A NEW DIGITAL DIVIDE?
CONSIDERING THE IMPLICATIONS OF *RILEY V. CALIFORNIA*'S WARRANT MANDATE FOR CELL PHONE SEARCHES

GEORGE M. DERY III AND KEVIN MEEHAN*

This Article analyzes Riley v. California, *in which the Supreme Court considered whether the police could, without a warrant, search digital information on a cell phone seized from an arrestee. The* Riley *Court, in refusing to extend its search incident to arrest exception to these searches, ruled that the Fourth Amendment required police obtain a warrant to lawfully search cell phones upon arrest. This work examines the implications of* Riley*'s ruling. This Article asserts that, in justifying its mandate that cell phone searches be supported by a warrant,* Riley *created two categories of Fourth Amendment "effects": "physical objects" and devices holding "digital data." Further,* Riley*'s characterization of cell phone privacy as equivalent to or greater than the privacy of the home dramatically expanded the "core" of Fourth Amendment privacy. Finally,* Riley*'s "cloud computing" analysis turned the Fourth Amendment's third-party doctrine on its head. As discussed in this work, each one of these significant developments could create uncertainty for courts and police.*

* George M. Dery III: Professor, California State University Fullerton, Division of Politics, Administration, and Justice; Former Deputy District Attorney, Los Angeles, California; J.D., 1987, Loyola Law School, Los Angeles, California; B.A., 1983, University of California Los Angeles.

Kevin Meehan: Associate Professor, California State University Fullerton, Division of Politics, Administration, and Justice; Former Executive Director, Orange County Youth & Family Services, Santa Ana, California; Ph.D., School of Social Ecology, University of California, Irvine, 1994; B.S., Sociology, Virginia Tech, 1972.

INTRODUCTION

When does a difference in degree become a difference in kind? What amount of information must an object contain to cross the Fourth Amendment's threshold of privacy, requiring it to be protected by a warrant?[1] If an object contains thousands of words and dozens of pictures, is it a constitutional cipher compared to an item that can hold millions of words and thousands of images? Suppose an officer arrests an individual and finds two items on the arrestee's person. One is a brand new iPod or iPhone, containing nothing but a digitized version of a single novella, John Steinbeck's *The Pearl*. The other object is a paperback book of Leo Tolstoy's *War and Peace*, the pages of which have been lovingly annotated by the personal notes of its reader. Is one book more deserving of privacy than the other? The Supreme Court thinks so, and its answer focuses on the media that present the information. In the recent case of *Riley v. California*, the Court found itself drawing a Fourth Amendment line between what it called "physical objects,"[2] such as the paperback, and "digital data,"[3] such as the iPhone.

The Court, noting that cell phones have become a pervasive part of so many aspects of our lives,[4] determined that these digital items can no longer be equated with traditional Fourth Amendment effects—"a cigarette pack, a wallet, or a purse."[5] Instead of being merely "physical objects," cell phones are a different class of effect—vessels of "digital data" needing their own Fourth Amendment protection.[6] These digital devices are so distinct that they possess privacy interests equivalent to, or even exceeding, the home,[7] which itself was once viewed as the Fourth Amendment's "core."[8] Cell phones offer such a difference from traditional physical objects that they "strain" the Court's Fourth Amendment definition of a "container."[9] Since cell phones take "advantage of 'cloud computing,'" where information is stored on "remote servers," privacy issues become all the more complex.[10] Phone users themselves might not know precisely where their intimate information is stored.[11] The enormous differences in cell phones—the vast personal

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1 U.S. CONST. amend. IV. The Fourth Amendment provides:

> 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.

2 Riley v. California, 134 S. Ct. 2473, 2484 (2014).

3 *Id.* at 2485.

4 *Id.* at 2489.

5 *Id.* at 2489-90.

6 *Id.* at 2489.

7 *Id.* at 2491.

8 Silverman v. United States, 365 U.S. 505, 511 (1961).

9 *Riley*, 134 S. Ct. at 2491.

10 *Id.*

11 *Id.*

data they store, their equivalence to a private residence which one can carry in a pocket, the confusion about where their private information actually resides—persuaded the Court in *Riley* to treat these digital devices differently from the usual items found upon an arrestee.[12] Digital data is so different that an officer's search for it, even incident to a lawful arrest, now requires a separate warrant.[13]

Each contention *Riley* offered in support of cell phone privacy could have significant implications for Fourth Amendment doctrine. Part I of this Article reviews the Court's warrant mandate and the "search incident to arrest" exception to this requirement. Part II considers the facts and ruling of *Riley*. Part III critically examines the potential impact of the rationales the Court offered to support Fourth Amendment privacy of cell phones. By distinguishing "digital data" from mere "physical items,"[14] *Riley* effectively created two classes of effects: the first kind—the traditional object—being vulnerable to search incident to arrest without a warrant, and the second kind—the digital device—requiring a warrant before any such search. This division of effects into two constitutional categories could have unforeseen consequences. Furthermore, equating cell phone privacy with the intimacies of the home could cause unintended results. The expansion of privacy rights for data devices used everywhere could later result in pressure on the Court to limit Fourth Amendment protection over cell phones, which could then result in eroding the privacy of homes, which *Riley* equates with phones. Finally, *Riley*'s acceptance of privacy interests even when information is shared in cloud computing could cause the third-party doctrine to be turned on its head, causing an extension, rather than a restriction of Fourth Amendment protections.

I. BACKGROUND

A. The Warrant Mandate

Although it flatly commanded police to "get a warrant," the *Riley* Court evinced ambivalence about the warrant requirement.[15] On one hand, *Riley* knew that the need for proper warrants was a source of our Founders' outrage in the American Revolution, noting that opposition to general searches gave birth to "the child Independence."[16] The Court also noted the importance of having "a neutral and detached magistrate" review a warrant application, for such an official operated as a buffer between the zealous officer and the citizen.[17] *Riley*, therefore, only tolerated a warrantless search if it fell within "a specific exception to the warrant requirement."[18] On the other hand, the Court tempered these assertions by voicing doubts about the centrality of warrants in Fourth Amendment analysis. Rather than deeming the warrant requirement a general

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[12] *Id.* at 2494-95.

[13] *Id.* at 2495.

[14] *Id.* at 2489.

[15] *Id.* at 2495.

[16] *Id.* at 2494 (quoting 10 CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS 248 (Boston, Little, Brown & Co. 1856)).

[17] *Id.* at 2482 (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).

[18] *Id.* (citing Kentucky v. King, 131 S. Ct. 1849, 1856 (2011)).

rule for all searches, *Riley* saw it as only a mandate for a particular class of searches involving law enforcement pursuit of "evidence of criminal wrongdoing."[19] Further, even though it noted that search incident to arrest was long seen as "an exception to the warrant requirement,"[20] the Court characterized such a label as a "misnomer" because "warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant."[21] Finally, it determined that the Fourth Amendment's "ultimate touchstone" was not the protection provided by a warrant but "reasonableness" itself.[22]

Riley's equivocation about warrants was a microcosm of the Court's internal and ongoing tug of war in interpreting the Fourth Amendment's two clauses: the reasonableness clause, which declares "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and the warrant clause, which provides, "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."[23] The Fourth Amendment itself offers little guidance about the relationship between the reasonableness command and the recipe for a warrant, for it connects the two clauses with the ambiguous conjunction "and."[24] The Court itself has recognized this uncertainty, acknowledging that, "the text of the Fourth Amendment does not specify when a search warrant must be obtained."[25]

The Court identified warrants as a bulwark against arbitrary power only a few decades after the Civil War in *Boyd v. United States*.[26] In *Boyd*, the Court warned against leaving "the liberty of every man in the hands of every petty officer."[27] Later, at the beginning of the twentieth century, the Court, in *Weeks v. United States*, decried a warrantless search, warning:

> 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.[28]

By 1925, the Court, in *Agnello v. United States*, declared a warrantless search to be "in

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19 *Id.* (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995)).

20 *Id.*

21 *Id.* (citing 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 5.2(b), at 132 & n.15 (5th ed. 2012)).

22 *Id.* (citing Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

23 U.S. CONST. amend. IV.

24 *Id.* For an informative discussion of the Court's interpretation of these two clauses, see Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985).

25 Kentucky v. King, 131 S. Ct. 1849, 1856 (2011).

26 Boyd v. United States, 116 U.S. 616, 625 (1886). *Riley* itself relied on *Boyd* when it mentioned James Otis's and John Adams's resistance to writs of assistance. *Riley*, 134 S. Ct. at 2494.

27 *Boyd*, 116 U.S. at 625.

