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WHY *ARIZONA V. GANT* IS THE WRONG SOLUTION TO THE WARRANTLESS CELL PHONE SEARCH PROBLEM

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Some scholars have looked to *Arizona v. Gant*¹ to limit police searches of cell phones incident to arrest.² Under the *Gant* test, police would only be permitted to search a cell phone if it were reasonable to believe it might hold evidence of the crime of arrest.³ The allure of the *Gant* framework is that it would prevent the police from searching through huge amounts of sensitive cell phone data after conducting an arrest for a minor offense. Unfortunately, with the rapid development of cell phone apps, the *Gant* test fails to offer adequate protection for cell phone data in the long run.⁴ Consider the following examples.

Let us say police arrest a suspect for driving while intoxicated. Would it be reasonable to believe evidence of drunk driving – the crime of arrest – might be found in her cell phone? In 2010, the answer to that question would probably have been “no.” But in 2015, the answer likely will be different. Apps that allow you to pay bills with your phone – for instance, Google Wallet or Square Wallet – are growing in popularity.⁵ At present, these apps are primarily used to pay for your pumpkin spice latte at Starbucks.⁶ But with the

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¹ *Arizona v. Gant*, 556 U.S. 332, 351 (2009) (“Police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”).

² See, e.g., Orin S. Kerr, *Foreword: Accounting for Technological Change*, 36 HARV. J.L. PUB. POL’Y 403, 406 (2013).

³ *Id.* at 406-07 (applying the second prong of *Gant* to cell phones and determining that “[s]uch a device should be searched pursuant to the search-incident-to-arrest exception only when ‘it is reasonable to believe evidence relevant to the crime of arrest might be found’” (quoting *Gant*, 556 U.S. at 343)).

⁴ I initially endorsed the “crime of arrest” limitation before the *Gant* decision. See Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 48-49 (2008). For the reasons explained in this Perspective, however, I now think the *Gant* doctrine is insufficiently protective.

⁵ See Laurie Segall, *5 Pay-by-Phone Apps Tested*, CNN MONEY (Sept. 24, 2012, 9:31 AM), <http://money.cnn.com/gallery/technology/2012/09/24/mobile-payment-apps/index.html>.

⁶ See Jenna Wortham, *I’m Still Waiting for My Phone to Become My Wallet*, N.Y. TIMES, July 28, 2013, at BU3.

number of vendors rising – Google Wallet is now accepted at “hundreds of thousands of merchant locations”⁷ – this payment method will soon be typical in bars and nightclubs. If your phone can hold the receipts for a night of drinking, it would be “reasonable to believe” that evidence of the crime of drunk driving might be found on your phone.

Many cell phone users have the Foursquare app to “check in” to locations in order to be social or earn benefits from vendors.⁸ Users can even download an app called “Future Checkin” that “allows you to check-in to your favorite Foursquare venues automatically when you’re near them.”⁹ If a police officer is investigating a theft, it is reasonable to believe that the suspect – particularly a younger suspect – has Foursquare on his phone and that the phone might provide evidence of his proximity to the crime scene.

It is also reasonable for police to believe that text messages will hold evidence of a variety of low-level crimes. The most obvious example is texting while driving, which is an arrestable offense in numerous states.¹⁰ Simple drug possession is another example. An officer who arrests a suspect for possession of a small amount of marijuana may reasonably believe the purchase was coordinated by text message,¹¹ thus authorizing a search of the phone under *Gant*. It would similarly seem reasonable to believe a woman arrested for prostitution might have texted her fee or the meeting location to her client.

Police will also be reasonable in assuming that social media apps such as Facebook and Twitter harbor evidence of minor criminal activity. If police come across intoxicated college students holding cell phones on Main Street at two o’clock in the morning, it would be reasonable to believe their phones contain Tweets or Facebook status updates confessing to their underage drinking or public disorderliness.

