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Did My Boss Just Read That? Applying a Coding vs. Content Distinction in Determining Government Employees' Reasonable Expectation of Privacy in Employer- Provided Electronic Communication Devices After *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010)

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Note*

Did My Boss Just Read That? Applying a Coding vs. Content Distinction in Determining Government Employees' Reasonable Expectation of Privacy in Employer- Provided Electronic Communication Devices After *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010)

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I. INTRODUCTION

Government employees have a fundamental right to be free from unreasonable searches and seizures;¹ however, that right is not abso-

1. See U.S. CONST. amend. IV. The Fourth Amendment applies to searches conducted by government employers on their employees, see *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987), government searches of private citizens, see *United States v. Jacobsen*, 466 U.S. 109 (1984), and police searches of criminal suspects, see *Davis v. United States*, 328 U.S. 582 (1946). This Note is primarily concerned with the privacy interests of government employees; the privacy interest at issue for private citizens or criminal suspects may be different.

lute. Courts have granted government employees' Fourth Amendment protection over their offices,² drug and alcohol urine testing,³ and personal computers storing work-related files.⁴ On the other hand, courts have not extended Fourth Amendment protection from government employers searching files downloaded to employees' work computers over the work-provided internet server⁵ and documents stored in a locked file cabinet in the employees' offices.⁶

One basic question that must be answered in any Fourth Amendment analysis is, first and foremost, whether the Fourth Amendment applies to the search at issue. In *Katz v. United States*,⁷ Justice Harlan's concurring opinion outlined the prevailing two-part test to determine whether the Fourth Amendment applies to a search or seizure: (1) the individual must have a subjective expectation of privacy, and (2) that expectation of privacy must be one that society is ready to recognize as reasonable.⁸ This test is a balancing test, weighing the government employee's liberty interest in freedom from unreasonable searches and seizures against the government interest in conducting the search.⁹ Unfortunately, the Supreme Court has given little guidance in how lower courts should weigh these two interests.

With the rapidly increasing prevalence of cell phones, e-mail, and other forms of electronic communication,¹⁰ courts are forced to answer the question of whether individuals have a reasonable expectation of privacy in electronic communication devices. Courts increasingly face situations where public employers search their employees' work-provided communication devices, and the employees claim a violation of an expectation of privacy.¹¹

Historically, the Court has distinguished information available to third parties from information intended only for the recipient's eyes, which the sender attempted to keep secret from others. In 1877, the Supreme Court applied the Fourth Amendment to sealed letters sent via the United States Postal Service.¹² In *Ex parte Jackson*, the Supreme Court determined an individual who mails a letter has a reasonable expectation of privacy in the content of the sealed letter; on

2. *E.g.*, *O'Connor v. Ortega*, 480 U.S. 709 (1987).

3. *E.g.*, *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602 (1989).

4. *E.g.*, *Sabin v. Miller*, 423 F. Supp. 2d 943 (S.D. Iowa 2006).

5. *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).

6. *Gossmeier v. McDonald*, 128 F.3d 481 (7th Cir. 1997).

7. 389 U.S. 347 (1967).

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

9. *Id.*

10. AMANDA LENHART, PEW RESEARCH CENTER, CELL PHONES AND AMERICAN ADULTS (Sept. 2, 2010), available at http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Adults_Cellphones_Report_2010.pdf [hereinafter CELL PHONE USAGE].

11. *See, e.g.*, *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).

12. *Ex parte Jackson*, 96 U.S. 727 (1877).

the other hand, the individual has no reasonable expectation of privacy in the addressing information on the outside of the envelope.¹³ In 1979, the Court applied a similar distinction in determining an individual does have a reasonable expectation of privacy in the content of telephone calls, but not the number he or she has dialed.¹⁴ With technology advancing, the question has arisen of whether a similar distinction should apply to determine the reasonableness of a privacy interest attached to electronic communications.¹⁵

The United States Supreme Court faced this question in *City of Ontario v. Quon*,¹⁶ in which the Court held the Fourth Amendment does not protect an employee's text messages from a public employer's search.¹⁷ Quon, a police officer in the City of Ontario, claimed his supervisors violated his reasonable expectation of privacy when they searched the content of his text messages sent on his employer-provided text messaging pager.¹⁸ The Court declined to determine whether Quon, and by extension other public employees, would have a reasonable expectation of privacy in such devices.¹⁹ Instead, the Court determined that, regardless of Quon's expectation of privacy, the City of Ontario was reasonable in searching the pager.²⁰

This Note begins by exploring the relevant history of the Fourth Amendment search and seizure provision as applied to communications and government employers. Part III discusses the Court's opportunity in *Quon* to apply a set standard to text messages, and argues the Court should make more definitive statements determining government employees' privacy interests in the future. Part IV gives recommendations for lower courts in handling the nebulous area left by the decision in *Quon*. The Court should follow the standard first espoused in *Ex parte Jackson*: individuals have a reasonable expectation of privacy in the content of their text messages, but not the addressing information.

II. BACKGROUND

A. Fourth Amendment Protections of Reasonable Expectations of Privacy

The Fourth Amendment states the following: "The right of the people to be secure in their persons, houses, papers, and effects, against

13. *Id.* at 733.

14. *Smith v. Maryland*, 442 U.S. 735 (1979).

15. Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 SANTA CLARA L. REV. 183, 186 (2010).

16. 130 S. Ct. 2619.

17. *Id.* at 2632.

18. *Id.* at 2626.

19. *Id.* at 2630.

20. *Id.*

unreasonable searches and seizures, shall not be violated.”²¹ This protects individuals from unreasonable government intrusion into certain areas.²² The Supreme Court has faced comparable issues in determining what possessions or areas the Fourth Amendment protects.²³

1. *Katz and Smith: Adoption of the Reasonable Expectation of Privacy Standard*

In *Katz v. United States*, the Court analyzed whether the police violated the defendant’s Fourth Amendment right to freedom from unreasonable searches and seizures when they placed a wiretap on the phone booth the defendant used.²⁴ The police used the wiretap to record Katz’s private phone conversations.²⁵ The Court concluded, even though “the Fourth Amendment cannot be translated into a general constitutional ‘right to privacy,’”²⁶ it “protects people, not places.”²⁷ *Katz* demonstrates that the Fourth Amendment protections may apply to government searches using electronic surveillance, not just a physical intrusion. The Court determined Katz had a reasonable expectation of privacy in his private telephone conversations, and thus a recording of those conversations without the proper warrant was unconstitutional.²⁸ Katz purposely kept the content of his private conversations from being overheard by others when he closed the door to the phone booth and therefore the Fourth Amendment protected the content of his conversation. Had Katz made his call from home, the Fourth Amendment also would have protected the content of his communications.²⁹

Justice Harlan, in his concurring opinion, outlined a two-part test to determine whether the Fourth Amendment applies to a government search: “first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”³⁰ Thus, the test involves a subjective and objective standard for the expectation of privacy. For

21. U.S. CONST. amend. IV.

22. For an overview of the protection the Fourth Amendment provides citizens, see *Investigation and Police Practices*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 3, 3–19 (2006).

