

---

---

# Done with Distracted Driving: Implications of Pennsylvania's Ban on Text-Based Communication While Driving Under the State Constitution

Tara M. Franklin\*

## ABSTRACT

In an era characterized by prolific use of cellular phones with ever-expanding capabilities, liberty and privacy ideals often compete with public safety interests. Rising levels of injuries and fatalities from collisions attributed to cell phone use while driving have motivated Pennsylvania lawmakers to ban text-based communication while an individual is operating a vehicle. Roadway safety is a legitimate and important governmental objective; however, the innumerable functions capable of being performed by a modern cell phone and the enormity of information able to be stored on such a device necessitates a policy consistent with Pennsylvania's historic dedication to the privacy rights of its residents.

This Comment provides an overview of the problem of cell phone use while driving and discusses the primary elements of Pennsylvania's prohibition of text messaging while driving. In addition, the Comment examines Pennsylvania search and seizure law under article I, section 8 of the state constitution as it is applicable to scenarios that are likely to arise in the enforcement of Pennsylvania's ban on text-based communication during vehicle operation. The analysis reveals concerns regarding the enforcement of Pennsylvania's distracted driving legislation and highlights issues concerning the privacy implications inherent in cell phone searches. Lastly, this Comment seeks to provide

---

\* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2013; B.A., Campbell University, 2010. I would like to thank my family and friends Mary, Sara, and Whitney, for their ongoing love and support. I also extend heartfelt thanks to Rebekah Saidman-Krauss, Jonathan Dewald, Mark McCormick-Goodhart, and Jacqueline Motyl who provided invaluable edits and critiques to this Comment.

solutions consistent with Pennsylvania case law to balance personal privacy and public safety.

### Table of Contents

I.	INTRODUCTION .....	172
II.	BACKGROUND.....	177
	A. Pennsylvania’s Distracted Driving History .....	177
	B. Text and History of Article I, Section 8 .....	179
	C. Relevant Case Law Interpreting Rights Under Article I, Section 8.....	181
	1. Vehicle Stops .....	181
	2. Search Pursuant to a Vehicle Stop: Warrant Requirement and Exceptions .....	183
	3. Warrantless Arrests for Misdemeanor or Summary Offenses .....	185
	4. Search Incident to Arrest.....	186
	5. Cell Phone Search and Seizure .....	187
III.	AN ANALYSIS OF THE PENNSYLVANIA TEXTING BAN UNDER ARTICLE I, SECTION 8.....	188
	A. Enforcement: The Initial Traffic Stop and the Problem of Proof.....	188
	B. Search and Seizure Implications .....	194
	1. Search after Vehicle Stop.....	194
	2. Search Incident to Lawful Arrest .....	195
	a. Warrantless Arrests for Misdemeanors or Summary Offenses .....	195
	b. Scope of Search Incident to Arrest .....	196
IV.	CONCLUSION .....	199

#### I. INTRODUCTION

May 18, 2008 was college graduation day for Jacy Good.<sup>1</sup> A day that the Goods intended to be memorable quickly turned painfully unforgettable for Jacy.<sup>2</sup> She and her parents had attended the commencement ceremony at Muhlenberg College in Allentown, Pennsylvania, and were returning home when a tractor trailer slammed into the Goods’ vehicle.<sup>3</sup> The driver of the tractor trailer swerved to miss

---

1. *Faces of Distracted Driving: Jacy Good* “I never want anyone to go through what I’ve been through,” FAST LANE: THE OFFICIAL BLOG OF THE U.S. SECRETARY OF TRANSPORTATION (May 23, 2011, 8:00 AM), <http://bit.ly/jROXu1> [hereinafter *Faces of Distracted Driving*].

2. *Id.*

3. *Id.*

a car whose driver sped through a red light while talking on his cell phone.<sup>4</sup> Jacy's parents were killed instantly.<sup>5</sup>

After defying her doctors' expectations and living past the first 36 hours after the accident, Jacy began a long physical and emotional recovery process during which she had to re-learn basic skills while coping with the grief of losing her parents.<sup>6</sup> Although she has made great progress, Jacy can no longer participate in her favorite athletic activities and wonders who will walk her down the aisle at her wedding.<sup>7</sup> Jacy's traumatic experience led her to become a spokesperson for a campaign to end distracted driving.<sup>8</sup>

For Jacy Good, as well as many others in Pennsylvania and the United States, the fight against the alarming trend of distracted driving has become a personal crusade. Although citizens and lawmakers are often divided as to the best approach to modify drivers' behavior,<sup>9</sup> these stories of preventable tragedies have created a strong impetus for change.

Recently, a number of studies have emphasized the danger of cell phone use while driving and have created an additional catalyst for change in the movement against distracted driving.<sup>10</sup> The mounting evidence on the topic indicates that cell phone use behind the wheel, particularly text messaging, or "driving while intexticated,"<sup>11</sup> should be a major concern for those who advocate safety on the road.<sup>12</sup> For instance,

---

4. *Id.*

5. *Id.*

6. *Faces of Distracted Driving*, *supra* note 1.

7. *Id.* Because of the severity of her injuries, Jacy's progress has surprised her doctors; however, she lacks function in one of her arms and walks with the assistance of a cane. *Say Yes to the Dress: Bride Jacy Good Talks About Her Tragic Accident*, HUFFPOST WEDDINGS (Dec. 16, 2011, 7:50 PM), <http://huff.to/MTrLGy>. Jacy will marry her longtime boyfriend in October 2012, and recently appeared on television in TLC's "Say Yes to the Dress." *See id.*; *see also Say Yes to the Dress* (TLC television broadcast Dec. 16, 2011), available at <http://bit.ly/NdgWur>.

8. *See Faces of Distracted Driving*, *supra* note 1.

9. *See generally* DISTRACTED DRIVING SAFETY ALLIANCE, <http://bit.ly/MmljIB> (collecting various articles on possible methods of addressing the problem of distracted driving). *See also Safety Culture: Heads Up Driving Week—Fact Sheet*, AAA FOUND. FOR TRAFFIC SAFETY (Oct. 2-8, 2011), <http://bit.ly/s4oTwZ> [hereinafter *Fact Sheet*] ("87% of drivers expressed support for having a law against reading, typing, or sending a text message or email while driving; 70% of drivers support having a law against using a hand-held cell phone while driving for all drivers regardless of age; 50% of drivers support having a law against using any type of cell phone while driving, hand-held or hands-free, for all drivers regardless of age.").

10. *See infra* notes 12-15 and accompanying text.

11. *See* Jenny Brundin, *High-Tech Solutions to Help Deter Driver Texting*, NPR (Sept. 23, 2009), <http://n.pr/HuwGm>.

12. *See, e.g.,* Jim Forsyth, *Texting, or Emailing, While Driving Doubles Reaction Time and Makes Drivers More Likely to Miss a Flashing Light, According to New Research*, REUTERS (Oct. 6, 2011, 5:07 AM), <http://reut.rs/NeKR5d>.

a recent study reveals that texting while driving doubles a driver's reaction time.<sup>13</sup> Research also indicates that text messaging while driving is at least as dangerous as driving under the influence of alcohol.<sup>14</sup> Additionally, the National Safety Council estimates that at least 23 percent of all traffic collisions involve one or more drivers using a cell phone moments before impact.<sup>15</sup>

Despite increased public awareness of these risks, many individuals continue to use a cell phone while driving. This behavior persists even though both empirical data<sup>16</sup> and surveys of drivers<sup>17</sup> indicate the magnitude of the distracted driving problem. For instance, within a one month period, 35 percent of drivers have sent or read a text message or e-mail while on the road.<sup>18</sup> Similarly, 67 percent of drivers admitted to having talked on a hand-held cell phone while driving within the same month period and many admitted to doing so regularly.<sup>19</sup> Although most drivers are aware of the inherent dangers of driving while distracted, a large number continue the practice of using cell phones on the road.<sup>20</sup>

Recognizing the significant dangers of drivers using cell phones for voice communication and texting purposes, a growing number of jurisdictions have sought to promote safety on the road by enacting laws that proscribe this behavior in some manner.<sup>21</sup> Currently, 39 states have

---

13. *Id.* In a study by Texas A&M University's Texas Transportation Institute, researchers found that non-distracted drivers stopping in response to a flashing yellow light on a test course had a reaction time of about one to two seconds. *Id.* In contrast, drivers who were either reading or writing a text message had a reaction time of three to four seconds. *Id.* Additionally, the study found that a texting driver was 11 times more likely to miss the flashing light completely. *Id.* One of the leaders of the study emphasized that "the three to four second lag time is significant because at highway speeds a driver can travel the length of a football field in that time." *Id.*

14. See PHILADELPHIA, PA., TRAFFIC CODE § 12-1132(1)(e)(.2) (2011). Legislative findings accompanying the Philadelphia ordinance indicate that "[d]rivers operating motor vehicles while using a mobile phone are as impaired as drivers with a 0.08 percent blood alcohol level—the level that defines drunk driving in most states." *Id.*; see also Phil LeBeau, *Texting and Driving Worse than Drinking and Driving*, CNBC (June 25, 2009), <http://bit.ly/ayo9rP>.

15. Press Release, Nat'l Safety Council, National Safety Council Estimates that at Least 1.6 Million Crashes Each Year Involve Drivers Using Cell Phones and Texting (Jan. 10, 2010) (updated in 2011), available at <http://bit.ly/923bY8>.

16. See *Fact Sheet*, *supra* note 9.

17. See *id.* ("95% of drivers said they consider other drivers text messaging or emailing while driving to be a serious threat to their personal safety and 94% said they consider texting or emailing while driving to be unacceptable.")

18. *Id.*

19. *Id.* (stating that 31% of drivers surveyed said that they frequently talked on their cell phone while driving).

