the United States Supreme Court began favoring the prosecution, the California Supreme Court began favoring criminal defendants.¹⁰⁸ The commentator writes:

The end of the Warren Court and the rise of the Burger Court appeared to foretoken a narrowing of the federal constitutional rights of criminal defendants. When the Burger Court signaled that it would no longer be looking to expand defendants' rights and would rather create exceptions that favored the prosecution, some of the state courts discovered that they could preserve and expand these rights by interpreting *state*

¹⁰⁵ Latzer, *supra* note 41, at 165 (The relevant portion of the Victims' Bill of Rights is the truth-in-evidence portion that reads: "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court." CAL. CONST. art. I, § 28(f)(2)).

¹⁰⁶ Governor Brown does not always defer to the Courts for political expediency. In fact, the Victims' Bill of Rights, also known as Proposition 8 (1982), was only allowed on the ballot after the Legislature passed a very specific state law—signed by Governor Brown—which allowed it to be put on the ballot without the requisite percentage of verifiable signatures. If Governor Brown had not signed the bill, the California Supreme Court would likely have kept the proposition off of the ballot. See Robert Fairbanks, *Bill to Aid Anti-Crime Law Signed*, L.A. TIMES, Mar. 9, 1982 at B3.

¹⁰⁷ See Keith Love, *Brown Calls Prop. 8 'Costly, Confusing'*, L.A. TIMES, May 21, 1982, at A3 ("Supporters of the proposition . . . have aimed it in part at Brown. They charge that he has appointed judges who are too concerned about the rights of the accused.").

¹⁰⁸ Latzer, *supra* note 41, at 154.

constitutional bills of rights provisions more broadly than comparable federal provisions. Such state court cases are generally not subject to Supreme Court review, and therefore they could not be reversed by the Burger or Rehnquist justices. . . . [F]rom 1971 to 1986, the California Supreme Court was among the most controversial of American tribunals.¹⁰⁹

In response to the political and legal climate, Governor Brown appointee Chief Justice Rose Bird in 1986 was unseated from the California Supreme Court, and two associate justices were forced to run, and subsequently lost,¹¹⁰ in a retention election.¹¹¹ Though Governor Brown's second term as governor expired in 1983, it is likely that he witnessed the 1986 conservative backlash against liberal California Supreme Court Justices. With the passage of the Victim's Bill of Rights in 1982, Governor Brown also witnessed how easily California court precedent could be changed.¹¹² In sum, Governor Brown's deference to the courts can be explained by his knowledge that if public support were high enough, SB914 would have included the exclusionary rule when it was presented to him. However, without the exclusionary rule, any victory for privacy advocates would have been hollow and at the judiciary's expense.

Further, it is worth briefly exploring a California case that was decided before the 1982 voter backlash, that if still good law today would have prevented warrantless cell phone searches and rendered SB914 moot. In *People v. Norman*,¹¹³ the California Supreme Court rejected the search incident to arrest standard set forth in *Robinson*.¹¹⁴ Instead of allowing a full warrantless search of the individual during a search incident to arrest, *Norman* restricted law enforcement to searching only locations for which they have "probable cause to believe contained evidence of crime, contraband, or weapons."¹¹⁵ In *Norman*, the defendant was arrested for a traffic infraction, and as he got out of his van with a black object in hand,

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 166 ("[Chief Justice Bird] amassed only 34 percent of the vote, with her two fellow Gerry Brown [*sic*] appointees scoring higher but still well short of the 50 percent required for affirmation."). See also *infra* text accompanying note 111.

¹¹¹ A retention election is where the judges run unopposed, but a majority of the public has to vote "yes" for them to retain their seats. Latzer, *supra* note 41, at 173 n.70 (explaining the procedure for appointing California Supreme Court Justices).

¹¹² *Id.* at 166.

¹¹³ *People v. Norman*, 538 P.2d 237 (Cal. 1975).

¹¹⁴ See *supra* Part II.C.

¹¹⁵ Latzer, *supra* note 41, at 160.

he threw it under the van.¹¹⁶ The police took the black object and opened it, finding “marijuana, cigarette papers, and seconal.”¹¹⁷ Because the defendant was arrested for a minor traffic offense, the warrantless search of the black object was illegal because there was no basis for the police to conclude they would find contraband in the pouch, and, accordingly, the additional drug charges were dropped.¹¹⁸

Applying this overturned standard to the facts of *Diaz*, unless the defendant had made the *controlled* ecstasy sale using his cell phone (which he did), the search would have been unreasonable and the evidence excluded because the sheriffs would have had no probable cause to search his cell phone. Further, it is likely that if *Norman* remained today, cell phones would be treated like the object that was found in *Norman*, and, therefore, be protected during a search incident to arrest unless there was a legitimate need to collect evidence of the crime. In other words, the *Diaz* analysis would not have hinged on whether a cell phone is afforded a greater privacy protection or is considered a closed container, but rather whether law enforcement had probable cause, based on the arrested offense, to search the cell phone without a warrant.

The Victims’ Bill of Rights narrowed and aligned every California Supreme Court case that had broadened the exclusionary rule with the narrower United States Supreme Court holdings.¹¹⁹ The effect on the California judicial system was considerable:

[The Victims’ Bill of Rights succeeded] in abrogating no fewer than twenty-seven leading cases of the Supreme Court of California. Those leading cases were of course relied upon in subsequent decisions by the supreme court and by lower courts in California. In total, there are well over one thousand appellate cases that were affected by . . . [the Victims’ Bill of Rights] (and an undetermined number of superior court rulings). It is a rare piece of legislation or judicial decision that, in one stroke, accomplishes such a remarkable result.¹²⁰

It is therefore understandable that Governor Brown deferred to the judicial branch in vetoing SB914, because he understood the power voters have in holding the California judicial system accountable, and without a proper exclusionary rule the bill would have carried little weight in

¹¹⁶ *Norman*, 538 P.2d at 239–40.

¹¹⁷ Latzer, *supra* note 41, at 160.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 165.

¹²⁰ *Id.* at 165–66 (quoting J. Clark Kelso & Brigitte A. Bass, *The Victims’ Bill of Rights: Where Did It Come From and How Much Did It Do?*, 23 PAC. L.J. 860, 865–66 (1992)).

protecting against unwarranted searches.

B. POLITICAL PRESSURES

While Governor Brown may truly believe, as he said in his post-veto statement, that the courts are better suited to determine search and seizure law,¹²¹ the fact that he receives significant campaign contributions from law enforcement agencies make his motivations suspect.¹²² The 2010 California gubernatorial campaign was the most expensive in state history, costing nearly \$250 million,¹²³ and while Governor Brown has yet to announce that he will seek re-election, the 2014 election could be just as costly. As a result, the Governor must appeal to his financial base to ensure he is financially competitive against would-be opponents. By rejecting SB914, the Governor seemingly kowtowed to his law enforcement base while passing the responsibility for protecting against warrantless cell phone searches to the independent judicial branch.¹²⁴

One organization that represents the law enforcement community is the Peace Officers Research Association of California (PORAC).¹²⁵ Their website boasts that “[n]o other organization can claim the legislative victories that PORAC has achieved. PORAC has the clout to tie up and/or kill legislative issues that are detrimental to peace officers.”¹²⁶ Unfortunately for supporters of SB914, PORAC’s boast proved true. PORAC argued against SB914, stating that “[r]estricting the authority of a peace officer to search an arrestee unduly restricts their ability to apply the law, fight crime, discover evidence valuable to an investigation and protect the citizens of California.”¹²⁷ The Legislature countered, “once in

¹²¹ See Gahran, *Governor Allows Warrantless Search*, *supra* note 85.