23. For example, the Supreme Court has determined an individual’s reasonable expectation of privacy in the individual’s vehicle in *Arizona v. Gant*, 129 S. Ct. 1710 (2009) and whether an electronic monitoring signal constitutes a search in *United States v. Knotts*, 460 U.S. 276 (1983).

24. *Katz v. United States*, 389 U.S. 347, 348 (1967).

25. *Id.*

26. *Id.* at 350.

27. *Id.* at 351.

28. *Id.* at 359.

29. *Id.*

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

Justice Harlan, even if an individual subjectively expected to keep his conversations private, if the conversation was held out in the open the Fourth Amendment would not apply because the expectation of privacy under the circumstances would be unreasonable.³¹ Even though the defendant's recorded conversations took place in a phone booth, which is technically a public place, the phone booth was "a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable."³²

In analyzing expectation of privacy issues for communications, courts have emphasized a difference in the expectation of privacy in the content of the communication and the expectation of privacy in the coding information of the communication.³³ "Coding information" most often refers to the address or phone number of the intended recipient.³⁴ Since 1877, the Court has maintained that there is a difference between the expectation of privacy in information that is necessarily shared with others and that which is kept hidden: "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles."³⁵ In *Ex parte Jackson*, the Court made a distinction between the content of a letter sealed in an envelope and sent through the mail and other mailed content, such as newspapers, pamphlets, and magazines that are purposefully not sealed and open to examination.³⁶

In *Smith v. Maryland*,³⁷ the police attempted to obtain evidence in a criminal investigation against a suspect by surveying the suspect's telephone.³⁸ The police placed a pen register on the defendant's phone line via the phone service provider to record all phone numbers dialed from that phone line.³⁹ *Smith* adds two points to the Fourth Amendment analysis of electronic communications. First, the Court highlighted the difference between coding information (addressing) and content information.⁴⁰ For the Court, a chief distinction between the defendant in *Smith* and the defendant in *Katz* was the use of the pen register, because pen registers do not record the contents of communications, just the addressing information.⁴¹ The defendant in *Smith*

31. *Id.*

32. *Id.*

33. *E.g.*, *Ex parte Jackson*, 96 U.S. 727 (1877).

34. *Id.* at 733.

35. *Id.*

36. *Id.*

37. 442 U.S. 735 (1979).

38. *Id.* at 737.

39. *Id.*

40. *Id.* at 741-42.

41. *Id.* at 741.

did not have a reasonable expectation of privacy in the phone numbers he dialed because, although he dialed the numbers in the privacy of his own home, the police only obtained a record of the phone numbers dialed (i.e., the addressing information). The Court noted that the defendant, and other reasonable home phone subscribers, should know that such information is already shared with the phone service provider.⁴² Second, *Smith* was the first case in which a majority of the Court relied on Justice Harlan's two-part "reasonable expectation of privacy" analysis for Fourth Amendment claims, requiring an analysis of both the subjective expectation of privacy and the objective reasonableness of the privacy interest.⁴³

2. *The Fourth Amendment Protects Searches of Government Employees by Their Employers*

Although *Katz* and *Smith* involved violations of a Fourth Amendment right to be free from unreasonable searches and seizures performed by the police in the midst of a criminal investigation, the Fourth Amendment applies to all state and federal actors—including government employers.⁴⁴ In *O'Connor v. Ortega*,⁴⁵ the Court established that a public sector employee can have a reasonable expectation of privacy in his place of work, stating, "Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer."⁴⁶ In *O'Connor*, Dr. Ortega, a public hospital employee, claimed a violation of his right to freedom from unreasonable searches and seizures when the hospital searched his office while he was out on administrative leave.⁴⁷ A majority of the Court agreed Dr. Ortega had a reasonable expectation of privacy in his locked office.⁴⁸ The Court, however, was divided as to which test to apply when government employees bring claims against their employers under § 1983 for Fourth Amendment violations.⁴⁹

The plurality opinion, written by Justice O'Connor, used an operational realities test: "The operational realities of the workplace, however, may make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official."⁵⁰ An examination of the operational realities of the workplace requires a fact-based inquiry into the specific workings of the workplace, including societal expectations and actual office practices

42. *Id.* at 742.

43. *Id.* at 740.

44. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

45. 480 U.S. 709 (1987).

46. *Id.* at 717.

47. *Id.* at 713–14.

48. *Id.* at 719.

49. *Id.* at 729 (Scalia, J., concurring).

50. *Id.* at 717 (majority opinion).

or procedures.⁵¹ For the plurality, “the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.”⁵² This would entail Justice Harlan’s two-part reasonable expectation of privacy analysis from his concurrence in *Katz*: the employee must have a subjective expectation of privacy in the area or thing, and that privacy must be one society is willing to see as reasonable.⁵³ Only then, if the Court finds a reasonable expectation of privacy, would the Court analyze the reasonableness of the search, considering the day-to-day operations of the workplace. Justice O’Connor reasoned that the purpose of the search, at its inception, would determine whether the search itself was unreasonable.⁵⁴ A workplace search is reasonable if the employer performed the search either for a non-investigatory, work-related purpose, or for investigations of work-related misconduct.⁵⁵

Justice Scalia instead advocated for a one-step analysis in his concurring opinion, which provided the fifth vote in favor of a reasonable expectation of privacy.⁵⁶ Justice Scalia believed the operational realities test would lead to more uncertainty.⁵⁷ Under this one-step analysis, it is unnecessary to determine the reasonableness of the expectation of privacy, because whether the searcher is an employer or a police officer is irrelevant to whether the Fourth Amendment applies, but is relevant to whether the area is protected.⁵⁸ The Fourth Amendment generally protects offices of government employees.⁵⁹ The difference between the majority’s operational realities test and Justice Scalia’s test is that Justice Scalia would forego an analysis of the reasonable expectation of privacy and, instead, assume government employees always have a reasonable expectation of privacy in their places of work.⁶⁰

3. *Advances in Electronic Communication: Application of the Coding vs. Content Distinction*

The Court’s articulation and adoption of the *Katz* reasonable expectation of privacy test and the ruling that government employees can have a reasonable expectation of privacy in their workplace were not completely determinative of all Fourth Amendment application issues. District and circuit courts have had to determine whether indi-

51. *Id.* at 718.