20. See *id.*

21. See *State Laws on Distracted Driving*, DISTRACTION.GOV, <http://bit.ly/vIc20p> (giving overview of state laws). For a more recent overview, see *Cell Phone and Texting Laws*, GOVERNORS HIGHWAY SAFETY ASS'N (July 2012), <http://bit.ly/MhTvPD>.

prohibited texting while driving, and 10 states and the District of Columbia have also banned any use of hand-held phones while operating a vehicle.<sup>22</sup> The U.S. Department of Transportation also recognized the problem when it prohibited commercial drivers, such as truck and bus drivers, from texting while driving.<sup>23</sup> Moreover, President Barack Obama issued an executive order that banned all federal employees from texting while either driving a government-owned vehicle or driving in the course of their employment.<sup>24</sup>

Because individuals who acknowledge the dangers of using cell phones while driving often continue this behavior,<sup>25</sup> many citizens and lawmakers believe government sanctions are the most effective means of limiting this conduct.<sup>26</sup> Sanctions have typically taken the form of fines;<sup>27</sup> however, even where the punishment is minimal, a significant danger exists that laws limiting the use of cell phones while driving invade the privacy interests of citizens.<sup>28</sup>

Pennsylvania recently<sup>29</sup> became the 35th state in the United States to enact a ban on text messaging while driving.<sup>30</sup> Before the passage of title 75, section 3316 of the Pennsylvania Vehicle Code,<sup>31</sup> state lawmakers had struggled for years to create a distracted driving law pertaining to cell phone use.<sup>32</sup> Disputes over whether enforcement

---

22. *Cell phone and texting laws, supra* note 21. The following states prohibit adults from using hand-held cell phones while operating a vehicle: California, Connecticut, Delaware, Maryland, Nevada, New Jersey, New York, Oregon, Washington, and West Virginia. *Id.* Far more states have taken a more hesitant approach by only banning text-messaging while driving. *Id.* Those states include: Alabama, Alaska, Arkansas, Colorado, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, Wisconsin, and Wyoming. *Id.* Other states have banned cell phone use within certain highway zones or by particular age groups. *Id.* Additionally, some states have enacted broad distracted driving provisions that encompass cell phone use. *Id.*

23. *See* 49 C.F.R. § 392.80 (2010).

24. *See* Exec. Order No. 13513, 70 Fed. Reg. 51225 (Oct. 1, 2009).

25. *See Fact Sheet, supra* note 9.

26. *See, e.g.,* sources cited *supra* note 9.

27. *See generally Cell Phone and Texting Laws, supra* note 21 (providing a monthly update and overview of state laws related to cell phone use while driving).

28. *See infra* Part III.

29. Governor Tom Corbett signed the ban into law on November 9, 2011. *See* Mark Shade, *Pennsylvania Joins States with Texting-While-Driving Bans*, REUTERS (Nov. 9, 2011, 2:02 PM), <http://reut.rs/QLebo0>.

30. *See id.*

31. 75 PA. CONS. STAT. § 3316 (Supp. 2012).

32. *See Pennsylvania: Cell Phone Laws, Legislation*, HANDS-FREE INFO (Nov. 9, 2011), <http://bit.ly/SaeBt> [hereinafter HANDS-FREE INFO].

should be primary or secondary<sup>33</sup> and whether talking and texting should both be banned led to gridlock in the General Assembly.<sup>34</sup> Failure to pass a state law caused several cities and townships across the state to enact municipal bans on distracted driving.<sup>35</sup> However, issues of preemption by state law and conflicts with provisions of the Pennsylvania Vehicle Code raised questions over whether these ordinances were enforceable.<sup>36</sup> In addition, due process concerns and other constitutional issues made these laws susceptible to challenges by citizens who received citations.<sup>37</sup>

In reaction to the legal issues created by the municipal bans, many citizens urged the General Assembly to enact a statewide ban on distracted driving.<sup>38</sup> The Pennsylvania General Assembly responded by passing a statewide prohibition on “text-based communication,” making driving while texting a summary offense<sup>39</sup> subject to primary enforcement.<sup>40</sup> Significantly, however, Pennsylvania’s law does not prohibit receiving or placing a phone call, nor does it proscribe engaging in cell phone “voice communication” while driving.<sup>41</sup>

This Comment will clarify the law in Pennsylvania relating to cell phone use while driving and will describe concerns that arise from enforcing the state’s recent prohibition of text messaging behind the wheel. Part II will recount the efforts of Pennsylvania lawmakers to address distracted driving in the context of cell phones and will outline the details of the newly enacted texting ban. Part II will also discuss the history of the state constitutional provision that governs search and seizure and will give a framework of case law interpreting relevant rights under that section. Part III will highlight foreseeable problems in enforcing section 3316 and its ramifications on the privacy interests of

---

33. Primary enforcement means that officers can pull over a driver solely for violating the text messaging ban while secondary enforcement involves citing a driver for the distracted driving offense after stopping the vehicle for violating another provision of the Vehicle Code. *See id.*

34. *See id.*

35. *See id.* (stating that Philadelphia, Harrisburg, Erie, Wilkes-Barre, and Allentown, among others, have enacted such laws); *see also infra* note 42.

36. *See, e.g.,* HANDS-FREE INFO, *supra* note 32.

37. *See* Matthew Harris, *Wilkes-Barre Posts Signs Warning Motorists of Cell Phone Law*, CITIZENS VOICE (May 22, 2010), <http://bit.ly/M97I6j> (reporting on signs telling drivers of a city ordinance banning cell phone use while driving and quoting Wilkes-Barre City Attorney Tim Henry as saying that “[t]he intent is to put the public on notice. . . . Notice in a legal hearing is the same as due process protection”).

38. *See id.*

39. A summary offense is “an offense . . . that can be prosecuted without an indictment.” BLACK’S LAW DICTIONARY 1113 (8th ed. 2004).

40. 75 PA. CONS. STAT. § 3316 (Supp. 2012).

41. *See id.* § 3316(a).

citizens. Specifically, Part III will focus on the level of suspicion an officer must have to stop a driver and the possibility of cell phone searches incident to arrest arising under section 3316. After an analysis of possible difficulties in enforcing the provision, Part III will suggest potential resolutions within the framework of Pennsylvania search and seizure precedent. Finally, Part IV will reiterate the importance of striking the appropriate balance between the safety and privacy interests of Pennsylvania citizens relating to the issue of cell phone use while driving.

## II. BACKGROUND

### A. *Pennsylvania's Distracted Driving History*

Before the enactment of a statewide ban, governing bodies in several Pennsylvania municipalities enacted distracted driving ordinances that banned the use of cell phones while driving.<sup>42</sup> These jurisdictions recognized that drivers distracted by wireless devices are more likely to cause accidents.<sup>43</sup> Although safety on municipal roadways has been and remains a legitimate state interest, municipalities encountered several impediments to enforcing the ordinances.<sup>44</sup>

First, Pennsylvania's Vehicle Code requires traffic laws to be uniform across the state.<sup>45</sup> For this reason, a Court of Common Pleas Judge invalidated Allentown, Pennsylvania's distracted driving law on the grounds that state law preempted it.<sup>46</sup> Additionally, because of preemption concerns, the Pennsylvania Department of Transportation, acting pursuant to its statutory authority, prohibited municipalities from posting signs on local state-funded roads to notify drivers of distracted driving bans.<sup>47</sup> As a result, some drivers in jurisdictions with distracted

---

42. See, e.g., WILKES-BARRE, PA., CODE OF ORDINANCES § 29-7 (Supp. 2010); PHILADELPHIA, PA., TRAFFIC CODE § 12-1132 (2011) (approved April 29, 2009); ERIE, PA., ORDINANCE no. 19-2010 (2010) (amending a previous ordinance enacted in 2009).

43. See *supra* Part I; see also PHILADELPHIA, PA., TRAFFIC CODE § 12-1132(1) (2011). The Philadelphia ordinance includes legislative findings that enumerate various statistics on the danger of cell phone use while driving. *Id.*

44. See *infra* notes 45-59 and accompanying text (describing preemption and due process issues concerning enforcement of bans on cell phone use while driving).

45. 75 PA. CONS. STAT. § 6101 (2006) ("The provisions of this title shall be applicable and uniform throughout this Commonwealth and in all political subdivisions in this Commonwealth, and no local authority shall enact or enforce any ordinance on a matter covered by the provisions of this title unless expressly authorized.").

46. *Allentown Cell Phone Law Tossed*, HANDS-FREE INFO (June 8, 2011), <http://bit.ly/ilfHKB> (discussing how officials in Allentown decided to stop enforcing the ban and not appeal the ruling, hoping that the Pennsylvania General Assembly would pass a statewide ban).

47. See *supra* note 37. See generally 75 PA. CONS. STAT. § 6122 (2006).

driving ordinances may not have been on notice of the ban, possibly raising due process issues.<sup>48</sup>

Such concerns, as well Pennsylvania's nearly 1,100 automobile collisions involving "hand[-]held cellular phone[s]" in 2010, were the impetus for the General Assembly's recent ban on text messaging while driving.<sup>49</sup> After multiple revisions in both the Pennsylvania Senate and the House of Representatives, section 3316 bans only text messaging while driving and does not ban engaging in phone conversations while driving.<sup>50</sup> The legislation prohibits a driver from using an "interactive wireless communications device"<sup>51</sup> to "send, read or write a text-based communication"<sup>52</sup> while the vehicle is in motion.<sup>53</sup>

Additionally, the new law mandates primary enforcement for texting while driving.<sup>54</sup> A violation of the prohibition is a summary offense subject to a \$50 fine.<sup>55</sup> The statewide ban on texting and driving also expressly preempts "all ordinances of any municipality" relating to "use of an interactive wireless communications device"<sup>56</sup> by drivers in accord with the state's requirement of uniformity of traffic codes.<sup>57</sup> Moreover, section 3316 articulates that the new law "shall not be construed as authorizing the seizure or forfeiture of an interactive

---

48. *See, e.g.*, Harris, *supra* note 37. To protect against due process challenges to Wilkes-Barre's texting and driving law, lawmakers designated a three-month period to notify the public of its existence before the ordinance took effect. *Id.*

49. *See* Shade, *supra* note 29; Press Release, Pa. Office of the Governor, Governor Corbett Signs Ban on Texting While Driving in Pa. (Nov. 9, 2011), *available at* <http://bit.ly/aBuhyH> ("Senate Bill 314 aims to put a halt to texting from behind the wheel and is intended to save lives. . . . In 2010, there were almost 14,000 crashes in Pennsylvania where distracted driving played a role, with nearly 1,100 of those crashes involving a hand-held cellular phone.").