28 Weeks v. United States, 232 U.S. 383, 393 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

itself unreasonable and abhorrent to our laws."[29] The Court required judicial approval through the warrant process because it distrusted officers who were subject, in the daily exercise of their duties, to the emotional pressures and distorting incentives of pursuing criminals.[30] The Court, in *United States v. U.S. District Court for the Eastern District of Michigan*, traced the doubts about the objectivity of those fighting crime on the front lines to Lord Mansfield in England of 1765.[31] The Court noted:

> Over two centuries ago, Lord Mansfield held that common-law principles prohibited warrants that ordered the arrest of unnamed individuals who the officer might conclude were guilty of seditious libel. "It is not fit," said Mansfield, "that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer."[32]

The law limited the power of officers because "[t]he Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates."[33] This distrust had nothing to do with the individual character of the official in the field. Instead, the concern was based on the role every officer undertook. Further, the Court noted:

> [An officer's] duty and responsibility [was] to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.[34]

Thus, at "the very heart of the Fourth Amendment directive" was a process where an officer and magistrate could work together to decide when a search or seizure was reasonable.[35] The warrant requirement was not meant as some punitive "inconvenience," but "an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly over-zealous executive officers' who are a part of any system of law enforcement."[36] Any officer acting on his or her own was condemned as bypassing "the

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29 Agnello v. United States, 269 U.S. 20, 32 (1925).

30 *See id.*

31 United States v. United States District Court for E. Dist. of Mich., 407 U.S. 297, 316 (1972).

32 *Id.* (quoting Leach v. Three of the King's Messengers, 19 Howell's State Trials 1001, 1027 (1765)).

33 *Id.* at 317.

34 *Id.* (citation omitted).

35 *Id.* at 316 (stating that "a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation").

36 Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971).

safeguards provided by an objective predetermination of probable cause."[37]

It therefore became a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[38] The warrant requirement thus became a "valued part of our constitutional law for decades"[39] and a "basic principle of Fourth Amendment law"[40] that the Court reaffirmed "[t]ime and again."[41] The warrant mandate amounted to the "Court's longstanding understanding of the relationship between the two Clauses of the Fourth Amendment."[42]

The warrant requirement, despite its long tenure, did not go unchallenged. A competing approach, which employed the reasonableness clause without reference to the warrant clause, received sporadic but increasingly frequent mention over the years. The Second Circuit in *United States v. Rabinowitz* questioned the warrant mandate as early as 1949.[43] On appeal, the Supreme Court declared:

> It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against unreasonable searches. . . . The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.[44]

Justice Scalia harkened back to this theme in his concurring opinion in *California v. Acevedo*, a case interpreting the automobile exception to the warrant requirement.[45] Justice Scalia reiterated that, "[t]he Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are 'unreasonable.'"[46] He noted that the language of the Fourth Amendment explicitly limited the use of warrants (allowing only those warrants possessing the ingredients of probable cause, oath or affirmation, and particular description), but did not compel their use.[47] Justice Scalia explained that warrants, instead of being perceived as a protection for the citizen, provided officials who bothered to obtain them

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37 Beck v. Ohio, 379 U.S. 89, 96 (1964).

38 Katz v. United States, 389 U.S. 347, 357 (1967) (footnotes omitted).

39 *Coolidge*, 403 U.S. at 481.

40 Brigham City v. Stuart, 547 U.S. 398, 403 (2006).

41 Minnesota v. Dickerson, 508 U.S. 366, 372 (1993). Rather than a mere formality, the warrant served "a high function." Chimel v. California, 395 U.S. 752, 761 (1969) (quoting McDonald v. United States, 335 U.S. 451, 455) (1948)). *Chimel* was eventually recognized as abrogated in *Davis v. United States*, 131 S. Ct. 2419 (2011).

42 Thompson v. Louisiana, 469 U.S. 17, 20 (1984) (citing *Katz*, 389 U.S. at 357 nn.18-19).

43 United States v. Rabinowitz, 176 F.2d 732 (2d Cir. 1949), *rev'd*, 339 U.S. 56 (1950).

44 United States v. Rabinowitz, 339 U.S. 56, 65-66 (1950), *overruled in part by Chimel*, 395 U.S. 752.

45 California v. Acevedo, 500 U.S. 565 (1991).

46 *Id.* at 581 (Scalia, J., concurring).

47 *See id.*

absolute immunity from personal liability in any later lawsuit over the search.[48] He saw the Court's Fourth Amendment case law as "lurch[ing] back and forth between imposing a categorical warrant requirement and looking to reasonableness alone."[49] While Justice Scalia acknowledged that, "[b]y the late 1960s, the preference for a warrant had won out," he saw this victory as "illusory" because the requirement was riddled with almost twenty exceptions.[50] He urged remedying the problem by a return to the "first principle" of "reasonableness."[51]

Fourth Amendment reasonableness as a standard in its own right percolated into the Court's consciousness. By 2006, the Court, in *Brigham City v. Stuart*, declared "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'"[52] *Stuart*, in which police entered a home after observing a fist fight draw blood, involved the "exigent circumstances" exception to the warrant requirement.[53] The Court reiterated its reasonableness-as-touchstone statement in two more exigent circumstance cases. The first case was *Michigan v. Fisher*, in which police entered a house after coming upon a "smashed" truck in the driveway and a screaming man in the home.[54] The next case, *Kentucky v. King*, involved a warrantless entry by police to prevent the destruction of evidence.[55] The first mention of reasonableness-as-touchstone outside of exigent circumstances occurred in *Fernandez v. California*.[56] *Fernandez* considered whether police could enter a home with the consent of one occupant when another, objecting occupant was absent from the premises.[57] *Fernandez* somewhat marginalized the warrant requirement by noting that "'the text of the Fourth Amendment does not specify when a search warrant must be obtained.'"[58] Thus, when *Riley* itself noted that reasonableness was the Fourth Amendment's "ultimate touchstone,"[59] it was referencing an explicit shift away from the warrant mandate begun eight years earlier.[60]

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[48] *See id.* (citing Wakely v. Hart, 6 Binn. 316, 318 (Pa. 1814)). Justice Scalia explained:

> [T]he warrant was a means of insulating officials from personal liability assessed by colonial juries. An officer who searched or seized without a warrant did so at his own risk; he would be liable for trespass, including exemplary damages, unless the jury found that his action was "reasonable." . . . If, however, the officer acted pursuant to a proper warrant, he would be absolutely immune. . . . By restricting the issuance of warrants, the Framers endeavored to preserve the jury's role in regulating searches and seizures.

Id. at 581-82 (citations omitted).

[49] *Id.* at 582.

[50] *Id.*

[51] *Id.* at 583.

[52] *Brigham City*, 547 U.S. at 403.

[53] *Id.* at 400-02.

[54] Michigan v. Fisher, 558 U.S. 45, 45-46 (2009).

[55] *Kentucky v. King*, 131 S. Ct. at 1853-54.

[56] Fernandez v. California, 134 S. Ct. 1126, 1132 (2014).

[57] *Id.* at 1129-30.

[58] *Id.* at 1132 (quoting *Kentucky v. King*, 131 S. Ct. at 1856).

[59] *Riley*, 134 S. Ct. at 2482.

[60] Having the Fourth Amendment's "touchstone" simply be "reasonableness" raised its own concerns. What was "reasonable" might be founded "on little more than a subjective view regarding the acceptability of certain sorts

B. The Search Incident to Arrest Exception to the Warrant Requirement

The exception proposed to justify the warrantless search in *Riley* was a search incident to arrest.[61] *Riley* noted that the Court first mentioned "search incident to arrest" in dictum in *Weeks v. United States*.[62] Previously, the Court spoke even more plainly, declaring that "[v]irtually all of the statements of this Court affirming the existence of an unqualified authority to search incident to a lawful arrest are dicta."[63] Despite its "sketchy" origins,[64] search incident to arrest has become so robust that, as noted by *Riley*, it is used "with far greater frequency than searches conducted with a warrant."[65]

Despite much effort expended by the Court to clarify the origins and scope of search incident to arrest, questions remain.[66] *Riley* itself demonstrated this; one of the reasons Justice Alito wrote a separate opinion was to express his own views regarding the basis of search incident to arrest.[67] The Court has lamented that a historical review of search incident to arrest has been frustratingly fruitless; "such authorities as exist are sparse" because the early law of arrest was "rough and rude."[68] The Court, in *United States v. Robinson*, interpreted the very lack of authority as evidence of search incident to arrest's validity, for the scarcity of early case law could be "due in part to the fact that the issue was regarded as well settled."[69]

The Court, in *Chimel v. California*, sought to provide a clear and pragmatic rule regarding the scope of search incident to arrest.[70] The *Chimel* Court ruled that "[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape."[71] Such a search was justified for purposes of officer safety.[72] *Chimel* also thought it was "entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in

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of police conduct, and not on considerations relevant to Fourth Amendment interests." *Chimel*, 395 U.S. at 764-65. The conclusion that a search was "reasonable" needed "some criterion of reason." *Id.* at 765. Otherwise, the Court recognized, Fourth Amendment protections "would approach the evaporation point." *Id.*

61 *Riley*, 134 S. Ct. at 2482.

