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NO LONGER ACCEPTING EXCEPTIONS: EXCEPTIONS TO THE  
EXCLUSIONARY RULE OF THE FOURTH AMENDMENT ARE  
UNCONSTITUTIONAL AS APPLIED TO SMARTPHONES

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**I. Introduction**

“[The] ‘exclusionary rule’ . . . keeps courts from being ‘made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.’”<sup>1</sup> This excerpt of Justice Sotomayor’s stinging dissent in *Utah v. Strieff* stems, in part, from the Supreme Court’s long history of limiting the corrective power of the exclusionary rule and the protections that the Founding Fathers believed the Fourth Amendment would provide to the citizens of this country.<sup>2</sup> Americans are to be

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<sup>1</sup> See *Utah v. Strieff*, 136 S. Ct. 2056, 2065 (2016) (Sotomayor, J., dissenting) (quoting *Terry v. Ohio*, 392 U.S. 1 (1968)); *Weeks v. United States*, 232 U.S. 383, 392 (1914) (finding that the Fourth Amendment requires evidence seized unlawfully to be excluded from trial); see also Ralph Grunewald, *Comparing Injustices: Truth, Justice, and the System*, 77 ALB. L. REV. 1139, 1169 (2013/2014) (explaining that the concept of the exclusionary rule is not practiced in many other countries besides the United States).

<sup>2</sup> See *Strieff*, 136 S. Ct. at 2067-68 (Sotomayor, J., dissenting) (believing that the majority’s holding, that the Constitution does not require the exclusion of illegally obtained evidence when law enforcement had been negligent, was ill considered).

afforded a reasonable expectation of privacy, free from government intrusion, unless and until law enforcement has reasonable suspicion that a crime has been, is being, or will be committed.<sup>3</sup> This is an important issue for many Americans who place a high value on their privacy.<sup>4</sup> One of the most private personal effects an American carries with them is their smartphone,<sup>5</sup> which can contain pictures, videos, text messages, emails, voicemails, banking information, etc.<sup>6</sup> This vast collection of private information is literally in the hands of people all across the United States because Americans who do not own a smartphone are now the minority.<sup>7</sup>

While the connection between the Fourth Amendment of the United States Constitution and smartphones may not be explicit, most

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<sup>3</sup> See U.S. CONST. amend. IV (protecting the privacy rights of citizens of the United States from unlawful police intrusions). The Fourth Amendment states:

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

*Id.*

See also *Katz v. United States*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring) (expressing his belief that not only do Americans enjoy a reasonable expectation of privacy, but that privacy is also a right protected by the Constitution).

<sup>4</sup> See Mary Madden, *American's Attitudes About Privacy, Security and Surveillance*, PEW RES. CTR. (May 20, 2015), archived at <http://perma.cc/65FL-NQHN> (finding that 74% of Americans feel it is very important that they have control over who can obtain information about them).

<sup>5</sup> See *Smartphone*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2009) (last visited Mar. 28, 2017), archived at <https://perma.cc/3646-S5HH> (defining smartphone as "a cell phone that includes additional software functions (as e-mail or an Internet browser)").

<sup>6</sup> See Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RES. CTR. (Apr. 1, 2015), archived at <http://perma.cc/D7HG-9LY8> (explaining that smartphone users use their phones to look up health information, bank online, search for real estate, and find or apply for jobs).

<sup>7</sup> See Smith, *supra* note 6 (indicating that 64% of Americans are now smartphone users, as opposed to in the spring of 2011 when the number of American smartphone users was 35%).

people in the United States are now using a device that stores gigabyte upon gigabyte of their private information.<sup>8</sup> All of this information, contained on a smartphone, can be found on someone's person at any given time—even during arrest.<sup>9</sup> Near the time of an arrest, law enforcement should obtain a warrant to search an arrestee's smartphone, but even if that warrant turns out to be defective, the evidence discovered could, nevertheless, be admitted in a court of law.<sup>10</sup>

While this so-called good faith exception<sup>11</sup> to the exclusionary rule, along with the other exclusionary rule exceptions, seem to be violations of the Fourth Amendment, the Supreme Court sanctioned

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<sup>8</sup> See Monica Anderson, *6 facts About Americans and Their Smartphones*, PEW RES. CTR. (Apr. 1, 2015), archived at <http://perma.cc/EW4W-6RUE> (explaining that with their smartphones, 60% users take pictures/and or videos, 75% use it for social networking, 88% send emails, 89% use the internet, 92% make calls and leave voicemails, and 97% text); David Goldman, *The Biggest Cell Phone Ripoff: \$100 for 32 GB of Storage*, CNNMONEY (Aug. 14, 2015), archived at <http://perma.cc/RK6L-7MJM> (explaining that the Apple iPhone comes with storage sizes of 16, 64, or 128 gigabytes).

<sup>9</sup> See Uniform Crime Reports, FEDERAL BUREAU OF INVESTIGATION, archived at <http://perma.cc/P8QM-MU89> (quantifying the number of Americans who were arrested for any reason in 2014); see also Anderson, *supra* note 8 (indicating that 46% of smartphone owners say that they could not live without their smartphone); Tristan M. Ellis, *Reading Riley Broadly: A Call for a Clear Rule Excluding All Warrantless Searches of Mobile Digital Devices Incident to Arrest*, 80 BROOK. L. REV. 463, 464 (2015) (discussing the problems that may arise for an arrestee when their smartphone is seized during an arrest); Alexandra Ma, *A Sad Number of Americans Sleep with Their Smartphone in Their Hand*, THE HUFFINGTON POST (Jun. 29, 2015), archived at <http://perma.cc/BX9F-JR95> (disclosing that 71% of smartphone users admit to sleeping either with or next to their smartphone). If smartphone users sleep with their smartphones, then it would be safe to suggest that they almost constantly have their smartphone on their person. *Id.*

<sup>10</sup> See *Davis v. United States*, 564 U.S. 229, 249-50 (2011) (finding an exception to the exclusionary rule and allowing evidence obtained from a search even when the search procedure that was used was later deemed unconstitutional); *Arizona v. Evans*, 514 U.S. 1, 1 (1995) (declaring that the exclusionary rule did not apply when a faulty warrant was issued due to a clerical error within the court); *United States v. Leon*, 468 U.S. 897, 924 (1984) (creating a good faith exception to the exclusionary rule); *Mapp v. Ohio*, 367 U.S. 643, 649 (1961) (stating that evidence obtained as part of an illegal search was inadmissible; creating the exclusionary rule).

<sup>11</sup> See *Leon*, 468 U.S. at 920-21 (stating that a good faith exception would apply if the police acted in good faith on a warrant that was issued by a judge, but for a reason, unbeknownst to the police, the warrant was not valid).

these exceptions as constitutional in numerous decisions.<sup>12</sup> The problem with this is that a majority of these Fourth Amendment cases pre-date smartphones.<sup>13</sup> Where the evidence that can be found from an unwarranted search of a home or a car is limited and quantifiable, the amount of information available from a search of a smartphone is endless. Section II of this Note will discuss the way that the Fourth Amendment has morphed from protecting the rights that it originally intended to protect into a doctrine with exceptions never intended by the Founding Fathers.<sup>14</sup> Then, Section III will describe the reasons why exceptions to the exclusionary rule were instituted and the detriment these exceptions can bring to smartphone users.<sup>15</sup> Section IV, will argue that, due to this significantly disproportionate difference in information available, the good faith exception, and other exceptions to the exclusionary rule, are unconstitutional when applied to searches of smartphones.<sup>16</sup> Finally, Section V will conclude why a number of the exceptions to the exclusionary rule are unconstitutional when illegal searches are made of smartphones.<sup>17</sup>

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<sup>12</sup> See Wayne R. LaFare, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 757-58 (2009) (discussing the author's distaste for several Supreme Court decisions that have failed to protect the Fourth Amendment).