50. 75 PA. CONS. STAT. § 3316(a) (Supp. 2012).

51. *Id.* An interactive wireless communications device is defined as "a wireless telephone, personal digital assistant, smart phone, portable or mobile computer or similar device which can be used for voice communication, texting, e-mailing, browsing the internet or instant messaging." *Id.* However, it does not include a GPS, a system that is integrated into the vehicle, or "a communications device that is affixed to a mass transit vehicle, bus or school bus." 75 PA. CONS. STAT. § 102 (2006 & Supp. 2012).

52. *Id.* § 3316(f) (defining "text-based communication" as a "text message, instant message, electronic mail or other written communication composed or received on an interactive wireless communications device").

53. *Id.*

54. *See id.* § 3316. The Pennsylvania statute also provides for a fine of up to \$100, which doubles in school and construction zones. 75 PA. CONS. STAT. § 3316(d) (Supp. 2012). *See supra* note 39 for the definition of summary offense.

55. 75 PA. CONS. STAT. § 3316(d) (Supp. 2012).

56. *Id.* § 3316(e).

57. *See* 75 PA. CONS. STAT. § 6101 (2006); *see also supra* note 45 for the language of the prohibition.

wireless communications device, unless otherwise provided by law.”<sup>58</sup>  
The legislation took effect on March 8, 2012.<sup>59</sup>

*B. Text and History of Article I, Section 8*

A basic tenet of federalism in the United States is that states are free to interpret provisions of their constitutions independently of the United States Constitution.<sup>60</sup> Consistent with its statement that “each state has the power to provide broader standards, and go beyond the minimum floor which is established by the federal Constitution,”<sup>61</sup> the Supreme Court of Pennsylvania has interpreted the Pennsylvania State Constitution to reserve more individual liberties for its citizens in some circumstances than the Supreme Court of the United States.<sup>62</sup> In no area of its state constitutional jurisprudence has the court been more protective of the rights of its citizens than in the domain of search and seizure.<sup>63</sup>

Article I, section 8 of the Pennsylvania Constitution is the counterpart to the Fourth Amendment of the United States Constitution, as both provisions govern security from search and seizure.<sup>64</sup> Article I, section 8 provides:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.<sup>65</sup>

---

58. *Id.* § 3316(c).

59. *Id.* § 3316.

60. *See, e.g.,* Commonwealth v. Edmunds, 586 A.2d 887, 894 (Pa. 1991) (“[I]n interpreting a provision of the Pennsylvania Constitution, we are not bound by the decisions of the United States Supreme Court which interpret similar (yet distinct) federal constitutional provisions.”).

61. *Edmunds*, 586 A.2d at 894 (citing Commonwealth v. Sell, 470 A.2d 457, 467 (Pa. 1983)).

62. *See id.*; *see also* Commonwealth v. White, 669 A.2d 896, 902 (Pa. 1995) (“It is axiomatic that the Supreme Court of Pennsylvania may provide more protection for the citizens of Pennsylvania under the Pennsylvania Constitution than the federal courts provide under the United States Constitution.”).

63. For an overview of search and seizure in Pennsylvania, see DAVID RUDOVSKY, THE LAW OF ARREST, SEARCH, AND SEIZURE IN PENNSYLVANIA (6th ed. 2011).

64. PA. CONST. art. I, § 8; U.S. CONST. amend. IV.

65. PA. CONST. art. I, § 8. The language of the Fourth Amendment of the United States Constitution is similar:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

Adopted in 1776, this provision predates the Fourth Amendment to the United States Constitution; in fact, the framers of the United States Constitution looked to article I, section 8 in creating its federal counterpart.<sup>66</sup> Although a version of this provision has been present in the Pennsylvania Constitution for over 200 years, Pennsylvania courts did not broadly interpret article I, section 8 until the criminal procedure jurisprudence of the 1960s and the application of the exclusionary rule to states in *Mapp v. Ohio*.<sup>67</sup> In broadly interpreting its own provision, the Pennsylvania Supreme Court began to carefully scrutinize decisions of the United States Supreme Court interpreting the Fourth Amendment.<sup>68</sup>

In fact, analyzing state constitutional protections separately from federal interpretation has been a fairly recent phenomenon following a period in which independent inquiry was not common.<sup>69</sup> Renewed interest in state constitutional interpretation has created a distinct body of criminal procedure guidelines in Pennsylvania.<sup>70</sup> In response to this developing body of precedent, the Pennsylvania Supreme Court in *Commonwealth v. Edmunds*<sup>71</sup> articulated a framework for courts to follow when determining whether a provision of the Pennsylvania Constitution should grant greater constitutional protection than the federal Constitution.<sup>72</sup> The *Edmunds* test encourages parties and courts to analyze: (1) the text of article I, section 8; (2) the history and case law interpreting article I, section 8; (3) related case law from other states; and (4) policy considerations.<sup>73</sup>

---

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

66. See David Rudovsky, *Searches and Seizures*, in THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 301 (Ken Gormley et al. eds., 2004); see also *Commonwealth v. Parker*, 619 A.2d 735, 738 (Pa. Super. Ct. 1993).

67. *Mapp v. Ohio*, 367 U.S. 643 (1961). See Rudovsky, *supra* note 66, at 302.

68. See *id.*

69. See *Commonwealth v. Edmunds*, 586 A.2d 887, 894 (Pa. 1991) (“The past two decades have witnessed a strong resurgence of independent state constitutional analysis, in Pennsylvania and elsewhere.”). This trend of renewed interest in state constitutional analysis separate from the federal Constitution has been termed “New Federalism.” *Id.*

70. See, e.g., *id.* (“The past two decades have witnessed a strong resurgence of independent state constitutional analysis, in Pennsylvania and elsewhere.”).

71. *Commonwealth v. Edmunds*, 586 A.2d 887, 894 (Pa. 1991).

72. *Id.* Notably, the court decided *Edmunds* in the context of search and seizure under article I, section 8, though it applies to all provisions of the Pennsylvania Declaration of Rights. See Rudovsky, *supra* note 66, at 301.

73. *Edmunds*, 586 A.2d at 894.

C. *Relevant Case Law Interpreting Rights Under Article I, Section 8*

Following the framework set forth in *Edmunds*, the Pennsylvania Supreme Court has frequently articulated that article I, section 8 gives citizens greater protection from government search and seizure than the Federal Constitution because the Pennsylvania provision is grounded in the privacy rights of citizens.<sup>74</sup> Conversely, the trend in Fourth Amendment jurisprudence is to focus on the goal of deterring police misconduct.<sup>75</sup> The Pennsylvania Supreme Court has found that article I, section 8 is more protective of citizens' privacy interests than the Fourth Amendment to the United States Constitution in a variety of contexts.<sup>76</sup> Several important cases decided by Pennsylvania appellate courts establish a framework of search and seizure rights that are relevant in analyzing the constitutional ramifications of Pennsylvania's ban on text messaging while driving.<sup>77</sup>

1. Vehicle Stops

In *Commonwealth v. Chase*,<sup>78</sup> the Pennsylvania Supreme Court undertook a federal and state constitutional analysis of a Pennsylvania

---

74. See, e.g., *Commonwealth v. White*, 669 A.2d 896, 902 (Pa. 1995).

75. See, e.g., *Commonwealth v. Brown*, 996 A.2d 473 (Pa. 1991); cf. *New York v. Belton*, 453 U.S. 454, 461 (1981) (stating that the "justification" for a search incident to arrest of a container found in the passenger compartment of an automobile "is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have").

76. See *Commonwealth v. Clark*, 735 A.2d 1248 (Pa. 1999) (holding that when a misdemeanor is not committed in the presence of officers, warrantless arrest is unconstitutional); *Commonwealth v. Matos*, 672 A.2d 769, 773 (Pa. 1996) (holding that, unlike the United States Supreme Court's holding in *California v. Hodari D.*, 499 U.S. 621 (1991), an officer who pursues an individual without probable cause or reasonable suspicion seizes that person for purposes of article I, section 8 and stating that Pennsylvania "has always maintained a strong preference for the rights of the individual in the face of coercive state action"); *Commonwealth v. White*, 669 A.2d 896 (Pa. 1995) (holding that vehicle searches incident to arrest are only permissible in Pennsylvania when obtaining a warrant would be dangerous to police officers or when there is a risk of destruction of evidence); *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991) (holding that the "good faith" exception to the exclusionary rule—established by *United States v. Leon*, 468 U.S. 897 (1984)—is not a part of article I, section 8 of the Pennsylvania Constitution); *Commonwealth v. Sell*, 470 A.2d 457 (Pa. 1983) (rejecting the United States Supreme Court's decision in *Rakas v. Illinois*, 439 U.S. 128 (1978), and safeguarding broad standing rights relating to an individual's expectation of privacy); *Commonwealth v. Dejohn*, 403 A.2d 1283 (Pa. 1979) (holding that individuals have privacy expectations and interests in their bank records).