62 *See Weeks*, 232 U.S. at 392.

63 United States v. Robinson, 414 U.S. 218, 230 (1973).

64 *Id.* at 232.

65 *Riley*, 134 S. Ct. at 2482 (citing 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 5.2(b), at 132 & n.15 (5th ed. 2012)).

66 The Court considered the origins of search incident to arrest in *United States v. Robinson*, 414 U.S. at 230. The Court provided a thorough analysis of the scope of search incident to arrest in *Chimel v. California*, 395 U.S. 752.

67 *See Riley*, 134 S. Ct. at 2495-96 (Alito, J., concurring).

68 *Robinson*, 414 U.S. at 230.

69 *Id.* at 233.

70 *See Chimel*, 395 U.S. at 762-63.

71 *Id.* at 763.

72 *See id.*

order to prevent its concealment or destruction."[73] Thus, the Court provided a search right for weapons and for evidence of the crime. *Chimel* then allowed officers to search beyond the arrestee's person to "the area into which an arrestee might reach in order to grab a weapon or evidentiary items."[74] *Chimel*'s designation of boundary "area 'within [the arrestee's] immediate control'" boundary was meant to provide adequate protection and guidance for police.[75]

After *Chimel*, a question persisted about whether the Court's rationales for search incident to arrest—officer safety and preservation of evidence—operated as limits on this warrant exception. While confronting this issue, *Robinson* broke down search incident to arrest down into "two distinct propositions."[76] First, "a search may be made of the *person* of the arrestee by virtue of the lawful arrest."[77] Second, "a search may be made of the area within the control of the arrestee."[78] *Robinson* explained that the search of the "person" and the "area" around the person were to be "treated quite differently."[79] While the second proposition of searching the surrounding area suffered from "differing interpretations," the "unqualified authority"[80] of the first proposition to search the person "has been regarded as settled from its first enunciation."[81]

Robinson next placed search incident to arrest on a foundation independent of the warrant requirement. Rather than being merely an exception to the warrant requirement, search incident to arrest provided officers with "an affirmative authority to search" based on the Fourth Amendment reasonableness requirement.[82] Because the very fact of the lawful arrest established the authority to search, *Robinson* held that "in the case of a lawful custodial arrest[,] a full search of the person is not only an exception to the warrant requirement" but is also a "reasonable" search under the Fourth Amendment.[83] *Robinson* therefore refused to force the government to litigate in either case whether one of *Chimel*'s reasons—officer safety or preservation of evidence—existed for searching a person incident to arrest.[84] Instead, a lawful arrest based on

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[73] *Id.*

[74] *Id.*

[75] *Id. Chimel* cautioned, "[t]here is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." *Id.*

[76] *Robinson*, 414 U.S. at 224.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 224-25.

[81] *Id.* at 224.

[82] *Id.* at 226.

[83] *Id.* at 235.

[84] *See id.* The *Robinson* Court declared:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.

Id.

probable cause was reasonable, and "that intrusion being lawful, a search incident to the arrest requires no additional justification."[85] Thus, while the Court recognized its own warrant requirement, this Fourth Amendment protection seemingly had tenuous control over search incident to arrest after *Robinson*.

II. *RILEY V. CALIFORNIA*

A. The Facts of Riley v. California

On August 22, 2009, San Diego Police Officer Charles Dunnigan pulled over David Riley in his Lexus for driving with expired registration tags.[86] When Dunnigan checked Riley's license, he found it was suspended.[87] Deciding to impound Riley's car, Dunnigan, with the help of a fellow officer, performed an inventory search of the vehicle pursuant to department policy.[88] During this search, the officers found two firearms under the car's hood and arrested Riley for possession of concealed and loaded firearms.[89] Dunnigan searched Riley incident to this arrest and recovered the following items indicating membership in the "Bloods" street gang: a green bandana and a keychain with a "miniature pair of red-and-green Converse shoes."[90] Dunnigan also found a smart phone in Riley's pants pocket and scrolled through its text messages.[91] The officer noticed that some words in text messages and the phone's contact list "normally beginning with the letter 'K' were preceded by the letter 'C.'"[92] Dunnigan believed that this "CK" prefix stood for "'Crip Killers,' a slang term for members of the Bloods gang."[93]

Dunnigan called in Duane Malinowski, a detective in the department's gang suppression team, who arrived at the station about two hours after Riley's arrest.[94] Malinowski reviewed and downloaded content on the phone, including photographs, videos, and phone numbers.[95] In particular, Malinowski noticed videos of street boxing, or sparring,[96] during which someone

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85 *Id.*

86 *Riley*, 134 S. Ct. at 2480; Brief for Petitioner at 4, Riley v. California, 134 S. Ct. 2473 (2014) (No. 13-132) [hereinafter Brief for the Petitioner].

87 Brief for Respondent at 1, Riley v. California, 134 S. Ct. 2473 (2014) (No. 13-132) [hereinafter Brief for the Respondent].

88 Brief for the Petitioner, *supra* note 86, at 4.

89 Brief for the Respondent, *supra* note 87, at 1.

90 *Id.* at 2; Brief for the Petitioner, *supra* note 86, at 5 (noting the recovery of the keychain).

91 Brief for the Respondent, *supra* note 87, at 4-5; Brief for the Respondent, *supra* note 87, at 2. The Court noted that a smart phone is "a cell phone with a broad range of other functions based on advanced computing capability, large storage capacity, and Internet connectivity." *Riley*, 134 S. Ct. at 2480. The phone was a Samsung SPH-M800 Instinct. Brief for the Petitioner, *supra* note 86, at 4-5.

92 Brief for the Petitioner, *supra* note 86, at 5.

93 *Riley*, 134 S. Ct. at 2480; Brief for the Petitioner, *supra* note 86, at 5.

94 Brief for the Petitioner, *supra* note 86, at 5; Brief for the Respondent, *supra* note 87, at 2.

95 Brief for the Petitioner, *supra* note 86, at 5-6 (citation omitted).

96 *Id.* at 6.

yelled encouragement "using the moniker 'Blood.'"[97] Malinowski also noticed photos of Riley making gang gestures in front of a red Oldsmobile police suspected had been involved in a recent shooting.[98] Authorities ultimately charged Riley "in connection with that earlier shooting, with firing at an occupied vehicle, assault with a semiautomatic firearm, and attempted murder."[99] The government also added gang allegations that could enhance Riley's sentence.[100] When Riley urged that the searches of his phone violated his Fourth Amendment rights, the trial court rejected his contentions, allowing police to testify about the photographs and videos they had found.[101] Upon conviction, Riley was sentenced to fifteen years to life in prison.[102]

B. The Facts of United States v. Wurie

United States v. Wurie was the companion case that the Court decided with *Riley*.[103] In *Wurie*, on September 5, 2007, Sergeant Detective Paul Murphy, a supervisor of a drug control unit in South Boston, was patrolling in an unmarked vehicle.[104] Around 6:45 p.m., Murphy observed Brima Wurie make an apparent drug sale while driving his buyer in a Nissan Altima sedan.[105] After the buyer, Fred Wade, left Wurie's vehicle, Murphy and another officer approached Wade, recovered from him two "8-balls" of crack cocaine, and learned from him that the seller lived in South Boston and generally sold crack cocaine in "quantities no smaller than an 8-ball."[106] Murphy radioed this information to Officer Steven Smigliani, who then arrested Wurie for distributing cocaine.[107]

At the station, police seized from Wurie "two cell phones, a key ring with keys, and $1,275 in cash."[108] Shortly after Wurie arrived at the station, officers noticed that one of Wurie's phones[109] was repeatedly receiving calls from "a source identified as 'my house' on the phone's external screen."[110] The officers opened the phone, seeing "a photograph of a woman and a baby

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97 *Riley*, 134 S. Ct. at 2481.

98 Police believed the car had been involved in a shooting a few weeks earlier. *Id.* (citation omitted); Brief for the Petitioner, *supra* note 86, at 6.

99 *Riley*, 134 S. Ct. at 2481.

100 *Id.*

101 *Id.*

102 *Id.*

103 *Wurie* originated in the U.S. District Court for the District of Massachusetts. *See* United States v. Wurie, 612 F. Supp. 2d. 104 (D. Mass. 2009). After the case was reversed and remanded by the First Circuit, 728 F.3d 1 (1st Cir. 2013), the Supreme Court granted certiorari in 2014. *See* 134 S. Ct. 999 (2014). The case was decided simultaneously with *Riley v. California*, 134 S. Ct. 2473 (2014).

104 *Wurie*, 612 F. Supp. 2d. at 106.