52. *Id.*

53. *Katz v. United States*, 389 U.S. 347, 361 (1967).

54. 480 U.S. at 725–26.

55. *Id.*

56. *Id.* at 731 (Scalia, J., concurring).

57. *Id.* at 730.

58. *Id.* at 731.

59. *Id.*

60. *Id.*

viduals have a reasonable expectation of privacy in addresses of e-mails sent and received,⁶¹ cell phone records,⁶² and the content of conversations held in a work office.⁶³ In *United States v. Forrester*,⁶⁴ the Ninth Circuit affirmed the district court's decision to deny a motion to suppress information providing websites visited by Forrester and addresses from his sent and received e-mails.⁶⁵ The court compared this type of information to the information obtained from the use of a pen register—it was merely *addressing* information, not a search of the content of the information.⁶⁶ On the Internet, the court reasoned, an individual has a different expectation of privacy in the addresses of the websites he visits or of the e-mail addresses of the people he e-mails than the expectation of privacy he has in the content of those e-mails.⁶⁷

4. *Government Employees and the Coding vs. Content Distinction*

Lower courts have relied on the distinction between the content of communications and the coding information (or addressing information) when analyzing Fourth Amendment expectation of privacy claims for government employees' communications.⁶⁸ In *Beckwith v. Erie County Water Authority*, the plaintiff claimed a Fourth Amendment violation of a reasonable expectation of privacy because his employer had requested a copy of the plaintiff's cell phone records.⁶⁹ There the court reasoned that, because the employer had only demanded the addressing information of the phone numbers dialed, this was analogous to the use of a pen register in *Smith v. Maryland*.⁷⁰ Because cellular phone customers know the phone numbers they dial are shared with the phone company, there is no reasonable expectation of privacy in those numbers.⁷¹

In contrast, courts have found a reasonable expectation of privacy in the content of employees' communications.⁷² For example, in *United States v. Hagarty*, the Seventh Circuit found a government employee had a reasonable expectation of privacy in the content of the

61. *United States v. Forrester*, 512 F.3d 500 (9th Cir. 2008).

62. *Beckwith v. Erie Cnty. Water Auth.*, 413 F. Supp. 2d 214 (W.D.N.Y. 2006).

63. *United States v. Hagarty*, 388 F.2d 713 (7th Cir. 1968).

64. 512 F.3d 500.

65. *Id.* at 509.

66. *Id.* at 510.

67. *Id.*

68. *Beckwith v. Erie Cnty. Water Auth.*, 413 F. Supp. 2d 214, 218 (W.D.N.Y. 2006).

69. *Id.* at 218.

70. *Id.* at 224.

71. *Id.*

72. *See United States v. Hagarty*, 388 F.2d 713 (7th Cir. 1968).

conversations the employee had in his office.⁷³ In *Hagarty*, the government employer had placed an electronic listening device in the employee's office without first obtaining a warrant.⁷⁴ A criminal trial followed based on evidence obtained from that recording.⁷⁵ On appeal, the Seventh Circuit determined the employee did have a reasonable expectation of privacy in those conversations.⁷⁶ The Seventh Circuit analogized private phone conversations in one's office to the phone conversation in a private phone booth in *Katz*: the key fact is whether or not the individual, government employee, or private citizen, sought to exclude the "uninvited ear."⁷⁷

Similarly, the Seventh Circuit has determined employees may have a reasonable expectation of privacy in the content of the phone calls they make from a work line.⁷⁸ In *Narducci v. Moore*, the plaintiff claimed a Fourth Amendment violation when his government employer placed a wiretap on his work phone.⁷⁹ There, the city comptroller requested the city record all calls to and from the finance department to monitor any harassing phone calls and to determine whether the finance department employees were making personal phone calls while at work.⁸⁰ The Seventh Circuit, on review of a grant of summary judgment in favor of the city employee, determined there was a genuine issue of material fact as to whether the employee had a reasonable expectation of privacy in the content of his phone calls made on his work phone.⁸¹ The Seventh Circuit recognized that *O'Connor* rejected a categorical denial of Fourth Amendment protections to government employees, and applied the operational realities test to determine there was a genuine issue of material fact to the reasonable expectation of privacy.⁸²

The Supreme Court has not yet articulated one test that can be applied to all forms of electronic communication. With the technology of communications quickly advancing,⁸³ Courts have no bright-line rule for evaluating government employees' privacy expectations.

73. *Id.* at 718.

74. *Id.* at 714.

75. *Id.* at 715.

76. *Id.* at 719.

77. *Id.* at 716.

78. *Narducci v. Moore*, 572 F.3d 313 (7th Cir. 2009).

79. *Id.* at 321.

80. *Id.* at 316.

81. *Id.* at 321.

82. *Id.* at 320.

83. *See* CELL PHONE USAGE, *supra* note 10.

B. Supreme Court's Opportunity to Address Expectation of Privacy in Modern Electronic Communications in *City of Ontario v. Quon*

1. Background and Procedural History

For the first time, the Supreme Court in *City of Ontario v. Quon* was faced with a government employer's search of an employer-provided electronic device.⁸⁴ The City of Ontario, California, issued a team of police officers text messaging-enabled pagers to help facilitate communication between the team members.⁸⁵ The City's text messaging plan allowed for a certain number of characters to be sent on each pager per month.⁸⁶ The City had an official privacy policy that specified the City "reserves the right to monitor and log all network activity including e-mail and Internet use."⁸⁷ Although this policy did not explicitly cover the text messaging pagers, the City claimed that it held an official meeting explaining that the policy did include the pagers, and e-mailed an official memorandum to that effect.⁸⁸

In the first or second billing cycle after the pagers were distributed, Quon exceeded the allotted amount of characters on his pager.⁸⁹ Quon testified that his supervisor, Lieutenant Steven Duke, told Quon that as long as he paid the overage fees, the City would not audit Quon's text messages.⁹⁰ Over the next several months, Quon again exceeded the character limit three or four times.⁹¹ Lieutenant Duke told his supervisor of the problem.⁹² In response, the City ordered an audit of Quon's and several other officers' text messages to determine whether the set monthly character limit was sufficient for work purposes.⁹³ The supervisor requested a printout of the officers' text messages for the previous months.⁹⁴ After the service provider, Arch Wireless, confirmed the City was the named subscriber on the plan, the provider sent a printout of the text messages to the City.⁹⁵

The City then redacted the text messages to only account for those Quon had sent while he was on the clock.⁹⁶ The City read Quon's text messages and found that a good number of them were not at all related to work; in fact many of Quon's text messages were sexually ex-

84. *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).

