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An Analysis of the Fourth Amendment and the Role of the Plain View Doctrine in Cell Phone Privacy

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AN ANALYSIS OF THE FOURTH AMENDMENT AND THE ROLE OF THE PLAIN VIEW DOCTRINE IN CELL PHONE PRIVACY

by

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ABSTRACT

The purpose of my thesis is to analyze the role of the Fourth Amendment, specifically the Plain View Doctrine, in cell phone privacy. The thesis will attempt to answer the question of whether viewing a cell phone screen can be considered a search in plain view. To have a better understanding of the topic, I included case law on the Plain View Doctrine, cell phone privacy law, and statistics on the scope of the issue. I conducted research through interviews with police officers from surrounding police departments and the Maine Criminal Justice Academy to determine what police protocol is for cell phone searches. In an attempt to incorporate all of the research and case law surrounding the issue, I devised a hypothetical brief to showcase how the proposed situation would proceed in today's courts system. My thesis also includes directions for further research and possible benefits of this research.

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INTRODUCTION

In today's times, technology is rapidly changing and influencing our everyday lives as human beings. Most people interact with technology countless times throughout the day. This can be through phone calls, texting, typing and opening documents, using GPS services, purchasing items online, and numerous other daily tasks that we use cell phones for. The number of smartphone users in the United States alone is estimated to be over 200 million (eMarketer). Phones are used for more than phone calls and texting today. Certain applications on the smartphone allow users to check and transfer money in their bank accounts, access their medical records, lock and unlock their home, and countless other things. By looking at the information on a cell phone, someone can analyze a person's entire life. Unlike a computer that is more difficult to secretly look at and carry around, cell phones are more easily available to those that want to find more information about a person. The small device is handheld computer with the only thing standing between someone's private matters and a person trying to get into the phone is often only a four digit passcode. Now more than ever, privacy laws are important to protect the information many people would like to keep private.

The case law that normally protects people's privacy concerns is not changing as rapidly as the rate at which technology evolves. Cell phones have not always been pocket sized mountains of information. The first cell phones can be traced back to 40 pound portable radios that had a range of three miles and were used by the military during World War II. Portable phones then evolved into car phones. These car phones used radio frequencies to communicate with others when the car was on. The car phones did not last

long because there was a very limited number of frequencies. From car phones, cell phones transitioned into smaller phones that did not need the use of a car to operate. These phones were still quite large compared to the smartphones many Americans have today. Along with the bigger size these phones had a bigger price tag than the phones we have today. In 1983, a Motorola DynaTAC cell phone was priced at nearly $4,000 dollars. Not only was the use of these phones extremely limited, but they were also not available to the majority of American consumers because of the high price. Cell phones were a luxury item for a select group of consumers. This began to change in the late 1980s, when cell phone technology drastically evolved.

Mobile phones from the 1980s transformed into a new kind of technology. Americans created the term ‘smartphones’ to describe the new design of mobile phones. These smartphones used a touch screen instead of numbered buttons to type on the device. The touch screen allows the user to shrink, expand, or click things on the screen. The wave of mobile applications, also nicknamed as ‘apps’ surfaced with the creation of smartphones. These applications are software that is downloaded onto a smartphone and contains a program that is developed for a specific purpose. Some of the early applications that arose on a smart-phone were a calculator, address book, and a notepad. Today there are applications that allow users to do their banking and shopping via their cell phone. Not only could a user call and text their contacts, they could also video-chat, send money, or create social media posts on their cell phone. More information began to be stored on these devices, even private information.

Today a majority of Americans own cell phones and use the technology for tasks besides phone calls. Law enforcement can gain access to social media outlets, text

messages, banking information, photos, search history, and health records on phones. This information goes a long way in solving cases. In order to prevent law enforcement from violating the privacy of many Americans, the Fourth Amendment in the Constitution prohibits unlawful searches and seizures of people's property. The amendment prohibits warrants from being issued without probable cause and from conducting unlawful searches of a person. If evidence was obtained from an unlawful search, the defendant can argue the evidence should be suppressed because the search was illegal. This argument has been used in numerous cases such as *Riley v. California 573 US 373 (2014)*, *United States v. Jones 565 US ___ (2012)*, and *Terry v. Ohio 392 US 1 (1968)*. In each of these cases the defendant argued certain evidence should not be used in trial because it was obtained illegally. There is a fine line on what constitutes a reasonable expectation of privacy, especially when it comes to the privacy associated with technology. Officers have to obtain a search warrant to search people's home or possessions, but warrants are not always needed in select cases. There are numerous exceptions to the Fourth Amendment that allow certain searches to be conducted without a warrant. The exceptions can be narrowed into six broad categories: the Plain View Doctrine, Search Incident to Arrest, the Automobile Exception, Consent, Stop and Frisk, and Emergencies or Hot Pursuit.

The Plain View Doctrine exception allows a police officer to seize contraband or obtain evidence that is in plain sight of the officer. This can include looking through a window and seeing illegal drugs or when an officer notices alcohol in the backseat of a car they just pulled over. The Search Incident to Arrest exception occurs when a police officer arrests an individual and searches their person and or personal items. The purpose

of this exception is to protect the arresting police officer from any harm that could be caused by a weapon on the individual or in their belongings and to prevent the destruction of evidence. The officer may only search belongings and seize items that could cause harm to the officer or arrested individual, or items that are deemed contraband. The exception that often allows an officer to search a vehicle without a search warrant is the automobile exception. When a person is pulled over in their vehicle and they are believed to be involved in some sort of criminal activity, their vehicle may be searched if the officer has probable cause and reason to believe evidence may be destroyed or there is a threat to officer safety. Probable cause can include the smell of alcohol on someone's breath or if the driver of the vehicle is swerving between lanes on the highway. The reason an officer may not have to obtain a warrant for the vehicle when they have probable cause is because the vehicle is not stationary like a home. A car can change location in a matter of seconds unlike a house, so evidence or contraband in a vehicle will be difficult to obtain when the location of these things changes.

The Consent exception seems fairly simple in the Fourth Amendment. If an individual gives a police officer consent to search their belongings, home, or person the officer may do so without obtaining a warrant. Officers may not need consent from the individual in question, but from someone who has ownership over the property. One example of this is when a parent can give consent for a police officer to search their child's bedroom or belongings because they are suspected of criminal activity. The Stop and Frisk exception is similar to the automobile exception, but instead of needing probable cause to search, the officer only needs reasonable suspicion. Reasonable suspicion can be described as a lower level of probability that a crime has occurred or

will occur than probable cause. This allows officers to search individuals who are acting suspiciously and may pose a threat to society.

In a Stop and Frisk the officer may only pat down the outer layers of a person's clothes to check for weapons. An example of this is if an officer stops and frisks a person at a street fair to check if they have a bomb or a weapon on them. The purpose of this exception is to ensure public and officer safety. The last exception, the emergencies exception, occurs when police officers may enter a home without a warrant when they believe there is an emergency in the home that requires aid and attention. An example of this exception is when an officer enters a home after hearing gunshots and a woman screaming for help. The purpose for this exception is similar to the others; public safety. These exceptions are necessary to ensure the safety and welfare of not only the public, but the police officers conducting the searches. Unfortunately, these exceptions are not black and white. They can be construed and interpreted in different ways. Many of these interpretations of the exceptions will be discussed later in my thesis. The importance of these exceptions in my thesis come into play when they are applied to cell phone searches.

The search of cell phones has been a heavily debated topic in today's digital age. Many Americans view their cell phones as a storage space for all of their important data and private life. They communicate to friends and family members privately and phones contain information that most users would prefer to keep secret from the rest of the world. The laws surrounding cell phone privacy are not black and white because the technology of these devices is constantly evolving. It can be debated whether or not these exceptions can be used to allow a warrantless search of a cell phone. Some people may

argue probable cause is all an officer needs to search a person's cell phone or that the cell phone could present a risk to officers, so it should be searched to ensure the safety of the officer and the people in the area. There is also the argument that a cell phone may be searched without any level of suspicion if the device is on the individual when they are arrested, because search incident to arrest does not require any amount of suspicion.

There are also questions surrounding the issue such as, does a warrant allow an officer to search everything in the phone or just certain apps, and is information presented on the screen of the cell phone considered evidence in plain view? If an officer sees evidence of a crime in a text message as it flashes across a phone screen, can this be a search in plain view? Many of these questions have still not been answered by the Supreme Court of the United Statesn. In a time period where technology is rapidly changing, the expectation of privacy can be infringed upon or narrowed if there is no established legal precedent. These unanswered questions could eventually lead to violations of the Fourth Amendment. It is up to law enforcement to currently decide the answers to these questions, until the Supreme Court or a lower court decides on the matter.