¹²² See Ryan Singel, *Gov. Brown: Sign Bill Outlawing Warrantless Smartphone Searches*, WIRED (Sept. 22, 2011, 8:26 PM), <http://www.wired.com/threatlevel/2011/09/smartphone-warrant/> (“L.A.’s District Attorney’s office spent more than \$144,000 on lobbying in just the first six months of 2011.”).

¹²³ Anthony York, *PolitiCal Flashback: Most Expensive Governor’s Race in State History Ends with a Flurry of Campaigning*, L.A. TIMES (Nov. 2, 2010, 4:30 PM), <http://latimesblogs.latimes.com/california-politics/2010/11/political-flashback-most-expensive-governors-race-in-state-history-ends-with-a-flurry-of-campaigning.html>.

¹²⁴ Kravets, *supra* note 99.

¹²⁵ See *Mission Statement*, PEACE OFFICERS RESEARCH ASS’N OF CAL., <http://porac.org/mission-statement/> (last visited Feb. 16, 2013).

¹²⁶ *Legislation*, PEACE OFFICERS RESEARCH ASS’N OF CAL., <http://porac.org/political-action/legislation/> (last visited Feb. 16, 2013).

¹²⁷ Amy Gahran, *New Law Bans Warrantless Cell Phone Searches*, CNN (Sept. 20, 2011), http://articles.cnn.com/2011-09-20/tech/tech_mobile_california-phone-search-law_1_cell-

the exclusive control of the police, cellular telephones do not ordinarily pose a threat to officer safety. . . . [C]oncerns about destruction of evidence on a cellular telephone can ordinarily be addressed through simple evidence preservation methods and prompt application to a magistrate for a search warrant.”¹²⁸ PORAC followed up their rhetoric with political donations.¹²⁹ They donated \$38,900 to Governor Brown’s 2010 gubernatorial campaign,¹³⁰ and according to disclosures filed with the California Secretary of State, in the first three quarters of 2011, the organization spent nearly \$300,000 lobbying, including lobbying against SB914.¹³¹

While PORAC’s political donations may seem trivial in a \$250 million campaign, they are not the only law enforcement organization donating to Governor Brown. As of October 2011, “at least seven police unions donated more than \$12,900 each to Brown. Those unions, including the California Association of Highway Patrolmen and the Sacramento County Deputy Sheriff’s Association, had given Brown more than \$160,000 in combined contributions.”¹³² The high level of financial support from law enforcement organizations incentivizes Governor Brown to continue supporting their interests. By vetoing SB914 and passing the responsibility for allowing the warrantless cell phone searches to the judiciary, the Governor keeps his fundraisers happy and his hands clean in front of voters.

In conclusion, the veto of SB914 has negative privacy implications that extend beyond leaving arrestees unprotected from warrantless cell phone searches. Protesters are one group at risk of having their privacy violated because law enforcement can decide to arrest them on minor charges such as disturbing the peace and use that arrest as a pretext to check protestors’ phones to see messages from other organizers.¹³³ The

search-warrant-new-law?_s=PM:TECH.

¹²⁸ S.B. 914, 2011-2012 S. Sess. (Cal. 2011), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0901-0950/sb_914_bill_20110902_enrolled.pdf (vetoed Oct. 9, 2011).

¹²⁹ *Contributions to Brown, Jerry*, NAT’L INST. ON MONEY IN STATE POLITICS, http://www.followthemoney.org/database/StateGlance/contributor_details.phtml?c=116678&u=4238&ince=0&incs=0 (last visited Feb. 16, 2013).

¹³⁰ *Id.*

¹³¹ *Lobbying Activity: Peace Officers Research Association of California*, CAL-ACCESS, <http://cal-access.ss.ca.gov/Lobbying/Employers/Detail.aspx?id=1145744&session=2011&view=activity> (last visited Feb. 16, 2013) (showing general lobbying expenditures totaling \$298,634.89).

¹³² See Kravets, *supra* note 99.

¹³³ See Gahran, *Governor Allows Warrantless Search*, *supra* note 85.

information on protestors' phones could be used to identify and locate the protest's instigators and otherwise chill speech.¹³⁴ Further, California State Senator and SB914 sponsor, Mark Leno, warned against the abuse of warrantless cell phone searches during protests by police.¹³⁵ Senator Leno said, "[r]eporters who are covering protests and other events that attract police attention should be concerned about getting arrested and then having the info they gathered, including info about sources, ending up in police hands."¹³⁶ While this Note discusses the particular dangers of having the police obtain information from the cell phones of reporters and protestors without a warrant, the need to protect cell phones is not limited to particular segments of society because all cell phone users have an interest in keeping their own information private. Though the privacy benefits of SB914 eventually yielded to political realities, it remains an honorable attempt to legislatively solve a problem that the Supreme Court has yet to address.

IV. PROTESTS

They're saying that freedom / has done little to stop / Corporations from
keeping / the wealth at the top . . . a sultan and student / both have
iPhone 4s / it's not fair.¹³⁷

Political protestors are one such group at risk of having their speech chilled by warrantless cell phone searches incident to arrest.¹³⁸ It is therefore critical to understand the role of cell phones as a new technology within the natural evolution of protest strategies, the protestors' own responses to a lack of warrantless cell phone search protections, and law enforcement's current policies regarding social media.

When Governor Brown vetoed SB914 on October 11, 2011, the Occupy Wall Street protests had been in the public dialogue for almost a

¹³⁴ See Andrew Breitbart, 'Crowdsourced' This: Emails Expose #OccupyWallStreet Conspiracy to 'Destabilize' Global Markets, Governments, BREITBART.COM (Oct. 14, 2011), <http://www.breitbart.com/Big-Government/2011/10/14/Crowdsourced-This--Emails-Expose--OccupyWallStreet-Conspiracy-to-Destabilize-Global-Markets--Governments>.

¹³⁵ See Gahrman, *Governor Allows Warrantless Search*, *supra* note 85.

¹³⁶ *Id.*

¹³⁷ ReasonTV, *Remy's Occupy Wall Street Protest Song*, YOUTUBE (Oct. 8, 2011), <http://www.youtube.com/watch?v=4QTfNEDgusQ> (showing the irony in the prevalence of expensive cell phones at a protest concerned with wealth disparities, set to the tune of Bob Dylan's *The Times They Are A-Changin'*).