105 *Id.*

106 *Id.* An "8-ball" is 3.5 grams of rock cocaine. *Id.*

107 *Id.*

108 *Id.*

109 The Court of Appeals identified the phone as a gray Verizon LG phone. *Wurie*, 728 F.3d at 2.

110 *Riley*, 134 S. Ct. at 2481.

set as the phone's wallpaper."[111] Officers then accessed the phone log and learned the phone number attached to the "my house" label."[112] Police then used an online phone directory, "Any Who," to trace the number to an apartment in South Boston.[113]

Police went to the address linked to the phone number, finding the name "Wurie" on one of the apartment mailboxes.[114] Seeing a woman resembling the photograph on Wurie's phone through the window, officers "entered the apartment to 'freeze' it" while they sought a search warrant.[115] A later execution of the warrant recovered "215 grams of crack cocaine, marijuana, drug paraphernalia, a firearm and ammunition, and cash."[116] A grand jury indicted Wurie for felony possession of a firearm and ammunition, distribution of cocaine base within one thousand feet of a school, and possession of crack cocaine with intent to distribute.[117] The district court denied Wurie's motion to suppress evidence based on an unconstitutional search of his cell phone.[118] Wurie was convicted and sentenced to 262 months in prison.[119]

C. The Court's Opinion

The Court, in an opinion written by Chief Justice Roberts, framed the issue in *Riley* as "whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested."[120] Although *Riley* analyzed search incident to arrest by reviewing what it called the "search incident to arrest trilogy"[121] of *Chimel*, *Robinson*, and *Arizona v. Gant*,[122] its primary focus was on the implications of smart phone technology.[123] The Court saw "modern cell phones" as "such a pervasive and insistent part of daily life" that a visitor from Mars would mistakenly believe them "an important feature of human anatomy."[124] Smart phones had outstripped Court precedent, for even the relatively recent technology at issue in *Chimel* and *Robinson* had become obsolete.[125]

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111 *Id.*; *Wurie*, 612 F. Supp. 2d. at 106.

112 *Riley*, 134 S. Ct. at 2481.

113 *Id.*; *Wurie*, 612 F. Supp. 2d. at 106-07.

114 *Riley*, 134 S. Ct. at 2481; *Wurie*, 612 F. Supp. 2d. at 107.

115 *Riley*, 134 S. Ct. at 2481; *Wurie*, 612 F. Supp. 2d. at 107.

116 *Riley*, 134 S. Ct. at 2481.

117 *Wurie*, 612 F. Supp. 2d. at 105.

118 *Riley*, 134 S. Ct. at 2482.

119 *Id.*

120 *Id.* at 2480.

121 *Id.* at 2484.

122 Arizona v. Gant, 556 U.S. 332 (2009) (focusing on the scope of search incident to arrest in the context of vehicle searches).

123 *Riley*, 134 S. Ct. at 2484.

124 *Id.*

125 The Court declared, "[b]oth [Riley's and Wurie's] phones are based on technology nearly inconceivable just a few decades ago, when *Chimel* and *Robinson* were decided." *Id.*

Riley thus determined that search incident to arrest had to be reassessed with reference to smart phone technology. While *Robinson*'s categorical rule allowing searches upon every lawful custodial arrest struck the "appropriate balance in the context of physical objects," its rationales lost logical force with respect to the "digital content on cell phones."[126] The government's interests that *Robinson* had deemed "present in all custodial arrests"—the risks of harm to officers and of destruction of evidence—simply did not exist with "digital data."[127] *Riley* also reconsidered *Robinson*'s rule from the other side of the balance: the arrestee's privacy interests. *Robinson* had regarded an arrestee's privacy as "significantly diminished by the fact of the arrest itself"[128] because "an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person."[129] However, the Court in *Riley* determined that a cell phone search placing "vast quantities of personal information literally in the hands of individuals" bore "little resemblance to the type of brief physical search considered in *Robinson*."[130]

Riley saw the advent of cell phone technology as necessitating limits on *Robinson*'s search incident to arrest rationale.[131] The Court, therefore, held that officers must generally secure a warrant before conducting a search of cell phones.[132] With all that cell phones "contain" and all they "reveal," they hold for many Americans, the very "'privacies of life.'"[133] Invoking the privacy protection for which the Founders fought, *Riley* ruled that police seeking to search digital cell phone data had no choice but to "get a warrant."[134]

III. THE IMPLICATIONS OF *RILEY*'S REASONING

A. In Justifying the Warrant Requirement for Cell Phone Searches, the Court Created a Constitutional Distinction Between Two Kinds of Effects: "Physical Objects" and "Digital" Data

Riley viewed the collection, storage, and use of digital data on cell phones as a constitutional game-changer. When the United States attempted to equate searches of "physical items" and searches of cell phone data, the Court scoffed that the government was essentially likening the Pony Express to the Apollo Space Program,[135] because cell phones implicated "privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse."[136] *Riley* therefore explicitly ruled out any analogies to the cell phone's "pre-digital

126 *Id.*

127 *Id.* at 2484-85.

128 *Id.* at 2485.

129 *Id.* at 2488.

130 *Id.* at 2485.

131 *Id.*

132 *Id.* (citation omitted).

133 *Id.* at 2494-95 (quoting *Boyd*, 116 U.S. at 625).

134 *Id.* at 2495.

135 *Id.* at 2488 (declaring that the government's position was "like saying a ride on horseback is materially indistinguishable from a flight to the moon").

136 *Id.* at 2488-89.

counterpart"[137] by insisting that any extension of earlier reasoning "to digital data has to rest on its own bottom."[138]

This digital divide made the once-venerated precedent cases, *Chimel* and *Robinson*, effectively obsolete for an entire class of Fourth Amendment effects. Riley's smart phone "was unheard of ten years ago" and even Wurie's "less sophisticated" flip phone was only a fifteen-year-old technology at the time.[139] Wurie's phone, so outdated that it had "faded in popularity," still involved technology "nearly inconceivable" to the Court that decided *Chimel* and *Robinson*.[140] *Robinson* had confidently deemed that every arrest posed risks to officer safety and preservation of evidence,[141] while the arrest itself "significantly diminished" any arrestee's privacy interests.[142] Neither of *Robinson*'s suppositions survived the invention of the cell phone. It was impossible to use a phone's digital data as a weapon against an officer.[143] A cell phone itself could only be dangerous if it were fashioned into something lethal by, for example, a "razor blade hidden between the phone and its case."[144] In contrast, any "unknown physical object,"[145] even a crumpled cigarette pack,[146] could "always pose risks, no matter how slight."[147] *Riley* here used absolutes: a physical object "always" posed risks while "[n]o such unknowns exist[ed] with respect to digital data."[148]

As for preventing the destruction of evidence, both Riley and Wurie conceded that officers could have "seized and secured their cell phones" without a warrant to preserve evidence.[149] The Court therefore noted that once officers had the phone, there was "no longer any risk that the arrestee himself would be able to delete incriminating data from the phone."[150] Should officers have "specific concerns about the potential loss of evidence in a particular case," such as an attempt to remotely wipe the device, they could justify their warrantless search on the independent basis of exigent circumstances.[151] For government interests in search incident to arrest, *Riley* thus drew a bright and categorical line between the physical and digital worlds.

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137 *Id.* at 2493.

138 *Id.* at 2489.

139 *Id.* at 2484.

140 *Id.*

141 *Id.* at 2484-85.

142 *Id.* at 2485.

143 *Riley* flatly declared, "[d]igital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape." *Id.*

144 *Id.*

145 *Id.*

146 *Robinson*, 414 U.S. at 223.

147 *Riley*, 134 S. Ct. at 2485.

148 *Id.*

149 *Id.* at 2486.

150 *Id.*

151 *Id.* at 2487. The Court found the exigent circumstances warrant exception to be a "more targeted way[]" to address the concern of evidence destruction. *Id.* at 2487.

Here, *Riley* was aware of its departure from *Robinson*. The Court noted that *Robinson* had admonished "that searches of a person incident to arrest, 'while based upon the need to disarm and to discover evidence,' are reasonable regardless of 'the probability in a particular arrest situation that weapons or evidence would in fact be found.'"[152] *Riley*, however, insisted on considering the risks to officers and evidence with this particular category of effects—cell phones—because a "mechanical application of *Robinson*" could "untether" search incident to arrest from its underlying justifications.[153] *Riley*'s break with *Robinson*, however, might have been deeper than the Court realized. *Robinson* had elevated search incident to arrest to something more than a mere exception to the warrant requirement by independently basing an "authority to search" an arrestee's person upon the "fact of" a lawful arrest.[154] By mandating a warrant for the search of a cell phone found on an arrestee's person, *Riley* brought a category of objects—digital devices—under the warrant requirement's wing. Thus, *Robinson*'s assertion that search incident to arrest of an arrestee's person is a reasonable search regardless of the Warrant Clause is simply no longer good law for cell phones.[155]

Riley continued to scrutinize the facts of the particular case when assessing the interests of the individual implicated by a cell phone search incident to arrest. While *Robinson* established that arrestees have a diminished privacy expectation in physical objects,[156] *Riley* determined that privacy expectations in digital data added up to "gigabytes," which translated into "millions of pages of text, thousands of pictures, or hundreds of videos"[157] which go "far beyond" any privacy arrestees have in their pockets.[158] Cell phones are fundamentally different, "in both a quantitative and qualitative sense," from other objects officers might find on an arrestee's person during a search incident to arrest.[159] Quantitatively speaking, cell phones possess an "immense storage capacity" which enables a searcher to reconstruct the "sum of an individual's private life."[160] Qualitatively speaking, a phone gathers together in one device "many distinct types of information."[161] The Court reasoned that the "term 'cell phone' is itself misleading" because these devices actually are more akin to "minicomputers" that "could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers."[162] Even the cheapest twenty dollar cell phone, the Court cautioned, "might hold photographs, pictures, messages, test messages, Internet browsing history, a calendar, a thousand-

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152 *Id.* at 2485 (quoting *Robinson*, 414 U.S. at 235).