<sup>13</sup> See Marc W. McDonald, *The Good Faith Exception to the Exclusionary Rule: United States v. Leon and Massachusetts v. Sheppard*, 27 B.C. L. Rev. 609, 609 (1986) (indicating that *Leon*, was decided in 1984); *20 years of the smartphone: an evolution in pictures*, DAILY TELEGRAPH (last visited May 11, 2017), archived at <https://perma.cc/44DK-BXB3> (reminiscing to the year 1994, when the first smartphone, IBM Simon, was released—with notably fewer features than smartphone users enjoy today).

<sup>14</sup> See *infra* Section II (exploring that evolution of the Fourth Amendment from its creation to its interpretation, as we know it currently).

<sup>15</sup> See *infra* Section III (discussing why the Supreme Court implied a good faith exception to the text of the Fourth Amendment).

<sup>16</sup> See *infra* Section IV (arguing that the inclusion of evidence obtained from cell phones by way of the good faith exception, and others, is overly prejudicial that it violates criminal defendants' constitutional rights).

<sup>17</sup> See *infra* Section V (concluding that the good faith exception should be found to be unconstitutional if used when evidence is admitted as the result of an illegal search of an arrestee's smartphone).

## II. History

Many courts, and much of the legal community, seem to have mistaken the Founding Fathers' reason for including the Fourth Amendment in the Bill of Rights.<sup>18</sup> In the years leading up to the American Revolution, warrants were "general warrants" that gave law enforcement far too much power.<sup>19</sup> These general warrants gave the police free rein to conduct any search and seizure when they had the slightest belief that criminal conduct was afoot.<sup>20</sup> The use of general warrants created much discontent among colonial Americans and was the reason behind the inclusion of the Fourth Amendment in the Constitution.<sup>21</sup> However, since the ratification of the Constitution, the Supreme Court's interpretation of the protections guaranteed by the Fourth Amendment has changed many times.<sup>22</sup>

*Boyd v. United States*<sup>23</sup> was the first major case in which a question regarding the exclusion of evidence obtained in violation of

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<sup>18</sup> See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551 (Dec. 1999) (clarifying that the Framers of the Constitution never meant to apply the term "unreasonable search and seizure" to warrants as we think of them today.) The Framers sought to forbid searches and seizures allowed by general warrants, the warrants used by the British government during the American Revolutionary War era, to be unreasonable. *Id.*

<sup>19</sup> See *id.* at 558 (explaining that general warrants were warrants that were issued without any reasonable suspicion and were extremely overbroad, giving officers the authority to search anyone or any place that they deemed to be suspicious).

<sup>20</sup> See *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (recounting the ability of law enforcement to act as they pleased when criminal wrongdoing was suspected).

<sup>21</sup> See Davies, *supra* note 18, at 567-68 (describing that colonials felt so strongly about general warrants that the First Continental Congress included them as a grievance in a petition to Parliament, and then drafted "the first clause of the Fourth Amendment . . . to state a broad reasonableness for government intrusions, while the second was specifically meant to ban general warrants"); *Amendment IV: Searches, Seizures, and Warrants*, RUTHERFORD INST., archived at <https://perma.cc/KE52-WTXY> (discussing the reason for the Fourth Amendment's inclusion in the U.S. Constitution and how the Fourth Amendment has evolved to become what we know today).

<sup>22</sup> See Josh Fitzhugh, *The New Exclusionary Rule Cases*, 70 A.B.A. J. 58, 59 (Mar. 1984) (discussing Justice Potter Stewart's comparison of the exclusionary rule to "a roller coaster track constructed while the roller coaster sped along" because of the lack of thought he believed the rule had received before it was enacted); *Fourth Amendment*, CORNELL U. LAW SCH. (last visited Mar. 28, 2017), archived at <https://perma.cc/HC9Y-QKUN> (discussing the many legal rules and exceptions that have shaped the way the Fourth Amendment works currently).

<sup>23</sup> 116 U.S. 616 (1886).

the Fourth Amendment was heard before the Supreme Court.<sup>24</sup> The Petitioner argued that being forced to turn over self-incriminating evidence, his own personal documents, to law enforcement was a violation of his Fourth and Fifth Amendment<sup>25</sup> rights.<sup>26</sup> The Court was persuaded by the Petitioner's Fourth Amendment argument, acknowledging that an unreasonable search and seizure had occurred even though there was no intrusion into the Petitioner's home.<sup>27</sup> Additionally, the majority found that the Petitioner's Fifth Amendment protections had also been violated.<sup>28</sup> The Court made it clear that the evidence obtained in violation of the Fifth Amendment would be excluded, but adversely, the evidence uncovered as a result of the violation of Boyd's Fourth Amendment rights would not.<sup>29</sup> After the dismissal of Fourth Amendment protections in *Boyd*, it was not until

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<sup>24</sup> See *Boyd*, 116 U.S. at 621 (1886) (stating that the cause of action asserted is based on the Fourth and Fifth Amendments of the U.S. Constitution); David Gray, *A Spectacular Non Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AM. CRIM. L. REV. 1, 14 (2013) (detailing how the Supreme Court had yet to hear any cases challenging the admittance of evidence into trial that was obtained as the result of an unreasonable search and seizure).

<sup>25</sup> See U.S. CONST. amend. V (stating that no U.S. citizen ". . . shall be compelled in any criminal case to be a witness against himself").

<sup>26</sup> See *Boyd*, 116 U.S. at 621 (revealing that the petitioner not only believed that his Fifth Amendment rights had been violated because he was required to produce evidence that would incriminate himself, but he claimed that his Fourth Amendment rights were also violated due to the government seizing his private papers).

<sup>27</sup> See *id.* at 630 (stating that "[i]t is not the breaking of [a man's] doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence . . .")

<sup>28</sup> See *id.* at 634-35 (deciding that the petitioner's Fourth Amendment rights were not violated because the seizing of evidence, when it is of importance in a criminal, is not unreasonable, but requiring the defendant to turn over evidence that would incriminate themselves is a violation of the Fifth Amendment); Gray, *supra* note 24, at 14 (specifying that at different times in the nineteenth century both a Supreme Court Justice and the Supreme Judicial Court of Massachusetts made known their strong feelings about not excluding evidence as a result of a violation of a person's Fourth Amendment protections).

<sup>29</sup> See Gray, *supra* note 24, at 14 (discussing how courts in the early 1800s could not fathom excluding evidence based on violations of the Fourth Amendment, but the Supreme Court felt violations of the Fifth Amendment were a cause for exclusion).

1914 that another major Fourth Amendment case was again before the Supreme Court.<sup>30</sup>

Consequently, when *Weeks v. United States* was decided, the Fourth Amendment was given a much-needed reaffirmation of legitimacy.<sup>31</sup> The decision in *Weeks* required that illegally obtained evidence be excluded from trial without exception.<sup>32</sup> The Court's position was that it made no sense to have a Fourth Amendment if it did not do anything to promote the liberties enjoyed by the citizens of this country.<sup>33</sup> If law enforcement faces no repercussions for conducting illegal searches and is rewarded with the admittance of illegal evidence at trial, then there is nothing to dissuade would-be violators.<sup>34</sup>

However, state courts across the country interpreted the *Weeks* decision as only applying to the federal government, and the States felt that they did not have to abide by the ruling if they so decided.<sup>35</sup> While the Fourth Amendment suffered a slight setback in

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<sup>30</sup> See Gray, *supra* note 24, at 14 (indicating that it took until 1919 before a case arose which coerced the Supreme Court into finding a solution to stop unreasonable search and seizure violations).

<sup>31</sup> See *Weeks*, 232 U.S. at 398 (declaring that the seizure of letters from the defendant was in violation of the unreasonable search and seizure clause of the Fourth Amendment and ordering the case be remanded because the trial court erroneously allowed the illegally obtained evidence to be admitted).