The purpose of my thesis is to examine the role the of the Plain View Doctrine exception from the Fourth Amendment of the Constitution in cell phone privacy law. The thesis attempts to answer whether the Plain View Doctrine allows for a more structured view of how much privacy is expected around the issue of cell phones. The research I find and conduct is used in an attempt to answer the question of what information on a cell phone can be considered seen in plain view based on previous court decisions and data obtained from interviews with police officers. My thesis analyzes these decisions

and information obtained from police officers to decide whether they do or do not reflect the Fourth Amendment's privacy rights. The area of law I am examining is still currently grey, allowing for law enforcement to interpret these unanswered questions and answer them how they deem fit. There is no concrete answer as to whether situations like watching text messages flash on a screen is a violation of the Fourth Amendment.

In order to analyze the legality of cell phone searches and the issues surrounding them, my thesis looks at previously decided Supreme Court and Circuit Court cases, published law journals on cell phone searches, statistics reporting the use of cell phones in cases, articles written by concerned citizens, and data obtained from conducting interviews with law enforcement officials. These cases and statistics mentioned later in my thesis reflect the legal decisions made on the issue and the hard facts regarding searches. Important Supreme Court cases that set precedent surrounding the issue of warrantless cell phone searches include *Katz v. United States, Carpenter v. United States, Riley v. California, and United States v. Wurie*. Another case well-connected to my thesis is *United States v. Morgan*, a case decided in 2016 by the 8th Circuit Court. This case examines an incident in which a police officer looks over the shoulder of a suspect as he is on his cell phone and obtains information from that device by glancing at it. This case is similar to the situation presented in my hypothetical brief and creates somewhat of a precedent for the role of the Plain View Doctrine in cell phone searches. All of these cases present what has already been decided as a lawful and unlawful search of a cell phone and I will go in depth on the importance of each case later in my thesis.

The statistics and research I obtained for my thesis reflect how greatly case law on cell phone searches affects Americans and showcases the level of privacy many

Americans expect when it comes to their cellular device. The statistics show the number of warrants that were obtained to search a cell phone, the uneasiness of Americans feel when certain applications may be searched on their phones, and much more. Research in articles and publications reveals the perceptions and beliefs many citizens have about the issue. Several articles show the wariness many Americans have with having their privacy rights narrowed or infringed upon. Other articles also show how law enforcement has adapted to the new wave of technology and how they use it to help solve cases. These statistics and articles are key to my thesis because they showcase how Americans feel about the issue. One of the purposes of my thesis is to shed light on the unanswered questions in cell phone searches and to find answers or solutions that will address the privacy concerns.

To better understand the issues around cell phone searches, I interviewed officer from the University of Maine Police Department, a police sergeant from Hampden, and a training coordinator from the Maine Criminal Justice Academy. The interviews conducted with Maine police officers and the coordinator from the Maine Criminal Justice Academy showcase their opinions and the protocols used by law enforcement regarding cell phone searches. They reflect on how they would act when the possibility of a cell phone search arises and what they believe to be best plan of action when it comes to the unanswered questions of the Fourth Amendment. I truly learned a lot from this opportunity I received interviewing police officers and I am grateful to share the information I obtained relating to this issue. This research will benefit other students and other readers of this thesis, so that they may have a better understanding of the role of the Fourth Amendment, and more specifically the Plain View Exception in the searches of

cell phones. All forms of research and data I found or conducted are incorporated in a cohesive analysis of the role of the Fourth Amendment, and the Plain View Exception in cell phone searches carried out by the government or law enforcement. The next chapter of my thesis examines current case law to better predict how a hypothetical situation involving the search of a cell phone screen would play out in the United States today.

LIT REVIEW

The purpose of my literature review is to analyze the fourth amendment as it is laid out in the Constitution and to provide a brief explanation of each of the major exceptions to the amendment. The major exceptions included in my analysis of the Fourth Amendment are the Plain View doctrine, search incident to arrest, automobiles, consent, stop and frisk, exigent circumstances, and the Third Party doctrine. I will then discuss how the fourth amendment plays a role in cell phone privacy law. This chapter will also include an analysis of previous Supreme Court decisions in cases relevant to my thesis topic. These cases include *Katz v United States, Carpenter v. United States, United States v. Wurie, Riley v. California*, and there will be an additional case from the 8th Circuit of Appeals, *United States v. Morgan*. These cases highlight previous decisions surrounding the issues of either the Fourth Amendment or technology. The rest of this chapter analyzes these cases and the major exceptions of the Fourth Amendment, there will be a deeper understanding of the possible legal outcomes on cell phone searches.

The Fourth Amendment was not passed by Congress until 1789 and it was ratified over two years later. The Fourth Amendment specifically 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" (Constitution Center). 'The right to be secure' protects an individual's privacy and keeps the government from becoming over-bearing when it comes to intervening in people's lives. This is why the state and federal

government cannot search a home simply because they have a hunch there is evidence of a crime inside. The Constitution additionally regulates searches of people and items. The term 'effects' in the Fourth Amendment takes on a broader sense of unsearchable things. Personal effects can include a backpack, a vehicle, a computer, or relating to my thesis, a cell phone.

Even before the Fourth Amendment was ratified, there were cases involving unreasonable searches in America. Around 1760 cases involving 'writs of assistance' arose in courts across the colonies. Writs of Assistance were written orders that allowed British officials to search a home or business for contraband or untaxed goods. These orders were usually signed by judges without much probable cause and were often used as a way to go after political opponents. Many colonists were angered with the random searches and took action. James Otis lead the group as a lawyer and previous advocate general in the colonies. He argued before the Massachusetts Superior Court how these writs of assistance violated the rights of colonists. A famous quote from his argument reads, "one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle" (Bill of Rights Institute). Even before the Bill of Rights was written, there were concerns of unreasonable searches and seizures. Otis's ideas and beliefs played a strong role in the shaping of the Constitution and protections granted in the Fourth Amendment that are in place today.

The first exception to the Fourth Amendment, the Plain View doctrine is the idea that if something is seen by a police officer in a place where he is allowed to be and that 'something' is evidence of a crime or contraband, the officer can search the immediate area. There are three requirements to constitute a valid plain view search. First the officer

must have a reason to be at the location of the search or vehicle. This reason must not be relative to the future search. It must relate to something prior of the plain view search. This requirement exists so that law officials may not show up to a house and look inside windows for no reason,\ or look inside a car parked in a driveway. The second requirement is that the uncovering of the contraband or evidence is inadvertent, meaning the officer did not intentionally mean to find the object by being on the premise. The third requirement is that the object must be immediately noticed as contraband or evidence. If an officer seizes the object before knowing it is contraband or evidence, and connects the object after the seizure, the search is invalid. The Plain View Doctrine exists so that when officers see obvious signs of a crime, they do not have to leave and take the time to obtain a search warrant for the object in question.

The second exception to the Fourth Amendment is the search incident to arrest exception. The purpose of this exception is to ensure no evidence of a crime would be destroyed and no weapon could be accessed by the person being arrested to use against the arresting officer. These purposes can also be considered requirements. If the search is not for these purposes, it is considered invalid. For example if a police officer completes a search incident to arrest of an individual and finds their wallet in one of their pants pockets, and opens the wallet, looking at its contents, this is not a valid search under the terms of the exception. The contents of the wallet pose no threat to officer safety. If the officer opens the wallet to inspect credit cards or identification cards, he is looking for information. Any information inside the wallet does not have a risk of being destroyed on the way to the police station because it is so tangible, a cell phone differs from a wallet because of this. Because evidence can quickly disappear in the time it takes to obtain a

warrant there are ways to prevent the destruction of evidence or bypass the use of a warrant. If an officer arrests an individual for a crime the officer can search the individual for obvious evidence or contraband and any bag the person may have with them. The same is true for the surrounding area of a home if a person is arrested in their dwelling. This situation is somewhat tricky because officers cannot thoroughly search the home to find evidence of the crime. They may only search what is in plain view of the officers.

Stop and Frisk exceptions allow an officer to search an individual for weapons and contraband based on reasonable suspicion. The search is non-intrusive and usually consists of a pat-down over top of one's clothing. If a person is reasonably expected to have committed a crime, or may commit a crime, an officer may stop the person and quickly perform a frisk. The exception comes from the Supreme Court case, *Terry v. Ohio 392 U.S 1 (1968)*. In this case, an officer witnessed several individuals walking past a store and looking in the window a total of almost twenty times. The officer approached the individuals suspecting them of planning to rob a store. The officer patted down one of the individuals and found a gun in the individual's coat-pocket. He then patted down the other two individuals and found more firearms. At trial, the defense attempted to get the firearms suppressed as evidence, but the court held a quick, noninvasive search of an individual that exhibited reasonable suspicious activity did not violate the Fourth Amendment, thus creating the stop and frisk exception.