Photo apps are another obvious repository for evidence of minor illegal activity. Just as people take pictures of what they cooked for dinner,¹² so do they photograph themselves with contraband.¹³ Following an arrest for theft,

⁷ See *Frequently Asked Questions*, GOOGLE WALLET, <http://www.google.com/wallet/faq.html> (select “Where can I use Google Wallet in-store?”) (last visited Jan. 21, 2014).

⁸ *About Foursquare*, FOURSQUARE, <https://foursquare.com/about> (last visited Jan. 21, 2014).

⁹ See MG Siegler, *Check-in on Foursquare Without Taking Your Phone out of Your Pocket*, TECH CRUNCH (Aug. 2, 2010), <http://techcrunch.com/2010/08/02/future-checkin>.

¹⁰ See Adam M. Gershowitz, *Texting While Driving Meets the Fourth Amendment: Deterring Both Texting and Warrantless Cell Phone Searches*, 54 ARIZ. L. REV. 577, 579-80 (2012).

¹¹ See, e.g., *United States v. Aguirre*, 664 F.3d 606, 615 (5th Cir. 2011) (summarizing testimony of a Drug Enforcement Agency (DEA) agent that cell phones record evidence of the “buying and selling of drugs” (internal quotation marks omitted)).

¹² See Kate Murphy, *First the Camera, then the Fork*, N.Y. TIMES, Apr. 7, 2010, at D1.

¹³ See, e.g., *Teen Arrested for Suspected Burglary at Fresno School*, ABC 30 KFSN-TV FRESNO, CAL. (Mar. 31, 2013), <http://abclocal.go.com/kfsn/story?section=news/local&id=9046322> (“Authorities say the teenager had pictures and video of the crime on his cell

criminal mischief, drug possession, or graffiti, it would be reasonable to believe a cell phone might contain photographic evidence of such crimes.

As technology improves, the list of minor offenses that could give rise to an invasive cell phone search under the *Gant* doctrine will almost certainly grow. Even though it is currently unlikely that a cell phone could contain evidence of a traditional traffic violation, like speeding or running a stop sign, it is far from certain that this will be true in five years.

The problem with applying the *Gant* doctrine to cell phones is therefore twofold. First, if the Court only wants to authorize a very narrow search incident to arrest of cell phones, the *Gant* rule will not accomplish that goal. Police can reasonably believe evidence of many low-level crimes might be found on the phone. Thus, the *Gant* doctrine will allow widespread rummaging by the police.

Second, at the same time that the *Gant* rule allows expansive searching, it fails to offer a clear rule for police. Officers will have to make quick decisions about whether evidence of burglary, prostitution, or drunk driving might reasonably be found on the phone. They will also have to decide which apps on the phone could reasonably contain evidence of the crime. Each case will likely be different, police will be uncertain, and litigation will ensue. While the *Gant* doctrine may be functional when applied to vehicles,¹⁴ it will likely be a mess if applied to cell phones.

A more protective and clearer rule would simply be for the Court to ban all warrantless cell phone searches incident to arrest. Instead of embracing the *Gant* framework, the Court should authorize police to seize a cell phone without a warrant and place it in a faraday bag or aluminum foil in order to immobilize it and prevent remote destruction of evidence.¹⁵ Police could then seek a warrant and ask a neutral magistrate to decide whether law enforcement should be allowed to explore the treasure trove of data on the phone.

phone.”).

¹⁴ Even this is debatable. See Geoffrey S. Corn, *Arizona v. Gant: The Good, the Bad, and the Meaning of “Reasonable Belief,”* 45 CONN. L. REV. 177, 195-97 (2012) (analyzing lower court confusion in interpreting the phrase “reasonable belief” in cases involving searches of vehicles).

¹⁵ See Adam M. Gershowitz, *Seizing a Cell Phone Incident to Arrest: Data Extraction Devices, Faraday Bags, or Aluminum Foil as a Solution to the Warrantless Cell Phone Search Problem*, 22 WM. & MARY BILL RTS. J. 601 (2013).