<sup>32</sup> See Fitzhugh, *supra* note 22, at 59 (declaring that the decision in *Weeks* created what we now know as the "exclusionary rule").

<sup>33</sup> See *Weeks*, 232 U.S. at 393 (holding that it is not enough to simply admit that unreasonable search and seizures are unconstitutional, but there must be a remedy for the violation).

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

*Id.*

<sup>34</sup> See *id.* at 394 (asserting that without excluding evidence that was obtained as the result of unwarranted searches it would seem that the court was condoning the behavior of law enforcement who were acting in direct contradiction with the Constitution).

<sup>35</sup> See *Wolf v. Colorado*, 338 U.S. 25, 33 (1949) (finding that the Fourteenth Amendment did not preclude the use of illegally obtained evidence from being admitted during trial because a defendant's right to Due Process is not infringed

*Wolf*, thankfully that obstruction only lasted twelve years before it was overruled by *Mapp v. Ohio*.<sup>36</sup> The Supreme Court in *Wolf* found that the states should not have to abide by the same restrictions placed on federal courts when the Fourteenth Amendment<sup>37</sup> bound the states to enforcing the protections of the Fourth Amendment as well.<sup>38</sup> Justice Harlan penned a strong dissent in *Mapp* claiming that the Court went out of its way to overrule *Wolf*.<sup>39</sup> Even if Justice Harlan's accusation is true, the majority's holding that the exclusionary rule applies to the states is still the law of the land today.<sup>40</sup>

*Katz v. United States*, decided by the Warren Court in 1967, gave American jurisprudence the first notion of a "reasonable expectation of privacy."<sup>41</sup> The question before the Court was whether the use of a wiretap on a public phone booth was a violation of the Fourth Amendment guarantee against unreasonable search and seizure.<sup>42</sup> The Court found that "once it is recognized that the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures, it becomes clear that the reach of the Fourth Amendment cannot turn upon the presence or absence of a

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upon). The Court believed that there were other ways in which to discourage law enforcement from conducting searches and seizures without warrants. *Id.*

<sup>36</sup> See *Mapp*, 367 U.S. 643, 655 (1961) (deciding that the Fourteenth Amendment did, indeed, forbid state courts from allowing illegally obtained evidence into the courtroom).

<sup>37</sup> See U.S. CONST. amend. XIV.

<sup>38</sup> See *Mapp*, 367 U.S. at 655 (reasoning that if the Fourth Amendment, by way of the Fourteenth Amendment, is enforceable against the states in the same way it is enforceable against the federal government, then illegally seized evidence should be inadmissible in state courts as well).

<sup>39</sup> See *id.* at 673-75 (claiming that there was no reason to revisit *Wolf* and decide whether the Fourteenth Amendment applied to the states). Justice Harlan believed the Court should have only answered the question that was before it, which was whether the Ohio statute was unconstitutional in regards to the Fourteenth Amendment requirement of Due Process. *Id.* at 673 (Harlan, J., dissenting).

<sup>40</sup> See Gray, *supra* note 24, at 19 (expressing that following the decision in *Mapp*, the Court had to decide many issues arising from the exclusionary rule).

<sup>41</sup> See *Katz*, 389 U.S. at 360-61 (Harlan, J., concurring) (declaring that any place that has a reasonable expectation of privacy should normally require a search warrant to conduct a search or seizure).

<sup>42</sup> See *id.* at 349-50 (discussing the question that was posed to the Court as to whether police needed to obtain a search warrant when conducted surveillance on a suspect).



physical intrusion into any given enclosure.”<sup>43</sup> The Court’s holding in *Katz*, once again, heightened the warrant requirement of the Fourth Amendment even further.<sup>44</sup>

After the implementation of the exclusionary rule and the creation of the idea of a reasonable right to privacy, it was not long before the Supreme Court backpedaled on their progressiveness and decided that excluding all evidence obtained illegally was overbroad.<sup>45</sup> The majority in *Leon* felt that barring all evidence from admittance at trial created problems in its attempt to solve other ones.<sup>46</sup> To solve the problems law enforcement was thought to be facing, the Supreme Court made it easier for evidence to be admitted in a situation where the police officer was not the reason for the illegal search and seizure occurring.<sup>47</sup> In the same decision, the Court affirmed the denial of a motion to suppress evidence in an instance where police relied, in good faith, on a warrant issued without probable cause.<sup>48</sup> The dissent, consisting of Justices Marshall, Brennan, and Stevens, called the decision in *Leon* a “victory over the Fourth Amendment.”<sup>49</sup> The dissent further argued that while the Fourth Amendment does not explicitly forbid the admittance of illegally seized evidence, it is easy to infer that the purpose of the Fourth Amendment is to make sure that

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<sup>43</sup> See *id.* at 353 (concluding that the Fourth Amendment protects people and places).

<sup>44</sup> See *id.* at 373 (Black, J., dissenting) (claiming that the majority opinion was too focused on the right to privacy rather than the right to unreasonable searches and seizures).

<sup>45</sup> See *Leon*, 468 U.S. at 926 (1984) (creating a loophole within the exclusionary rule by finding that there was a “good faith” exception).

<sup>46</sup> See *id.* (holding that evidence obtained from a search with an improperly issued warrant is admissible as long as the police officer acted in good faith regarding the warrant’s validity). The majority justified this decision by reasoning that criminals would routinely escape prosecution and citizens would lose faith in the judicial system if evidence, obtained in good faith, was suppressed simply because of a faulty warrant. *Id.* at 907-08.

<sup>47</sup> See *id.* at 925-26 (explaining that as long as it was the magistrate who failed to properly issue a warrant, and if the police officer believed there was probable cause to conduct the search, the police officer would be deemed as having acted in good faith).

<sup>48</sup> See *id.* at 913 (deciding to create a good faith exception to ensure the relevancy of law enforcement by excluding evidence only if the warrant-issuing judge was abusing his or her discretion).

<sup>49</sup> See *id.* at 911 (arguing that the Court’s decision may seem to have the support of the Constitution but, in reality, the benefits of creating the “good faith” exception are not enough to directly contradict the words and sentiments of the Constitution).

this evidence does not get admitted.<sup>50</sup> The dissent further claimed that the majority was too quick to combat crime by infringing on constitutional rights instead of letting the legislature find other, more appropriate ways to solve the problem.<sup>51</sup>

In much the same fashion, *Herring v. United States*<sup>52</sup> allowed evidence to skirt the exclusionary rule when police relied, in good faith, on an outstanding arrest warrant that did not actually exist.<sup>53</sup> The Court again focused on the same argument that if evidence had to be excluded every time there was a clerical error, too many criminals would go free.<sup>54</sup> In this five-to-four decision, Justice Ginsburg's dissent brought up the majority opinion in *Arizona v. Evans*,<sup>55</sup> holding that one of the purposes for the exclusionary rule's creation was to discourage the police from being careless.<sup>56</sup>

Jumping ahead (only six years) to the Court's 2014 decision in *Riley v. California*<sup>57</sup> that requires police, with a few exceptions, to

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<sup>50</sup> Compare *Leon*, 468 U.S. at 933 (finding that when illegal searches and seizures are conducted the direct consequence of those searches and seizures is that the illegally seized evidence will end up at trial to be used against the defendant), with *Dodge v. United States*, 272 U.S. 530, 532 (1926) (concluding that allowing illegally obtained evidence into the courtroom was only perverting the Fourth Amendment further).

<sup>51</sup> See *Leon*, 468 U.S. at 959 (proposing that instead of infringing on the protections of the Fourth Amendment the government could spend money to build more prisons, better train law enforcement, etc.).

<sup>52</sup> 555 U.S. 135 (2009).