The fourth exception to the Fourth Amendment is the automobile exception. This occurs when an officer pulls an individual over in their vehicle and has probable cause the individual has committed a crime or is committing a crime. For example if a person is pulled over by a police officer for swerving into other lanes or drifting off of the road,

and the officer notices the driver smells of alcohol when he approaches the vehicle, the police officer may search the vehicle looking for open-containers of alcohol.

Probable cause differs from reasonable suspicion needed for a stop and frisk search. Probable cause often has a higher level of likelihood for a crime to be committed than reasonable suspicion. Reasonable suspicion gives officers the right to detain a person for a short period of time and to frisk the outside of their clothing. Reasonable suspicion is not enough for a warrant. Probable cause is mentioned specifically in the Fourth Amendment as a requirement for a warrant, but the Constitution offers no real definition as to what probable cause means.

A famous Supreme Court case that helps narrow the definition of probable cause, at least in the realm of automobile searches is *United States v. Ross 456 U.S 798, (1982)*. In this case, police received information that an individual was selling narcotics out of their vehicle. The police located the vehicle and waited until the owner began to drive the car. The police pulled the vehicle over and performed a search of the vehicle. In the truck the officers found a bag with heroin inside. The owner of the vehicle, Albert Ross, was arrested. Before the trial Ross filed for a motion to suppress the evidence found in the vehicle because the police did not have a warrant to search the vehicle. The motion was denied and Ross appealed. The case was eventually appealed to the United States Supreme Court.

The Supreme Court held that the search was valid under the Fourth Amendment. If a police officer has legitimately stopped a vehicle and has probable cause that would be sufficient for warrant, the police officer may search the vehicle if there is reason to believe contraband or evidence of a crime might be inside. Unlike a house a car is easier

to move from place to place, therefore it is more difficult to obtain a warrant when a vehicle's location constantly changes. The defense questioned whether the government's search of the bag within the car was valid because the bag is not part of the automobile. The court ruled that if the container or bag is believed to reasonably carry the evidence or contraband being searched for, then the search is justified. Justice Stewart, who wrote the opinion of the court, stated the additional requirement that probable cause must be based on facts that would be sufficient for a warrant signed by a neutral judge, not just on the belief of the police officer thus, narrowing the scope of the automobile exception.

The fifth exception to the Fourth Amendment is the consent exception. The exception is based on the idea that a person consents to a search they are willingly giving up their expectation of privacy, however, consent is determined by a variety of factors. A person's age, mental capacity, and knowledge can change whether the initial consent is true and binding. If an individual does not fully understand their rights and consents to search of their vehicle without knowing they have the opportunity to refuse, consent could be questioned. In the United States Supreme Court case *Schneckloth v. Bustamonte 412 U.S 218, (1973)*, the court held that valid consent requires evidence that a right known by the defendant has been willingly abandoned or given up.

Consent may also be confined to specific searches as well. Consenting to a search of a kitchen, may not be giving consent to search the entire house. Other problems that arise with the consent exception is once an individual gives consent, it may not be withdrawn. If an individual gives consent for a police officer to search their vehicle and then tries to revoke their consent halfway through the search, the officer may still continue searching the vehicle. Consent that is given because of threats or bribes is also

not a valid form of consent under the Fourth Amendment (Bumper v. North Carolina, 391 US 543 (1963). Due to each of these circumstances that may arise under the consent exception of the Fourth Amendment, consent is often difficult to prove in a case.

The last exception is the exigent circumstances exception. This exception occurs when there is probable cause to search an area and the officer believes if the search is not completed at that time, evidence or contraband would be destroyed before a warrant could be issued. The exception can also occur when immediate action may be needed by a police officer. For example if a police officer hears gunshots and screaming from a home, they may not need a warrant to enter the home. One of the major cases that defined the scope of the exigent circumstances exception was *Mincey v. Arizona, 437 U.S. 385 (1978)*.

In this case, the state believed a new exception should be made under the Fourth Amendment. Rufus Mincey was investigated by undercover police officers for narcotics. The undercover officers conducted a raid on Mincey's apartment, which resulted in gunfire. A police officer was killed during the incident. Homicide detectives arrived to investigate the murder and conducted a four-day search of the apartment. Mincey was then charged in court with murder of a police officer, assault, and with possession of narcotics. A motion to suppress all the evidence found during the four-day search was filed by Mincey, but was denied by the trial court and the Arizona Supreme Court because the murder scene was a valid exception to the Fourth Amendment's warrant requirements. The case was appealed all the way to the United States Supreme Court. Unanimously the court found the search to not be included in the scope of the exigent circumstances exception. In the opinion the United States Supreme Court states that if a

murder scene is included in the scope of the exigent circumstances, then there is nothing that prevents a rape scene or a robbery scene from being searchable under the exigent circumstances exception. Threats and abuse can occur over text or online transforming a cell phone into a potentially searchable crime scene. If the decision made by the district court stayed, this case could greatly affect other areas of law, such as cell phone privacy.

Katz v. United States 389 U.S. 347 (1967)

Katz v. United States is a major Fourth Amendment Supreme Court case. This case defines the legal definition of a search under the Fourth Amendment and what it applies to. This case involved listening devices being placed inside phone booths and whether there can be a reasonable expectation of privacy in that situation. In this case, an individual named Charles Katz was placing illegal bets over state lines. The police did not have enough evidence to charge him because he was placing these bets through a pay phone. The police placed a wire tap on the phone booth he visited most without having a warrant to do so. The police were able to obtain phone conversations between Katz and another individual placing illegal bets. Katz was charged and convicted of the crime. Katz appealed and argued the wiretapping violated his fourth amendment rights. The Court of Appeals ruled against Katz and Katz appealed to the United States Supreme Court.

Katz brought the issue of whether a public telephone booth is an area that falls under the constitutional protections of the fourth amendment and if attaching a listening device to the top of the phone booth is considered a search that violates the privacy rights of the individual using the phone booth. In Justice Stewart's written opinion, he defines

the Fourth Amendment as having nothing to do with a general right to privacy, but instead it protects individual government intrusion. The government argued because Katz had the conversation in a public, glass phone booth that was visible to the rest of the world, there is no reasonable expectation of privacy. Justice Stewart defended Katz in his opinion, "But what he sought to exclude when he entered the booth was not the intruding eye— it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen" (Stewart). The Supreme Court ruled that not only did Katz have a reasonable expectation of privacy, but that the government violated the Fourth Amendment by wiretapping the phone booth. The reason I chose to include this case in my thesis is because Justice Stewart's phrase on the 'uninvited ear' could be applied to the use of cell phones. Unlike computers, cell phones are easily transported. An individual can carry their cell phone in their back pocket and use it almost anywhere; a train, restaurant, or just walking down the street. A cell phone is used in the public eye enormously and yet, when it is used in public, an individual still has an expectation of privacy with the device. Should an officer be reasonably allowed to obtain information from the screen of a cell phone, when an individual keeps so much of their private life on the device and expects the information to remain private and protected?

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

In 1964, Edward Coolidge was investigated for the murder of a woman named Pamela Mason. Police officers visited his home and obtained evidence from Coolidge's spouse. The police officers returned with a warrant they received from the Attorney General who was in charge of the case, to search Coolidge's vehicle. Coolidge was first

arrested in his home and his vehicle was towed to the police station. Following a search of Coolidge's vehicle, evidence was found using vacuumed particles from the floor of the car. The evidence was then used at trial to convict Coolidge of murder. Coolidge appealed and argued the warrant issued to search his vehicle was not signed by a neutral and detached judge. The government argued even if the warrant was not applicable, the plain view exception and the search incident to arrest exempted the officers from needing a warrant to search the car.

The court ruled in favor of Coolidge. Not only was the warrant inapplicable because it was issued by a biased magistrate, but the search was not covered by the plain view exception or the search incident to arrest exception of the Fourth Amendment. The police argued Coolidge's vehicle was searchable because it was in the driveway of his home, in plain view of the officers at the time of his arrest. Because Coolidge was arrested in his home, police believed the car parked in the driveway would fall under the search incident to arrest, however, the police did not have justification to tow the vehicle and perform a search of it on their own time. Justice Stewart wrote in the court opinion, that because the police had sufficient time to obtain a search warrant for Coolidge's vehicle and they knew the location of the vehicle for some time, a warrant should have been required to search the car. The case also held that evidence or contraband may be seized in plain view only when the discovery of the evidence or contraband is inadvertent. This decision made by the court greatly limited the search incident to arrest exception and the plain view exception. Searches allowed under these exceptions were narrowed tremendously by the decision in this case.

Horton v. California 496 U.S 128 (1990)

Horton v. California is another United States Supreme Court Case that examines the warrantless seizure of evidence in plain view. I choose to include this case because it differs from the decision in *Coolidge v. New Hampshire*. While Coolidge sets the three requirements for a search in plain view, *Horton v. California* concludes that inadvertence is not necessary for the seizure of evidence in plain view. Although this case pertains to the seizure of evidence instead of the search itself, the decision in this case can be applied to similar situations to what occurred in *Coolidge v. New Hampshire 403 U.S. 443 (1971)*.