77. See, e.g., *Commonwealth v. Chase*, 960 A.2d 108 (Pa. 2008); *Commonwealth v. Clark*, 735 A.2d 1248 (Pa. 1999); *Commonwealth v. White*, 669 A.2d 896 (Pa. 1995); *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991); *Commonwealth v. Sell*, 470 A.2d 457 (Pa. 1983).

78. *Commonwealth v. Chase*, 960 A.2d 108 (Pa. 2008).

statute.<sup>79</sup> The General Assembly had recently changed the provision to articulate reasonable suspicion<sup>80</sup> as the standard police officers must use to determine if they have cause to stop a driver for violating a provision of the Vehicle Code.<sup>81</sup> After applying the *Edmunds* test<sup>82</sup> to determine if article I, section 8 provided broader constitutional protections than the Fourth Amendment, the court found that the Pennsylvania Constitution, like the Fourth Amendment, does not require an officer to possess probable cause<sup>83</sup> to effectuate an investigative detention of a vehicle.<sup>84</sup> The court held that “vehicle stops that are constitutional under *Terry v. Ohio*<sup>85</sup> are constitutional under article I, section 8.”<sup>86</sup>

Further, the court in *Chase* emphasized that the purpose of a stop based upon the less stringent standard of reasonable suspicion is to “allow immediate investigation through temporarily maintaining the *status quo*.”<sup>87</sup> To ensure that such a stop will serve its goal, the

---

79. The relevant statute states:

Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle’s registration, proof of financial responsibility, vehicle identification number or engine number or the driver’s license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

75 PA. CONS. STAT. § 6308(b) (2006). “The former version of 75 Pa.C.S. § 6308(b) required an officer to have ‘articulable and reasonable grounds to suspect a violation of [the Vehicle Code]’ to effectuate a vehicle stop.” *Chase*, 960 A.2d at 112. The modification took effect on February 1, 2004. *Id.*

80. Reasonable suspicion is a “reasonable belief that criminal activity is afoot” based on “specific and articulable facts and reasonable inferences drawn from those facts in light of the officer’s experience.” *Commonwealth v. Cook*, 735 A.2d 673, 677 (Pa. 1999) (citing *Commonwealth v. Melendez*, 676 A.2d 226, 228 (Pa. 1996) and *Commonwealth v. Jackson*, 698 A.2d 571, 573 (Pa. 1997)).

81. *Chase*, 960 A.2d 108. Before the Pennsylvania legislature modified the statute, Pennsylvania courts had interpreted the statute’s previous ambiguous language to require police officers to have probable cause before stopping a vehicle. *See id.* at 112; *see also Commonwealth v. Gleason*, 785 A.2d 983, 986 (Pa. 2001).

82. *See Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991).

83. “Probable cause exists where the facts and circumstances within the officer’s knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed.” *Commonwealth v. Gibson*, 638 A.2d 203, 206 (Pa. 1994) (citing *Berger v. New York*, 388 U.S. 41, 55 (1967)).

84. *Chase*, 960 A.2d at 120.

85. *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that a brief interference with an individual’s freedom of movement is justified if an officer has reasonable suspicion that criminal activity is afoot).

86. *Chase*, 960 A.2d at 117. *See also id.* at 117-18 (rejecting the defendant’s reliance on Pennsylvania cases finding that probable cause was necessary to stop a driver who is in violation of the vehicle because the cases interpreted Pennsylvania statutes in the context of the Fourth Amendment and did not mention article I, section 8).

87. *Chase*, 960 A.2d at 114-15.

underlying offense must be one that is capable of further investigation.<sup>88</sup> Thus, in practice, police officers should apply two different standards to determine whether they have the constitutional authority to stop a vehicle.<sup>89</sup> For offenses where “a post-stop investigation is normally feasible,” such as driving under the influence of alcohol, police may use the lesser standard of reasonable suspicion.<sup>90</sup> However, where the offense is not “investigatory,” such as in the case of speeding or failing to obey a traffic signal, the purposes of a *Terry* stop cannot be achieved, and an officer must have probable cause to make the vehicle stop constitutional.<sup>91</sup>

Additionally, even when an offense is capable of further investigation pursuant to a vehicle stop, courts often construe reasonable suspicion narrowly.<sup>92</sup> For example, the Pennsylvania Supreme Court recently held that an officer did not have reasonable suspicion to stop a vehicle based on a violation of section 4524(c) of the Vehicle Code,<sup>93</sup> which proscribes individuals from hanging items from their rearview mirror that “materially impair[s] the driver’s vision through the front windshield.”<sup>94</sup> At the suppression hearing for drugs found pursuant to the stop, the officer did not articulate with sufficient specificity why he believed an object hanging from the rearview mirror was obstructing the driver’s view.<sup>95</sup> The court emphasized that the transcript from the suppression hearing indicated that the officer did not testify “as to the size or general description of the objects hanging from the rearview mirror, or how the objects impaired [the driver’s] view.”<sup>96</sup>

## 2. Search Pursuant to a Vehicle Stop: Warrant Requirement and Exceptions

Although neither the language of article I, section 8 nor the Fourth Amendment expressly require that a warrant be issued before a search or

---

88. *Id.* at 115-16.

89. *See id.* at 116.

90. *Id.* at 116.

91. *Id.* at 116. In an effort to minimize the potential detriment to privacy when cell phones are involved in investigatory stops, proposed legislation in the Pennsylvania House of Representatives prohibits officers who are conducting such stops from using “data extraction device[s] to secure information” from a driver’s phone or other electronic device. H. Rep. 1607, 195th Gen. Assemb., Reg. Sess. (Pa. 2011); *see also infra* Part III.B.1.

92. *See, e.g.,* Commonwealth v. Holmes, 14 A.3d 89 (Pa. 2011).

93. *Id.*

94. *Id.* at 91; 75 PA. CONS. STAT. § 4524(c) (2006).

95. *Holmes*, 14 A.3d at 97-98.

96. *Id.* at 98.

an arrest is made,<sup>97</sup> both the United States and the Pennsylvania Supreme Courts recognize a warrant requirement.<sup>98</sup> However, while the United States Supreme Court has continuously eroded a defendant's right to exclude evidence based on the absence of a warrant or on a faulty warrant,<sup>99</sup> case law interpreting the Pennsylvania Constitution "has more consistently adhered to the warrant/probable cause model."<sup>100</sup>

The Pennsylvania Supreme Court has demonstrated its faithfulness to the warrant requirement through its treatment of vehicle searches. The court has rejected arguments in favor of the vehicle exception to the warrant requirement espoused by the United States Supreme Court.<sup>101</sup> For instance, in *Commonwealth v. White*,<sup>102</sup> the court dismissed the rationale that the mobility and lessened expectation of privacy in a vehicle authorize an exception to the warrant requirement under the Pennsylvania Constitution.<sup>103</sup> Absent special circumstances, such as a demonstrated threat to public safety, both probable cause and a search warrant are necessary to search a vehicle.<sup>104</sup>

Additionally, the Pennsylvania Supreme Court has refused to exempt officers from obtaining a warrant after a police canine alerts for drugs on an individual's "person."<sup>105</sup> Rejecting the reasoning of the United States Supreme Court in *United States v. Place*,<sup>106</sup> the Pennsylvania Supreme Court, in *Commonwealth v. Martin*,<sup>107</sup> held that use of a drug-sniffing dog to detect whether narcotics were present in an individual's satchel constituted a search under article I, section 8.<sup>108</sup> The court assumed that the satchel must be afforded greater privacy protection because it is part of one's person and not merely property, yet the *Martin* court failed to offer significant discussion regarding this meaningful distinction.<sup>109</sup>

---

97. PA. CONST. art. I, § 8; U.S. CONST. amend. IV. The two conjunctive clauses contained in both the Fourth Amendment and article I, section 8 are not connected. "[T]he first observes the right of the people against 'unreasonable' searches and seizures, and the second provides the conditions under which a warrant may issue, including probable cause and particularity of description." RUDOVSKY, *supra* note 63, at 11.

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

99. See, e.g., *United States v. Leon*, 468 U.S. 902 (1984); see also *Samson v. California*, 547 U.S. 843 (2006); *Chambers v. Maroney*, 399 U.S. 42 (1970).

100. RUDOVSKY, *supra* note 63, at 12-13.

101. See, e.g., *Commonwealth v. White*, 669 A.2d 896 (Pa. 1995).

102. *Id.*

103. See *id.* at 902.

104. *Id.*

105. See *Commonwealth v. Martin*, 626 A.2d 556 (Pa. 1993).

106. *United States v. Place*, 462 U.S. 696 (1983).

107. *Commonwealth v. Martin*, 626 A.2d 556 (Pa. 1993).

108. *Id.* at 559.

109. *Id.* at 560 (finding that "different interests are implicated" in a search of one's person rather than one's property since "an invasion of one's person is, in the usual case,

The court also found that to make a sniff search of a *person* proper, an officer “must have probable cause to believe that a canine search of a person will produce contraband or evidence of a crime.”<sup>110</sup> Once a dog conducts a sniff search of the suspect’s person, police must procure a warrant to search further, unless police are performing a *Terry* search, which consists only of patting down the outer garments of the suspect for weapons.<sup>111</sup> The court explained its divergence from federal precedent by asserting that “[t]he Constitution does not cease to exist merely because the government’s interest is compelling.”<sup>112</sup>

### 3. Warrantless Arrests for Misdemeanor or Summary Offenses

The United States Supreme Court has held that the Fourth Amendment does not bar warrantless arrests in public for minor traffic offenses when an officer has probable cause to arrest the driver.<sup>113</sup> Under Pennsylvania constitutional and statutory law, the issue of warrantless arrests for minor crimes is less clear. In *Commonwealth v. Clark*<sup>114</sup> the Pennsylvania Supreme Court found that a warrantless arrest in public may be effectuated under two circumstances.<sup>115</sup> Officers may make a warrantless arrest when they have probable cause to believe that a particular person has committed a felony.<sup>116</sup> Additionally, an officer may make a public arrest for a misdemeanor without a warrant if an individual commits an offense in the officer’s presence.<sup>117</sup> In most other instances, an officer must have a warrant.<sup>118</sup>

Under the Pennsylvania Rules of Criminal Procedure, an officer may arrest an individual without a warrant for committing a summary offense in “exceptional circumstances” if the officer is authorized to do

---

a more severe intrusion on one’s privacy interest than an invasion of one’s property”). In order to conduct a dog sniff search of *property*, an officer must possess only reasonable suspicion. *Id.* at 559.