153 *Id.* at 2484-2485 (citing *Gant*, 556 U.S. 343).

154 *Robinson*, 414 U.S. at 235. In *Riley*, the search of the phone was a continuation of a search of the arrestee's person because Officer Dunnigan had recovered the smart phone from Riley's pocket. *Riley*, 134 S. Ct. at 2480. Similarly, the cigarette packet recovered by the officer in *Robinson* was located in the left breast pocket of the arrestee's coat during a search of the person. *Robinson*, 414 U.S. at 223.

155 *See Robinson*, 414 U.S. at 235.

156 *Riley*, 134 S. Ct. at 2488.

157 *Id.* at 2489.

158 *Id.* at 2488-89.

159 *Id.* at 2489.

160 *Id.*

161 *Id.*

162 *Id.*

entry phone book, and so on."[163]

Further, the "pervasiveness" of cell phones distinguishes them from traditional physical records, for they have become a constant part of people's lives.[164] The Court reported that "nearly three-quarters of smart phone users report being within five feet of their phones most of the time," while twelve percent admitted to using their phones in the shower.[165] Before the "digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day," and as a result, police searches of personal items on an arrestee amounted to a limited investigation.[166] Now, with most cell phone owners keeping a digital record of "nearly every aspect of their lives," government intrusion into this digital realm constitutes an entirely different level of invasion.[167] Concerning privacy, *Riley* not only draws a broad boundary between physical items and digital data, but also warns that the boundary could become even wider because the Court has indicated that it "expect[s] that the gulf between physical practicability and digital capacity will only continue to widen in the future."[168]

Riley's concern for individual interests is genuinely significant, for it contrasts sharply with the Court's prior pronouncements on personal privacy. In *Skinner v. Railway Labor Executives' Ass'n*, the Court considered the privacy implications involved in the biological testing (such as urinalysis) of railroad employees.[169] Even though it acknowledged that urine tests required "employees to perform an excretory function traditionally shielded by great privacy,"[170] the *Skinner* Court concluded that the biological sampling posed "only limited threats to the justifiable expectations of privacy of covered employees."[171] In *Florence v. Board of Chosen Freeholders*, the Court considered the constitutionality of a government order that each jail detainee submit to a "close visual inspection"[172] where an individual would strip off his clothing and "open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals" while deputies looked "for scars, marks, gang tattoos, and contraband."[173] After focusing almost solely on the government's interests rather than those of the individual, the *Florence* Court determined that the strip searches did not violate the Fourth Amendment privacy of the detainees.[174] In *Maryland v. King*, the Court considered whether the Fourth Amendment "prohibits the collection and analysis of a DNA sample from persons arrested, but not yet convicted, on felony charges."[175]

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163 *Id.*

164 *Id.* at 2490.

165 *Id.*

166 *Id.*

167 *Id.*

168 *Id.* at 2489.

169 Skinner v. Ry. Labor Execs' Ass'n, 489 U.S. 602, 626 (1988).

170 *Id.*

171 *Id.* at 628.

172 Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1513 (2012).

173 *Id.* at 1514.

174 *Id.* at 1523.

175 Maryland v. King, 133 S. Ct. 1958, 1966 (2013).

The *King* Court deemed the DNA sampling to be only a "minimal"[176] and "minor" intrusion,[177] despite Justice Scalia's doubt "that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection."[178] Curiously, *Riley* required a warrant for an official to scroll through a cell phone while these earlier cases required no warrants for mandatory urinalysis, strip searches, or collection of DNA from a body orifice. While the Court will protect your cell phone's wallpaper, it will not step in to prevent an individual from being forced to perform an excretory function[179] or from being "required to lift his genitals, turn around, and cough in a squatting position."[180]

It must be noted that *Skinner*, *Florence*, and *King* all involved situations where government interests were heightened. *Skinner* involved "special needs beyond the normal need for law enforcement" because the biological tests were administered in an effort to promote railway safety.[181] The *Florence* Court understood the great responsibility corrections officials have in ensuring "that jails are not made less secure by reason of what new detainees may carry in on their bodies."[182] *King* noted that the government had to know "who has been arrested and who is being tried."[183] Yet *Riley* was able to value individual privacy even in the context of increased danger to police during arrest. *Robinson* had declared:

> It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from a typical Terry-type stop.[184]

Arrests must therefore be particularly hazardous, considering that in the less dangerous *Terry* stop, "the answer to the police officer may be a bullet."[185] Further, "American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded."[186] Still, even with the dangers inherent in arrests, the Court changed course to protect a new class of item—the cell phone containing digital data.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

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176 *Id.* at 1977.

177 *Id.* at 1980.

178 *Id.* at 1989 (Scalia, J., dissenting).

179 *Skinner*, 489 U.S. at 626.

180 *Florence*, 132 S. Ct. at 1514.

181 *Skinner*, 489 U.S. at 619 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)) (internal quotation marks omitted).

182 *Florence*, 132 S. Ct. at 1513.

183 *Maryland v. King*, 133 S. Ct. at 1971 (internal quotation marks omitted) (quoting Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177, 191 (2004)) (internal quotation marks omitted).

184 *Robinson*, 414 U.S. at 234-35.

185 Terry v. Ohio, 392 U.S. 1, 8 (1967) (internal quotation marks omitted).

186 *Id.* at 23.

violated."[187] The Court in *Riley* has now divided the "effects" category into two classes. One group of effects—physical objects—existing since the Founders drafted the Fourth Amendment, is subject to the "search incident to arrest" precedent that has been built up over decades. The other type of effects—cell phones holding digital information—being newly invented and relentlessly evolving, have broken the bounds of *Chimel* and *Robinson*. *Riley* has deemed that these new kind of effects, which promise so much for the future, are protected by the warrant, a Fourth Amendment bulwark established over two centuries ago.

B. The Court's Characterization of Cell Phone Privacy as Equivalent or Greater than the Privacy of the Home Could Have Unintended Consequences

Riley's reasoning raises concerns about the enduring centrality of the home in Fourth Amendment jurisprudence. The Court has previously labeled the home as "the very core" of the Fourth Amendment.[188] From the age of England's William Pitt[189] to the twenty-first century,[190] the Court has consistently seen the home as a special enclave of privacy—a person's "castle."[191] The Court in *Kyllo v. United States* declared that "the Fourth Amendment draws a firm line at the entrance to the house."[192] The home was so special that in it, "*all* details are intimate details, because the entire area is held safe from prying government eyes."[193] In short, when it came to the Fourth Amendment, the Court consistently viewed the home as unique—until now.

Riley expanded the Fourth Amendment's core from "houses" to "effects"[194]—cell phones—by reexamining a truism offered by Judge Learned Hand.[195] The Court noted, "Learned Hand observed . . . that it is 'a totally different thing to search a man's pockets and use against

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187 U.S. CONST. amend. IV.

188 *Silverman*, 365 U.S. at 511. The Court declared in *Silverman* that "[t]he Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Id.*

189 *See Silverman*, 365 U.S. at 511 n.4 (describing William Pitt's description of the right to be free from unreasonable governmental intrusion). In an earlier case, *Miller v. United States*, the Supreme Court quoted William Pitt as follows:

> The poorest man in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

Miller v. United States, 357 U.S. 301, 307 (1958).

190 The Court, in the 2006 case *Georgia v. Randolph*, stated that the home "is entitled to special protection as the center of the private lives of our people." Georgia v. Randolph, 547 U.S. 103, 115 (2006) (quoting Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring)) (internal quotation marks omitted).

191 *Id.*

192 Kyllo v. United States, 533 U.S. 27, 40 (2001) (quoting Payton v. New York, 445 U.S. 573, 590 (1980)) (internal quotation marks omitted).

193 *Id.* at 37.