The defendant in this case, Terry Horton, was believed to involved in an armed robbery. The police sought a search warrant to search Horton's home for the firearm involved in the crime and for stolen property. The magistrate only allowed the police to search for the stolen property so a warrant for the firearms was denied. While in Horton's house, police found the weapons used in the crime, but found no stolen property. At trial, the police officer who conducted the search testified that while searching for the stolen property, he was also interested in finding other evidence that connect the defendant to the crime. Horton was convicted of armed robbery and sentenced to jail time. His lawyer appealed, arguing the officer did not find the firearms inadvertently and therefore did not meet all of the requirements of the test in *Coolidge v. New Hampshire.*

The Court of Appeals did not grant suppression of the firearms because they noted Coolidge was only endorsed by four of the Supreme Court justices and therefore was not binding. The California Supreme Court denied Horton's petition for review and the United States Supreme Court affirmed this decision. The U.S Supreme Court held

that the seizure of the firearms was still a valid plain view seizure of evidence because the inadvertence requirement is not an objective standard that can be set for all police officers. This case does apply to seizures in plain view, but it may also be extended to include searches in plain view. In order to seize evidence in plain view, it must first be noticed in plain view, therefore the inadvertence requirement would not be necessary for the initial search. Whether it is considered inadvertent for a police officer to glance at the screen of a cell phone or not, inadvertence is not a requirement for a valid plain view search and is not necessary for a police officer to search a phone screen.

Riley v. California 573 U.S 373 (2014)

Riley v. California was a landmark Supreme Court case that was decided in 2014. David Riley was pulled over for driving a vehicle with expired license registration tags. Riley's license was suspended, so the police officer completed an inventory search of the vehicle and had it impounded, which is normal protocol for a suspended license. The police officer found two firearms in the car during the inventory search and arrested Riley for possession of the firearms. The police officer completed a search incident to arrest and found Riley's cell phone in his pant's pocket. While back at the station a detective analyzed Riley's cell phone and found pictures and videos that showed Riley's connection to a gang. These photographs were used to tie Riley back to a gang shooting two weeks prior to his arrest. David Riley was then arrested on a separate charge of attempted murder. During trial, Riley sought to suppress evidence obtained by the search of his cell phone and his motion for suppression was denied. He was sentenced to fifteen

years in prison. The case was appealed to the United States Supreme Court, and the court ruled in favor of Riley, overturning the lower court's previous decision.

Riley is a landmark case and a huge win for privacy rights. The conclusion the court reached was that a warrantless search cannot be used to search data contents of the cell phone. The main purpose of a warrantless search exception is to prevent loss of evidence and to ensure the safety of police officers as held in *California v. Chimel, 395 U.S. 752 (1969)*, but the court found no risk by searching the contents of a phone without waiting for a warrant. Evidence from the cell phone can be preserved by keeping the device in a faraday bag, which blocks electromagnetic interference. These bags prevent the device from potentially being hacked or tampered with before a search warrant is obtained. The Supreme Court also mentioned in the oral argument that the exterior of the phone could be examined to ensure the safety of officers, but there was no safety concern for officers involving the contents of the cell phone. Riley, however, still left many questions unanswered, like what would happen if the cell phone was receiving phone calls, could the officer answer it? What instances would be considered an emergency exception that would allow an officer to search a cell phone?

United States v. Morgan 16-1525 (8th Cir. 2016)

Although this case is not a United States Supreme Court case, the topic of the case is extremely relevant and has not yet been covered by SCOTUS. This case is also the most recent of all the cases, as it was decided in 2016. This case came from the Eight Circuit Court of Appeals, which includes states such as, Arkansas, Iowa, Missouri, Nebraska, and both Dakotas. Circuit courts are the intermediate courts between the

Supreme Court and trial courts. Similar to the Supreme Court, the Court of Appeals does not hear new evidence as in trial courts, instead they examine whether the decisions made by the trial courts and the procedures done were fair and within the law. Because of the small amount of cases the Supreme Court hears, the decisions made in the Courts of Appeals are often final decisions. In this case there has been no decision made by a higher court than the Eight Circuit Court of Appeals, meaning the decision in this case can serve as precedent for other cases that are similar.

Many issues arise in this case, but the issue most important to my thesis is the use of the Plain View Doctrine in the case. In 2013, police officers discovered a computer with child pornography on it. The police were able to trace the computer's IP address to an individual named Damien Morgan. After obtaining a search warrant for his home, over seven weeks later, the police searched Morgan's home and also arrested Morgan on a separate no-fare transit violation. Before being placed in the police car, Morgan was searched incidental to the arrest. His cell phone was confiscated from him.

While in custody at the police station, Morgan asked to use his cell phone so that he may let his employer and sister know where he was. The police officer agreed to let Morgan have his phone, but only under the supervision of an officer. Morgan did not object to the officer viewing his cell phone screen as he used the phone. While scrolling through his contacts list, Morgan made remarks about people in his contact list to the officer. The officer watching his cell phone wrote down several names and numbers from Morgan's phone. During investigation, a detective was able to match one of Morgan's contacts to a woman in photo found on Morgan's Facebook page. After further

investigation on Facebook the police discovered the woman's child was the child pictured in Morgan's pornography.

Morgan filed a motion to suppress all of the evidence seized from his person or possession which included the information obtained from his cell phone that allowed the police to connect Morgan with the victim. The district court denied the motion to suppress evidence and Morgan was sentenced to thirty years in prison and appealed the decision. The Eight Circuit Court of Appeals reviewed the case and found no error. The court held Morgan could have no reasonable expectation of privacy due to the fact that his phone screen was voluntarily shown to police officers. Additionally, due to the fact that Morgan gave information to an officer about individuals in his contact list, his consent is obvious. The court mentioned *Riley v. California 573 U.S 373(2014)* and how this case differed from what occurred in *Morgan v. Arizona*. In *Morgan*, the cell phone screen was purposely left in plain view of the officer, while in *Riley* a police officer looked through the contents of the cell phone themselves.

Morgan does point to the requirements set in *Coolidge v. Hampshire 403 U.S 443 (1971)*. He argues that although the officer was in a lawful position to view the cell phone screen, the evidence discovered on the cell phone was not immediately apparent nor was it discovered inadvertently. The prosecution argued that because Morgan knew the officer was watching the screen of the cell phone and Morgan was telling the officer details about the individuals in his contact list as he was scrolling through them, he gave the officer consent to look at the screen of the cell phone. Because Morgan gave the officer consent to view the cell phone screen, it does not matter whether the information on screen was immediately apparent as evidence of a crime nor does it matter whether the

search was inadvertent. Each of these cases deals with privacy concerns in one way or another. The decisions made in these cases will impact current law and will affect any future decisions the courts make regarding cell phone privacy. Until then, all current issues regarding cell phones are handled by the police force. To see what is currently being done today to address privacy concerns, one must first analyze the actions of police departments.

DATA ANALYSIS

Interviews

The purpose of the data analysis section of this thesis is to interpret information obtained from interviews conducted with police officers and training coordinators, and evaluate statistics involving cell phone technology. I decided to incorporate interviews with police officers as part of the research for my thesis because it provides the perspective of the government and shows the current protocol police departments have on cell phone searches. This is extremely important because without any case law setting guidelines for conducting cell phone searches in plain view, the decisions made by police officers determine how private a cell phone truly is. The second component of my data analysis is statistical research. I did not conduct the research myself. The statistics were found by companies such as, Snapchat or Facebook and large polling places such as, YouGov, which reports on statistics involving the government. These statistics showcased how impactful decisions regarding this issue are, and how influential the growth of technology has become.

A major component of the research for my thesis was conducting interviews with police officers from the Hampden Police Department, University of Maine Police Department, and the Maine Criminal Justice Academy. The process to be able to conduct these interviews was long and difficult. To use human subjects in my research for my thesis I was required to submit an application to the Institutional Review Board, which oversees all research involving human subjects to ensure the research does not drop below ethical standards. To be heard by the IRB committee, I had to describe my

research in specific detail through an application process. The application was fourteen pages in length of my own writing and there was a total of seven revisions. After being rejected three times, I was finally approved to conduct interviews with a few considerations. I could not disclose the name of the police officers and I could only interview officers from the police departments mentioned in my IRB application. This made my pool of subjects extremely limited. I was only able to interview officers from the University of Maine Police Department, the Hampden Police Department, and the Maine Criminal Justice Academy and I could not reach out to officers from surrounding police departments such as, Old Town, or Orono. At first I did not see this as an issue, but as time went on and there no responses to my requests for an interview, I began to worry.