110. *Id.* at 559.

111. *Id.*

112. *Id.* at 561.

113. *See* *Atwater v. City of Luego Vista*, 532 U.S. 318, 354 (2004).

114. *Commonwealth v. Clark*, 735 A.2d 1248 (Pa. 1999).

115. *Id.* at 1251.

116. *Id.*

117. *Id.* (citing *Commonwealth v. Long*, 414 A.2d 113, 115 (Pa. 1980)).

118. *See Clark*, 735 A.2d at 1251-52. *But see* 18 PA. CONS. STAT. § 2711(a) (2006) (authorizing warrantless arrests in domestic violence cases “although the offense did not take place in the presence of the police officer” where the officer has “first observ[ed] recent physical injury to the victim or other corroborative evidence”); 18 PA. CONS. STAT. § 3904 (2006) (authorizing warrantless arrests “for any grade of theft”).

so by law.<sup>119</sup> In contrast, the Pennsylvania Vehicle Code authorizes “a member of the Pennsylvania State Police who is in uniform” to “arrest without a warrant any person who violates any provision of [the Vehicle Code] in the presence of the police officer making the arrest.”<sup>120</sup> However, when a law enforcement officer who is not a member of the Pennsylvania State Police observes a violation of the Vehicle Code, the officer may only effectuate an arrest if the individual is not a Pennsylvania resident.<sup>121</sup>

#### 4. Search Incident to Arrest

Once police officers make a lawful custodial arrest,<sup>122</sup> they may conduct a full search of the suspect.<sup>123</sup> Pennsylvania courts have not definitively decided whether a cell phone search is constitutionally permissible during a search incident to arrest.<sup>124</sup> Similar contexts, however, provide guidance as to how the Pennsylvania Supreme Court may rule on the issue. For instance, the court has largely rejected a vehicle search incident to arrest, stating that “a police officer may search the arrestee’s person and the area in which the person is detained,” not the vehicle.<sup>125</sup> Similarly, in *Commonwealth v. Timko*,<sup>126</sup> the court held, in part, that an arrestee had a reasonable expectation of privacy in a “zippered valise” taken from a vehicle. Because the valise was comparable to “personal luggage,” police were required to secure a warrant before searching its contents.<sup>127</sup> Additionally, because arrests for ordinary traffic offenses usually do not generate evidence that police can seize, officers must possess “independent probable cause to believe a

---

119. See PA. R. CRIM. P. 440 cmt. (emphasizing that such an arrest should be reserved for scenarios “such as those involving violence, or the imminent threat of violence, or those involving a danger that the defendant will flee”).

120. 75 PA. CONS. STAT. § 6304(a) (2006).

121. *Id.* § 6304(b).

122. An arrest is “any act that indicates an intention to take the person into custody and subjects him to the actual control and will of the person making the arrest.” *Commonwealth v. White* 669 A.2d 896, 901 (Pa. 1995) (citing *Commonwealth v. Rodriguez*, 614 A.2d 1378 (Pa. 1992)).

123. *Clark*, 735 A.2d at 1251.

124. While many Pennsylvania cases mention mobile phones in the context of the Pennsylvania Wiretapping and Electronic Surveillance Control Act, a thorough search of case law did not reveal any results directly bearing on the propriety of warrantless searches of data contained in a mobile phone under article I, section 8.

125. See *Commonwealth v. White*, 669 A.2d 896, 902 (Pa. 1995). There is an exception to the general rule that vehicle searches incident to arrest are not permissible. *Id.* at 902 n.5. The exception applies when the police need to search a vehicle to “avoid danger to themselves or others,” such as when explosives may be found. *Id.*

126. *Commonwealth v. Timko*, 417 A.2d 620 (Pa. 1980).

127. *Id.* at 623.

felony has been committed”<sup>128</sup> and must believe that weapons or evidence of the felony can be found in a vehicle before they can legally search it.<sup>129</sup>

## 5. Cell Phone Search and Seizure

Pennsylvania case law related to searches of cell phones, incident to arrest or otherwise, is scant. Although the Pennsylvania Supreme Court has yet to resolve many issues, prior decisions indicate that Pennsylvania courts are sensitive to the unique privacy risks created by cell phone searches.<sup>130</sup> For instance, in *Commonwealth v. Cruttenden*,<sup>131</sup> the Pennsylvania Superior Court decided that warrantless interception of text messages violated the Pennsylvania Wiretapping and Electronic Surveillance Act.<sup>132</sup> In the area of cell phone searches incident to arrest, federal courts have produced some case law on the topic. One of the most influential cases is the U.S. Court of Appeals for the Fifth Circuit’s decision in *United States v. Finley*.<sup>133</sup> Although the court held that an individual had a privacy interest in his cell phone, the court rejected the defendant’s argument that his cell phone was analogous to a closed container apart from his person.<sup>134</sup> Instead, the *Finley* court found that the scope of a search incident to a lawful arrest under the Fourth Amendment extended to containers found on the person of the arrestee.<sup>135</sup>

More recently, in *United States v. Flores-Lopez*,<sup>136</sup> the U.S. Court of Appeals for the Seventh Circuit held that a search of a cell phone incident to arrest was permissible where it was limited to identifying the telephone number associated with the phone.<sup>137</sup> Although officers used the telephone number to obtain the defendant’s call records from the telephone company<sup>138</sup> and the court emphasized that “[t]he potential invasion of privacy in a search of a cell phone is greater than in a search

---

128. *Commonwealth v. Dussel*, 266 A.2d 659, 661 (Pa. 1970).

129. *Id.*

130. *See, e.g., Commonwealth v. Cruttenden*, 976 A.2d 1176 (Pa. Super. Ct. 2009).

131. *Id.* at 1179 (“Because the Wiretap Act emphasizes the constitutional protection of privacy, its provisions are strictly construed.”).

132. *Id.* at 1181 (finding that the texts in this case constituted electronic communications within the meaning of the Act because the officer received the text messages contemporaneously with their transmission); Wiretapping and Electronic Surveillance Control Act, 18 PA. CONS. STAT. § 5701-82 (2006).

133. *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007).

134. *Id.* at 260.

135. *Id.*

136. *United States v. Flores-Lopez*, 670 F.3d 803 (7th Cir. 2012).

137. *Id.* at 810.

138. *Id.* at 804.

of a ‘container’ in a conventional sense,”<sup>139</sup> the Court of Appeals found the search in this case to be too trivial an intrusion to arouse significant privacy concerns.<sup>140</sup> Based on Pennsylvania courts’ historic independent interpretation of article I, section 8, the state courts are free to rule on cell phone search incident to arrest issues in a way that is consistent with Pennsylvania precedent.<sup>141</sup>

### III. AN ANALYSIS OF THE PENNSYLVANIA TEXTING BAN UNDER ARTICLE I, SECTION 8

#### A. *Enforcement: The Initial Traffic Stop and the Problem of Proof*

One potentially concerning aspect of Pennsylvania’s legislation banning text messaging while driving is enforcement of the provision. As an offense subject to primary enforcement,<sup>142</sup> section 3316 allows law enforcement officers to stop any driver that they observe using a cell phone for “text-based communication.”<sup>143</sup> Because the law deliberately does not proscribe a driver’s use of an “interactive wireless communications device” to place, receive, or engage in a phone call,<sup>144</sup> an officer must differentiate between actions that often appear similar. Consequently, it is unlikely that officers will consistently be able to perceive whether drivers are using cell phones legally, which may lead to inaccurate or diminished enforcement.

Officers also have little guidance in determining the nature and amount of proof required to stop a vehicle for a violation of section 3316.<sup>145</sup> The Pennsylvania General Assembly and the state supreme court have articulated that police must possess reasonable suspicion to

---

139. *Id.* at 805.

140. *Id.* at 806-07, 810.

141. *See* Commonwealth v. Martin, 626 A.2d 556 (Pa. 1993). *But cf.* Rudovsky, *supra* note 66 (discussing the current developments in state jurisprudence and stating that the Pennsylvania Supreme Court has been following, and may continue to follow, federal Fourth Amendment precedent rather than afford Pennsylvanians greater search and seizure rights under article I, section 8).

142. *See* HANDS-FREE INFO, *supra* note 32.

143. 75 PA. CONS. STAT § 3316(a) (Supp. 2012).

144. *Id.* (“A person does not send, read or write a text-based communication when the person reads, selects or enters a telephone number or name in an interactive wireless communications device for the purpose of activating or deactivating a voice communication or a telephone call.”).