85. *Id.* at 2625.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 2626.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

PLICIT in nature, sent to both his wife and another City employee with whom Quon was having an affair.⁹⁷ The City then allegedly disciplined Quon for his unauthorized use of the pagers.⁹⁸

After being disciplined, Quon, along with several other City employees, instituted a claim alleging a violation of a reasonable expectation of privacy against both the City and Arch Wireless.⁹⁹ The parties filed cross-motions for summary judgment and the district court denied the City's motion for summary judgment on the Fourth Amendment claims.¹⁰⁰ The district court determined Quon did have a reasonable expectation of privacy in the content of his text messages, and held a jury trial to determine whether the search was reasonable under *O'Connor*.¹⁰¹ The jury concluded Lieutenant Duke ordered the audit to determine the effectiveness of the word limit, and the City did not violate the Fourth Amendment.¹⁰²

The United States Court of Appeals for the Ninth Circuit agreed Quon had a reasonable expectation of privacy in the content of his text messages, and held that even though the search was conducted for a legitimate work-related purpose, the search was not reasonable in scope.¹⁰³ The Court concluded there were less intrusive forms of determining if the character limit for the pagers was sufficient, such as only examining the numbers Quon exchanged messages with to determine whether Quon was communicating solely with colleagues.¹⁰⁴ The City then petitioned for certiorari.

2. *The City's Search was Reasonable, Regardless of Whether Quon Had a Reasonable Expectation of Privacy*

The Court granted certiorari on the question of whether the search of Quon's text messages was a violation of his Fourth Amendment right to be free from unreasonable searches and seizures.¹⁰⁵ Quon argued that the Court should uphold the Ninth Circuit's decision because his expectation of privacy in the text messages was reasonable due to the lack of an official policy indicating the City had the right to audit the text messages and the comments of his supervisor.¹⁰⁶ The City argued Quon did not have a reasonable expectation of privacy because of its memorandum and announcement made in a meeting

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Quon v. Arch Wireless Operating Co., 445 F. Supp. 2d 1116, 1146 (C.D. Cal. 2006).

102. *Id.*

103. Quon v. Arch Wireless Operating Co., 529 F.3d 892, 899, 909 (9th Cir. 2008).

104. *Id.*

105. City of Ontario v. Quon, 130 S. Ct. 1011 (2009).

106. City of Ontario v. Quon, 130 S. Ct. 2619, 2629 (2010).

indicating the privacy policy applied to the text messaging pagers.¹⁰⁷ The City also asserted that, even if Quon's expectation of privacy was reasonable, the search of the text messages itself was reasonable because it was for a work-related purpose.¹⁰⁸

Ultimately, the Court concluded that it did not matter whether Quon had a reasonable expectation of privacy in his employer-issued text messaging pager because the City's search was justified at its inception as a work-related, non-investigatory search.¹⁰⁹ Because the City audited the text messages sent on Quon's pager to determine whether the set limit was adequate, the search was reasonable.¹¹⁰ Therefore, the Court reasoned, it did not have to address the question of whether Quon's expectation of privacy was reasonable.¹¹¹

In addition, the Court also ruled that the recipients of some of Quon's text messages, also plaintiffs in this case, did not have a Fourth Amendment claim.¹¹² The Court said that because these plaintiffs largely based their claim on Quon's argument, the additional plaintiffs had no claim of invasion of privacy because the City's search of Quon's text messages was reasonable.¹¹³

The Supreme Court declined to address the issue of whether Quon had a reasonable expectation of privacy in his employer-issued text messaging pager.¹¹⁴ In doing so, the Court also declined to pick the correct test of the two set forth in *O'Connor*.¹¹⁵ The Court could avoid these two issues because of the facts unique to the Quon case: at least according to the Court, it did not matter whether Quon had a reasonable expectation of privacy in his pager because the City of Ontario's search of that pager was reasonable.

3. *Scalia's Concurrence: Should the Fourth Amendment Apply to Messages Sent on Employer-Provided Devices?*

Justice Scalia concurred in the judgment that the search was not a violation of Quon's reasonable expectation of privacy; however, Justice Scalia believed the question addressed should have been whether the Fourth Amendment applies in general to messages sent on employer-provided pagers, not just public employees' pagers.¹¹⁶ This line of reasoning objected to the majority's failure to address the question of privacy interests in text messaging pagers, because "[t]he-times-they-

107. *Id.*

108. *Id.*

109. *Id.* at 2630 (citing *O'Connor v. Ortega*, 480 U.S. 709, 725–26 (1987)).

110. *Id.* at 2632.

111. *Id.* at 2630.

112. *Id.* at 2633.

113. *Id.*

114. *Id.* at 2630.

115. *Id.* at 2628.

116. *Id.* at 2634 (Scalia, J., concurring).

are-a-changin' is a feeble excuse for disregard of duty."¹¹⁷ Justice Scalia pointed out the majority's advocating a case-by-case evaluation of an electronic device to determine if the device is a necessary instrument for self-expression would be extremely difficult to administer objectively.¹¹⁸

III. ANALYSIS

At one time, the world's main form of long distance communication was the letter. Later, individuals could communicate with a phone call. Today, people can communicate in an instant with others around the world via e-mail, instant message, or text message. Governments and private citizens can clash over what privacy rights people have in these different forms of electronic communications.¹¹⁹ In 1877, the Court determined an individual has a reasonable expectation of privacy in the content of letters, but not the addressing information.¹²⁰ More than a hundred years later, in *Smith v. Maryland*, the Court decided citizens have a reasonable expectation of privacy in the content of their telephone calls but not the telephone numbers they dial.¹²¹ In 2010, the Court failed to apply the same test to a newer form of communication: text messages.¹²² Because more people are using cellular devices, and the types of communication people use are increasing,¹²³ lower courts, private citizens, and government employers will need guidance on which test to apply to new and changing devices. If the Court had stuck to the coding vs. content distinction first applied in *Ex parte Jackson*,¹²⁴ there would have been one test to cover all communication types.