Contacting an officer from the Hampden Police Department did not take much time and the interview proceeded with no problems. I was able to conduct a phone interview with an officer from Hampden and obtained information relevant to the thesis. Problems arose when I tried to contact the University of Maine Police Department and the Maine Criminal Justice Academy. Emails went to all of the police departments I mentioned in my IRB application. I tried calling both the University of Maine Police Department and the Maine Criminal Justice Academy. A secretary at the University of Maine Police Department answered and told me they would pass the information along to the Chief and I should expect an email or a phone call shortly. The Maine Criminal Justice Academy gave me the emails of each of the four training coordinators at the Academy. After writing an email to each of the coordinators I still received no reply. My next step to reach officers at the University of Maine Police Department was visit the department in person. The secretary in the office remembered our conversation and

apologized for forgetting to pass the information to the Police Chief. I was told the information would be passed along to the Chief when he returned and that I should be expecting a phone call shortly. I never received a phone call nor a response from emails sent to the Academy. After coming to a wall, I was finally able to make headway when two professors reached out to contacts close to the UMPD and the Maine Criminal Justice Academy. I was able to set up a phone interview with one of the coordinators at the Academy and to arrange a meeting with an officer at the University of Maine Police Department.

In total, I interviewed three police officers and was only able to record two of the three interviews. To avoid confusion I will refer to the officer from the Hampden Police Department as Officer A, the officer from the University of Maine Police Department as officer B, and the training coordinator from the Maine Criminal Justice Academy as officer C. I conducted the interviews in a very similar fashion. I had a series of questions to ask during the interview that I had written beforehand. Follow-up questions would occur if I saw that more information could present itself. The interviews lasted around 20 minutes and after I would transcribe the interview on my laptop, which usually took about one to two hours. My interview with Officer A was by far the most helpful in terms of answering questions and providing information.

The first question I asked during the interview was, "Have you heard of the Supreme Court Case *Riley v. California*, and if so, how does it apply to your work?" Although this case does not involve the Plain View Doctrine, I still believed the question was relevant to ask because the case shows how technology is changing and the level of privacy associated with a cell phone. Officer A knew the case extremely well. He referred

to the case as “basically the search incident to arrest of people’s cell phones.” He went on to say “that the cell phone is no longer an item that can be searched incident to arrest because of the privacy concerns and issues in the way in which the cell phone is used.” This case changed the way the Hampden Police Department deals with cell phones. *Riley v. California* was used in a case law update to train officers at the Hampden Police Department what they can and cannot do with a cell phone. I found it interesting how Officer A noted the Search Incident to Arrest exception. Could Officer A believe there is no exception for a cell phone search without a warrant, or maybe there is an exception that is not search incident to arrest that allows the search of a cell phone without a warrant? Officer A went on to explain the decision in Riley was not surprising to him given a cell phone is like a ‘mini personal computer. Officer A shared that he teaches at a local institution and that he uses *Riley v. California* as part of the learning material for the class, “that’s a discussion point we have with students there. I present that case and we talk about it and they’re actually tested on it as well." Although *Riley v. California* was decided recently in 2014, the case has already had a huge impact on Officer A’s career and his teaching.

The second question I asked was whether Officer A had any specific training regarding the search of cell phones. At first he mentioned there was no specific training other than what had been brought up through the Criminal Justice Academy. He then also mentioned the case law updates that occur at least once a year. I found this interesting because I expected there to be more training like a walk-through of confiscating a cell phone, due to how much technology has changed in the recent years. Case law updates will educate officers on what the law legally allows them to do during a search, but

having a walk-through on confiscating a cell phone would create a more sound protocol to avoid unlawful searches. I asked Officer A, when does an officer confiscate a cell phone from a person. Officer A brought up Search Incident to Arrest again and explained it to me in more detail. “Now what we normally do when we arrest somebody, and we usually take them to jail. We search a person’s body within reason…We search their pockets, any items, if they’re carrying a backpack, you can search the backpack. Now that’s search incident to arrest." He then shifted the conversation to cell phones, “So if I have a personal item like a cell phone or a wallet with money in it, normally what I do, if it’s a wallet with money in it, I leave it in in their pocket. When we get to the jail, the jail people will take it out. Any weapons I would secure. Usually with a cell phone, unless there is reason to believe it’s being used as part of a crime or probable cause, I can’t seize it. I can hold it for safe-keeping until I get to the jail, so it doesn’t get destroyed or broken." Officer A points out that unless there is reason to believe a person’s cell phone has been used in a crime or has evidence of a crime on it, then he will leave the phone in their pocket. In a situation such as this, an officer cannot just take a cell phone whenever it suits them.

Things became interesting when I asked a follow-up question to Officer A’s response. I asked if the phone is turned off when the officer seizes the cell phone. Officer said replied that he usually does not turn off the cell phone and leaves the cell phone the way he received it. Without manipulating the cell phone in any way, the phone would continue to receive messages and make noises each time an alert popped up on the screen. When I asked Officer A what he would do in a situation that involves a seized phone continuously buzzing with text messages, he replied saying, “Yeah I mean as long

as they're popping up as I'm holding the phone that I can righteously have because I have probable cause then I would certainly take note of those text messages coming in." Officer A's statement made me think back to the first prong of the test in *Coolidge v. New Hampshire*. This requirement states that an officer must have a reason or must legally be allowed to be in the location they conduct the plain view search. Officer A did not seem surprised by the question I presented and his answer made it seem as if a situation similar to this has happened. Officer A explains that because he is not manipulating the phone in any way or searching through the phone like he would if he received a warrant, the search of the cell phone screen is in plain view. I asked Officer A if instead of text messages popping up on the screen of the phone, it was a phone call, could he answer the phone. Officer A's answer was shocking to me because the department did not have an answer. Officer A said, "If someone calls and I answer the phone? Uh. Oh boy. I don't know if that's… I don't know what the courts would say about that would probably uh.. answering the phone and searching the phone, just answering the phone.. you might be able to get away with that. If you answered it and said ya know… but you're kinda walking a thin line there. You have to be careful." Officer A was unsure whether answering a phone call would be a valid search under the Plain View Doctrine of the Fourth Amendment. He went on to explain that when an officer watches the screen of the cell phone, they are not manipulating the phone in any way like a phone call would, "It's not like I'm manipulating the phone, searching through the phone, doing those kinds of things. If I was doing that, I was playing with it, going through the text messages, then I would be searching it, and that would not be, without a search warrant, that would not be permissible." Officer A was very clear that viewing text

messages on the screen, if he can legally have the device, is allowed under the Constitution. Other officers I interviewed were not as clear on what was and was not permissible.

Officer A mentioned a 'thin line' in his interview and this is the line I am trying to examine in my thesis. At what point does the search of a cell phone switch from being allowed under the exceptions of the Fourth Amendment to being an unconstitutional search? I asked each of the officers I interviewed where they stood on this line and each one had a slightly different answer? The second interview I conducted was with Officer B from the University of Maine Police Department. I found it somewhat difficult to obtain information during this interview because the University of Maine. Police Department. Has never applied for and obtained a search warrant for a cell phone. When I asked Officer B a question about search warrants and this was his reply, I was shocked. How could a police department for a college campus of over 10,000 young students, most of which probably have a cell phone, never need a search warrant for a cell phone. Officer B explained that most of the evidence they receive is screenshots of text messages. This evidence usually only comes from one of the parties and can easily be manipulated. Officer B said most of the crime that involves a cell phone at the University is when an individual is angered or upset over a break-up, "where we see it mostly here is the boyfriend girlfriend breaking up and I, you know, he's harassing me, she's harassing me, that type of thing and I'm getting these text messages and everything and then they'll show the text messages and stuff like that or they'll print off a screenshot." Although warrants do not arise often at the University of Maine Police Department, Officer B did

mention the department has received mandatory training regarding *Riley v. California* in the last few years.

Officer B mentioned the case and how important training on the Fourth Amendment is to police work, but other than case law there was no training on specifically searching cell phones, “you’re gonna search your phone, it’s a search warrant, you know? Uh, so yeah, we’ve gotten training on that as far as that type of stuff. But as far as the actual searching of a phone, that’s highly technical." Neither officers at the University of Maine Police Department nor at the Hampden Police Department received specific training by the state on what to do with a cell phone once it is in their possession. It is left up to the department’s or even their own discretion to decide what to do with an arrestee’s cell phone. Since the issue of whether an officer can search the screen of a cell phone can be construed either way, it could be dangerous for officers to not have a set of procedures that all officers in the state should follow.