145. Because Pennsylvania’s on texting while driving has gone into effect recently, its practical application is somewhat uncertain. However, one can make analogies to other offenses regarding the proof that an officer must articulate to constitutionally stop a vehicle for using a cell phone to text or e-mail.

detain the occupants of a vehicle briefly.<sup>146</sup> Reasonable suspicion requires that officers be able to “point to ‘specific and articulable facts’ leading [them] to suspect” a violation of the Vehicle Code.<sup>147</sup>

Nonetheless, the rationale underlying a *Terry* stop based upon reasonable suspicion only applies to offenses that are “investigatory” in nature.<sup>148</sup> Under the framework articulated in *Commonwealth v. Chase*,<sup>149</sup> a vehicle stop that is “investigatory”<sup>150</sup> requires an officer to have reasonable suspicion.<sup>151</sup> Although an officer may stop an automobile upon reasonable suspicion, the officer must establish probable cause that the driver violated the Vehicle Code to issue a citation or to detain the driver longer than necessary.<sup>152</sup> A finding of probable cause must occur during the brief time in which an officer is permitted to detain an individual for an investigatory stop.<sup>153</sup> On the other hand, if an offense is not “investigatory,” an officer must have probable cause because, as a practical matter, the officer cannot gather additional evidence related to the offense during the stop.<sup>154</sup>

Sending a “text-based communication”<sup>155</sup> from a mobile phone appears to be an inherently investigatory offense. Because vehicles move at a high speed, officers may have difficulty determining whether drivers are using their cell phones for permissible purposes. Accordingly, some form of investigation will often be necessary for officers to confirm their original suspicions. It appears especially likely that a violation of section 3316 is an offense for which further investigation would be necessary when text messaging while driving is compared to driving under the influence,<sup>156</sup> which the *Chase* court

---

146. See 75 PA. CONS. STAT. § 6308(b); *Commonwealth v. Chase*, 960 A.2d 108 (Pa. 2008).

147. *Commonwealth v. Holmes*, 14 A.3d 89, 95 (Pa. 2011) (quoting *Commonwealth v. Melendez*, 676 A.2d 226, 228 (Pa. 1996)).

148. *Chase*, 960 A.2d at 115.

149. *Id.* at 116.

150. “Investigatory” offenses, such as driving under the influence of alcohol, require further inquiry by a law enforcement officer to establish whether the individual being stopped has committed the requisite elements of the offense. *Id.*; see also *supra* Part II.C.1.

151. *Chase*, 960 A.2d at 116.

152. See *Commonwealth v. Cauley*, 10 A.3d 321, 326 (Pa. Super. Ct. 2010) (“An investigatory detention may last ‘as is necessary to confirm or dispel such suspicion.’” (quoting *Commonwealth v. LaMonte*, 859 A.2d 495, 500 (Pa. Super. Ct. 2004))).

153. See *id.*

154. *Id.* But see *Chase*, 960 A.2d at 121 (Saylor, J., concurring) (arguing that stopping a driver for a non-investigatory traffic offense such as “driving at an unsafe speed, running a red light, and driving the wrong way on a one-way street” often results in the driver “mak[ing] an inculpatory statement to the officer following the stop”).

155. 75 PA. CONS. STAT. § 3316(f).

156. See 75 PA. CONS. STAT. § 3802 (2006).

characterized as an investigatory offense.<sup>157</sup> In both offenses, officers usually cannot accurately conclude whether a violation occurred without stopping the vehicle.<sup>158</sup> Additionally, like driving under the influence of alcohol, evidence of texting while driving is contained within the vehicle.

Even so, courts may plausibly characterize a perceived violation of section 3316 as an offense for which officers cannot gain additional evidence from a post-stop investigation. In that case, an officer should have probable cause before stopping the vehicle to issue a citation.<sup>159</sup> The ban states that it “shall not be construed as authorizing the seizure or forfeiture of [a cell phone], unless otherwise provided by law.”<sup>160</sup> Consequently, if a cell phone is not subject to “seizure” by a police officer, the only investigation that could ensue after a stop—assuming the driver does not consent to a cell phone search—would be questioning the driver on the purpose of his or her cell phone use. Such an “investigation” is of the same type that could follow common non-investigatory offenses, such as speeding or failing to obey a traffic signal.<sup>161</sup> Similarly, like many non-investigatory offenses,<sup>162</sup> the texting prohibition is a summary offense with a small fine.<sup>163</sup> As such, Pennsylvania courts may not view an intrusion into a phone’s call or text messaging history as constitutionally permissible in light of an individual’s significant privacy rights.<sup>164</sup>

Because of the unique privacy intrusions associated with its communicative nature,<sup>165</sup> a violation of section 3316 does not fit neatly into the same category as driving under the influence of alcohol. Nevertheless, because determining whether a driver has sent or received text-based communications while driving is inherently ascertainable, it is not sufficiently analogous to most minor traffic offenses to warrant a

---

157. *Chase*, 960 A.2d at 116.

158. *See id.*

159. *See id.*

160. 75 PA. CONS. STAT. § 3316 (Supp. 2012).

161. *Cf. Chase*, 960 A.2d at 115.

162. *See, e.g.*, 75 PA. CONS. STAT. § 3323 (2006) (failing to obey stop signs and yield signs is a summary offense); 75 PA. CONS. STAT. § 3362 (2006) (stating that the penalty for exceeding the maximum speed limit is “\$42.50 for violating a maximum speed limit of 65 miles per hour” and that violation is a summary offense); 75 PA. CONS. STAT. § 3342(a), (f) (2006) (providing that failing to stop a vehicle at a railroad crossing is a summary offense subject to a \$100 to \$150 fine).

163. 75 PA. CONS. STAT. § 3316(d).

164. *See* cases cited *supra* note 76.

165. *See* *United States v. Flores-Lopez*, 670 F.3d 803, 806 (7th Cir. 2012) (“Even the dumbest of modern cell phones gives the user access to large stores of information.”); *Commonwealth v. Cruttenden*, 976 A.2d 1176 (Pa. Super. Ct. 2009); *see also infra* note 183.

conclusion that investigation is not possible following a stop.<sup>166</sup> Consequently, officers will likely be able to stop a vehicle if they have reasonable suspicion that an individual has been using an “interactive wireless communications device” to engage in “text-based communication” while driving.<sup>167</sup>

Additional considerations arise if one assumes that officers may make vehicle stops predicated on reasonable suspicion. Like the court in *Commonwealth v. Holmes*,<sup>168</sup> Pennsylvania courts must determine what observations by a police officer warrant a determination sufficient to support reasonable suspicion for a violation of section 3316.<sup>169</sup> In *Holmes*, the Pennsylvania Supreme Court found that a testifying officer did not describe an item dangling from a rearview window with sufficient specificity to support the officer’s conclusion that the item “materially obstructed” the driver’s view.<sup>170</sup> As a result, the court concluded that the officer did not have reasonable suspicion to stop the vehicle.<sup>171</sup> *Holmes* illustrates the importance of an officer’s ability to articulate reasonable suspicion for stopping a driver for even seemingly minor violations of the Vehicle Code.<sup>172</sup> The standard for stopping a vehicle becomes especially important when the stop uncovers evidence that implicates an individual of a more serious crime, such as drug possession.<sup>173</sup> Because the exclusionary rule bars the use of evidence gathered unlawfully, stops are often the subject of scrutiny during suppression hearings.<sup>174</sup>

Officers applying the law and courts reviewing the constitutionality of law enforcement actions must determine which observations will allow an officer to articulate reasonable suspicion to stop a driver based on section 3316. Several observations could possibly constitute sufficient evidence to establish reasonable suspicion that a driver is sending or receiving “a text message, instant message, electronic mail or other written communication.”<sup>175</sup> For instance, officers could articulate

---

166. Compare 75 PA. CONS. STAT. § 3316 (supp. 2012), with, e.g., 75 PA. CONS. STAT. § 3301 (Supp. 2012).

167. 75 PA. CONS. STAT. § 3316 (supp. 2012).

168. See *Commonwealth v. Holmes*, 14 A.3d 89 (Pa. 2011).

169. See § 3316.

170. *Holmes*, 14 A.3d at 98.

171. *Id.* at 99.

172. *Id.*

173. See, e.g., *Commonwealth v. Kemp*, 961 A.2d 1247, 1250-51 (Pa. Super. Ct. 2008) (affirming the validity of a traffic stop for violation of a prohibition of tinted windows that eventually led to the discovery of drugs).

174. See generally *Commonwealth v. Holmes*, 14 A.3d 89 (Pa. 2011) (excluding the use of drugs and paraphernalia at trial because there was no reasonable suspicion to support the vehicle stop that led to the discovery of items).

175. 75 PA. CONS. STAT. § 3316(f).

that they witnessed drivers taking their eyes off the road to view a screen or taking a hand or hands off the steering wheel to enter data into the device. Because section 3316 is a primary offense, an adverse effect on an offender's driving abilities is not required to stop a driver;<sup>176</sup> however, a driver's actions, such as swerving or slowed reaction times, may strengthen an argument that the officer had reasonable suspicion to stop the vehicle.

Several additional enforcement considerations arise if courts characterize text messaging while driving as an investigatory offense requiring reasonable suspicion to stop a driver for investigatory purposes.<sup>177</sup> These issues relate to an officer's ability to pursue evidence of the offense. Although an officer always needs probable cause to issue a valid citation, an officer can establish probable cause through the subsequent stop when the offense is investigatory.<sup>178</sup> This standard greatly expands an officer's ability to pursue evidence of text messaging while driving.<sup>179</sup>

Consequently, if the offense is investigatory, an officer will be more likely to view a phone's texting or call history. Aside from questioning the driver in hopes of a truthful answer, there are few methods by which an officer can determine if a driver had been texting or making a phone call.<sup>180</sup> Unlike conducting a field sobriety test in the case of driving while intoxicated,<sup>181</sup> or inspecting an item hanging from a rearview mirror to determine whether it "materially obstructs" a driver's vision,<sup>182</sup> inspecting a driver's cell phone implicates privacy interests in an individual's communications.<sup>183</sup> Pennsylvania courts are immediately suspicious of any interference with an individual's "right to privacy."<sup>184</sup>

---

176. *Id.* § 3316(a).

177. *See Chase*, 960 A.2d at 116; *see also Terry v. Ohio*, 392 U.S. at 1 (1968).

178. *See generally Chase*, 960 A.2d 108. In contrast, an officer must have probable cause before stopping a driver for a "non-investigatory" offense. *See id.* at 115-16.

179. *See id.* at 115-16.