<sup>53</sup> See *id.* at 147-48 (holding that when police did not act with blatant disregard to the constitutional protection of the Fourth Amendment evidence obtained during the unwarranted search would not be excluded); Sherry F. Colb, *How Far Does Police "Good Faith" Go? The Supreme Court Creates Another Exception to The Exclusionary Rule*, FINDLAW (Jan. 21, 2009), archived at <https://perma.cc/2QDY-SUGQ> (revealing that the defendant in *Herring* was arrested, not only, without a warrant, but without probable cause as well, and yet the Court still decided that evidence seized from his arrest was still admissible through the good faith exception to the exclusionary rule).

<sup>54</sup> See *Herring*, 555 U.S. at 148 (reasoning that prosecuting criminals, even though there was a flaw with the warrant, does not create a constitutional violation).

<sup>55</sup> 514 U.S. 1 (1995).

<sup>56</sup> See *Herring*, 555 U.S. at 148 (reiterating the belief that if the courts ignore police error and allow the error to go without reprimand, there is nothing to ensure that police are more careful in the future).

<sup>57</sup> See *Riley v. California*, 134 S. Ct. 2473 (2014).

get a warrant in order to search an arrestee's smart phone.<sup>58</sup> In fact, one of the final lines written by Chief Justice Roberts states, "[o]ur answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant."<sup>59</sup> While the Court seems to pride itself on its defense of the Fourth Amendment, it was silent on the "good faith" exception established in *Leon*.<sup>60</sup> In fact, the unanimous majority failed the Fourth Amendment by writing:

Moreover, even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone. "One well-recognized exception applies when "the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." . . . Such exigencies could include the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury.<sup>61</sup>

While the good faith exception, and other exceptions, to the exclusionary rule are not named specifically, it is blaringly obvious that the Court still feels the need for exceptions to the exclusionary

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<sup>58</sup> *See id.* at 2494 (listing the exceptions that exist for a cell phone search without a warrant, such as when the search could be used to apprehend a fleeing suspect, help someone in need, or prevent the destruction of evidence).

<sup>59</sup> *See id.* at 2495 (implying that, aside from obtaining a warrant, police officers do not have many other options if they would like to search an arrestee's cell phone).

<sup>60</sup> *See id.* (suggesting that a warrantless search that results in the evidence seized being admissible would be the exception, not the rule). Although, nowhere in the majority opinion's discussion of what circumstances may lead to a warrant not being required by the Fourth Amendment, save exigent circumstances, are there any specific exceptions listed that would be excused, leaving lower courts to speculation. *Id.* at 2494.

<sup>61</sup> *See Riley v. California*, 134 S. Ct. at 2494 (first quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011); and then quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)).

rule to exist as these exclusions are mentioned as continuing to be applicable throughout the unanimous *Riley* decision.<sup>62</sup> Because a decision regarding these exceptions to the exclusionary rule did not specifically make it into the majority opinion, courts seem to be in disagreement about whether it is still applicable for smartphone searches.<sup>63</sup>

### III. Premise

The 1980s were a tumultuous time in American history.<sup>64</sup> During this decade, Ronald Reagan was elected President of the United States, and many historians consider his term to have undone the liberal progression the country had seen since the start of the Great Depression.<sup>65</sup> Along with a conservative President, the 1980s

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<sup>62</sup> See *id.* (listing such circumstances as a fleeing suspect, someone in need of medical attention, or the potential of evidence being destroyed as circumstances in which the police may have the ability to search the arrestee's cell phone without a warrant); Michael D. Ricciuti and Kathleen D. Parker, *My Phone is My Castle: Supreme Court Decides That Cell Phones Seized Incident to Arrest Cannot be Subject to Routine Warrantless Searches*, 58 B. B.J. 7, 9 (2014) (verifying that the *Riley* Court did not provide any strict rules when deciding whether police needed a warrant to search an arrestee's cell phone, but that each case would have to be considered individually to make the necessary determination).

<sup>63</sup> See *United States v. Graham*, 796 F.3d 332, 338 (4th Cir. 2015) (affirming the district court's decision to allow evidence based on the "good faith" exception to the exclusionary rule); see also *United States v. Brewer*, 2015 U.S. Dist. LEXIS 62260, 13 (M.D. Pa. 2015) (deciding that even if probable cause was not found for a warrant to issue, the court would have denied the defendant's motion to suppress anyway because the "good faith" exception would have applied). *But see* *United States v. Gary*, 790 F.3d 704, 705 (7th Cir. 2015) (determining that because the police officer's search of the arrestee's cell phone was conducted in 2009, before *Riley*, that the evidence obtained from that search would not be suppressed because the "good faith" exception to the exclusionary rule was still applicable at that time).

<sup>64</sup> See *The 1980s*, HISTORY (last visited Jan. 18, 2016), archived at <https://perma.cc/RYN2-PBS3> (listing, among others, the Cold War, Reaganomics, and the New Right conservative movement as some of the greatest influences of the 1980s in America).

<sup>65</sup> See Gil Troy, *The Age of Reagan*, THE GILDER LEHRMAN INST. AM. HIST. (last visited NOV. 1, 2015), archived at <https://perma.cc/M3TC-LNN7> (discussing how the Reagan administration sought to bring conservative beliefs to Americans on both social and fiscal issues).

saw a politically conservative-leaning Supreme Court as well.<sup>66</sup> The legacy of the Supreme Court of the 1980s includes upholding a law criminalizing homosexual activity,<sup>67</sup> decreasing the privacy rights students have in school,<sup>68</sup> and condoning the use of illegal search warrants.<sup>69</sup>

As a result of the extreme conservativeness of the 1980s Supreme Court, the Fourth Amendment presently functions as a tool that law enforcement uses to decide what search and seizure conduct is considered constitutional rather than a tool to protect the American people's right to privacy as it was originally intended.<sup>70</sup> Forcing the Fourth Amendment to work as a balancing test is a direct violation of what the amendment itself commands.<sup>71</sup> The Fourth Amendment clearly states that unless there is probable cause, warrants will not be granted, and this requirement is not meant to be an algorithm for police to use to determine just how far they can go before their actions

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<sup>66</sup> See *Members of the Supreme Court of the United States*, S. CT. U.S. (Nov. 1, 2015), archived at <http://perma.cc/6JSE-TKVL> (listing the conservative-voting justices that sat on the Supreme Court at some point during the 1980s: Lewis F. Powell, Jr., Sandra Day O'Connor, William H. Rehnquist, Warren Earl Burger, Antonin Scalia, and Anthony M. Kennedy). Not only did President Reagan appoint three of these conservative justices to the Court, but he also elevated William H. Rehnquist to the position of Chief Justice. *Id.*

<sup>67</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 220 (1986) (condoning a Georgia statute outlawing homosexual activity between consenting adults in the privacy of their own home).

<sup>68</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (creating a "reasonableness" standard for schools conducting searches of students, but only defining this reasonable standard so far as to say it requires less suspicion than is required for probable cause).

<sup>69</sup> See *Leon*, 468 U.S. at 926 (deciding that the Fourth Amendment does not require evidence obtained illegally to be suppressed at trial).

<sup>70</sup> See Elizabeth Phillips Marsh, *On Rollercoasters, Submarines, and Judicial Shipwrecks: Acoustic Separation and the Good Faith Exception to the Fourth Amendment Exclusionary Rule*, 1989 U. ILL. L. REV. 941, 945 (1989) (calling the Fourth Amendment a "rule of conduct" by which law enforcement determines whether their actions are permissible under Fourth Amendment requirements); Nathan Freed Wessler, *Search Party: A 30-year-old Loophole Increasingly Gives Police Officers a Pass When They Violate the Fourth Amendment*, SLATE (Oct. 29, 2014), archived at <https://perma.cc/6VQ5-97YC> (listing the many ways that exceptions to the exclusionary rule is detracting from the protections the Fourth Amendment was supposed to offer).