Another interesting segment from the interview with Officer B was the importance of the Fourth Amendment, “You know for police officers, it’s the most important thing, is uh, the violation the Fourth Amendment. So it’s just no different than that. A phone is no different than a house or you, an apartment or something. The phone’s going to be a little different in the fact that really exigent circumstances don’t apply. But you know, in a house you either can search it by consent, by warrant, or exigent circumstances, the phone is either by consent or a search warrant, and, you know, it’s just the way it is." Officer B stressed a cell phone is the same as a house or an apartment except a cell phone cannot be searched under the exigent circumstances exception. Officer B did not seem to support the idea that the screen of the cell phone could be searched under the Plain View

Doctrine. In this case, Officer B expected a higher level of privacy with a cell phone than Officer A. Having a perspective from a police department on a college campus provides more insight into how technology is becoming more involved in everyday policing.

The last interview I conducted with a police officer was with a training coordinator from the Maine Criminal Justice Academy. I interviewed this individual because I thought it would be helpful to include information from someone who trains upcoming police officers in the state of Maine. Officer C was by far the most guarded in terms of giving information. He did not wish to be recorded and only answered questions briefly. I was told I would receive an email from the Attorney's General's office with more detailed answers to my questions, but I never received the email and after several attempts on trying to contact individuals about the issue, I gave up.

Officer C did not see a situation where the issue of viewing a cell phone screen would ever be considered a search. According to Officer C's reasoning a police officer could not seize a phone unless there is probable cause there is evidence on the phone or the person is being arrested. If the person is arrested and taken to jail, the phone must be turned over to the bailiff unless the police officer plans on obtaining a warrant for the cell phone. If the officer plans on applying for a warrant, the cell phone should be turned off to preserve information on the phone and checked into evidence. There should be no moment when an officer can examine the screen of the cell phone to look for messages or alerts. Officer C was extremely clear the cell phone cannot be manipulated in any way and emphasized the similarity between a phone and computer. Officer C did confirm that every police department in the state has case law updates every time something relevant surfaces. He specifically remembers *Riley v. California* is a case stressed in officer

training and that the case changed the way police officers viewed cell phones. Although I was not able to record Officer C, having his input on the actions and perspective of the Maine Criminal Justice Academy helped piece together the process officers undergo when an individual is arrested and their cell phone is seized.

Based on these three interviews one can see how important the issue of cell phone privacy is becoming based on the involvement of *Riley v. California* in their careers. One can also notice how unclear the issue of searching a cell phone screen still is today. All three police officers I interviewed expressed a different viewpoint on cell phone searches. They all acknowledged that a cell phone is a private place for person's conversations and personal data, but Officer B and C did not state that searching the screen of a cell phone could be covered under the Plain View Exception of the Fourth Amendment. Obviously, none of the officers' answers were wrong or invalid because this matter has not been decided yet by the courts and until the courts decide on the issue, these officers will determine when and if the screen of a cell phone can be searched.

Statistical Data

The second component of my data analysis is statistical research that shows how cell phones have increasingly become more prominent in every-day lives and how the number of cell phone searches has increased in the United States. I chose to include these data to highlight how the topic of my thesis is becoming more relevant every day. It is estimated that the number of smartphone users in the world will reach 2.5 billion by the end of 2019. Americans are believed to account for 255.9 million of the 2.5 billion (eMarketer). This is obviously a large pool of Americans that are affected by laws

concerning cell phone privacy. Each of these smartphone users could potentially be affected by more lenient policy on cell phone searches. As the smartphone becomes a more convenient place for users to store private information, the more police officers will want to search these devices. It is not difficult to conceive that just like any other American, criminals will also keep private information on their cell phones. With a warrant, police can search an individual's cell phone to find evidence of a crime, however, if there is no probable cause or a delay in the warrant it becomes difficult for a police officer to obtain this evidence. If more lenient policy regarding cell phone searches is established, the way police officers conduct investigations involving cell phones could change dramatically.

Today, cell phone privacy is on the minds of many Americans. According to the Pew Research Center, an estimated 37% of adults in the United States were concerned about government surveillance of their cell phones. The only higher category listed above cell phones is e-mails. There is no doubt many Americans are concerned about the privacy of their internet devices. In a survey done by Statista, participants were asked what types of personal information would they be most concerned with online hackers accessing. The two types of information with the most concern are banking information and credit card numbers. 36% of respondents said they were concerned with hackers gaining access to their private emails, while 24% of respondents said personal browsing history. Many phone applications have the option to show messages, emails, or changes in a bank account on the screen of the cell phone. A large portion of the information individuals are concerned with can be easily accessible to police officers if they have met all of the requirements for a Plain View Search.

In a survey done by Statistica, an estimated 48% of Americans, age 30-59, said they were "somewhat confident" in the protection given by the privacy settings of their social media (Statistica 2019). Although the majority of participants were either "very confident" or "somewhat confident", about a quarter of the participants said they had little to no confidence in the privacy settings associated with social media. Not only are Americans concerned with others having access to personal data, but they are also concerned with the effectiveness of privacy settings. What can internet users do to better protect the information kept on their devices? A total of 51% of internet users admit to regularly clearing their web browsing history and an estimated 31% of internet users have two step verifications for their devices (eMarketer 2018). Many Americans are taking steps to better protect their personal data, but some are still unsatisfied with the privacy settings on their devices. These statistics beg the question if anything else can be done to better protect the privacy interests of internet users. Once information is placed online, is there no level of privacy to guard it? Is there anything the government can do to better protect the information internet users have online, or should it be left to the users to fend for themselves? These questions show the importance of this privacy concern and highlight why the courts should make a decision on the issue. Allowing law enforcement to decide what infringes on an individual's privacy and what does not have negative consequences for the country.

The last set of data comes from social media companies. Companies like Facebook, Twitter, or Snapchat all have an app that is on most smartphone users' devices. These companies report the number of times federal agencies have requested user data information through warrants. In 2017, Snapchat received 8,820 requests from

U.S Federal Agencies or Courts for user data (Snap Inc.). Compared to only 1,623 requests in 2015, the number has grown exponentially. By noticing how quickly this number rose in two years, one can see how quickly the issue of cell phone privacy is becoming that much more of an issue to individual lives.

Cell phone can serve as great tools for the police to use in investigations. The data on cell phones can serve as fairly concrete evidence. In the first half of 2018 alone, Facebook received over 42,000 user data requests from federal agencies and courts (Facebook). The next highest country to receive requests is India with only 16,580. Based on that data, one can see that in the United States the search of data on cell phones has only recently erupted into an issue that affects thousands of Americans. Law enforcement can realize how helpful data stored on the internet can be for investigations and they can take advantage of the weak protections. Because of the rate in which cell phone privacy concerns grow, it is difficult for case law to keep up. Instead of being decided by the courts, the police force is left to decide what is fair in issues involving cell phone privacy, resulting in a biased effect. These statistics overwhelming support the idea that the lack of privacy for internet users is becoming a substantial problem in the United States. As the number of data requests from law enforcement continues to rise, Americans will begin to push for more laws and regulations protecting the information they place online. The courts will be asked to make decisions that will either benefit those seeking privacy on their devices or law enforcement seeking information that will help with investigations.

CONCLUSION

Each chapter of my thesis serves a purpose to determine and explain the circumstances in which a police officer can search the screen of an individual's cell phone. The literature review chapter contains what the courts have said on the matter and what case law is relevant to the issue. The Data Analysis chapter functions to show how the police force handles situations involving the search of a cell phone and to show what they believe the scope of the Plain View Doctrine to be. The Data Analysis chapter also shows how important cell phone privacy is to the public and how large of an issue the search of cell phone has become. To incorporate everything I have discussed thus far in my thesis and to illustrate how the question I presented would be handled in today's world, I have developed a hypothetical case brief involving a search of a cell phone screen.

This hypothetical case differs from others that have already been decided by the Supreme Court. Unlike *Riley v. California*, the police officer does not manipulate the phone to search contents; instead they simply wait and watch as messages pop up on the screen of the cell phone. The question this case asks is whether viewing the screen of the cell phone can be considered a valid search under the Plain View Doctrine or whether viewing the screen is an unlawful search like what happened in *Riley v. California*. This hypothetical case also differs from the situation in *United States v. Morgan*, which was an Eighth Circuit Court of Appeals case. In *Morgan* the police officer viewing the screen has consent from the owner of the cell phone to watch as he scrolls through the cell phone. In the hypothetical, the officer arrests the owner of the cell phone and seizes the

device to later obtain a warrant to search the contents. Although the police officer does not have consent from the owner of the cell phone to view the screen, the individual is in custody of the state and there is probable cause to believe that there is evidence on the phone. From the research I have done, an issue such as this has not been decided by the courts. The decision in this case could affect a large number of people.