¹³⁸ See *supra* notes 5–9 and accompanying text.

month¹³⁹ and had begun to spread throughout the country.¹⁴⁰ Protest participants turned to the Internet for a constant supply of new information and instructions from those they trusted, while Internet bystanders could view the protests in real time directly from the protestors' point of view.¹⁴¹ *Fast Company*, a progressive magazine for business leaders, wrote that the two protesters who streamed the protests online were "doing more with \$500 Samsung Galaxy S II phones on Sprint's 4G Network than TV networks can muster with thousands of dollars of gear, satellite trucks, pretty anchors, and helicopters."¹⁴² Since smartphones allow access to the Internet from almost any location, the protester on the street is able to relay critical information quickly to those in other areas in ways that have not been seen before, allowing the protests to adapt and shift fluidly.¹⁴³

The demographics of the Occupy Wall Street movement are strongly correlated to the demographics of online social media, meaning that a decrease in cell phone privacy has a disproportionate effect on the use of social media, and, thus, the eighteen to forty-four year old demographic.¹⁴⁴ In a survey conducted by City University of New York, 26.3% of protesters were under twenty-four years old, and 54.3% were between the ages of twenty-five and forty-four.¹⁴⁵ Most of the members surveyed were

¹³⁹ Colin Moynihan, *Wall Street Protest Begins, With Demonstrators Blocked*, N.Y. TIMES (Sept. 17, 2011, 4:26 PM), <http://cityroom.blogs.nytimes.com/2011/09/17/wall-street-protest-begins-with-demonstrators-blocked/>.

¹⁴⁰ Kevin Voigt, *Beyond Wall Street: 'Occupy' Protests Go Global*, CNN (Oct. 7, 2011) <http://edition.cnn.com/2011/10/07/business/wall-street-protest-global/index.html>.

¹⁴¹ Sean Captain, *Tim Pool and Henry Ferry: The Men Behind Occupy Wall Street's Live Stream*, FAST CO. (Nov. 21, 2011), available at <http://www.fastcompany.com/1796352/occupy-wall-street-tim-pool-henry-ferry> (One "video stream drew more than 20,000 simultaneous viewers and 250,000 unique visitors throughout the course of the day. It was also rebroadcast by Al Jazeera English and other outlets. . . . [The stream] stayed mostly on for 12-and-a-half hours during the string of protests on Nov. 17 and drew 737,000 unique viewers.").

¹⁴² *Id.*

¹⁴³ Devan Rosen et al., *Birds of a Feather Protest Together: Theorizing Self-Organizing Political Protests with Flock Theory*, 23 SYSTEMIC PRAC & ACTION RES. 419, 422 ("[I]n a decentralized protest group the very structure (as in decreased leadership) has causal power by fostering increased involvement from group members and fluid response to [threats].").

¹⁴⁴ Hector R. Cordero-Guzman, *Main Stream Support for a Mainstream Movement: The 99% Movement Comes From and Looks Like the 99%* (Oct. 19, 2011) (unpublished draft for discussion, City University of New York), available at <http://occupywallst.org/media/pdf/OWS-profile1-10-18-11-sent-v2-HRCG.pdf> (The methodology used is questionable because it only examines data from visitors to the occupywallstreet.org website, which therefore skews against those protesters without Internet access.).

¹⁴⁵ *Id.*; see also Sean Captain, *The Demographics of Occupy Wall Street*, GAWKER (Oct. 19, 2011, 1:32 PM), <http://gawker.com/5851376/the-demographics-of-occupy-wall-street> (interpreting Professor Cordero-Guzman's data).

active users of social media, with 73.9%, 66.4%, and 28.9% as regular users of YouTube, Facebook, and Twitter, respectively.¹⁴⁶ Additionally, a November 2011 Nielsen survey reported that 54% of cell phone users between the ages of eighteen and twenty-four, as well as 62% of cell phone users between the ages of twenty-five and thirty-four (the most of any age group), own smartphones.¹⁴⁷ Further, “[t]he number of smartphone subscribers using the mobile Internet has grown 45% since 2010.”¹⁴⁸ The result is that the young, technologically-savvy participants of the Occupy Wall Street protests are more likely to have cell phones that, as the Ohio Supreme Court acknowledged in *Smith*, carry “large amounts of private data [that] gives their users a reasonable and justifiable expectation of a higher level of privacy in the information they contain.”¹⁴⁹ Put simply, warrantless cell phone searches incident to an arrest have a disproportionate effect on the young people who utilize these new technologies.

A. EVOLUTION OF SOCIAL NETWORKING

Using the Internet to organize large groups of people, like Occupy Wall Street did with social media, is the natural evolution of social networking. Whether it was America’s Revolutionary War,¹⁵⁰ the worldwide protests of the 1960s,¹⁵¹ the Tiananmen Square protest in 1989,¹⁵² the Arab Spring protests in 2009,¹⁵³ or the Occupy Wall Street protests in 2011,¹⁵⁴ protesters have been applying new technologies with age-old principles of social networking to facilitate change. Likewise, governments have simultaneously worked to stop the dissemination of information to maintain the status quo. While the group, government, year, or technology may change, the principles of utilizing social networking for

¹⁴⁶ See Cordero-Guzman, *supra* note 144.

¹⁴⁷ *Generation App: 62% of Mobile Users 25-34 Own Smartphones*, NIELSENWIRE (Nov. 03, 2011), http://blog.nielsen.com/nielsenwire/online_mobile/generation-app-62-of-mobile-users-25-34-own-smartphones/.

¹⁴⁸ *Report: The Rise of Smartphones, Apps and the Mobile Web*, NIELSENWIRE (Dec. 15, 2011), http://blog.nielsen.com/nielsenwire/online_mobile/report-the-rise-of-smartphones-apps-and-the-mobile-web/.

¹⁴⁹ *State v. Smith*, 920 N.E.2d 949, 955 (Ohio 2009).

¹⁵⁰ See *infra* notes 155–162 and accompanying text.

¹⁵¹ See *infra* notes 163–164 and accompanying text.

¹⁵² See *infra* notes 165–167 and accompanying text.

¹⁵³ See *infra* notes 168–196 and accompanying text.

¹⁵⁴ See *infra* Part IV.B.

protests do not. Below, I will examine the evolution of organizing large groups of people over time, and the technologies employed by each, culminating in Part B with an analysis of how the Occupy Wall Street protests spread in 2011.