<sup>71</sup> See U.S. CONST. amend. IV (stating "[t]he right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . .").

violate the Constitution.<sup>72</sup> The Fourth Amendment should guarantee that if a warrant issued without probable cause, evidence seized from that search is not admissible.<sup>73</sup> Moreover, the most shocking aspect regarding warrants is that the exclusionary rule, coined in *Weeks*, was the law of the land for almost seventy years, and for almost seventy years, this was the protection Americans believed the Fourth Amendment provided before being overruled and replaced with the idea that the Fourth Amendment protects police officers and the judicial system first, and American citizens second.<sup>74</sup>

The Supreme Court of the United States chose to ignore the Fourth Amendment when it first integrated exceptions to the warrant requirement.<sup>75</sup> The point of having a Constitutional amendment against illegal searches and seizures is not only to protect people from illegal searches in general,<sup>76</sup> but also to make sure that evidence from those searches are not used against parties in court.<sup>77</sup> However,

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<sup>72</sup> See *id.* (inferring that the Founding Fathers did not choose to allow for any exceptions in which a warrant may be issued without probable cause).

<sup>73</sup> See Morgan Cloud, *A Conservative House United: How the Post-Warren Court Dismantled the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 477, 513 (2013) (arguing that a judge would have to suppress any evidence obtained by way of a warrant issued without probable cause if they were to protect the constitutional rights of citizens); see also JEFF WELTY, SEARCH WARRANTS FOR DIGITAL DEVICES 2 (UNC Sch. Gov't 2014) (detailing best practices when obtaining warrants for searches and seizures of digital devices to ensure they are done within the requirements of the Fourth Amendment).

<sup>74</sup> See *Leon*, 468 U.S. at 926 (deciding to modify the *Weeks* decision so that illegally obtained evidence was not automatically disqualified from presentation at trial if it fell under an exception to the rule).

<sup>75</sup> See Gray, *supra* note 24, at 2 (declaring that allowing ways around the exclusionary rule is the exact opposite of protecting against unlawful searches and seizures); see also *Mapp*, 367 U.S. at 655 (holding that “all evidence obtained by searches and seizures in violation of the Constitution is, by the same authority, inadmissible . . .”); Cloud, *supra* note 73, at 512 (arguing that the admittance of illegally obtained evidence shows blatant disregard for the requirements of the Fourth Amendment).

<sup>76</sup> See Cloud, *supra* note 73, at 513 (highlighting the fact that there are two schools of thought when discussing the protections of the Fourth Amendment, and one is the idea that the Fourth Amendment exists simply so that law enforcement does not conduct illegal searches of people and their property).

<sup>77</sup> See Craig M. Bradley, *Is the Exclusionary Rule Dead?*, 102 J. CRIM. L. & CRIMINOLOGY 1, 22-23 (2012) (clarifying that excluding evidence because law enforcement violated a suspect’s constitutional rights is what the Fourth Amendment requires and is not overly prejudicial to the government).

as unconstitutional as allowing the Fourth Amendment to be subverted by exceptions to its requirements may be, it seems as though exceptions to the Fourth Amendment are here to stay.<sup>78</sup> The good faith exception was created in 1984 and is still a valid exception to the warrant requirement of the Fourth Amendment, while other exceptions to the exclusionary rule were also created during this time.<sup>79</sup> Since the Court in *Riley* did not mention the good faith exception, or any other exceptions by name, the legal community can only hope that this exception will not apply to evidence found on smartphones, as futile as hoping may seem.<sup>80</sup>

Unfortunately, even though the Supreme Court did not mention the good faith exception or any other exceptions, specifically, in their *Riley* decision, lower courts are still considering good faith, among other factors, when deciding motions to suppress when evidence is obtained from cell phones without a warrant.<sup>81</sup> The District Court in *Brewer* found a substantial basis, having enough evidence that a magistrate could reasonably conclude that a warrant should issue, for a finding of probable cause that allowed the admission of evidence in that case.<sup>82</sup> Additionally, the Court went out of their way to add that even if there was not a substantial basis, they would admit the evidence pursuant to the good faith exception.<sup>83</sup> Interestingly enough, the only time the Court in *Brewer* cited to the *Riley* decision

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<sup>78</sup> See *Riley*, 134 S. Ct. at 2493 (discussing that even when it comes to cell phones there are still exceptions to searches and seizures conducted illegally).

<sup>79</sup> See *Leon*, 468 U.S. at 926 (deciding that it was unreasonable to exclude evidence from trial when police officers had, in good faith, relied on an invalid warrant to conduct a search and seizure).

<sup>80</sup> See *Riley*, 134 S. Ct. at 2494 (allowing for exceptions to the Fourth Amendment when warrantless cell phone searches take place, but not expressly indicating if all, or only some, of the exceptions apply).

<sup>81</sup> See *United States v. Brewer*, 2015 U.S. Dist. LEXIS 62260, \*14-15 (M.D. Pa. 2015) (denying a motion to suppress because police had good faith in the invalid warrant the evidence obtained from that search would be admissible); Paul M. Ervasti, *Is the Particularity Requirement of the Fourth Amendment Particular Enough for Digital Evidence?*, 2015 ARMY L. 3, 11 (Oct. 2015) (believing that the judicial system should determine whether or not to admit evidence gained from the legal search of a digital device based on how reasonable the search was that the police conducted).

<sup>82</sup> See *Brewer*, 2015 U.S. Dist. LEXIS 62260, at \*14 (confirming that the judge who had issued the search warrant was correct in determining the existence of probable cause with the facts presented).

<sup>83</sup> See *id.* (relying on the good faith exception as a safety net for their decision should a higher court not find that probable cause existed when the warrant issued).

was when it discussed the amount information cell phones can store.<sup>84</sup>

Taking it a step further, the U.S. Court of Appeals for the Eleventh Circuit read *Riley* very liberally and in *United States v. Johnson*,<sup>85</sup> and found that a police officer's search of the defendant's cellphone was completed without a search warrant, and without an exception to the search-warrant requirement, but still found that the District Court did not err in denying the defendant's motion to suppress.<sup>86</sup> The *Johnson* majority opinion seems to imply that if the decision not to suppress the evidence that had been obtained did not offend *Riley*, because the majority believed the cell phone in question to have been abandoned, thereby terminating Fourth Amendment protections, after only three days of the phone being missing, and notwithstanding the fact that the owner made an attempt to retrieve the phone.<sup>87</sup> Unfortunately, like the Courts in *Brewer* and *Johnson*, most courts still rely on exceptions to the exclusionary rule even though doing so completely undermines the Supreme Court's concession that smartphones can be likened to computers in terms of information storage capacity, whereby the good faith exception would not apply.<sup>88</sup>

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<sup>84</sup> See *id.* at \*12-13 (citing *Riley* when discussing the judge who issued the warrant could have reasonably assumed information about the co-conspirator's involvement in the crime because "phones have immense storage capacity, including historic location information").

<sup>85</sup> 806 F.3d 1323 (11th Cir. 2015).

<sup>86</sup> See *id.* at 1337 (finding that the good faith exception applied to the warrantless search of the arrestee's cell phone because the search took place before the Supreme Court decided *Riley*); see also *Commonwealth v. Dorelas*, 473 Mass. 496, 504 (2016) (allowing for a search of the defendant's pictures contained on his cell phone, when the evidence supporting the warrant only discussed communications that would normally be found in text messages or emails).

<sup>87</sup> See *Johnson*, 806 F.3d at 1347 (determining that the search of the arrestee's cell phone was supported by a valid warrant, but even if the search was not legal, the owner had abandoned the phone and therefore, no longer was a warrant needed to be able to search the phone); see also *United States v. Hendley*, 2015 U.S. Dist. LEXIS 162152, \*24 (N.D. Ga. 2015) (permitting the admittance of evidence obtained from a cell phone when the search warrant was specifically issued to search and seize a computer and other related media).