194 U.S. CONST. amend. IV.

195 *Riley*, 134 S. Ct. at 2490-91. (quoting United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926)).

him what they contain, from ransacking his house for everything which may incriminate him.'"[196] *Riley* responded, "If his pockets contain a cell phone, however, that is no longer true."[197] Moreover, the Court found that an intrusion into an effect could be even *greater* than an invasion of a citizen's own castle, noting:

> [A] cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.[198]

In 1961, in *Silverman v. United States*, the Court quoted Judge Jerome Frank as stating:

> A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.[199]

After *Riley*, the Fourth Amendment's "shelter from public scrutiny"[200] can now be carried around in a person's own pocket; the constitutional "castle" is a mobile home because it is a mobile phone. This "special protection"[201] has to follow us everywhere because government access to the cell phone would otherwise leave us too vulnerable to personal exposure. With its gigabytes of data that "can date back to the purchase of the phone,"[202] the cell phone offers insight into our politics, family life, religious beliefs, and even sexual interests.[203] The "[m]obile application software on a cell phone, or 'apps,'" reveal a "montage of the user's life."[204] Because of these cell phone privacy concerns, *Riley* expanded the "core"[205] of the Fourth Amendment

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196 *Id.*

197 *Id.* at 2491.

198 *Id.* (emphasis in original).

199 *Silverman*, 365 U.S. at 511 n.4.

200 *Id.*

201 *Randolph*, 547 U.S. at 115 (quoting Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring)). The Court in *Randolph* declared, "[s]ince we hold to the 'centuries-old principle of respect for the privacy of the home,' 'it is beyond dispute that the home is entitled to special protection.'" *Id.* (quoting Wilson v. Layne, 526 U.S. 603, 610 (1999); Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring)).

202 *Riley*, 134 S. Ct. at 2489.

203 *Id.* at 2490.

204 *Id.* The cell phone was "not just another technological convenience," but a vessel of "'the privacies of life'" for many Americans. *Id.* at 2494-95 (quoting *Boyd*, 116 U.S. at 630).

205 *Silverman*, 365 U.S. at 511.

exponentially from the "firm line" drawn "at the entrance to the house."[206]

Dramatic expansion of constitutional rights, while laudable, can boomerang, as seen with the Sixth Amendment right to trial by jury.[207] In the seminal 1968 case, *Duncan v. Louisiana*, the Court held that "the right to jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction."[208] *Duncan* therefore mandated that "the American States, as in the federal system," had to offer a jury to prevent "miscarriages of justice."[209] Later, the Court, in *Williams v. Florida*, interpreted *Duncan* as equating the state jury trial right with its federal counterpart, noting "that the Fourteenth Amendment guarantees a right to trial by jury in all criminal cases that—*were they to be tried in a federal court*—would come within the Sixth Amendment's guarantee."[210] The equating of the state and federal right meant that any diminution of the state right to jury trial would likewise limit the federal right. States, with much heavier caseloads, were continually pressured to streamline their criminal procedure rules to cut down on case backlogs. Thus, when states aimed to ease the burden on their courts by limiting the content of the right to jury trial, these restrictions, if accepted by the Court, would in turn shrink the federal right.

This is precisely what occurred in *Williams v. Florida*. Over the defendant's objection, Florida tried him before a six-man jury, which Florida law allowed in all but capital cases.[211] Despite the fact that "the requirement of twelve" had "become definitely fixed" since the middle of the fourteenth century,[212] the *Williams* Court dismissed it as an "accidental feature of the jury"[213] and "without significance 'except to mystics.'"[214] Since a six-person jury still offered "community participation" and "shared responsibility" of a "group of laymen," the *Williams* Court concluded that "the twelve-man requirement cannot be regarded as an indispensable component of the Sixth Amendment."[215] The Court further eroded the right to jury trial in *Apodaca v. Oregon*, where a jury convicted Robert Apodaca with the less-than-unanimous verdict, eleven to one.[216] Although *Apodaca* traced "the requirement of unanimity" back to the

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[206] Kyllo v. United States, 533 U.S. at 40 (quoting Payton v. New York, 445 U.S. 573, 590 (1980)) (internal quotation marks omitted).

[207] *See* U.S. CONST. amend. VI. The Sixth Amendment provides in part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. *Id.*

[208] Duncan v. Louisiana, 391 U.S. 145, 154 (1968).

[209] *Id.* at 157-58.

[210] Williams v. Florida, 399 U.S. 78, 86 (1970) (emphasis added).

[211] *Id.* at 79-80.

[212] *Id.* at 87 n.19 (quoting JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 85 (Cambridge Univ. Press 1898)).

[213] *Id.* at 90.

[214] *Id.* at 102 (quoting Duncan v. Louisiana, 391 U.S. 145, 182 (1968)).

[215] *Id.* at 100. While the number twelve was not "indispensable" to the Court, the number six was. *See* Ballew v. Georgia, 435 U.S. 223, 239 (1978). In *Ballew*, the Court found that "the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members." *Id.*

[216] Apodaca v. Oregon, 406 U.S. 404, 405-06 (1972).

Middle Ages,[217] it deemed this aspect of jury trials to not be "of constitutional stature."[218] In finding "no difference between juries required to act unanimously and those permitted to convict or acquit by votes of ten to two or eleven to one,"[219] *Apodaca* found unanimity to no longer be a part of the Sixth Amendment right to jury trial.[220]

By extending the core of the Fourth Amendment beyond the house to include every cell phone carried in public, *Riley* might have made the privacy of the home vulnerable to unforeseen intrusions. In the future, when state governments offer reasons to limit cell phone privacy, such arguments could come back to haunt *Riley* by shrinking the privacy of the home—now equated by the Court with digital devices. For instance, perhaps technological advances will allow future digital users to effectively seal off their devices from any intruder they have not already cleared for sharing. This could happen if technology relying on biometrical markers, such as fingerprints or irises, became perfected. If use of such technology became the societal norm, a future court could see failure to implement the technology as a passive invitation to intrusion. Such reasoning could work its way back to homes—the digital device's equal—limiting privacy only to those homeowners who bothered to use biometric technology to avoid intruders.[221]

C. The Court's "Cloud Computing" Reasoning Turned the Fourth Amendment's Third-Party Doctrine on Its Head

The *Riley* Court recognized that cell phone privacy issues were further complicated by the fact that certain data might be stored "on remote servers rather than on the device itself."[222] Treating a cell phone as a Fourth Amendment "container"—"'any object capable of holding another object'"—was "a bit strained" even without the complicating factor of cloud computing.[223] The Court found that having a phone act as a "key" giving access (to the cloud) rather than as a "house" providing storage (on the device itself) caused "the analogy [to] crumble[] entirely."[224] The problem was exacerbated by the seamlessness of cloud computing, for neither the phone's owner nor an officer searching it could be certain whether he or she was accessing information stored on the phone or in the cloud.[225] The Court's candor cast doubt on what definition remains for "containers" of digital information. In *New York v. Belton*, an early case involving search of vehicles incident to arrest,[226] the Court defined containers as follows:

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217 *Id.* at 407.

218 *Id.* at 406.

219 *Id.* at 411.

220 *Id.* at 406.

221 *Katz* itself might have left open the door to the erosion of privacy in the home when it noted: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351.

222 Riley, 134 S. Ct. at 2491.

223 *Id.* (quoting New York v. Belton, 453 U.S. 454, 460 n.4 (1981), *abrogated as recognized in* Davis v. United States, 131 S. Ct. 2419 (2011)).

224 *Id.*

225 *Id.*

226 New York v. Belton, 453 U.S. 454, 460 (1981), *abrogated, as recognized in* Davis v. United States, 131 S. Ct. 2419 (2011)). The *Belton* Court declared: "[W]e hold that when a policeman has made a lawful custodial arrest

"'[c]ontainer' here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like."[227] Further, in *United States v. Ross*, the Court rejected any "constitutional distinction between 'worthy' and 'unworthy' containers," for "a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf [should be able to] claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case."[228] While such refinements on defining a container remain valid for physical objects, they now offer little guidance for digital devices.[229] *Riley* thus created a vacuum in Fourth Amendment container law. In the continually growing subject of digital privacy, the Court needs to define digital "houses" or "containers," or offer guidance on the "keys" that open them.

Furthermore, *Riley*'s cloud computing confusion could doom the Court's third-party doctrine relating to Fourth Amendment searches.[230] When *Riley* recognized that phone users were allowing their data to be sent beyond their own personal devices to third-party remote servers, the Court did *not* automatically deem the users' privacy rights as lost due to this sharing with third parties.[231] In fact, *Riley* stated that whether the information was in the phone or the cloud made "little difference."[232] This stance represented a dramatic departure from the third-party doctrine, which, over the decades, has significantly limited the definition of a Fourth Amendment search.