The midnight ride of Paul Revere¹⁵⁵ is a legendary example of social networking before the advent of cell phones and the Internet.¹⁵⁶ Paul Revere was very social and well-connected,¹⁵⁷ like a Twitter user who has many followers.¹⁵⁸ As a result of his social status, “[h]e was the logical one to go to if you were a stable boy . . . and overheard two British officers talking about how there would be hell to pay on the following afternoon.”¹⁵⁹ In today’s parlance, the stable boy tweeted the overheard information at Paul Revere, and it was up to Revere to spread the news. When he set out to alert the countryside that the “British were coming,” he did not merely ride his horse through the streets shouting the news,¹⁶⁰ but instead shared the information with other socially connected individuals. He relied on those other local connectors to disseminate his message better than he could have alone.¹⁶¹ Again, in today’s parlance, Revere “retweeted” the information, ensuring the news reached both his socially average followers, and his socially-adept followers who could then retweet it to pass on the message even faster. The result was the mobilization of an

¹⁵⁵ Henry Wadsworth Longfellow’s *Midnight Ride of Paul Revere* was published in 1861, and ensured Paul Revere’s ride would become an American legend. However, Mr. Longfellow took many historical liberties to appeal to his Civil War audience, blurring the line between reality and myth. Keith Henderson, *Historian Trots Out the Truth About Paul Revere’s Famous Ride*, CHRISTIAN SCI. MONITOR, May 27, 1994, available at <http://www.csmonitor.com/1994/0527/27141.html>. In short, it is true that Paul Revere was well-connected, and he did ride and warn the American Colonists that the British were coming. To help parallel Malcolm Gladwell’s theories on social networking, this paper adopts the account of Paul Revere’s ride put forth by Malcolm Gladwell, which in turn was adapted from historian David Hackett Fischer. See MALCOLM GLADWELL, *THE TIPPING POINT* 30–34, 56–60 (2000); see generally DAVID HACKETT FISCHER, *PAUL REVERE’S RIDE* (1995).

¹⁵⁶ GLADWELL, *supra* note 155, at 30–34, 56–60; see also Amy Campbell, *What if Paul Revere Was on Twitter?*, AMY CAMPBELL’S WEB LOG (Nov. 22, 2011 at 1:32 PM), <http://blogs.law.harvard.edu/amy/2011/11/22/paul-revere-twitter/> (providing the idea for hypothesizing what Paul Revere’s ride would have been like on Twitter.).

¹⁵⁷ GLADWELL, *supra* note 155, at 54–57.

¹⁵⁸ See Lev Grossman, *Iran Protests: Twitter, the Medium of the Movement*, TIME (June 17, 2009), <http://www.time.com/time/world/article/0,8599,1905125,00.html>.

¹⁵⁹ GLADWELL, *supra* note 155, at 57–58.

¹⁶⁰ *Id.* at 58.

¹⁶¹ *Id.* (“When he came upon a town, he would have known exactly whose door to knock on, who the local militia leader was, who the key players in town were. He had met most of them before. And they knew and respected him as well.”).

entire region before the British arrived.¹⁶²

Fast forward to the protests of 1968, which expanded the spread of information from a single region, like Paul Revere's midnight ride, to the entire Western world. Images of student protests at the University of California, Berkeley and Columbia University provided solidarity with European protesters by taking advantage of two then-recent innovations: "[T]he use of videotape, which was cheap and reusable, instead of film, and the same-day broadcast, which meant that often unedited images of rebellion were disseminated across continents almost as they happened."¹⁶³ The result was that the protesters were able to harness the "galvanising [*sic*] power of television [better than] the politicians they were trying to overthrow."¹⁶⁴ Likewise, today's generation is harnessing social media through cell phones to control their message in much the same way protesters of the 1960s utilized broadcast television.

In some cases, the use of social networking allows protesters to bypass government censorship to share news. During the 1989 Tiananmen Square massacre, Chinese students in China traded fax numbers with Chinese students at American universities.¹⁶⁵ These newly formed social networks sent news directly from the protesters in China to outlets in the United States.¹⁶⁶ In turn, "[d]aily summaries of Western news accounts and photographs were faxed to universities, government offices, hospitals and businesses in major cities in China to provide an alternative to the government's distorted press reports."¹⁶⁷ From broadcast television in the 1960s to the fax machine of the 1980s, protesters exchanged information within their social networks and the outside world using new technologies. In this way, fax machine technology was a precursor to sharing information over the Internet on social networks via cell phones.

One of the first modern iterations of a protest using social media occurred during the 2009 Iranian protests when the social network Twitter was critical in broadcasting information to fellow protesters and outsiders.¹⁶⁸ The protest did not start on Twitter, but as with the Western

¹⁶² *Id.*

¹⁶³ Sean O'Hagan, *Everyone to the Barricades*, OBSERVER REV. Jan. 19, 2008, at 4, available at <http://www.guardian.co.uk/world/2008/jan/20/1968theyearofrevolt.features>.

¹⁶⁴ *Id.*

¹⁶⁵ *Fax Against Fictions*, TIME (June 19, 1989), available at <http://www.time.com/time/magazine/article/0,9171,957964,00.html>.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Grossman, *supra* note 158.

protests being viewed on broadcast television nearly four decades before, the social network gave them a sense of camaraderie.¹⁶⁹ Twitter “emboldened the protesters, reinforced their conviction that they are not alone and engaged populations outside Iran in an emotional, immediate way that was never possible before.”¹⁷⁰ Twitter is easy for protesters to use and hard for governments to penetrate.¹⁷¹ While the Iranian government censors prevented newspapers from discussing the protests, protesters on Twitter were self-reporting incidents such as, “Ashora platoons now moving from valiasr toward National Tv staion. mousavi’s supporters are already there. my father is out there!”¹⁷²

Before Twitter, the news would have only been shared among trusted groups over e-mail or Facebook, and to enter those ranks, the protesters would necessarily have had to reveal their identities. Twitter’s innovation is that it allows anyone to broadcast 140-character “tweets” to the rest of the world.¹⁷³ The user can broadcast either using a simple text message or over the Internet.¹⁷⁴ If the news is powerful enough, others can “retweet” the information and share it within their social networks without delay.¹⁷⁵ In other words, anyone can be like Paul Revere.

Social media continued to play a role in the 2011 Arab Spring uprisings, with nearly nine in ten Egyptians and Tunisians saying they

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* (“So what exactly makes Twitter the medium of the moment? It’s free, highly mobile, very personal and very quick. It’s also built to spread, and fast. Twitterers like to append notes called hashtags—#theylooklikethis—to their tweets, so that they can be grouped and searched for by topic; especially interesting or urgent tweets tend to get picked up and retransmitted by other Twitterers, a practice known as retweeting, or just RT. And Twitter is promiscuous by nature: tweets go out over two networks, the Internet and SMS, the network that cell phones use for text messages, and they can be received and read on practically anything with a screen and a network connection.”). See also Lauren Hockenson, *The Complete Guide to Twitter’s Language and Acronyms*, THE NEXT WEB (Sept. 15, 2012), <http://thenextweb.com/twitter/2012/09/15/a-list-twitters-language/> (providing an excellent explanation of the terminology and syntax employed by Twitter’s users).