In the United States alone there are over 250 million smartphone users. Many of these individuals keep personal information they would like to keep private on their cell phones. With an unlocked phone anyone can access a person's bank accounts, medical information, work emails, and text messages. If the United States Supreme Court decides on an issue similar to the hypothetical case discussed later, cell phone privacy will be drastically changed. The decision could either be a huge development in privacy rights, or it could severely hinder them. To discuss how the situation would be decided by today's Supreme Court, the hypothetical brief is as follows:

Hypothetical Brief

Defendants: Sam Jones and Kevin Brown

Prosecutor: The State of Maine

The State of Maine v. Jones 2019

Facts of the Case:

On February 15th, 2019, Sam Jones, a nineteen year old student at the University of Maine, was caught smoking marijuana in his vehicle in a gas station parking lot. Officer Smith arrested Sam for possession with the intent to distribute and placed him in the police vehicle. The officer then searched the vehicle and found a backpack full of more

marijuana. The officer also confiscated Sam's cell phone and wallet during a search incident to arrest. The phone kept buzzing repeatedly while the officer drove to the police station. Once Sam and Officer Smith arrived at the police station, the officer pulled out Sam's cell phone and noticed another text message flashed across the screen. The text message said that someone named Kevin needed Sam to sell more marijuana and narcotics for him.

Sam is eventually booked into the jail. The officer gives all of Sam's possessions and he had with him that night, except the cell phone to the jail clerk. Officer Smith additionally checks the drugs and all paraphernalia into evidence as well. The cell phone is considered evidence in this case, because Officer Smith believes Sam uses his cell phone to communicate about drug sales. Officer Smith keeps the cell phone while he asks a judge for a search warrant to search Sam's text messages and snapchat. While the phone is sitting on Officer Smith's desk, text messages continue to pop up on the screen, Officer Smith reads the text messages present on the screen. He does not press any buttons or manipulate the phone in any way to view them. Officer Smith continues to read the messages present on the screen as additional ones pop up. These messages contain details about Sam and a man listed as 'Kevin' dealing drugs. The text messages alert police to a drug deal happening in the area. Officer Smith dispatches a few officers to search for this drug deal and attempt to find a man named 'Kevin'. The officers find him along with marijuana and drugs in his vehicle. The police officers obtain a search warrant for Kevin's cell phone and are able to convict him for drug trafficking. Sam and Kevin filed a motion to exclude the evidence obtained from an illegal search. The trial court denied the motion and found both Sam and Kevin guilty of the crimes. Kevin was

sentenced to five years imprisonment and Sam was sentenced to two years of probation. Both appealed the trial court's decision, arguing their rights were violated when an officer illegally searched Sam's cell phone, which had a reasonable expectation of privacy.

Issue:

Riley v. California ruled that an officer needs a warrant to search the contents of a cell phone. In the oral argument the Justices discussed that an officer can inspect the exterior of the phone, but they may not search the contents without a warrant *(Riley v. California 573 US 373 (2014)*). The issue here is whether text messages on the screen could be considered part of the exterior of the phone thus, not constituting a 'search' as defined in the Fourth Amendment. The default setting of a cell phone is to have alerts from text messages pop up on the screen. The owner of the cell phone could turn off notifications on their cell phone to prevent text messages from popping up on the screen of the cell phone, so having alerts on the screen of the cell phone could be considered a voluntary choice. Although these settings may be changed, is it unreasonable to expect this of individuals?

Cell phones differ from other pieces of evidence such as, a wallet or a gun. All the information presented by these objects, as evidence, is physical, unlike with a cell phone. With a cell phone an individual can quickly access bank records, missed calls, conversations, health records, schedules, and more. Many apps that include this information have alerts that pop up on the screen of the cell phone. Should these devices be treated differently from other types of evidence? The oral argument in *Riley* mentions the use of faraday bags to prevent the destruction of evidence. Information or messages

on a cell phone can be deleted or destroyed by the use of a remote device. A faraday bag prevents a remote device from accessing the cell phone checked in as evidence. A police officer may additionally turn the cell phone off before checking the phone into evidence to keep the phone from showing alerts or phone calls until it is turned back on again or a warrant is received. If an officer holds onto the cell phone and places it on his or her desk and notices the messages as they pop up, would this be deliberately setting the phone up to find evidence? What if details from text messages do not immediately show signs of a crime, but the information obtained from these messages is used to investigate further and find more evidence? With cell phones being so different from most other types of evidence, these questions are more difficult to answer.

Decision:

In this case, the court answers the question of whether a law official can reasonably obtain information from the screen of a cell phone if the officer has a right to be in proximity of the cell phone and has not manipulated the phone in any way. One of the issues associated with searching the screen of the cell phone is whether the purpose of the search is to ensure the safety of law officials or to prevent the destruction of evidence. Based on the court's previous decision in *Riley v. California 573 U.S 373 (2014)*, contents of a cell phone usually do not present an immediate hazard to police officers. The contents of a cell phone can also be preserved by the use of a faraday bag. Although the search does not meet either of these requirements, viewing the touch screen of a cell phone falls into a valid search under the Fourth Amendment because of the Plain View Doctrine. If the police officer does not manipulate the cell phone in any way, such as, pressing buttons, then that action does not fall under the Plain View exception.

Based on *Coolidge v. New Hampshire 403 U.S. 443 (1971)*, there are three elements required of a search to fall under the Plain View exception. These elements include reason to be present, inadvertence, and immediately apparent and the officer must have a reason to be in viewing distance of the cell phone screen. If an officer is searching a vehicle after an arrest and a cell phone is laying in the passenger seat of the car, then the screen of the cell phone is reasonably in direct sight of the officer. If an officer has reason to believe the contents on the cell phone will provide evidence of a crime and the cell phone is seized, then the cell phone is not checked in at the jail with other personal belongings. Instead, the cell phone is taken into evidence. While in evidence, an officer may inspect the object and gather information from it.

The second element needed for a search to be considered to be in Plain View, according to *Coolidge*, is inadvertence. In both *Coolidge* and in the hypothetical case, the police knew the location of potential evidence. Where this case differs from *Coolidge* is that in the search for evidence the police did not open or manipulate the phone in any way. In *Coolidge*, the police opened the defendant's vehicle and vacuumed particles from the car's floor, but in *Maine v. Jones,* the officer simply watches the screen of the cell phone. Even if this is still considered deliberate and an obvious search, the inadvertence element of a Plain View Search is no longer needed because of the decision in *Horton v. California 496 US 128 (1990).* In this case, over twenty years after the decision in *Coolidge v. Hampshire 403 US 443 (1971)*, the Supreme Court held that inadvertence is not a requirement for valid Plain View Seizures, instead it is only a characteristic that appears often in these seizures. When a police officer stumbles upon evidence of a crime whether he planned to find evidence or not does not change the outcome of finding

evidence. A police officer should not be afraid to use his intuition to suspect there is other evidence of a crime in the searchable area.

Justice Stevens delivered the opinion of the court, stating why the inadvertence requirement is no longer necessary for an officer to seize an item in plain view as long as it still meets the other conditions laid out in Coolidge. Stevens' reasoning behind this opinion was that the inadvertence requirement relied on an officer's subjective state of mind, instead of objective standards set for all police officers. In the opinion, Stevens wrote, "The fact that an officer is interested in an item and fully expects to find it should not invalidate its seizure if the search is confined in area and duration by a warrant's terms or by a valid exception to the warrant requirement" (*Horton v. California, 496 U.S. 128 (1990)*). Based on this opinion, an officer should not be deterred from purposely looking for evidence of a crime when they have a right to be in that location. When a police officer finds evidence of a crime, the question of whether the evidence should be suppressed should not be determined by whether the officer planned to find the evidence or whether he stumbled upon it. Although the precedent set in this case applies to seizures in plain view, the precedent can be extended to searches in plain view as well. In order to seize evidence in plain view it must first be noticed or seen by an officer, thus creating a search. Since the search must come before the seizure, inadvertence is not necessary for either component. Based on the decision in *Horton v. California*, the inadvertence requirement is not necessary to search the screen of a cell phone because an officer glancing at a screen when it makes a noise is no different than purposely waiting and expecting evidence of a crime on the screen of the phone.

The last element specified in *Coolidge* requires that the evidence obtained from the search in plain view must be immediately apparent in relating to criminal activity. In other words, the object in question must be an obvious sign of a crime. Drugs and other types of contraband usually give way to an obvious crime, however finding items such as, a necklace and confiscating that item to later find out it was stolen does not fall within the parameters of the Plain View Doctrine. In this case it was immediately apparent that the text messages contained evidence of a crime. Not all text messages may contain evidence of a crime and thus should not be used in an investigation, but the messages on Sam's phone referenced drugs and the selling of drugs. They also exposed the location of a drug sale. In a different situation where the text messages did not contain evidence of a crime, but the information on the screen was used for other findings, then the search could be considered invalid.

In this case, the police officer's search of the cell phone screen and the seizure of evidence from the screen was a valid search according to *Horton v. California.* The officer was reasonably allowed to be in proximity and have the cell phone on his desk like any other piece of evidence in a crime because he was waiting for a search warrant for the device. The information obtained from the text messages on the screen of the cell phone was immediately apparent as evidence of a crime due to the fact that the text messages contained details about drug sales. Regardless of whether the police officer found the information inadvertently or not, *Horton v. California* does not require the inadvertence characteristic to fall within the parameters of the Plain View Doctrine.