A full appreciation of *Riley*'s impact on the third-party doctrine requires an understanding of the Court's definition of a Fourth Amendment "search" in *Katz v. United States*.[233] In *Katz*, federal agents recorded Katz's phone conversations involving gambling by attaching a device to the outside of a public phone booth he was using to make his calls.[234] When Katz protested that such recording of his private conversations amounted to an unlawful search, the Court of Appeals for the Ninth Circuit rejected his contention because "there was no physical entrance into the area" he occupied in the booth.[235] The Supreme Court in *Katz* declined the physical trespass formulation of the issue,[236] declaring that "the Fourth Amendment protects

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of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* (footnote omitted).

227 *Id.* at 461 n.4.

228 United States v. Ross, 456 U.S. 798, 822 (1982).

229 *Riley*, 134 S. Ct. at 2491.

230 *See* United States v. Jones, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring). For an illuminating discussion of the Fourth Amendment implications of cloud computing, see David S. Barnhill, *Cloud Computing and Stored Communications: Another Look at* Quon v. Arch Wireless, 25 BERKELEY TECH. L.J. 621 (2010).

231 *Riley*, 134 S Ct. at 2491.

232 *Id.*

233 *Katz*, 389 U.S. at 353, 361. The third-party doctrine discussed here does not implicate the Court's alternative "property-based" definition of a Fourth Amendment "search" as given in *Jones*. *See* 132 S. Ct. at 950.

234 *Katz*, 389 U.S. at 348.

235 *Id.* at 349 (quoting Katz v. United States, 369 F. 2d 130, 134 (9th Cir. 1966)) (internal quotation marks omitted).

236 *Id.* at 350.

people, not places."[237] Justice Harlan clarified this bold statement by explaining: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[238] The resulting "reasonable" or "legitimate expectation of privacy" test provided by Justice Harlan became the Court's definition of a Fourth Amendment "search."[239] The reasonableness of privacy expectations, however, could be undermined by what "a person knowingly expose[d]" to others.[240] The Court's later assessment of such exposures would evolve into the third-party doctrine.

The seeds for the third-party doctrine were planted by the Court's recognition that there is no honor among criminals.[241] In *United States v. White*, a narcotics dealer made incriminating statements to a government informant, unaware that his confidant was broadcasting all that was said to agents by radio transmitter.[242] When White objected that such surveillance violated his Fourth Amendment right to privacy, the Court found any reasonable privacy expectation undermined by his own choice to speak to the informant.[243] *White* intoned: "[T]he law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent . . . ."[244]

The Court also considered the third-party doctrine in *Couch v. United States*, a case involving an Internal Revenue Service summons for a client's tax records from an accountant.[245] The *Couch* Court ruled that since the taxpayer here "surrendered possession of the records" to her accountant,[246] she could not reasonably claim a Fourth Amendment "expectation of protected privacy."[247] Couch knew, when she handed the records to her accountant, that "mandatory disclosure of much of the information therein is required in an income tax return."[248] *Couch* followed the third-party doctrine despite the taxpayer's appeal to "the confidential nature of the accountant-client relationship."[249]

The Court next applied this doctrine to banking in *United States v. Miller*, in which Treasury Department agents subpoenaed the bank records of a whiskey distiller.[250] When Miller complained that his Fourth Amendment rights had been violated, the Court disagreed, noting that "[a]ll of the documents obtained" contained "only information voluntarily conveyed to the banks

237 *Id.* at 351.

238 *Id.* at 361 (Harlan, J., concurring).

239 Smith v. Maryland, 442 U.S. 735, 739 (1979).

240 *Katz*, 389 U.S. at 351.

241 United States v. White, 401 U.S. 745, 752 (1971).

242 *Id.* at 746-47.

243 *Id.* at 752.

244 *Id.*

245 Couch v. United States, 409 U.S. 322, 322 (1973).

246 *Id.* at 324.

247 *Id.* at 335-36.

248 *Id.* at 335.

249 *Id.*

250 United States v. Miller, 425 U.S. 435, 437-38 (1976).

and exposed to their employees in the ordinary course of business."[251] The *Miller* Court reasoned that the "depositor takes the risk in revealing his affairs to another, that the information will be conveyed by that person to the Government."[252] It therefore declared:

> [T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.[253]

Once a depositor risks sharing information by using the bank, the expectations that his or her records will remain private become unreasonable; thus, no warrant is needed because obtaining the information is itself not a search.[254]

The Court next applied the third-party doctrine to telephones, albeit the landline variety, in *Smith v. Maryland*, in which a robber repeatedly called his victim after the robbery to make "threatening and obscene phone calls."[255] To track down the robber, the government instructed the phone company to install a "pen register," a device that recorded only the numbers dialed from the phone in Smith's home.[256] When the pen register revealed that, at a particular time, a call was placed from Smith's phone to the victim's phone, police included this information in a successful warrant application of his house.[257] Smith then contended that the authorities had committed an unlawful search by intruding on the "'legitimate expectation of privacy' regarding the numbers he dialed on his phone."[258]

The Court disagreed, explaining that every caller realized that "they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed."[259] Moreover, phone users understood that "the phone company does in fact record this information for a variety of legitimate purposes."[260] Therefore, it was simply "too much to believe that telephone subscribers . . . harbor[ed] any general expectation that the numbers they dial[ed] [would] remain secret.[261]

The Court, in *California v. Greenwood*, even applied the third-party doctrine to trash left

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251 *Id.* at 442.

252 *Id.* at 443.

253 *Id.*

254 *Miller* simply dismissed the Fourth Amendment concerns: "Since no Fourth Amendment interests of the depositor are implicated here, this case is governed by [another] rule . . . ." *Id.* at 444.

255 *Smith*, 442 U.S. at 737.

256 *Id.* Unlike the intrusion in *Katz*, the pen register in *Smith* did not collect or record the contents of any conversation made on the phone. *Id.* at 741.

257 *Id.* at 737.

258 *Id.* at 742.

259 *Id.*

260 *Id.* at 743.

261 *Id.*

out on the curb.[262] In *Greenwood*, police based a search warrant on evidence they recovered from plastic garbage bags that homeowners had left on the curb.[263] The Court noted that the Greenwoods "placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so."[264] Since the Greenwoods acted with the "express purpose of having strangers" take their trash, they "could have no reasonable expectation of privacy in the inculpatory items that they discarded."[265]

Thus, whether confiding with a fellow criminal, pursuing tax or banking business, dialing a phone, or wheeling trash out to the curb, every individual must realize that by sharing information, the very act of communication or delivery destroys privacy. There has, however, been recent rumbling about the harsh ramifications of the third-party doctrine. Justice Sotomayor, in her concurring opinion in *United States v. Jones*, suggested that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."[266] She explained that the third-party approach:

> is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. . . . I for one doubt that people would accept without complaint the warrantless disclosure to the government of a list of every Web site they had visited in the last week, or month, or year.[267]

Justice Sotomayor suggested in concurrence that the Court no longer "treat secrecy as a prerequisite for privacy."[268] Instead of an all-or-nothing approach to privacy, where sharing information with a single party rendered previously secret information open to all, including the police, Justice Sotomayor would "not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection."[269]

Justice Marshall, who was an early critic of the Court's third-party doctrine, inspired this reasoning.[270] In *Smith*, the pen register case, Justice Marshall noted that even if phone users knew that they were sharing their phone numbers with the phone company in order to complete their calls, this did not mean that customers expected the information about the numbers dialed to be

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262 California v. Greenwood, 486 U.S. 35, 40-41 (1988).

263 *Id.* at 37-38.

264 *Id.* at 40.

265 *Id.* at 40-41.

266 *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring).

267 *Id.*

268 *Id.*

269 *Id.*

270 *See Smith*, 442 U.S. at 748-51 (Marshall, J., dissenting).

"made available to the public in general or the government in particular."[271] Justice Marshall recognized that the third-party doctrine was premised on the idea that the individual, in initially conveying the information to another party, had made a calculated risk that the information might therefore be disclosed to the government.[272] Such an assumption of risk made practical sense when a criminal exercised his discretion to include a confidant in his illegal scheme, as occurred in *White*.[273] The assumption of risk reasoning fell apart where an individual lacked a choice about whether to engage in the information-sharing activity.[274] Unless a citizen is ready to give up using a phone at home—"what for many has become a personal or professional necessity"—he or she simply has "no realistic alternative."[275]

Justice Marshall's arguments carry even more force with today's technology. The third-party doctrine's "assumption of risk" analysis would likely ring hollow for most smart phone users. Indeed, the twelve percent of smart phone owners who cannot part with their phones even during a shower are hardly making rational choices about assumption of risk.[276] *Riley* recognized that "modern cell phones" are such "a pervasive and insistent part of daily life" that Martians could confuse them for a part of the human body.[277] Must an individual today, in order to preserve privacy, amputate him or herself from cell phones and the "vast quantities" of information they contain?[278] The Fourth Amendment cannot require that people sacrifice all the services of these "minicomputers," whether such services are with communications, banking, videos, internet searches, political affiliations, drug and alcohol recovery, pregnancy, or prayer.[279] The third-party doctrine would force the ninety percent of American adults who use a cell phone to wean themselves off from a tool that touches "nearly every aspect of their lives" to preserve what is supposed to be a right guaranteed by the Constitution.[280]

Both Justices Sotomayor and Marshall offered to correct the third-party doctrine by implementing a purpose-based approach.[281] Under such analysis, Justice Marshall explained, "[t]hose who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes."[282] This is because, "[t]he fact that one has disclosed private papers to the bank, for a limited purpose,

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271 *Id.* at 749.