¹⁷¹ Grossman, *supra* note 158.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See Gilad Lotan, *Timing, Network and Topicality: A Revealing Look at How Whitney Houston Death News Spread on Twitter*, SOCIALFLOW (Feb. 17, 2012), <http://blog.socialflow.com/post/7120244763/timing-network-and-topicality-a-revealing-look-at-how-whitney-houston-death-news-spread-on-twitter> [hereinafter Lotan, *Timing, Network and Topicality*] (discussing how news of Whitney Houston’s death took forty-three minutes to reach a critical mass).

used Facebook to “organise protests or spread awareness about them.”¹⁷⁶ In America, the 2011 Occupy Wall Street protesters utilized online social networks to coordinate and strategize well before a single individual marched into Zuccotti Park.¹⁷⁷

B. OCCUPY WALL STREET

The Occupy Wall Street movement provides an excellent case study on the emergence and vulnerabilities inherent in modern protests that rely on social media. While the Zuccotti Park Occupy Wall Street protest officially began on September 17, 2011, the idea had been brewing on social networks and blogs since early July.¹⁷⁸ On July 13, the social activist magazine *Adbusters* wrote a blog post titled “#OCCUPYWALLSTREET,” which suggested that “[o]n Sept 17, . . . 20,000 people flood into lower Manhattan, set up tents, kitchens, peaceful barricades and occupy Wall Street.”¹⁷⁹ *Adbusters’* traditional print magazine circulation is only 120,000, but by using social media and the Internet, the magazine was able to greatly expand its audience.¹⁸⁰ The same day the blog post was published, a Twitter user by the name of “@Voyno,” tweeted the first relevant Occupy Wall Street tweet with the hashtag #OccupyWallStreet, asking fellow Twitter user “@mat” what he thought of *Adbusters’* idea.¹⁸¹

While Twitter is often portrayed as the rapid disseminator of

¹⁷⁶ Carol Huang, *Facebook and Twitter Key to Arab Spring Uprisings: Report*, NAT’L (June 6, 2011), available at <http://www.thenational.ae/news/uae-news/facebook-and-twitter-key-to-arab-spring-uprisings-report>.

¹⁷⁷ Ben Berkowitz, *From a Single Hashtag, a Protest Circled the World*, BRISBANE TIMES (Oct. 19, 2011), <http://www.brisbanetimes.com.au/technology/technology-news/from-a-single-hashtag-a-protest-circled-the-world-20111019-1m72j.html>.

¹⁷⁸ *Id.*

¹⁷⁹ #OCCUPYWALLSTREET, ADBUSTERS, (July 13, 2011), <http://www.adbusters.org/blogs/adbusters-blog/occupywallstreet.html>.

¹⁸⁰ *Guys and Dolls*, ADBUSTERS, <http://www.adbusters.org/about/adbusters> (last visited Feb. 16, 2013).

¹⁸¹ Gilad Lotan, *#OccupyWallStreet: Origin and Spread Visualized*, SOCIALFLOW (Oct. 18, 2011), <http://blog.socialflow.com/post/7120244404/occupywallstreet-origin-and-spread-visualized#more-7120244404> [hereinafter Lotan, #OccupyWallStreet]; see also Berkowitz, *supra* note 177; but see Lauren Dugan, *What Was the First #OccupyWallStreet Tweet?*, MEDIABISTRO (Oct. 17, 2011, 3:05 PM), http://www.mediabistro.com/alltwitter/what-was-the-first-occupywallstreet-tweet_b14916 (crediting *Adbusters* with the first use of #occupywallstreet on July 4th, 2011); Stan Pugsley, *Tracing the Roots of #OccupyWallStreet*, ICROSSING (Oct. 12, 2011), <http://greatfinds.icrossing.com/tracing-the-roots-of-occupywallstreet/> (crediting *Adbusters* similarly).

information, the Occupy Wall Street movement's initial buildup was very slow. For instance, between July 13th and July 23rd, there were only 386 users publishing 586 tweets about Occupy Wall Street.¹⁸² The use of the #OccupyWallStreet hashtag was used minimally until September 16th, the day before *Adbusters* called for the occupation to begin.¹⁸³ "The first two weeks of the movement were slow, media coverage was slim. . . . But then a demonstration on the Brooklyn Bridge prompted hundreds of arrests and the [social media] spark was ignited."¹⁸⁴ Photos of the Brooklyn Bridge protest depict the police arresting and removing protesters from the bridge, while the protesters documented the event with cameras and cell phones.¹⁸⁵ The photos corroborate the data that suggests the Occupy Wall Street movement was primarily young people using technology to organize, capture, and share the constantly-evolving protest with others.¹⁸⁶

While Occupy Wall Street was building momentum, law enforcement organizations began to take notice. In addition to tweets, during its early stages the protesters exchanged e-mails and Facebook messages through a listserv called "September17discuss."¹⁸⁷ The listserv was a central location where activists could openly converse about daily tactics and protest strategies.¹⁸⁸ While September17discuss was a closed group, Thomas Ryan, a New York security consultant, was able to infiltrate the listserv and forward pertinent e-mails to both the FBI and the NYPD.¹⁸⁹ In all, Ryan released more than 3,900 e-mails to the public and law enforcement.¹⁹⁰ However, because Ryan did not act at law enforcement's direction in releasing the e-mails but rather of his own volition,¹⁹¹ the FBI and NYPD did not violate the Fourth Amendment search and seizure

¹⁸² Lotan, #OccupyWallStreet, *supra* note 181.

¹⁸³ Berkowitz, *supra* note 177 ("Trendistic, which tracks hashtag trends on Twitter, shows that OccupyWallStreet first showed up in any volume about 11pm on September 16, the evening before the occupation of lower Manhattan's Zuccotti Park began. Within 24 hours, the tag represented nearly one of every 500 uses of a hashtag.").

¹⁸⁴ *Id.*

¹⁸⁵ See *Occupy Wall Street Protesters Arrested on Brooklyn Bridge—In Pictures*, THE GUARDIAN (Oct. 1, 2011, 4:42 PM), <http://www.guardian.co.uk/world/gallery/2011/oct/02/occupy-wall-street-brooklyn-bridge>.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See *id.* See also See *For Yourself*, OWS ORGANIZING EMAILS, <http://owsmail.dc406.com/> (last visited Feb. 16, 2013) (providing a searchable database of more than 3900 September17discuss e-mails).

¹⁸⁹ Chen, *supra* note 5.

¹⁹⁰ See Breitbart, *supra* note 134.

¹⁹¹ See Chen, *supra* note 5.

rights of September 17 discuss members.

While there is no direct evidence that the e-mail data was used by law enforcement, it is not difficult to imagine a scenario¹⁹² in which the information contained in the e-mails, including the identities of key participants in the protest plans,¹⁹³ were used to preemptively censor¹⁹⁴ the protests before they expanded worldwide on October 15th.¹⁹⁵ The compiled information could also be used against key participants later—a tactic that law enforcement had used during the civil rights era.¹⁹⁶

By late 2012, the Occupy Wall Street movement had largely faded from the public conversation.¹⁹⁷ In June 2012, *Adbusters* published a blog