<sup>88</sup> See *Riley*, 134 S. Ct. at 2489 (asserting that cell phones "could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers").



Most recently in February of 2016, the United States judicial system took unprecedented action.<sup>89</sup> In response to the heinous shootings that took place in San Bernardino, California, the Federal Bureau of Investigation (“FBI”) is trying to hack into an iPhone belonging to one of the shooters.<sup>90</sup> The FBI asked Apple to create a hack so that the FBI would be able to search the shooter’s phone, and Apple refused.<sup>91</sup> In a disturbing move, a Judge Magistrate from the Central District of California ordered Apple Inc. to create a hack that would allow the FBI to access a locked iPhone.<sup>92</sup> In a letter to their customers explaining why the company would be disregarding the court’s order, Apple wrote:

Smartphones, led by iPhone, have become an essential part of our lives. People use them to store an incredible amount of personal information, from our private conversations to our photos, our music, our notes, our calendars and contacts, our financial information and health data, even where we have been and where we are going.

All that information needs to be protected from hackers and criminals who want to access it, steal it, and use it without our knowledge or permission. Customers expect Apple and other technology companies to do everything in our power to protect their personal information, and at Apple we are deeply committed to safeguarding their data.

Compromising the security of our personal information can ultimately put our personal safety at risk. That is why encryption has become so important to all of us.

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<sup>89</sup> See Kim Zetter, *Magistrate Orders Apple to Help FBI Hack San Bernardino Shooter’s Phone*, WIRED (Feb. 16, 2016), archived at <https://perma.cc/8EGT-K9VC> (discussing the legal feud arising between the FBI and Apple).

<sup>90</sup> See Zetter, *supra* note 89 (explaining why the FBI would need Apple to hack the phone of one of the San Bernardino shooters).

<sup>91</sup> See Zetter, *supra* note 89 (discussing how the FBI tried to work with Apple directly to create the hack, before asking from help for the judicial system).

<sup>92</sup> See Zetter, *supra* note 89 (disclosing that Magistrate Sheri Pym was responsible for ordering Apple to comply with the FBI’s request).

For many years, we have used encryption to protect our customers' personal data because we believe it's the only way to keep their information safe. We have even put that data out of our own reach, because we believe the contents of your iPhone are none of our business.<sup>93</sup>

Apple opposed this order very strongly, because the company cannot create a hack for only one iPhone as doing so would create a very slippery slope.<sup>94</sup> If Apple creates a hack specifically for this phone—for this specific event—a ripple effect would occur across all iPhones.<sup>95</sup> In light of how courts have been inappropriately interpreting the Fourth Amendment, how is this a good idea when we already cannot trust law enforcement to abide by the Bill of Rights?<sup>96</sup>

#### IV. Analysis

The Supreme Court's notion that the Founding Fathers intended the Fourth Amendment to be subject to exceptions, or did not envision an instance in which an exception to the Fourth Amendment might be needed, is incongruous. Sadly, now this point seems moot because the good faith exception, most notably, was created more

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<sup>93</sup> See Tim Cook, *A Message to Our Customers*, APPLE INC. (Feb. 16, 2016), archived at <https://perma.cc/V6AS-S32X> (expounding on Apple's argument as to why the company does not believe that it should be forced to create a hack for the iPhone).

<sup>94</sup> See Zetter, *supra* note 89 (expressing Apple's reasoning for not wanting to assist the FBI with their request); Alina Selyukh, *Apple-FBI: The Theories and Mysteries of the San Bernardino iPhone*, NAT'L PUB. RADIO (Apr. 16, 2016), archived at <https://perma.cc/PYU9-KUCU> (discussing another case out of a district court in New York in which the government is trying to force Apple to assist them in hacking another iPhone).

<sup>95</sup> See Zetter, *supra* note 89 (confirming that the FBI only wants to load the software hack onto one phone, but the software could be used on any phone).

<sup>96</sup> John Kelly, *Cellphone Data Spying: It's Not Just the NSA*, USA TODAY (last visited Jan. 18, 2016), archived at <https://perma.cc/7KKT-Z6RZ> (revealing "[a]bout one in four law-enforcement agencies have used a tactic known as a 'tower dump,' which gives police data about the identity, activity and location of any phone that connects to the targeted cellphone towers over a set span of time, usually an hour or two"). Additionally, "[a] typical dump covers multiple towers, and wireless providers, and can net information from thousands of phones." *Id.* See also Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 17 (2010) (stressing that the untruths of police officers can strip away the Constitutional rights afforded U.S. citizens).

than thirty years ago and has yet to be overruled.<sup>97</sup> What remains, however, is the question of how far exceptions to the exclusionary rule can reach,<sup>98</sup> considering that its scope has consistently grown wider and wider.<sup>99</sup>

As previously stated, the Fourth Amendment was written into the Constitution because the colonists regularly experienced British troops searching their homes and seizing their property without probable cause.<sup>100</sup> Therefore, it was important for the framers of the Constitution to include an Amendment declaring that “. . . no Warrants shall issue, but upon probable cause.”<sup>101</sup> While that sentence seems objectively unambiguous, the Supreme Court, nevertheless, created exceptions to the Fourth Amendment to bypass this explicit warrant requirement.<sup>102</sup> What makes matters worse, is that rather than making narrowly tailored exceptions to the exclusionary rule, the Court has repeatedly made overbroad decisions that tear the exclusionary rule apart.<sup>103</sup>

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<sup>97</sup> See *Leon*, 468 U.S. at 925-26 (reasoning that a good faith exception would apply to the exclusionary rule if police officers acted in good faith on an invalid warrant issued by a magistrate). Additionally, the Court implied that trained police officers did not need to know what the requirements for probable cause were. *Id.* at 926. See also Colb, *supra* note 53 (discussing the Supreme Court's actions in *Herring*, in which the Court added another warrant failure to the growing list of mistakes that are sanctioned under the good faith exception).

<sup>98</sup> See *Riley*, 134 S. Ct. at 2494 (holding that when applied to the searches and seizures of cell phones, exceptions to the exclusionary rule, like the exception of exigent circumstances, for instance, still apply).

<sup>99</sup> See Wessler, *supra* note 70 (discussing the expansion of the good faith exception since it was created in *Leon* in 1984).

<sup>100</sup> See *Amendment IV: Searches, Seizures, and Warrants*, *supra* note 21 (indicating that during colonial times, courts would issue authorizations for searches of homes and other property without any justification or restriction).

<sup>101</sup> See U.S. CONST. amend. IV (inferring that the desired result of this amendment was to allow the search and seizure of evidence only when there was a warrant issued based on probable cause); see also *Weeks*, 232 U.S. at 398 (disallowing the admission of evidence illegally seized or obtained); *Mapp*, 367 U.S. at 653 (applying the exclusionary rule against state governments in addition to the federal government).

<sup>102</sup> See *Fourth Amendment: III. Warrant Requirement*, *supra* note 22 (listing exigent circumstances, consent to search, plain view, and searches incident to arrest as exceptions to the warrant requirement of the Fourth Amendment).