With this increasing prevalence of cell phone use, courts will have to determine whether individuals have a reasonable expectation of privacy in those devices. Courts will need a definitive test to apply in situations where government employees claim an expectation of privacy in their employer-provided electronic communication devices. Additionally, public employers require guidance in implementing searches and drafting company privacy policies. In *City of Ontario v. Quon*, the Court had the opportunity to definitively determine the ap-

117. *Id.* at 2635.

118. *Id.*

119. For a discussion of the history of criminal defendants claiming Fourth Amendment protections over searches of their electronic communications, particularly cell phone text messages, see Katharine M. O'Connor, *o OMG They Searched My Txts: Unraveling the Search and Seizure of Text Messages*, 2010 U. ILL. L. REV. 685, 701–15 (2010).

120. *Ex parte Jackson*, 96 U.S. 727, 733 (1877).

121. 442 U.S. 735 (1979).

122. *Quon*, 130 S. Ct. 2619 (2010).

123. See CELL PHONE USAGE, *supra* note 10.

124. 96 U.S. 727 (1877).

plicable test for reasonable expectation of privacy in electronic communication.¹²⁵ Instead, the Court determined, as usual, it is prudent to avoid deciding constitutional issues when it is not absolutely necessary, and consequently did not determine whether Quon had a reasonable expectation of privacy in his employer-issued text messaging pager.¹²⁶

The Court for the first time was faced with determining whether the Fourth Amendment applies to electronic communication devices: “The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.”¹²⁷ The Supreme Court abstains from ruling on constitutional issues unless deciding the issue is absolutely necessary.¹²⁸ According to the Court, it did not need to discuss the reasonableness of Quon’s expectation of privacy in the content of his text messages because the City’s search of the messages was reasonable.¹²⁹ In doing so, the Court avoided an ideal opportunity to explicitly adopt a test for electronic communication that has been in use for over one hundred thirty years for other forms of communication: individuals have a reasonable expectation of privacy in the content of communications, but have no reasonable expectation of privacy in the addressing information. While the facts of *Quon* did allow the Court to avoid this analysis, the growing prevalence of employer-provided electronic communication devices shows that courts will increasingly be forced to face situations where they must analyze an employee’s expectation of privacy in those devices. When these issues arise, courts should recognize that the Fourth Amendment should always apply to government employers’ searches of the content of government employees’ electronic communications.

A. Cell Phone Use Is on the Rise

The Pew Research Center reports that in November 2004, 65% of United States adults owned a cell phone.¹³⁰ In 2009, the updated study found that 82% of adults own a cell phone, and one third of adults who do not own a cell phone live in a house with someone else who does.¹³¹ About the same percentage of adults own a computer—79%.¹³² While all adults use their cell phones to make voice calls, 72% of adults who own a cell phone also use their cell phone to send and

125. *Quon*, 130 S. Ct. at 2630.

126. *See id.*

127. *Id.* at 2629.

128. *See* *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960).

129. *Quon*, 130 S. Ct. at 2630.

130. CELL PHONE USAGE, *supra* note 10, at 4.

131. *Id.*

132. *Id.*

receive text messages, up from 58% of adult cell phone owners in 2007.¹³³ This increase in use is extremely rapid, outpacing the spread of availability of television and even overtaking fixed-line subscribers.¹³⁴ On average, adults who text send about ten text messages per day.¹³⁵ The Supreme Court has recognized that “[c]ell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification.”¹³⁶

Increasingly, employers are turning to the ubiquity and usefulness of cell phones and other devices to help improve their employees’ work performance or output. According to the Pew Research Center, 58% percent of cell phone owners report making a work-related phone call on their personal cellular device, and 32% of owners report making a work-related phone call on their cell phone every day.¹³⁷ Similarly, 49% of owners report sending a work-related text message on their cell phone, with 21% reporting they do so at least once a day.¹³⁸ Because of increasing work demands and travel requirements, many employers supply employees with cellular phones or personal digital assistants to help facilitate work productivity. Supplying employees with a cellular phone or text messaging device is attractive for employers because it can help facilitate better work performance, make employees more available after regular work hours, or help increase employee productivity. For example, the City of Ontario turned to the use of text messaging pagers to help their SWAT team members better communicate.¹³⁹

Employer-provided text messaging pagers are not the only device to which employers are turning. Many employers provide employees with a work e-mail address and Internet access while on the job. With the advent of SmartPhones such as Blackberries and iPhones, employees are now able to access the Internet wherever they are, further increasing their availability and making the employer-provided communication device that much more attractive to both employee and employer. It is estimated that 96% of American workers use technology in their work¹⁴⁰ and 80% say the technology has improved their ability to do their job.¹⁴¹

133. *Id.* at 5.

134. *Id.*

135. *Id.* at 5.

136. *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010).

137. CELL PHONE USAGE, *supra* note 10, at 13.

138. *Id.* at 16.

139. *Quon*, 130 S. Ct. at 2625.

140. MARY MADDEN & SYDNEY JONES, PEW RESEARCH CENTER, NETWORKED WORKERS 4 (Sept. 24, 2008), available at http://www.pewinternet.org/~media/Files/Reports/2008/PIP_Networked_Workers_FINAL.pdf.

141. *Id.* at 38.

Eventually, this increase in use will lead to more court cases involving an employee's expectation of privacy in these devices. Reasonable expectation of privacy issues may be present in motions to suppress in a criminal case or, like in *Quon*, in a § 1983 action for a breach of reasonable search and seizure provision in the Constitution.¹⁴² Although only state and federal actors need to worry about Fourth Amendment claims against them, private employers have other concerns. Many states¹⁴³ have privacy laws restricting private actors from obtaining others' electronic communication, and the federal Stored Communications Act¹⁴⁴ also applies to private actors. Private actors who violate state privacy laws can face civil liability or criminal prosecution.¹⁴⁵ These laws further support a rule that the Fourth Amendment always applies when a government employer searches government employees' electronic communications because legislatures have already found it reasonable to protect the content of communications.