As technology continues to advance, we must adapt our laws to privacy concerns, as occurred in *Riley v. California 573 U.S ____ (2014)*. However, this case differs from

Riley because the police officer did not check the contents of Sam's phone until he received a warrant. He only used information that presented itself on the front of the screen. Additionally, the suspects could alter the settings of the cell phone to prevent alerts or the details of text messages from popping up on the screen. Due to the fact that the defendants allowed this information to be displayed in plain view of the police officer and the search fulfills the necessary requirements of the test created by Coolidge, the Court rules in favor of the State of Maine.

This hypothetical case serves to demonstrate not only how easily a situation such as this could arise, but how quickly a police officer can obtain evidence from a personal device without a search warrant. There is no doubt looser privacy law will give an advantage to law enforcement with the cost of less protection for information stored online. Based on precedent, I believe the courts will side with law enforcement for this issue. Regardless of this decision, however, the best interest of the general public is not always based on legal precedent. The hypothetical case shows how if the country makes no changes to protect privacy interests, personal data will be recovered and used by law enforcement to aid in investigations.

Privacy concerns are growing in the United States and the government cannot keep up with the demand for standard laws and procedures for police officers to follow. Technology is rapidly changing and evolving faster than the courts can. In early March of 2019, Apple, a leading technology company specializing in cell phones and computers, released a commercial highlighting privacy concerns. The tagline of the commercial is "if privacy matters in your life, it should matter to the phone your life is on" (Haselton 2019). The commercial featured a series of images like 'no trespassing' signs, or

whispering gossip. Results from the Data Analysis portion of my thesis show the concerns many Americans have concerning the contents of their cell phones. In today's times, many Americans keep their lives on their cell phones, and tech companies should acknowledge that the same level of privacy for in-person conversations should apply to cell phones.

Although the hypothetical case is in favor of giving police more power when it comes to privacy, we might see a large shift in future cases promoting the protection of privacy online. Case law is reactive, not proactive, meaning that unlike statutory or regulation law, this allows the courts more flexibility in their decisions, but case law also lacks teeth because of this. Courts work by discouraging inappropriate investigator procedures by dismissing cases, not through legal sanctions on officers or departments, so change is slow and irregular. Americans are demanding change for greater cell phone privacy such as restrictions on websites for releasing personal data or creating a standard protocol for police officers during cell phone seizures. This change for cell phone privacy will eventually come, but the mode of administration, (executive, judicial, or legislative) and timeline may be uncertain. It is left up to the bodies that regulate local and federal police power to determine the level of privacy cell phone users will receive.

Every time there is a monumental change in case law it takes awhile for the new procedures to trickle down to law enforcement. The prosecutors have to make it clear that officers' cases will be dismissed for faulty police procedure. It is apparent that some law enforcement will be resistant to these changes as they appear contrary to common sense. One officer expressed this thought process when he stated: "Yeah I mean as long as they're popping up as I'm holding the phone that I can righteously have because I have

probable cause then I would certainly take note of those text messages coming in". It also appears that officers do not have a clear understanding of appropriate procedure in these situations. The same officer as spoke before indicated as much when he stated: If someone calls and I answer the phone? Uh. Oh boy. I don't know if that's… I don't know what the courts would say about that would probably uh.. answering the phone and searching the phone, just answering the phone.. you might be able to get away with that. If these monumental changes occur, this will cause a shock to law enforcement in general. If we can anticipate their reactions, we can then set about formulating solutions in the form of training, education, and incentives in order to make transitions as smooth as possible.

In light of officers' sentiments it would be beneficial to survey other players in law enforcement, like district attorneys, judges, defense attorneys, and juries. District attorneys function as gatekeepers for the courts. They decide which cases to prosecute, which cases to plea bargain, and which cases to dismiss. Defense attorneys often do not have knowledge as to what appropriate police procedure is and thus, cannot represent their clients to the fullest extent of their abilities. Further research would benefit police departments by allowing for more structured training procedures and educational opportunities. Although the question remains of how will the courts lean on the issue of cell phone screens in plain view, by surveying law enforcement one can predict how a court's decision will affect the country. This will create a better sense of what is already being done today in regards to cell phone privacy. One can then make better sense of how to train law enforcement to make more structured and regulatory decisions. Although this

does not necessarily create binding precedent, changing law enforcement is a good start to analyzing and resolving the issue.

Based on the statistics mentioned previously, and the uncertainty on the issue, it can be seen how important and uncertain the matter of cell phone privacy is in the United States and around the world. Many individuals use their phones for personal banking, emails, storage for health records, shopping, and communication with friends and family. Lives are stored on cell phones, and yet they are often only protected by a four-digit passcode. Not all hope is lost though. Americans are already taking action to better protect the information they keep online, but many believe this is not enough. A large number of Americans are not satisfied with the level of privacy settings for their social media and want more protection. With the number of data requests by law enforcement on the rise, Americans realize the importance of protecting their personal data.

After researching the topic of cell phone privacy, I have become invested in the issue. I see a need for more regulation and discussion of privacy concerns. With the pace technology is advancing our country needs to decide how to protect the privacy interests of those with devices that encapsulate their lives. Without more discussion of the issue, law enforcement will continue to handle cell phone privacy as they deem fit. I hope that my thesis has illustrated the importance of this topic and has exemplified why further research and action is necessary to better protect the privacy interests of Americans.

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APPENDIX A

APPLICATION COVER PAGE

- *KEEP THIS PAGE AS ONE PAGE – DO NOT CHANGE MARGINS/FONTS!!!!!!!!!*
- *PLEASE SUBMIT THIS PAGE AS WORD DOCUMENT*

APPLICATION FOR APPROVAL OF RESEARCH WITH HUMAN SUBJECTS
Protection of Human Subjects Review Board, 400 Corbett Hall

(Type inside gray areas)
PRINCIPAL INVESTIGATOR: Katie Hess EMAIL: katie.hess@maine.edu
CO-INVESTIGATOR: EMAIL:
CO-INVESTIGATOR: EMAIL:
FACULTY SPONSOR: Mark Brewer, Ph.D EMAIL: mark.brewer@maine.edu
(Required if PI is a student):
TITLE OF PROJECT: An Analysis of Cell Phone Privacy in Traffic Stops
START DATE: ~~October 31, 2018~~ 12/17/2018 **PI DEPARTMENT:** Political Science/Honors College
FUNDING AGENCY (if any):

STATUS OF PI: FACULTY/STAFF/GRADUATE/UNDERGRADUATE Undergraduate (F,S,G,U)

1. If PI is a student, is this research to be performed:

☒	for an honors thesis/senior thesis/capstone?	☐	for a master's thesis?
☐	for a doctoral dissertation?	☐	for a course project?
☐	other (specify)		

2. Does this application modify a previously approved project? N (Y/N). If yes, please give assigned number (if known) of previously approved project:

3. Is an expedited review requested? Y (Y/N).

Submitting the application indicates the principal investigator's agreement to abide by the responsibilities outlined in Section I.E. of the Policies and Procedures for the Protection of Human Subjects.

Faculty Sponsors are responsible for oversight of research conducted by their students. The Faculty Sponsor ensures that he/she has read the application and that the conduct of such research will be in accordance with the University of Maine's Policies and Procedures for the Protection of Human Subjects of Research. **REMINDER:** if the principal investigator is an undergraduate student, the Faculty Sponsor MUST submit the application to the IRB.

Email this cover page and complete application to UMRIC@maine.edu

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FOR IRB USE ONLY **Application # 2018-11-05** **Review (F/E): E Expedited Category:**
ACTION TAKEN:

☒ **Judged Exempt; category 2 Modifications required? Yes Accepted (date) 12/17/2018**
☐ **Approved as submitted. Date of next review: by Degree of Risk:**
☐ **Approved pending modifications. Date of next review: by Degree of Risk:**
Modifications accepted (date):
☐ **Not approved (see attached statement)**
☐ **Judged not research with human subjects**

FINAL APPROVAL TO BEGIN **12/17/2018**
Date

AUTHOR'S BIOGRAPHY

Katie is a Political Science student at the University of Maine with minors in Business Administration and Legal Studies. On campus she is involved in the Pride of Maine Marching Band and the University's Democratic Club. At the University Katie found her love for law and plans to attend law school at the University of New Hampshire School of Law next fall.

Katie was born and raised on a small farm in Danville, Pennsylvania, where she learned the value of hard work from her parents and grandparents. Her life would not be complete without the sound of cows in the morning and the rows of corn fields outside the window. In her free time Katie enjoys running, skiing, and playing with her dog, Kai.