¹⁹² For example, in 2003 the New York Police Department sent teams of undercover officers to infiltrate groups they believed would protest at the 2004 Republican National Convention. Jim Dwyer, *City Police Spied Broadly Before G.O.P. Convention*, N.Y. TIMES, March 25, 2007, § 1, at 1. The undercover officers traveled to fifteen different areas outside New York and “made friends, shared meals, swapped e-mail messages and then filed daily reports with the department’s Intelligence Division. Other investigators mined Internet sites and chat rooms.” *Id.* The intelligence was compiled and allegedly used to strategically place officers during the convention to prevent acts of violence or terrorism. *Id.* However, many groups and individuals who had no intention of breaking the law were infiltrated and had their information shared with other law enforcement agencies both around the country and in Europe. *Id.* An activist whose name was referenced in one such NYPD intelligence report said, “I think this idea of secret police following you around is terrifying. It really has an effect of spreading fear and squashing dissent.” Associated Press, *Documents Show NYPD Infiltrated Liberal Groups*, USA TODAY (March 23, 2012, 5:47 AM), <http://usatoday30.usatoday.com/news/nation/story/2012-03-23/nypd-liberal-groups/53722732/1>. Today, the NYPD conducts undercover operations using its Cyber Intelligence Unit, with an alleged focus on infiltrating liberal political organizations. *Id.* The Cyber Intelligence Unit, “[m]onitor[s] websites of activist groups, and undercover officers put themselves on email distribution lists for upcoming events. Plainclothes officers collect fliers on public demonstrations. Officers and informants infiltrate the groups and attend rallies, parades and marches. Intelligence analysts take all this information and distill it into summaries for Police Commissioner Raymond Kelly’s daily briefing.” *Id.* While it does not appear that the data is being collected illegally, the practices of the Cyber Intelligence Unit may nevertheless give rise to privacy concerns and the potential for abuse. *Id.*

¹⁹³ Breitbart, *supra* note 190 (citing e-mails from “radical anarchist organizer Lisa Fithian,” among others).

¹⁹⁴ Chen, *supra* note 5 (The FBI agent who received the e-mails from Ryan described “Occupy Wall Street as an example of a ‘newly emerging threat to U.S. information systems,’” and stated that “the FBI has been ‘monitoring the event on cyberspace and are preparing to meet it with physical security.’”).

¹⁹⁵ *Hundreds Arrested in ‘Occupy’ Protests*, *supra* note 9.

¹⁹⁶ During the 1960s, the FBI wiretapped the home of civil rights leader Martin Luther King, Jr. after his famous “I Have a Dream” speech, and in 1964 sent an anonymous letter suggesting King kill himself or face the release of news that threatened his reputation. See Jen Christensen, *FBI Tracked King’s Every Move*, CNN (Dec. 29, 2008), <http://edition.cnn.com/2008/US/03/31/mlk.fbi.conspiracy/index.html>.

¹⁹⁷ See *Occupy Wall Street: What Happened?*, HUFFINGTONPOST (Sept. 10, 2012, 3:33 PM), http://www.huffingtonpost.com/2012/09/10/occupy-wall-street_n_1871661.html (looking

post decrying the movement's lack of fresh ideas and advocating for its rebirth.¹⁹⁸ The original founders envisioned the movement spreading beyond a small number of large encampments like Zuccotti Park to "[s]mall groups of fired up second generation occupiers acting independently, swiftly and tenaciously pulling off myriad visceral local actions, disrupting capitalist business-as-usual across the globe."¹⁹⁹ As discussed above, this decentralized vision fits well with the strengths of online social networking. However, the longstanding criticism of Occupy Wall Street—that the movement lacked focus—may be indicative of modern protests that rely on social media in general.²⁰⁰ One early participant of the movement tellingly said:

The reason that the movement didn't make demands was because it was non-hierarchical. It was organized and planned out by anarchists and conscripted by various other political ideologies, but the center point is that its beliefs stemmed around the fact that the government doesn't serve the best interests of the people and therefore should not be begged, or "demanded" for change because it wouldn't happen.²⁰¹

The Occupy Wall Street protesters had plans for a new march on Wall Street on September 17, 2012,²⁰² and gathered protesters were arrested.²⁰³ While the September resurgence was short lived, if *Adbusters* has their way the movement that began slowly on Twitter in 2011 "has just begun."²⁰⁴

at the two factions within Occupy Wall Street and their (lack of) progress a year later).

¹⁹⁸ *Flash Encampments*, ADBUSTERS (June 05, 2012), <http://www.adbusters.org/blogs/adbusters-blog/flash-encampments.html>.

¹⁹⁹ *Id.*

²⁰⁰ Mariam, *Occupy Wall Street: One Year Later*, MEDIARIGHTS (Aug. 24, 2012), http://www.mediareights.org/engine_feed/occupy_wall_street_one_year_later_what_does_it_mean.

²⁰¹ *Id.*

²⁰² *Occupy Wall Street 1st Anniversary Convergence Guide*, OCCUPY WALL STREET, (Sept. 15, 2012, 7:31 AM), <http://occupywallst.org/article/occupy-wall-street-1st-anniversary-convergence-guide/> (showing the official calendar of events for the Occupy Wall Street protest's anniversary); see also Max Abelson, *Occupy Sets Wall Street Tie-Up as Protesters Face Burnout*, BLOOMBERG (Aug. 29, 2012, 1:03 PM), <http://www.bloomberg.com/news/2012-08-29/occupy-sets-wall-street-tie-up-as-protesters-face-burnout.html> (providing an excellent summary of the current state of the Occupy Wall Street movement and what goals each faction within the movement hopes to achieve).

²⁰³ John Surico, *Occupy Wall Street One-Year Anniversary Begins with 25 Arrests*, VILLAGE VOICE (Sept. 16, 2012, 10:27 AM), http://blogs.villagevoice.com/runninscared/2012/09/occupy_wall_str_57.php.

²⁰⁴ See *Flash Encampments*, *supra* note 198.

C. THE CURRENT PROBLEM & PROTESTERS' SOLUTIONS

If Sir Isaac Newton's third law of physics²⁰⁵—that for every action there is always an equal and opposite reaction—were applied to the social sciences, it would follow that for every political protest there is a counter-movement, usually involving a governmental reaction. This section looks at how governments have responded to each of the social movements discussed in Part B, and how protesters have countered the varied responses.

Paul Revere's ride, the Arab Spring Protests, and the Occupy Wall Street protests all utilized social networks to transfer information and coordinate definite plans between participants.²⁰⁶ However, take the scenario from Part IV.B, and imagine that Paul Revere's ride was in 2011 and that instead of going to the homes of influential people, he used an online social network through his smartphone to warn that the British were coming. What would have happened had Paul Revere or one of his socially connected confidants been arrested for disturbing the peace and had his or her cell phone seized?²⁰⁷ While the answer of course would depend on whether the capture was at the start or the end of the ride, the effect would be a message that had not fully promulgated through the network. If Paul Revere were arrested for disturbing the peace while yelling in the streets or going door-to-door, the only information the British would have obtained is the location of his current broadcast. However, with the search of his cell phone incident to the arrest, the British would have been able to read every message communicated to his trusted group. Additionally, the identities of those members would be compromised. The hypothetical illustrates the potential consequences of law enforcement seizing a cell phone and obtaining its data: compromising the entire group and exposing the whole protest before it promulgates to enough people to reach a tipping point.

It may sound like the work of conspiracy theorists or science fiction writers, but both private companies and law enforcement are looking at how to harness social network trends. Through social network research companies such as SocialFlow, we know it is possible to determine the

²⁰⁵ SIR ISAAC NEWTON, *THE MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY*, VOLUME I 20 (Andrew Motte trans.) (1729), available at <http://goo.gl/7XJvM>.

²⁰⁶ See *supra* part IV.A–B.