Courts will increasingly face a wide variety of claims, fact patterns, and evolving technologies. One potential issue for courts is how they will deal with different devices. Should courts establish one collective reasonable expectation of privacy analysis for cell phones, laptops, computers, internet usage, and e-mail; or should courts treat each of these devices differently? Ideally, courts should be able to establish one method of analysis for all types of devices. As the lines between devices blur, such as with SmartPhones, the evolving nature of technology would require courts to constantly draft new tests as new devices emerged if they had to treat each type of device differently.

Another potential problem with the increasing prevalence of work-provided electronic devices is the blending of work use and personal use. Like in *Quon*, employees do not always use their employer-provided devices exclusively for work-related communications, which potentially makes expectation of privacy claims more difficult.¹⁴⁶ Alternatively, when employees use their own devices to communicate for work purposes, expectation of privacy claims might also arise. For instance, if a state employee accesses his work-provided e-mail ad-

142. *Quon*, 130 S. Ct. at 2625.

143. For example, in Minnesota it is a gross misdemeanor for a person to enter, gaze into, or install a device for observing in another person's home. MINN. STAT. ANN. § 609.746 (West 2009). Similarly, in Wisconsin an intrusion of privacy is defined as including any intrusion that a reasonable person would find "highly offensive." WISC. STAT. ANN. § 995.50 (West 2007).

144. 18 U.S.C. § 2702(a)(1-2) (2006).

145. For example, the Nebraska legislature has created a civil cause of action for an invasion of privacy, NEB. REV. STAT. § 20-201 (Reissue 2007), while the Maine legislature has made it a criminal offense to intentionally access a computer resource without authorization, ME. REV. STAT. ANN. tit. 17-A, § 432 (2006).

146. *Quon*, 130 S. Ct. at 2626.

dress via his personally-owned Blackberry, can the employer then access the e-mails stored on that Blackberry? These problems, and others like it, demonstrate the need for the courts to be clear on what is a reasonable expectation of privacy.

B. Privacy Policies Are Not Sufficient to Define Employees' Reasonable Expectations of Privacy

One of the potential problems in *Quon* was that the City's privacy policy for its employees did not explicitly cover the text messaging pagers.¹⁴⁷ The official privacy policy involved in *Quon*—"Computer Usage, Internet and E-Mail Policy"—suggested, at least on its face, that it was inapplicable to the text messages in question.¹⁴⁸ Whether or not this policy extended to the text messaging pagers was a factual issue: the City claimed it had an official meeting and e-mailed an official memorandum informing its employees that the policy did cover the text messaging pagers. Despite this alleged warning, Quon claimed that his supervisor told him he would not audit the text messages as long as Quon paid any overage fees.¹⁴⁹

A clearly stated privacy policy can help form an employee's expectation of privacy.¹⁵⁰ In *Quon*, the Court stated, "[E]mployer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated."¹⁵¹ However, considering how fast technology changes, employers' privacy policies will not always be able to keep up with the technology used in the workplace, as evidenced in *Quon*.¹⁵² If courts are clear about what reasonable expectations of privacy employees have, state employers will know what to cover in their privacy policy statements. This, however, requires the courts to make clear statements in the first place.

Alternatively, if an employer does not have a usage monitoring policy, employees need a clear statement on what can and cannot be regulated.¹⁵³ As the Court stated in *O'Connor*, "the absence of such a policy does not create an expectation of privacy where it would not otherwise exist."¹⁵⁴ This means that courts need to be very clear on exactly where individuals have an expectation of privacy, regardless of whether individual employers have privacy policies. A bright line rule stating the Fourth Amendment does apply to the content of govern-

147. *Id.* at 2625.

148. *Id.*

149. *Id.*

150. *See id.* at 2631.

151. *Id.* at 2630.

152. 130 S. Ct. 2619.

153. *See O'Connor v. Ortega*, 480 U.S. 709, 728 (1987).

154. *Id.* at 719.

ment employees' electronic communications will help government employers, employees, and lower courts.

C. Despite the Court Claiming It Did Not Discuss the Reasonableness of the Privacy Interest, It Actually Did So in Its Discussion of the Reasonableness of the Search

The Supreme Court will abstain from deciding constitutional issues unless it is absolutely necessary to do so in the determination of the case.¹⁵⁵ In accordance with that principle, the Court in *Quon* determined it was unnecessary to decide whether there is a reasonable expectation of privacy in employer-provided electronic communication devices.¹⁵⁶ In *Quon*, the Court declined to analyze Quon's expectation of privacy in his text messaging pager, but instead went directly to an analysis of the reasonableness of the City's search.¹⁵⁷ Though the Court was attempting to avoid an unnecessary analysis of the reasonableness of an employee's privacy interest, it actually did discuss this interest in its discussion of the reasonableness of the employer's search.¹⁵⁸ The Court stated: "[T]he extent of an expectation is relevant to assessing whether the search was too intrusive."¹⁵⁹ In the analysis of whether the search was reasonable, the Court actually did analyze whether Quon had a reasonable expectation of privacy, without actually investigating the extensive issues that such analysis would require.

Because the Court addressed the reasonableness of Quon's privacy interest in the content of his text messages, it missed a good opportunity to clarify a bright-line rule to show the Fourth Amendment always applies in like situations. The Court recognized "[f]rom OPD's perspective, the fact that Quon likely had only a limited privacy expectation, with boundaries that we need not here explore, lessened the risk that the review would intrude on highly private details of Quon's life."¹⁶⁰ From the Court's perspective, the extent of an employee's privacy interest in a device is a factor in whether the employer's search is reasonable. But the Court failed to inquire into Quon's reasonable expectation of privacy in the device his employer searched, leaving this factor uninvestigated. The Court still used what it called a limited privacy expectation in determining whether the search was reasonable, though there was no discussion of what this privacy expectation

155. See, e.g., *Jean v. Nelson*, 472 U.S. 846, 854 (1985); *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 209 (1960).

156. *Quon*, 130 S. Ct. at 2630.

157. *Id.*

158. *Id.* at 2631.

159. *Id.*

160. *Id.*

actually entailed.¹⁶¹ A more thorough discussion of the privacy expectation would have been helpful in analyzing the reasonableness of the City's search. Courts must take into account the reasonableness of the privacy interest in discussing the reasonableness of the search at issue because the reasonableness of the search is, in part, determined by the extent of the privacy interest.