272 *Id.*

273 *Id.*; *White*, 401 U.S. at 752.

274 *Smith*, 442 U.S. at 749-50 (Marshall, J., dissenting).

275 *Id.* at 750.

276 *Riley*, 134 S. Ct. at 2490; *see also* HARRIS INTERACTIVE, 2013 MOBILE CONSUMER HABITS STUDY (2013), *available at* http://pages.jumio.com/rs/jumio/images/Jumio%20-%20Mobile%20Consumer%20Habits%20Study-2.pdf.

277 *Riley*, 134 S. Ct. at 2484.

278 *Id.* at 2485.

279 *Id.* at 2489-90.

280 *Id.* at 2490.

281 *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring); *Smith*, 442 U.S. at 749 (Marshall, J., dissenting).

282 *Smith*, 442 U.S. at 749 (citing Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 95-96 (1974)) (Marshall, J., dissenting).

within the context of a confidential customer-bank relationship, does not mean that one has waived all right to the privacy of the papers."[283] Justice Marshall likened the bank customer to *Katz*'s caller, "who, having paid the toll, was 'entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.'"[284] If Katz could speak into the mouthpiece of the telephone in the phone booth secure in the knowledge that sharing the contents of his conversation with the listener on the other end of the line did not destroy his Fourth Amendment privacy, should not a bank customer, "having written or deposited a check," also have "a reasonable expectation that his check will be examined for bank purposes only—to credit, debit or balance his account—and not recorded and kept on file for several years by Government decree so that it can be available for Government scrutiny"?[285] Thus, one should be able to release information to one party "solely" for one purpose without fear that it would metastasize to other purposes.[286]

The clear benefit of the purpose-based approach is that it places control over a constitutional right in the person who possesses it—the individual citizen. This purpose-based limit on the third-party doctrine also promotes the goal of avoiding another concern identified by Justice Marshall—the danger that the third-party doctrine could empower "the government to define the scope of Fourth Amendment protections."[287] Justice Marshall had worried that if risk analysis was "dispositive in assessing the reasonableness of privacy expectations," the government could shrink privacy simply by making public announcements of its "intent to monitor" various communications, such as mail or phone calls.[288] If, instead, the citizen is protected by the purpose-based approach, he or she preserves the choice over what personal information will and will not be private.

By requiring a warrant for searches of cell phone information voluntarily disclosed to remote servers,[289] *Riley* might be adopting a more nuanced approach to information shared with third parties. Indeed, much of the Court's opinion focused on the purposes individuals pursued in having or using cell phones. *Riley* urged that cell phone privacy must be protected precisely because of the many purposes these "minicomputers" have; the Court noted that these versatile devices "could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers."[290] Cell phones therefore served their owners' purposes in "nearly every aspect of their lives—from the mundane to the intimate."[291] In noting all the various activities for which phones were used, *Riley* did not find privacy lacking because so many of these tasks required sharing with myriad third parties. Instead, the Court viewed all the purposes of a cell phone, which have "the ability to store many

283 Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 95-96 (1974) (Marshall, J., dissenting).

284 *Id.* at 96 (quoting *Katz*, 389 U.S. at 352).

285 *Id.* at 96.

286 *Smith*, 442 U.S. at 752 (Marshall, J., dissenting).

287 *Id.* at 750.

288 *Id.*

289 *Riley*, 134 S. Ct. at 2491.

290 *Id.* at 2489.

291 *Id.* at 2490.

different types of information," as a reason to protect the owner's privacy.[292] Thus, for *Riley*, the interactions with third parties actually strengthened Fourth Amendment interests. *Riley* turned the decades-old third-party doctrine on its head; the more connections with others, the more sharing of information with third parties, and the more one could claim in the Fourth Amendment privacy in one's phone.

IV. CONCLUSION

Riley was hardly the first case in which the Court had to come to terms with the implications of advancing technology. In *Olmstead v. United States*, the Court considered government wiretapping of a Seattle bootlegger's phone line.[293] *Olmstead* ruled that, since the wiretaps "were made without trespass upon" the defendant's property,[294] "[t]here was no searching [and] False no seizure."[295] The *Olmstead* Court, wrestling with concerns about a technology invented a mere fifty years prior, feared enlarging the Fourth Amendment "beyond [its] possible practical meaning."[296] *Olmstead* concluded that "[t]he language of the amendment cannot be extended and expanded to include telephone wires, reaching to the whole world."[297] The Court also noted, in a passage anticipating the assumption of risk reasoning later offered in the third-party doctrine, that a person who installed a phone in his home intended to "project his voice to those quite outside," and therefore deserved no Fourth Amendment protection.[298]

Justice Brandeis, in his *Olmstead* dissent, worried not about an expanded Fourth Amendment, but about greater government intrusion.[299] While officials at the time the Fourth Amendment was adopted were limited to the crude and forceful expedient of breaking and entry, modern government possessed "[s]ubtler and more far-reaching means of invading privacy."[300] Wiretapping was a grave concern, for it intruded on not only the caller, but also all those who conversed with him.[301] Such phone intrusions made "writs of assistance and general warrants" merely "puny instruments of tyranny" by comparison.[302]

Decades into telephone technology, *Olmstead* offers a lens through which to view *Riley*, itself only decades into digital technology. In recognizing the significant distinctions, both quantitative and qualitative,[303] between cell phones and other physical items, the Court, by 2014, had come to appreciate Justice Brandeis' concerns about government intrusion growing with each

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292 *Id.* at 2489.

293 Olmstead v. United States, 277 U.S. 438, 456-57 (1928).

294 *Id.* at 457.

295 *Id.* at 464.

296 *Id.* at 465.

297 *Id.*

298 *Id.* at 466.

299 *See id.* at 473 (Brandeis, J., dissenting).

300 *Id.*

301 *Id.* at 476.

302 *Id.*

303 *Riley*, 134 S. Ct. at 2489.

"[d]iscovery and invention."[304] *Riley*, however, in basing its ruling on the constitutional difference between digital devices and pre-digital objects, has now created two categories of Fourth Amendment "effects." The full implications of drawing such a new line are simply unknown.

Further, when *Riley* equated cell phone privacy with that of the home,[305] it confirmed Justice Brandeis's prediction in *Olmstead*:

> Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.[306]

Indeed, *Riley* deemed a cell phone search to typically be "far *more*" intrusive than a house search because it would not only expose "sensitive records" of the home, but also information "never found in a home."[307] In equating cell phones with the Fourth Amendment's "core"—the home—*Riley* extended Fourth Amendment privacy so dramatically that the Court could later suffer buyer's remorse. If it later limits cell phone privacy, the Court could also limit the privacy of the home, now that houses are linked with phones. Finally, *Olmstead*'s dismissal of a caller's privacy claim on the grounds that in using the phone the caller intended to "project his voice to those quite outside" will no longer resonate with a post-*Riley* Court.[308] The third-party doctrine limiting the privacy of those who share information is inconsistent with *Riley*'s assertion that the location of information on a phone or in the cloud "makes little difference."[309]

Riley declared that cell phones, "[w]ith all they contain and all they may reveal," hold "'the privacies of life,'" and therefore are "worthy of the protection for which the Founders fought."[310] Despite its apparent grandiosity, *Riley* was right to invoke the American Revolution in finding the cell phone worthy of Fourth Amendment protection.[311] Although smart phones are objects of which our Founding "[F]athers could not have dreamed,"[312] applying the Constitution requires contemplation not "only of what has been but of what may be."[313] The search of a phone recovered during an arrest provides such vast material that it amounts to a general warrant or writ of assistance of colonial times.[314] In reaching the correct conclusion, however, *Riley* offered sweeping statements touching on the classification of effects, the privacy of the home, and the viability of the third-party doctrine. The impact of such pronouncements, while uncertain, could be profound.

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304 *Olmstead*, 277 U.S. at 473 (Brandeis, J., dissenting).

305 *Riley*, 134 S. Ct. at 2491.

306 *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting).

307 *Riley*, 134 S. Ct. at 2491.

308 *Olmstead*, 277 U.S. at 466.

309 *Riley*, 134 S. Ct. at 2491.

310 *Id.* at 2494-95 (quoting *Boyd*, 116 U.S. at 630).

311 *Id* at 2495.

312 *Olmstead*, 277 U.S. at 472 (Brandeis, J., dissenting).

313 *Id.* at 474 (internal quotation marks omitted).

314 *Riley*, 134 S. Ct. at 2494.