180. Justice Saylor wrote a concurring opinion in *Chase* arguing that the ability to question a driver about the driver's conduct makes every violation of the Vehicle Code investigatory. *Id.* at 121 (Saylor, J., concurring).

181. *See* 75 PA. CONS. STAT. § 3802 (2006).

182. *See Commonwealth v. Holmes*, 14 A.3d 89, 98 (Pa. 2011).

183. A potentially problematic aspect of enforcing section 3316 as an investigatory offense relates to its overlap with the Pennsylvania Wiretapping and Electronic Surveillance Control Act. 18 PA. CONS. STAT. § 5701-82. (2006). Under that scheme of legislation, warrantless interception of "wire, electronic, and oral communications" is prohibited. *Id.* § 5703. While "text messages do constitute electronic communications as statutorily defined[.]" *Commonwealth v. Cruttenden*, 976 A.2d 1176, 1181, n.5 (Pa. Super. Ct. 2009), a violation of the Act requires that interception of such data be "contemporaneous with [its] transmission." *Commonwealth v. Proetto*, 771 A.2d 823, 829 (Pa. Super. Ct. 2001). Hence, an officer violating the Act in the context of section

Problems may also arise, however, if texting while driving is a non-investigatory offense. An officer's inability to conduct an adequate investigation might lead to sanctions even when the driver was using his or her phone for a permissible purpose. Additionally, while refraining from investigating a violation of section 3316 may more adequately protect a driver's privacy interests, such action could make enforcement of the prohibition excessively burdensome. This burden could lead to less motivation for officers to enforce the law. Scattered enforcement may decrease the deterrent effect of the law and lessen its impact on decreasing the number of collisions on state roads.

A partial solution to the problem of proof is for the Pennsylvania General Assembly to pass legislation banning all cell phone use by drivers—except those using a hands-free device—as several other states have done.<sup>185</sup> However, to those who view personal responsibility rather than state intervention as the solution to distracted driving, added prohibitions may not be popular.<sup>186</sup> Moreover, considering that the Pennsylvania General Assembly was in gridlock for several years before it enacted the current ban,<sup>187</sup> a more comprehensive resolution is not likely to pass in the near future.

Solutions to the problems of enforcing Pennsylvania's new distracted driving law must balance public safety on the road with drivers' privacy interests in the information stored in their phones. While a law enforcement officer may often need to investigate the reason for which a driver was using a phone, the officer should first seek to gain an admission from the driver. If the driver does not admit to texting while driving and asserts that his or her use of the phone was for the purpose of placing or ending a phone call, the officer should seek the

---

3316 must have possession of the wireless phone and "intercept" incoming messages or calls. *See Cruttenden*, 976 A.2d at 1181.

184. *See Commonwealth v. Rosa*, 21 A.3d 1264, 1269 (Pa. Super. Ct. 2011) ("Because the protections of the Wiretap Act emanate from the speaker's right to privacy, all of the Act's provisions [allowing officers to interfere with privacy rights] are to be strictly construed.").

185. Ten states and the District of Columbia have banned all cell phone use while driving: California, Connecticut, Delaware, Maryland, Nevada, New Jersey, New York, Oregon, Washington, and West Virginia. *See Cell Phone and Texting Laws*, *supra* note 21; *see also supra* note 22.

186. *See generally* Harvard Men's Health Watch, *Harvard Report: Rise in Distracted Driving Fatalities Correlates with Increase in Mobile Devices*, THE ALTERNATIVE DAILY (June 8, 2012), <http://bit.ly/MhXhsv> ("In the last analysis, personal responsibility is the only way to contain the problem.").

187. *See supra* text accompanying note 32.

driver's consent to view the phone's most recent call history.<sup>188</sup> Examining a driver's text or call history should constitute a search under article I, section 8.<sup>189</sup> As such, police should avoid a warrantless search of a driver's mobile phone, if possible, to ensure that citations are enforceable in court and that individual privacy interests remain intact.

## B. Search and Seizure Implications

### 1. Search after Vehicle Stop

The previously stated enforcement concerns generate several search and seizure questions that remain unanswered by both the legislature and the courts. Although the Pennsylvania law proscribing text-based communication while driving contains a provision stating that the prohibition "shall not be construed as authorizing the seizure or forfeiture of an interactive wireless communications device, unless otherwise provided by law,"<sup>190</sup> this language is unlikely to fully protect drivers from potentially unconstitutional searches. The provision mentions seizures only—not searches—and states that seizure or forfeiture may be appropriate when "otherwise provided by law."<sup>191</sup> Because of the previously stated enforcement concerns, officers may view a search, with or without consent, as necessary to investigate whether a driver was using a phone for an impermissible purpose.<sup>192</sup>

To safeguard citizens' privacy rights in their communications when stopped for a violation of the Vehicle Code, the Pennsylvania General Assembly has proposed an amendment<sup>193</sup> to the Pennsylvania statute governing reasonable suspicion and searches.<sup>194</sup> The proposed legislation amends a statute that currently allows officers who have reasonable suspicion "to secure . . . information as the officer may reasonably believe to be necessary to enforce the provisions of this title."<sup>195</sup> The proposed amendment provides that "no police officer who

---

188. The acceptable legal scope of consent searches and problems of coercion relating to such searches are beyond the purview of this Comment. For a discussion of consent to search following a vehicle stop, see RUDOVSKY, *supra* note 63, at 83-85.

189. See PA. CONST. art I, § 8; see also RUDOVSKY, *supra* note 63, at 14-19 (providing an overview of cases in which Pennsylvania courts have held that an individual has a reasonable expectation of privacy under article I, section 8 of the Pennsylvania Constitution).

190. 75 PA. CONS. STAT. § 3316(c) (2012).

191. *Id.* As previously discussed in Part III.B.2.b, a seizure or forfeiture "otherwise provided by law" may include a seizure following arrest.

192. See *supra* Part II.C.1.

193. H.R. 1607, 195th Gen. Assemb., Reg. Sess. (Pa. 2011).

194. 75 PA. CONS. STAT. § 6308(b) (2006).

195. *Id.*

stops a vehicle in accordance with paragraph (1) may use a data extraction device to secure information from an electronic device in the possession of the driver or passenger in the vehicle.”<sup>196</sup> The proposed amendment could potentially function as a safeguard to drivers’ privacy rights in their cell phones, but it has not been passed by the Pennsylvania General Assembly.

2. Search Incident to Lawful Arrest

a. Warrantless Arrests for Misdemeanors or Summary Offenses

Pennsylvania case law interpreting article I, section 8 suggests that an officer may arrest an individual if the officer witnesses a violation of the Vehicle Code, even if the offense does not rise to the level of a felony.<sup>197</sup> Under current statutory<sup>198</sup> and case law,<sup>199</sup> any police officer may make a warrantless arrest of a *nonresident* driver for use of a cell phone for written communication if the use occurred in the presence of the officer.<sup>200</sup> However, only uniformed members of the Pennsylvania State Police may arrest *residents* of the state for the same offense.<sup>201</sup> Because violating the Pennsylvania statute is a primary offense,<sup>202</sup> a custodial arrest based solely on texting while driving is, in fact, lawful under certain circumstances.<sup>203</sup> Although an arrest under this provision, alone, is not likely to occur frequently because the penalty is minor, such

---

196. H.R. 1607, 195th Gen. Assemb., Reg. Sess. (Pa. 2011) (The proposed amendment goes on to define “data extraction device” as “a tool used to extract data stored in a telecommunications device, including, but not limited to, the following data: call history, text messages, contacts, images, videos, geotags, voice mails, voice recordings, source messaging service (SMS) messages, multi-media messaging service (MMS) messages or subscriber identification module (SIM) data.”).

197. *See, e.g.*, *Commonwealth v. Clark*, 735 A.2d 1248 (Pa. 1999).

198. *See* 75 PA. CONS. STAT. § 6304(a) (2006) (“A member of the Pennsylvania State Police who is in uniform may arrest without a warrant any person who violates any provision of this title in the presence of the police officer making the arrest.”).

199. *See Hughes v. Shestakov*, No. CIV.A.00-6054, 2002 WL 1742666 (E.D. Pa. 2002). The *Hughes* court noted that Pennsylvania law is ambiguous regarding warrantless arrests of individuals for misdemeanors when the officer has probable cause, but the offense is not committed in the presence of an officer; the court also stated that “the contours of the right” are not “sufficiently clear such that a reasonable official would understand that what he is doing violates that right.” *Id.* at \*4. Therefore, the court held that the officer has qualified immunity from a false arrest claim under Pennsylvania law. *Id.*

200. *See supra* note 193.

201. *See* § 6304(b).

202. *See* 75 PA. CONS. STAT. § 3316 (Supp. 2012).

203. 75 PA. CONS. STAT. § 6304(a) (2006).

an arrest raises concerns that the search incident to arrest doctrine authorizes a warrantless search of a driver's cell phone.<sup>204</sup>

b. Scope of Search Incident to Arrest

As an exception to the general search warrant requirement, the search incident to arrest doctrine allows an officer to search the person of an individual that he or she has lawfully arrested.<sup>205</sup> The rationale for this rule is to ensure that there are no weapons within the reach of the arrestee and that officers are able to save evidence from destruction.<sup>206</sup> Treatment of cell phone searches incident to arrest under article I, section 8 can be analogized to other situations in which the Pennsylvania Supreme Court has applied this doctrine.<sup>207</sup>

A Pennsylvania court undertaking this analysis must begin by asking whether an individual has a legitimate expectation of privacy in the data stored on a cell phone.<sup>208</sup> It is sensible that an individual would have an expectation of privacy that society accepts as reasonable in a cell phone because of the personal nature of a phone and the breadth of information stored on such a device.<sup>209</sup> However, an individual's reasonable expectation of privacy only gives him or her standing to

---

204. A search of an arrestee's cell phone incident to arrest was found to be permissible in *United States v. Finley*. *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007).