<sup>103</sup> See *Herring*, 555 U.S. at 147 (allowing evidence to be presented at trial if negligence was the reason a search was conducted based on a faulty warrant); *Davis*, 564 U.S. at 246 (allowing evidence to be presented at trial if police conducted a search that was believed to be valid but later deemed unconstitutional); *Evans*, 514 U.S. at 3-4 (allowing evidence to be presented at trial if a police officer arrested a

One slight glimmer of hope for the Fourth Amendment came with the Supreme Court's decision in *Katz*, which confirmed the notion that citizens of the United States have a reasonable expectation of privacy, granted by the Fourth Amendment.<sup>104</sup> Justice Stewart, writing for the majority, notably rationalized that:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . . [b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.<sup>105</sup>

For example, smartphones, especially those locked with a passcode, certainly fall under that same expectation of privacy.<sup>106</sup> Since smartphones carry an expectation of privacy, and the information within them is intended to be private, a warrant should normally be required for a search of that device.<sup>107</sup>

While it is clear to see why a warrant should be required for searches and seizures when a reasonable expectation of privacy exists, there are various reasons why a seemingly valid warrant may turn out to be invalid.<sup>108</sup> It is for this reason that the decision whether to exclude illegally obtained evidence from trial should be decided

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suspect and made a search on a warrant they believed to be valid, but never actually existed).

<sup>104</sup> See *Katz*, 389 U.S. at 360 (1967) (Harlan, J., concurring) (finding “that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment”).

<sup>105</sup> See *Katz*, 389 U.S. at 351 (asserting that the Fourth Amendment protects people and that places are not subject to Fourth Amendment rights).

<sup>106</sup> See *Riley*, 134 S. Ct. at 2486 (discussing that people go to such great lengths to protect their privacy that they will not only put a passcode on their phone, but also encrypt the data within their phone so that only they are able to access that information).

<sup>107</sup> See *Katz*, 389 U.S. at 362 (declaring searches and seizures of anything in which there resides a reasonable expectation of privacy must be done with a warrant). However, the majority also noted that they would not be so bold as to require warrants for every single instance as an occasion may present itself in which the obtainment of a warrant is unreasonable. *Id.*

<sup>108</sup> See *Welty*, *supra* note 73 (pontificating the different ways police can improperly obtain or misuse warrants when they relate to the search and seizure of digital devices).

based on and individual case-by-case basis.<sup>109</sup> An otherwise valid warrant that is later found to be invalid because of clerical errors is not at all comparable to a warrant that never should have been issued because law enforcement had a lack of probable cause or a warrant that never existed in the first place.<sup>110</sup> Nevertheless, the Court in *Herring* decided to apply the same good faith exception to the exclusionary rule outlined in *Leon*, even though the facts of both cases were strikingly different.<sup>111</sup> The only similarity between the *Herring* and *Leon* cases is that in neither instance was there a valid warrant supported by probable cause to make the arrests constitutional.<sup>112</sup> A warrant that, at its inception, was never supported by probable cause despite the police's good faith belief that probable cause existed, is in direct defiance of the text of the Fourth Amendment that says ". . . no Warrants shall issue without probable cause."<sup>113</sup>

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<sup>109</sup> See *Welty*, *supra* note 73 (listing lack of probable cause, insufficient description of item or place to be searched, failure to obtain permission to test the digital device at an offsite location, giving the request for a search warrant to an inappropriate judicial official, conducting the search within the necessary timeframe after the warrant is executed, etc. as reasons that a warrant may become invalid).

<sup>110</sup> See *Herring*, 555 U.S. at 135 (allowing evidence to be introduced at trial when a warrant police used to conduct their search and seizure was non-existent); *Evans*, 514 U.S. at 4-6 (deciding that a warrant quashed seventeen days before the arrest of the suspect, but relied on for the search and seizure of evidence, was not enough to suppress the evidence obtained); *Leon*, 468 U.S. at 902 (finding that the warrant issued in this case was done so by a magistrate who issued the warrant based on probable cause when there was none). In *Evans*, the Court also found that there was no need to deter magistrates or police officers from acting negligently by suppressing evidence when the warrant was invalid. *Evans*, 514 U.S. at 19. The *Leon* Court believed that allowing evidence from an illegal search and seizure was not, itself, a violation of the Fourth Amendment because the Fourth Amendment is silent regarding what should be done with the evidence obtained because of illegal searches and seizures. *Leon*, 468 U.S. at 906. The *Herring* Court decided that without intentional disregard, by police or magistrates, to falsify a warrant, the exclusionary rule does not apply to evidence gained from these seizures. *Herring*, 555 U.S. at 145.

<sup>111</sup> See *Herring*, 555 U.S. at 137-38 (acknowledging that the warrant in question was recalled five months before the defendant's arrest); *Leon*, 468 U.S. at 901-03 (recognizing that the defendant was arrested based on an affidavit, filed for a warrant, that lacked probable cause).

<sup>112</sup> See *Herring*, 555 U.S. at 137-38 (explaining that there were not any outstanding warrants for the defendant to make his arrest lawful); *Leon*, 468 U.S. at 901-03 (noting that the affidavit requesting an arrest warrant was not supported by probable cause).

<sup>113</sup> See U.S. CONST. amend. IV (stating that a warrant not supported by probable cause is inconsistent with the text of the Fourth Amendment).

However, the *Leon* majority argued that the constitutional issue is not whether evidence gathered from the illegal search should be admitted, but rather the illegal search itself.<sup>114</sup> Justice Brennan's irate dissent, on the other hand, rightly acknowledged that even though:

the Fourth Amendment makes no express provision for the exclusion of evidence secured in violation of its commands . . . many of the Constitution's most vital imperatives are stated in general terms and the task of giving meaning to these precepts is therefore left to subsequent judicial decision making in the context of concrete cases.<sup>115</sup>

Justice Brennan understood that even though the Fourth Amendment did not specifically exclude illegally obtained evidence, this exclusion was strongly implied.<sup>116</sup> The *Leon* majority additionally argued that the purpose of the exclusionary rule was a deterrence for police in hopes that they would tread carefully when conducting searches or seizures.<sup>117</sup> Nevertheless, claiming that the exclusionary rule only serves as a deterrence to law enforcement is still missing the point.<sup>118</sup>

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<sup>114</sup> See *Leon*, 468 U.S. at 906 (reasoning that evidence from illegal searches or seizures should not be so readily suppressed because “[t]he wrong condemned by the Amendment is ‘fully accomplished’ by the unlawful search or seizure itself”).

<sup>115</sup> See *id.* at 932 (Brennan, J., dissenting) (arguing also that “[t]he judiciary is responsible, no less than the executive, for ensuring that constitutional rights are respected”).

<sup>116</sup> See *id.* (Brennan, J., dissenting) (explaining that in many cases the Supreme Court had to read more into the Constitution than what was written down because the Constitution was meant to be a living document).

<sup>117</sup> See *id.* at 916 (citing the exclusionary rule as a deterrence to police officers, but not to judges and magistrates, because there was no reason to believe that judges and magistrates had cause to ignore the requirements of the Fourth Amendment); see also Grunewald, *supra* note 1, at 1173 (noting that the exclusionary rule was the basis for keeping those subjected to unlawful searches and seizures from having their constitutional rights infringed upon any further).

<sup>118</sup> See *Dodge*, 272 U.S. at 532 (explaining that “[i]f the search and seizure are unlawful as invading personal rights secured by the Constitution those rights would be infringed yet further if the evidence were allowed to be used”); *Weeks*, 232 U.S. at 392 (recognizing that the suppression of evidence seized unlawfully was just as important protection of the Fourth Amendment as the protection of citizens from being searched or seized without just cause).

If the exclusionary rule is, in part, used to prevent further violation of the Fourth Amendment, then why were exceptions to this rule created?<sup>119</sup> Until *Riley*, the court was looking at the Constitutional effect of evidence seized from an arrestee's home, car, or their person, but not from a smartphone.<sup>120</sup> Permitting the police to search a person's smartphone, and then admitting the evidence in court, even when the warrant turns out to be invalid cannot stand because of the sheer vastness of information that is readily accessible on such devices, originally intended to be kept private by the phone's owner.<sup>121</sup>

With an ever-increasing number of reasons why a warrant may be invalid, coupled with sensitive, private information kept on smartphones, a more restrictive examination should be required when deciding whether to suppress the evidence obtained illegally, rather than a default reliance on good faith or another exception to the exclusionary rule.<sup>122</sup> The Fourth Amendment was created because of the intrusive invasions of people's homes—a person's private domain—where private information is kept, and yet a device which has the potential to hold more information than what is contained in a household is subject to the same suppression of evidence standards.<sup>123</sup> Because smartphones now have the capability to store massive amounts of information, there must be a better way to protect

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<sup>119</sup> See *Marsh*, *supra* note 70, at 960-61 (speculating that the Court wanted to find a better balance between stopping police from conducting illegal searches and seizures and not letting criminals walk away without being convicted when evidence was found as a result of an illegal search or seizure).