²⁰⁷ In fact, Paul Revere was captured and questioned by British troops during his midnight ride, but he was able to escape hours later. See DAVID HACKETT FISCHER, *supra* note 155, at 130–36.

origins and paths a message takes to reach critical mass.²⁰⁸ For example, Twitter user “@AjaDiorNavy” tweeted about the death of Whitney Houston forty-two minutes before the Associated Press story went mainstream.²⁰⁹ However, between her first tweet and the news story going mainstream, “only 16 people found out and tweeted about Whitney Houston’s death.”²¹⁰ The applicable lesson is that “[j]ust because you’re first doesn’t mean your content will spread. In this case, @AjaDiorNavy had an incredibly hot piece of information many minutes before anyone else knew, yet @AjaDiorNavy didn’t have the right network to spread it.”²¹¹

Governments interested in using Twitter to monitor protestors and gather information may study the origins and paths that a message takes to reach critical mass, in order to identify the individuals with the most influence. One report during the Iranian protests read:

Rumors of the Iranian authorities’ tampering with Twitter traffic are rampant. But very little hard data is available, and so far it’s not clear that they’ve throttled Twitter completely. Why not is a matter of great speculation. It’s quite possible that the government finds Twitter useful as a way of monitoring protestors, gathering data on them and even tracking them down. There are also signs that the Iranian government may be infiltrating the Twitter network itself, manipulating it to its own advantage.²¹²

It is not difficult to envision a scenario in which the government predicts, based on an individual’s influence on social networks and the anti-establishment language he or she uses when writing online posts, that the individual is a threat, and then arrests him or her for an unrelated minor offense.²¹³ The arrest would give law enforcement access to the individual’s cell phone and its subsequent data. While one might discount law enforcement’s penetration into social networks as an Iranian problem, the United States government is beginning their own monitoring program

²⁰⁸ Lotan, *Timing, Network and Topicality*, *supra* note 175.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Grossman, *supra* note 158.

²¹³ Al Capone was widely believed to be responsible for ordering the murders of seven rival gang members in the Chicago St. Valentine’s Day Massacre. However, the government could not prove his responsibility and he was ultimately sentenced to eleven years in prison for tax evasion. *Solving Scarface: How the Law Finally Caught Up With Al Capone*, FBI.GOV (March 28, 2005), http://www.fbi.gov/news/stories/2005/march/capone_032805.

as well.²¹⁴ The Federal Bureau of Investigation, the Department of Defense, and the Office of the Director of National Intelligence have formally begun to seek information from contractors to design an automatic process that “identif[ies] emerging threats and upheavals using the billions of posts people around the world share every day.”²¹⁵ In the FBI’s request, they specifically cite social media’s applicability for crisis management:

Social media will be a valued source of information to the SIOC [Strategic Information & Operations Center] intelligence analyst in a crisis because it will be both eyewitness and first response to the crisis. Social media has emerged to be the first instance of communication about a crisis . . . [and] is rivaling 911 services in crisis response and reporting. Intelligence analysts will often use social media to *receive the first tip-off that a crisis has occurred*, collect details of the crisis on scene through eyewitnesses, *detect probable directions and timeframes the crisis is taking*, and can even *serve as evidence for investigation*.²¹⁶

It is important to emphasize that the information the FBI is seeking to analyze has been made public by the users themselves, but the potential for abuse still remains. With an average of one billion tweets being sent every three days, one former CIA analyst commented, “[i]t really ought to be the golden age of intelligence collection in that you’ve got people falling all over themselves trying to express who they are.”²¹⁷ Further, it appears that the Defense Department is attempting to use social media to create counter-informational campaigns, possibly similar to those allegedly used by the Iranian government during their protests,²¹⁸ to help influence social networks.²¹⁹

Protesters have responded to this potential for abuse by using

²¹⁴ Marcus Wohlsen, *U.S. Seeks Software to Mine Social Media*, USA TODAY (Feb. 13, 2012, 4:11 AM), http://www.usatoday.com/USCP/PNI/Nation/World/2012-02-13-PNI0213wir-FBI-social-media_ST_U.htm.

²¹⁵ *Id.*

²¹⁶ *Social Media Application*, FED. BUS. OPPORTUNITIES, <https://www.fbo.gov/utills/view?id=7f9abf0ff0fdb171d1130ddf412aea3> (last visited Feb. 16, 2013) (emphasis added).

²¹⁷ Wohlsen, *supra* note 214.

²¹⁸ Grossman, *supra* note 158 (The following tweet was reposted over 200 times by Iranian protesters, showing that there was suspicion that the Iranian government was creating its own informational counter-campaign on the Twitter network: “DO NOT RT anything U read from “NEW” tweeters, gvmt spreading misinfo.”).

²¹⁹ Wohlsen, *supra* note 214 (“The Defense Department’s tool would track social media to identify the spread of information that could affect soldiers in the field and also give the military ways to conduct its own ‘influence operations’ on social networks to counteract enemy campaigns.”).

Twitter alternatives²²⁰ and locking their cell phones. First, new Twitter alternatives like Vibe have emerged to help reduce the possibility of being identified.²²¹ Vibe allows individuals to broadcast messages like Twitter, but the messages are anonymous, disappear after a few minutes, and the user can set the broadcast radius.²²² While Vibe does not collect any user information and does not require a username like Twitter, the level of anonymity on Vibe is debatable. The developer of Vibe admits, “[i]t is anonymous, but that’s not to say someone with access, a phone company or the police, isn’t listening in on what’s being posted.”²²³ Additionally, the lack of usernames means nobody knows who is providing the information.²²⁴ The result is that no individual can be more trusted than another, and the possibility of law enforcement creating a counter-information campaign still exists. Still, the benefits apparently outweigh the potential for abuse, as one Occupy Wall Street protester describes the uses of Vibe:

Let's say you're protesting and someone up ahead sees that the cops are getting ready to kettle²²⁵ people, they can send out this vibe that only lasts a few minutes that says, "Cops are kettling." . . . It's anonymous too, . . . so not only are you able to send out relevant information to a small radius, but it also disappears, there's no record of it, so no one can come after the person who sent it.²²⁶

The ability to have messages self-destruct is powerful, because if individuals are arrested and their cell phones are searched, the messages they sent or received and the individuals to whom they are connected will not be able to be used against them.

Concerned with security, the Electronic Frontier Foundation, a digital

²²⁰ Anna Leach, *Anonymous Twitter Alternative Developed for Rioters*, REGISTER (Oct. 3, 2011, 3:03 AM), http://www.theregister.co.uk/2011/10/03/vibe_anonymous_twitter_for_anarchists_occupy_wallstreet/.

²²¹ *Id.*; see also *Vibe @ Occupy Wall Street*, ZAMI.COM, <http://zami.com/vows.html> (last visited Feb. 16, 2013) (the official website of the Vibe application).

²²² Leach, *supra* note 220.

²²³ Jenna Wortham, *Messaging App Grows with Wall Street Protests*, N.Y. TIMES (Oct. 12, 2011, 8:22 AM), <http://bits.blogs.nytimes.com/2011/10/12/anonymous-messaging-app-vibe-gets-boost-from-occupy-wall-street/>.