Justice Scalia's concurrence in *Quon* highlighted the fact that, while the majority opinion claimed to limit the discussion to the reasonableness of the search, the majority actually applied the plurality's test of reasonableness from *O'Connor*: "Despite the Court's insistence that it is agnostic about the proper test, lower courts will likely read the Court's self-described 'instructive' expatiation on how the *O'Connor* plurality's approach would apply here . . . as a heavy-handed hint about how *they* should proceed."¹⁶²

D. The Supreme Court Should Have Adopted a Bright-Line Rule Applying the Fourth Amendment to All Government Employees' Electronic Communications

To determine whether a Fourth Amendment search occurred, all communications, be they oral, in letter form, or electronic, should be treated the same. In *Quon*, the Court declined to discuss the privacy interest because, in part, the role of emerging technology is still unclear.¹⁶³ However, the Court should not decline to discuss expectation of privacy in a piece of technology just because the technology is new.¹⁶⁴ As Justice Scalia noted technology is constantly changing and the Court should not use its evolving nature as an excuse to avoid finding a single, workable objective test for communication devices.¹⁶⁵ The Supreme Court has recognized that "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."¹⁶⁶ Technology will continue to advance in the future. The Court cannot delay all determinations of privacy issues indefinitely. Today, electronic communications have expanded to the point of replacing so-called "snail mail." Because electronic communication has become so important in everyday life, the Court should make a definitive statement as to what expectation of privacy individuals have. By applying

161. *Id.*

162. *Id.* at 2635 (Scalia, J., concurring).

163. *See id.* at 2629 (majority opinion).

164. In *Kyllo v. United States*, 533 U.S. 27 (2001), the Supreme Court addressed the question of whether the use of heat-sensing technology on a criminal suspect's home is a search within the meaning of the Fourth Amendment. *Id.* at 29-30. There, the Court did examine the use of a relatively new technology and examined a reasonable expectation of privacy involving that technology. *Id.* at 40.

165. *Quon*, 130 S. Ct. at 2635 (Scalia, J., concurring).

166. *Kyllo*, 533 U.S. at 33-34.

the same standard the Court has applied in the past, that individuals have an expectation of privacy in the content of communications but not the addressing information,¹⁶⁷ the Court will remain consistent in its Fourth Amendment analysis and also give a clear message to lower courts and government employers about what searches are constitutional.

1. *Lay People's Views of What Is a Reasonable Search Can Help Inform Courts' Analyses of Reasonable Expectations*

In analyzing new technology, however, the Court may need to look to other sources to determine the expectation of privacy that society is willing to view as reasonable. Social science research has attempted to demonstrate whether the Court's own evaluation of what society is willing to recognize as reasonable actually corresponds to what individuals say they are ready to recognize as reasonable.

Christopher Slobogin and Joseph Schumacher asked participants to rank the "intrusiveness" of fifty searches the Court has analyzed in the past, and then compared those intrusiveness ratings to what the Court determined.¹⁶⁸ Searches included "looking in foliage in public park," "going through garbage in opaque bags at curbside," and "monitoring phone for 30 days."¹⁶⁹ Participants generally agreed with the Court on searches the Court saw as clearly a search within the meaning of the Fourth Amendment, and on those searches the Court saw as clearly not within the meaning of the Fourth Amendment.¹⁷⁰ For searches the Court did not see as easy to determine, however, participants often disagreed with the Court's final outcome.¹⁷¹ Most telling for future analyses like *Quon*, on average participants rated the "monitoring phone for 30 days" as the second most intrusive search, more intrusive than "perusing bank records," "needle in arm at work to get blood," and even "reading a personal diary"—all searches that have been held to violate the Fourth Amendment.¹⁷² Because participants see a search of electronic communication as highly intrusive, this shows private citizens have a reasonable expectation of privacy in these communications at least equal to, if not more than, the expectation of privacy in sealed letters. Although this example was of a police search and not an employer search, the same finding would likely extend to employer searches. Assuming a "highly intrusive" act impli-

167. See *Ex parte Jackson*, 96 U.S. 727, 733 (1877).

168. Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727 (1993).

169. *Id.* at 738–39 tbl.1.

170. *Id.* at 739.

171. *Id.* at 741.

172. *Id.* at 738–39 tbl.1.

cates a reasonable expectation of privacy, because participants viewed surveillance of a phone as one of the most intrusive searches in the study, electronic communications should be afforded Fourth Amendment protection from government employer searches.

Jeremy Blumenthal, Meera Adya, and Jacqueline Mogle decided to extend Slobogin's findings and investigate what factors related to these searches made them seem more intrusive.¹⁷³ They used the same fifty scenarios from Slobogin's study, and presented them to participants either describing the target of the search or without mentioning the target.¹⁷⁴ For example, the researchers presented the description of the search "flying 400 yards over backyard in helicopter" with the target of "marijuana" and "reading a personal diary" with the target of "embezzlement."¹⁷⁵ In some cases, giving the context (the potential target of the search) made participants see the search as less intrusive, which courts use in their analysis of whether the search was reasonable.¹⁷⁶ If a bright-line rule were used, the reasonableness of the search, in light of the circumstances of the particular search, would still depend on the object of the search. This study demonstrates that lay people consider the object of the search in their reasonableness analysis. The bright-line rule, then, would keep courts' analyses in line with what society already views as reasonable.

Social scientists have also examined how employees feel about employer surveillance and search of communications. Although these studies do not reference the Fourth Amendment, they can be applied to determine if society is willing to view the search as reasonable. Bradley Alge studied how electronic surveillance of employees' Internet usage affected employees' views of their employers.¹⁷⁷ The scope of the search compared to what the employer was trying to find, and employees' cooperation and assistance in the search both reduced employees' perceptions that their privacy had been invaded.¹⁷⁸ Employers can make sure to keep their searches relevant and allow individuals to participate, which will reduce employees' negative emotions toward the perceived intrusion.¹⁷⁹ A bright-line rule applying the Fourth Amendment to all government employees' electronic communication would allow these factors and circumstances surrounding employers' searches to come into play in the second step of the analysis in determining the reasonableness of the search.

173. Jeremy A. Blumenthal et al., *The Multiple Dimensions of Privacy: Testing Lay "Expectations of Privacy,"* 11 U. PA. J. CONST. L. 331 (2009).

174. *Id.* at 343.

175. *Id.* 356–60 tbl.1.

176. *Id.* at 353.

177. Bradley J. Alge, *Effects of Computer Surveillance on Perceptions of Privacy and Procedural Justice,* 86 J. APPLIED PSYCHOL. 797 (2000).