<sup>120</sup> See *Riley*, 134 S. Ct. at 2480-81 (disclosing that police went through the defendant's cell phone which led to the motion to suppress); *Herring*, 555 U.S. at 137 (stating that the inculpatory evidence was found in the defendant's automobile); *Evans*, 514 U.S. at 4 (illustrating that the defendant dropped evidence from his person and additional evidence was found in the defendant's vehicle); *Leon*, 468 U.S. at 902 (discussing that the evidence in question was collected from the defendant's home and automobile).

<sup>121</sup> See *Riley*, 134 S. Ct. at 2485 (finding that the amount of information contained on a cell phone is incomparable to any other searchable item when considering the amount of personal information contained within); see also *Ricciuti & Parker*, *supra* note 62, at 8 (stating that the Court's decision to require warrants in most situations when dealing with cell phones was due to the "privacy issues at stake").

<sup>122</sup> See *Ervasti*, *supra* note 81, at 3 (revealing that in most cases a search of someone's digital device would turn up much more private information than would be found in that same person's home).

<sup>123</sup> See *Riley*, 134 S. Ct. at 2494 (allowing for exceptions to the exclusionary rule to still apply when it comes to searches of cell phones, but failing to acknowledge exactly which exceptions would still be valid and which would not).

people against unlawful search and seizures when so much private information is at stake.<sup>124</sup>

Illustrating perfectly how much ordinary citizens' private information is in jeopardy, we need look no further than the feud between Apple and the FBI.<sup>125</sup> This showdown was thankfully resolved when the FBI found a way to hack into the phone in question without help from the tech giant, but the matter still raises extremely important questions about privacy in the United States.<sup>126</sup> The fact that a United States District Court ordered a private company to create a hack that would allow anyone with the hack to access any iPhone, anywhere in the world, shows just how little value the judiciary gives the Fourth Amendment.<sup>127</sup> The FBI certainly did not have probable cause, a warrant, or any exigent circumstances that would support their searching every single iPhone for information, and yet a court handed down an order that would have allowed the FBI to accomplish just that.<sup>128</sup> Many supporters of the court order argued that the FBI only wanted the hack to search one iPhone, but the ramifications of what could happen with this hack are undeniable.<sup>129</sup> With each passing day, it is becoming more and more blatant that a definitive ruling from the Supreme Court of the United States, dictating the express protections offered by the Fourth Amendment, and when exactly a warrant shall and shall not be required, is crucial.<sup>130</sup>

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<sup>124</sup> See *Ervasti, supra* note 81, at 11 (discussing the courts' inability to find a way that protects citizens from unwarranted searches and seizures of digital data, but not yet having a solution that will actually work); Kelly, *supra* note 96 (revealing that police are searching the data on people's cell phones, without a warrant, leaving the population unaware of what is going on).

<sup>125</sup> See Zetter, *supra* note 89 (explaining that the effect of Apple's hack, if created, would be detrimental as it could compromise the privacy of all people using iPhones).

<sup>126</sup> See Selyukh, *supra* note 94 (revealing that there is no confirmation as to how the FBI hacked the iPhone in question).

<sup>127</sup> See Zetter, *supra* note 89 (indicating that Magistrate Pym was aware that what she was ordering Apple to do could be used to access all Apple devices, not just the one iPhone in question).

<sup>128</sup> See Zetter, *supra* note 89 (discussing Apple's concern that the FBI would no longer need to get a warrant to search someone's phone, they could simply use the hack Apple was ordered to create).

<sup>129</sup> See Zetter, *supra* note 89 (implying that the government presented their case in such a way that focused on the FBI only using the hack to unlock one specific iPhone).

<sup>130</sup> See Zetter, *supra* note 89 (quoting Kevin Bankston, the director of New America's Technology Institute as saying "this isn't just about one iPhone, it's about all



The answer to how the judicial system can create a way to deter police, magistrates, and judges from acting negligently, all the while keeping criminals off the streets, is not an easy one.<sup>131</sup> Undoubtedly, the answer is not demanding an outright ban on all evidence seized as a result of a warrantless search.<sup>132</sup> If courts were to ban all evidence obtained because of a warrantless search, the judicial system would lose credibility, as the courts would be seen as letting too many criminals get away without being prosecuted.<sup>133</sup> Admittedly, there are a few circumstances in which it may be appropriate for a police officer to search or seize an arrestee's smartphone without a warrant.<sup>134</sup> The Supreme Court, however, must define these exceptions explicitly rather than let lower courts, and potentially even

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of our software and all of our digital devices, and if this precedent gets set it will spell digital disaster for the trustworthiness of everyone's computers and mobile phones").

<sup>131</sup> See *Ervasti*, *supra* note 81, at 11 (inferring that there is no precedent for the courts to follow concerning the best way to determine whether to suppress or allow evidence gathered for an illegal search or seizure); *Wilson*, *supra* note 96, at 6 (illustrating how police have been known to lie during motions to suppress because they know that it is in their best interest if the motion to suppress is denied and the evidence admitted at trial).

<sup>132</sup> See *Ellis*, *supra* note 9, at 500 (believing that an outright ban on evidence obtained without a warrant is what is required by the Fourth Amendment).

<sup>133</sup> See *Leon*, 468 U.S. at 907-08 (examining the issue with excluding evidence any time it was the product of a warrantless search).

The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern. "Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." *United States v. Payner*, 447 U.S. 727, 734 (1980). An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences because of favorable plea bargains. Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system. *Stone v. Powell*, 428 U.S., at 490.

*Id.*

<sup>134</sup> See *Riley*, 134 S. Ct. at 2487 (conceding that if the police are confronted with a "now or never situation" they would most likely be acting within the confines of the Constitution if they searched a digital device without a warrant). *But see Riley*,

their own Court, speculate as to whether or not evidence deserves suppression.<sup>135</sup>

## V. Conclusion

There is simply too much at stake, namely the elimination of the protections offered by the Fourth Amendment, to allow courts to hear suppression motions and blindly decide whether an exception to the exclusionary rule applies to the search or seizure of a smartphone. The Supreme Court should be enforcing the protections of the Fourth Amendment as it applies to digital devices, and unambiguously state which warrantless search exceptions align with the Constitution; there should not be many. As the use of smartphones continues to grow, the issue of whether a search or seizure was constitutional will proportionally grow until the Supreme Court draws a clearer picture of the constraints that in place to ensure that Fourth Amendment protections are afforded to all citizens.

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134 S. Ct. at 2485 (holding that police safety was not a reason police could search a digital device without a warrant because data on a digital device cannot harm police officers as the government argued). The Court expounded on this further and said that “[l]aw enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case.” *Id.*

<sup>135</sup> See *Johnson*, 806 F.3d at 1353 (Martin, J., dissenting) (speculating as to whether police needed a warrant to search a cell phone that the police believed to have been abandoned by its owner); *Hendley*, 2015 U.S. Dist. LEXIS 162152, at \*10 (deciding whether a warrant that allowed for the search of a home and seizure of a computer also authorized the police to search the data found within the computer they were authorized to seize); *Dorelas*, 473 Mass. at 497 (believing it reasonable for a warranted search of an arrestee’s cell phone to include not only the texts and contact list, but photographs contained within the cell phone as well).