²²⁴ Leach, *supra* note 220.

²²⁵ The term “kettle” is slang, meaning, “to incarcerate or restrain temporarily.” *Kettle Definition*, URBANDICTIONARY, <http://kettle.urbanup.com/5689910> (last visited Feb. 16, 2013).

²²⁶ Anjali Mullany, *Privacy for the People: Wall Street Protesters Use Social Media App Vibe to Communicate Anonymously*, N.Y. DAILY NEWS (Sept. 28, 2011), <http://www.nydailynews.com/technology/privacy-people-wall-street-protesters-social-media-app-vibe-communicate-anonymously-article-1.958432#ixzz1ZLj0GNhW>.

privacy advocacy group, published a guide recommending all protesters take precautions when bringing their cell phones to the Occupy Wall Street protests.²²⁷ The Electronic Frontier Foundation's recommendations range from the expensive to the practical.²²⁸ First, they suggest bringing a throwaway phone to eliminate the potential that law enforcement might gain access to personal data.²²⁹ However, because that is an expensive option, they suggest instead to password-protect the protester's cell phone to prevent unauthorized access.²³⁰ If the protester is arrested, the Electronic Frontier Foundation recommends that when "the police ask for the password to your electronic device, you can politely refuse to provide it and ask to speak to your lawyer. . . . [However,] just because the police cannot compel you to give up your password . . . doesn't mean they can't pressure you."²³¹

However, even password-protecting a cell phone provides limited protection against warrantless searches. First, if law enforcement officers ask to see the individual's cell phone and password and the protester complies before any arrest is made, no protections exist because the protester was free to leave.²³² Even if the protester is arrested and the police request and receive the password before reading the arrestee his Miranda rights, the "failure to read the warnings will not result in suppression of any illegal evidence found on the cell phone because the fruit-of-the-poisonous-tree doctrine never applies to *Miranda* violations."²³³ If the officer goes one step further and demands, instead of requests, "that an arrestee disclose his password, the arrestee would have only a very weak argument that the police have compelled a testimonial response in violation of the Fifth Amendment's Self-Incrimination Clause."²³⁴ While the guidelines published by the Electronic Frontier

²²⁷ Eva Galperin, *Cell Phone Guide for Occupy Wall Street Protesters (and Everyone Else)*, ELEC. FRONTIER FOUND. (Oct. 14, 2011), <https://www.eff.org/deeplinks/2011/10/cell-phone-guide-occupy-wall-street-protesters-and-everyone-else>.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* (emphasis omitted).

²³² See Adam M. Gershowitz, *Password Protected? Can a Password Save Your Cell Phone From a Search Incident to Arrest?*, 96 IOWA L. REV. 1125, 1130 (2011).

²³³ *Id.* (emphasis added).

²³⁴ *Id.* See also Julia Angwin, *FBI vs. Google: The Battle to Unlock Phones*, WALL ST. J., Sept. 7, 2012, at B4 (The FBI is requesting, through a search warrant, that Google turn over a suspect's unlock code to search their smartphone for evidence. This prevents a suspect from having to unlock the phone himself or herself, which could violate his or her Fifth Amendment protections against self-incrimination. Google so far has refused the FBI's request, but only in

Foundation provide a helpful start, until the Supreme Court creates national cell phone search standards, password-protecting a cell phone is a judicially untested and incomplete solution that only superficially protects protesters.

V. CONCLUSION

A. ADOPTING *SMITH*

The problems discussed above are pressing, and commentators have proposed a number of solutions to the warrantless cell phone search problem. The most drastic solution would entail the United States Supreme Court adopting the California Supreme Court's overturned standard in *Norman*,²³⁵ discussed in Part III.A.²³⁶ Limiting a search incident to arrest to only "searching for evidence of the crime for which the suspect was arrested" would likely solve the cell phone search "dilemma by reconceptualizing the entire search incident to arrest doctrine, without requiring a special rule for particular new technology."²³⁷ However, the solution is unlikely to be adopted because it "lacks doctrinal justification."²³⁸

A better proposal for the Supreme Court is one that adopts the Ohio Supreme Court's holding in *Smith*, recognizing that cell phones are a distinct item more akin to a laptop than an address book or container.²³⁹ This approach includes a number of benefits to law enforcement and cell phone users. First, it protects law enforcement's need to preserve evidence because the cell phone, assuming it is on the arrestee, will still be collected.²⁴⁰ If a search of the cell phone is deemed necessary, the police can obtain a warrant *and then* search it without the potential for the arrestee to destroy evidence because the arrestee lacks control of the cell phone.²⁴¹ Second, *Smith* did not discriminate based on the type of cell phone, so individuals using a standard cell phone receive the same

the case discussed in the article. The author admits it is unknown how many requests the FBI makes to Google, and how many Google actually grants.).

²³⁵ *People v. Norman*, 538 P.2d 237 (Cal. 1975).

²³⁶ See Gershowitz, *iPhone Meets the Fourth Amendment*, *supra* note 19, at 45–59 (proposing six alternatives to solve the current warrantless cell phone search doctrine).

²³⁷ *Id.* at 48–49.

²³⁸ *Id.* at 49.

²³⁹ See *State v. Smith*, 920 N.E.2d 949, 955 (Ohio 2009).

²⁴⁰ See Gershowitz, *iPhone Meets the Fourth Amendment*, *supra* note 19, at 48–49.

²⁴¹ *Id.*

protections as wealthier smartphone users.²⁴² As discussed in Part IV, while many of the young people at the Occupy Wall Street protests used smartphones, the same protections should be extended to all cell phone users. Finally, the need for state legislatures to seek their own remedies would be averted by the Supreme Court's updating the search incident to arrest jurisprudence to prevent warrantless cell phone searches.

B. CONCLUSION

Cell phone search jurisprudence has not caught up with the increased and widespread use of cell phones, and as a result cell phone users are uncertain about whether information on their phones will remain private. In an age where cell phones and the Internet play a significant role in social movements, this lack of privacy may have a chilling effect on speech. In short, everyone who uses a cell phone is at risk of having their privacy violated if they are searched incident to an arrest. California's legislative solution was an attempt to remedy the holding in *Diaz*,²⁴³ but it failed to overcome the state's political realities. The Court should adopt the Ohio Supreme Court's standard in *Smith*, because it provides a modern understanding of the cell phone as more than just a container and recognizes the unique category into which it fits. However, until a decision is rendered, law enforcement and protesters will be in a constant cat-and-mouse game where protesters utilize new technologies, like Vibe, to communicate with one another and law enforcement seeks ways to penetrate those networks, like the FBI's proposed application to search social networks. In conclusion, without a Supreme Court decision that updates the search incident to arrest doctrine to exclude warrantless cell phone searches incident to arrest, individuals and protesters can have their cell phones searched upon being arrested for minor offenses, potentially exposing their private information to abuse.

²⁴² See *Smith*, 920 N.E.2d at 954.

²⁴³ *People v. Diaz*, 244 P.3d 501, 503–04 (Cal. 2011).