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

206. *Id.* at 762-63; *Commonwealth v. Shiflet*, 670 A.2d 128, 130 (Pa. 1995) (citing *Commonwealth v. Timko*, 417 A.2d 620, 622 (Pa. 1980)) (stating that a search incident to arrest is limited "to areas and clothing immediately accessible to the person arrested" and that "the purpose of this search is to prevent the arrestee from securing weapons or destroying contraband").

207. *See, e.g.*, *Commonwealth v. White*, 669 A.2d 896 (Pa. 1995); *Commonwealth v. Timko*, 417 A.2d 620 (Pa. 1980); *Commonwealth v. Dussel*, 439 A.2d 659 (Pa. 1970).

208. *See, e.g.*, *Katz v. United States*, 389 U.S. 347 (1967) (finding that there is no "search" under the Fourth Amendment if an individual does not have a reasonable expectation of privacy in a communication).

209. Pennsylvania has comprehensive case law on the issue of an individual's "reasonable expectation of privacy" in various contexts. *See, e.g.*, *Commonwealth v. Martin*, 626 A.2d 556 (Pa. 1993) (holding that an individual has a reasonable expectation of privacy in personal possessions and an officer must possess probable cause before conducting a dog sniff search of a satchel in the suspect's possession); *Commonwealth v. Melilli*, 555 A.2d 1254, 1258 (Pa. 1989) ("[A] pen register cannot be utilized by law enforcement authorities without an order based on probable cause."); *Commonwealth v. Dejohn*, 403 A.2d 1283 (Pa. 1979) (holding that an individual has a reasonable expectation of privacy in bank records). *Cf.* *Commonwealth v. Sell*, 470 A.2d 457 (Pa. 1983) (holding that, in contrast to the United States Supreme Court's holding in *Rakas v. Illinois*, 439 U.S. 128 (1978), an individual charged with a possessory offense has standing to challenge the search as a matter of course under the Pennsylvania Constitution).

object to the search; it does not address whether that search is reasonable.<sup>210</sup>

The next portion of the court's analysis should turn upon whether the court considers a cell phone as part of an arrestee's person or as part of the person's separate "luggage." Consistent with precedent and the spirit of Pennsylvania search and seizure law,<sup>211</sup> the state supreme court should decide whether to diverge from standards used by some federal courts in interpreting the Fourth Amendment.<sup>212</sup> In determining whether to follow current Pennsylvania jurisprudence, or embark on a new precedent, following federal law, the court should consider the four *Edmunds* factors.<sup>213</sup>

A unique situation arises if police officers arrest a driver pursuant to section 3316 and the contents of the driver's cell phone were searched incident to arrest. Unlike an ordinary traffic offense, both the vehicle and the cell phone are instrumentalities involved in the commission of the offense.<sup>214</sup> In the vehicle context, the Pennsylvania Supreme Court has established that, barring exigent circumstances, "the arrestee's privacy interests remain intact as against a warrantless search" of a vehicle.<sup>215</sup> Conversely, an individual's "person and the immediate area which the person occupies" is searchable incident to arrest to facilitate the objectives of the doctrine.<sup>216</sup>

Courts may perceive a cell phone as analogous to the satchel that was sniff-searched in *Commonwealth v. Martin*.<sup>217</sup> While the *Martin* court was protective of citizen privacy rights in that case,<sup>218</sup> the assumption that a satchel is part of an individual's "person" is problematic when applied in the search incident to arrest framework because items that are considered part of the "person" are searchable following a valid arrest.<sup>219</sup> A possibility exists that the Pennsylvania

---

210. See *Katz v. United States*, 389 U.S. 347 (1967).

211. See *supra* Part II.C.

212. See *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007).

213. See *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991).

214. See 75 PA. CONS. STAT. § 3316(a) (Supp. 2012) ("No *driver* shall *operate a motor vehicle* . . . while using a [mobile phone] to send, read or write a text-based communication while the vehicle is in motion." (emphasis added)).

215. *Commonwealth v. White*, 669 A.2d 896, 902 (Pa. 1995). The court in *White* also stated that "[m]erely arresting someone does not give police carte blanche to search *any* property belonging to the arrestee." *Id.* (emphasis in original). Along the same lines, without independent probable cause of another offense, it is unlawful for police to conduct a warrantless search of an automobile that they stop for a routine violation of the Vehicle Code. See *Commonwealth v. Dussell*, 266 A.2d 659, 661 (Pa. 1970).

216. *White*, 669 A.2d at 902.

217. *Commonwealth v. Martin*, 626 A.2d 556 (Pa. 1993).

218. See *United States v. Place*, 462 U.S. 696 (1983).

219. *White*, 669 A.2d at 902.

Supreme Court, like the Fifth Circuit in *Finley*, will find that a mobile phone is analogous to a satchel or other container based on the reasoning in *Martin*.<sup>220</sup>

The fear that Pennsylvania courts will treat cell phones as objects searchable incident to arrest is partially alleviated by a close reading of *Commonwealth v. Timko*.<sup>221</sup> *Timko* articulates that, unlike vehicles which are “inherent[ly] mobil[e,]” luggage “is not mobile once it is taken into police custody.”<sup>222</sup> As such, the primary rationale supporting a Fourth Amendment vehicle search incident to arrest is not applicable to items such as the “zippered valise” in *Timko*.<sup>223</sup> Thus, officers must obtain a warrant to search items in vehicles that are analogous to luggage.<sup>224</sup> Similar reasoning applies to cell phones. Once police stop the vehicle and take the wireless device into custody, the rationale underlying a search incident to arrest<sup>225</sup> disappears. An arrestee cannot use the automobile or the cell phone as a weapon, nor can he or she destroy evidence of an offense under section 3316 while the device is in the possession of an officer.<sup>226</sup> As such, an officer should be required to obtain a warrant to conduct a search pursuant to article I, section 8.<sup>227</sup>

Considering the significance of the warrant requirement in search and seizure jurisprudence, any exception reducing the authority of this restraint on government power must be “narrowly construed.”<sup>228</sup> Additionally, because “case law in Pennsylvania [has] historically taken a more narrow view of the search incident to arrest exception than the federal courts,”<sup>229</sup> state courts should appropriately limit erosion of the warrant requirement under article I, section 8. The enactment of Pennsylvania’s text messaging ban creates additional opportunity for the judicial system to further depreciate the warrant requirement in the context of search incident to arrest. Thus, Pennsylvania courts reviewing case law on the issue should recognize that searching a cell phone following an arrest for a violation of section 3316 does not serve the purposes of the search incident to arrest doctrine.

---

220. See *Martin*, 626 A.2d at 142-43.

221. *Commonwealth v. Timko*, 417 A.2d 620 (Pa. 1980).

222. *Id.* at 623.

223. *Id.*

224. *Id.*

225. See *supra* Part III.B.2.b.

226. *But see* *United States v. Flores-Lopez*, 670 F.3d 803, 807-09 (7th Cir. 2012) (describing the danger of “remote wiping” in which co-conspirators monitoring a phone from afar are alerted to its seizure and wipe the phone of its contents).

227. See PA. CONST. art. I, § 8.

228. *Commonwealth v. Shiflet*, 670 A.2d 128, 132 (Pa. 1995) (citing *New York v. Belton*, 453 U.S. 454, 463 (1981) (Brennan, J. dissenting)).

229. *Shiflet*, 670 A.2d at 129.

#### IV. CONCLUSION

By enacting section 3316, Pennsylvania lawmakers have taken a significant step toward discouraging the use of hand-held cell phones while driving.<sup>230</sup> However, as motorists find more creative ways of driving while distracted, policymakers must strongly advance the important policy objective of safety on Pennsylvania roadways. Although zealously enforcing the state's law prohibiting a driver from "send[ing], read[ing,] or writ[ing] a text-based communication"<sup>231</sup> while driving is critical to public safety, the government must tread lightly to prevent erosion of the privacy rights of its citizens.<sup>232</sup>

The passage of Pennsylvania Vehicle Code section 3316 raises several issues concerning the proper approach that both law enforcement officers and courts should take in fitting this law into the state constitutional scheme. To safeguard the privacy rights of drivers, officers must recognize that section 3316 will be difficult to enforce.<sup>233</sup> Courts, therefore, must clarify the level of suspicion and articulable facts necessary to stop a vehicle under the provision, keeping in mind the often-competing interests of individual privacy and public safety.

Officers must be sensitive to drivers' privacy expectations in the information stored in their cell phones. Officers should secure a warrant to search a mobile phone following arrest of an individual because the rationale behind the search incident to arrest doctrine is not applicable to such devices.<sup>234</sup> Legislators, law enforcement personnel, and citizens must identify possible ramifications and must consider how cell phone use while driving fits into the current constitutional stop, search, and seizure framework. In doing so, those individuals should continue to acknowledge that Pennsylvania is a state where "an individual's privacy interests are given greater deference than under federal law."<sup>235</sup>

Despite possible difficulty in enforcing the ban on text-based communication while driving, the legislation is symbolic of the General Assembly's commitment to safety on Pennsylvania roads. As such, the law and the policies it reflects demonstrate the government's desire to alter societal norms through legislation proscribing a practice that is as dangerous as driving under the influence of alcohol.<sup>236</sup> Although section 3316 could better protect the privacy interests of Pennsylvania residents,

---

230. See *supra* Part II.A.

231. 75 PA. CONS. STAT. § 3316(a) (Supp. 2012).

232. See cases cited *supra* note 76.

233. See *supra* Part III.A.

234. See discussion *supra* Parts II.C.4, III.B.2.b.

235. *Commonwealth v. White*, 669 A.2d 896, 902 (Pa. 1995).

236. See sources cited *supra* note 14.

it marks an important step in altering unsafe driving behaviors and is likely to have a deterrent effect on individuals who consider whether to send or read text-messages while driving.