178. *Id.* at 802.

179. *See id.*

2. *A Bright-Line Rule Is Necessary to Guide Lower Courts*

With the increasing prevalence of electronic communication devices,¹⁸⁰ lower courts will most likely be faced with searches of employer-provided devices. Without clear guidance from the Supreme Court, lower courts will not know what analysis to apply. Lower courts will be lacking in guidance of how to conduct a reasonable expectation of privacy analysis for these situations, or even when it is proper to conduct that type of analysis. In performing the two-step reasonable expectations analysis, lower courts have no guidance in determining what exactly society is ready to view as reasonable. This lack of guidance could result in vast discrepancies among jurisdictions of what actually is a reasonable expectation of privacy in an employer-provided electronic communication device.

3. *A Bright-Line Rule Applying to All Communication Is Necessary Because There Is No Real Distinction Between the Different Types of Communication*

The Court should apply a bright-line rule that treats the content of all communications the same.¹⁸¹ The standard first applied in 1877 in *Ex parte Jackson*,¹⁸² that individuals have a reasonable expectation of privacy in information they take steps to keep hidden from third parties, but not in information that is shared with others,¹⁸³ is a workable test that can be applied to all types of information. There is no reason to distinguish letters and telephone conversations from e-mails, text messages, and other forms of electronic communication. The “content” information of these communications is kept private from other individuals, while the “coding” information, the address or phone number to which the communication is sent, is not.

Government employees take steps to keep the content of their text messages private from third parties. If the employee did not have an expectation of privacy in the content of the message, then there are other forms of communication—i.e., talking on a police radio or in person—that the employee could have used. The government employee, by using a text message, selected a form of communication that cannot be overheard or intercepted by anyone except the intended recipi-

180. *See supra* section III.A.

181. *See also* Ariel D. Cudkowicz et al., *Technology and Privacy in the Workplace: Monitoring Employee Communications After the Supreme Court’s Quon Decision*, 54 Bos. B.J. 29, 29 (2010) (commenting that many court-watchers had hoped the Supreme Court would establish a bright-line rule regarding government searches of text messages in *City of Ontario v. Quon*).

182. *Ex parte Jackson*, 96 U.S. 727 (1877).

183. *Id.* at 733.

ent.¹⁸⁴ Because Courts have applied the Fourth Amendment to less private forms of communication, such as oral communications,¹⁸⁵ that could be overheard by others, the same analysis should hold true for text messages.

4. *The Coding vs. Content Distinction Should Hold True For Government Employers' Searches*

The coding vs. content distinction was originally applied in police searches of criminal subjects, and not government employers' searches of their employees' communications.¹⁸⁶ But the Court was clear in *O'Connor* that government employees do not lose a reasonable expectation of privacy merely because they have chosen to work for a public employer.¹⁸⁷ The distinction that courts have consistently applied to police searches should also apply to government employer searches. By applying the Fourth Amendment, the Court recognizes that the individual who was searched has a liberty interest in remaining free from searches and seizures that outweighed the government's interest in searching. In government employers' searches of employees' electronic communications, the interest in the search is to monitor the employees' use of the electronic communication medium.¹⁸⁸ Normally, the government employer is not searching for a suspected crime or wrongdoing, but is only looking to determine whether the employee is using the device for work related purposes.¹⁸⁹ The government employer's interest, then, is actually *less* than the interest police have in searching electronic communications for evidence of criminal acts. The government employees' liberty interest is to have only the intended recipient view the content of those communications—the same liberty interest at issue for the communications in police searches.¹⁹⁰ The coding vs. content distinction, which courts have applied when balancing a state's interest in searching criminal suspects, should apply to government employers' searches when the state's interest is actually less. A bright-line rule applying the Fourth Amendment to all government employees' electronic communication would recognize that the liberty interest does outweigh the government employers' interest in monitoring their employees' communications.

184. Of course, the intended recipient is always able to relay the contents of the information to a third party. This argument only applies to government searches of the text messages without the consent of either the sender or the intended recipient.

185. *E.g.*, *Katz v. United States*, 389 U.S. 347, 348 (1967).

186. *E.g.*, *Smith v. Maryland*, 442 U.S. 735, 737 (1979).

187. *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987).

188. *See, e.g.*, *Narducci v. Moore*, 572 F.3d 313 (7th Cir. 2009).

189. *Id.* at 321.

190. *Smith*, 442 U.S. at 738.

5. *Potential Downfalls Do Not Outweigh the Utility of a Bright-Line Rule*

One potential counterargument to applying the coding vs. content distinction is government employees do not actually take steps to keep the content of their text messages or other electronic communications hidden from others.¹⁹¹ Unlike a letter, text messages cannot be “sealed” from prying eyes. Text messages, however, are still more private than other forms of communication, such as oral communication or telephone calls, which a third party could always overhear. Without knowledge of encryption, technology does not provide users a way to seal the content of their text messages.

Another potential argument is that, unlike the content of letters or telephone communications, the content of text messages are already shared with third parties because the service provided stores the content of the messages on their servers.¹⁹² Text message users, however, do not necessarily share the content of their information with third parties. There is a difference between voluntarily sharing the content of a message with a third party and a third party having the ability to access that information.¹⁹³ Cell phone service providers do not have someone constantly monitoring the content of all of their clients’ text messages. The only way the content of a message will be shared with a third party is if the service provider prints off the transcript of the text messages.

Despite these counterarguments, the bright-line rule stating the Fourth Amendment applies to the content of government employees’ text messages, but not the coding information, is the best, most workable rule. This rule is easy to apply to a variety of fact patterns involv-

191. This issue was discussed in *United States v. Katz*, 389 U.S. 347, 351–52 (1967). In *Katz*, the Court pointed out that “one who occupies [the phone booth], shuts the door behind him, and pays the toll permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.” *Id.* at 351. It may be argued that, because text messages could be “hacked” into or otherwise intercepted without special encryption technology, the sender has not actually “shut the door behind him” to prevent others from receiving the message.

192. In *United States v. Miller*, 425 U.S. 435, 443 (1976), the Supreme Court stated that individuals do not have a reasonable expectation of privacy in information they voluntarily share with third parties.

193. The Sixth Circuit recently made a similar argument in *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010). In *Warshak*, the Court distinguished the normal application of the third-party doctrine and the sharing of e-mail messages with an Internet Service Provider (ISP) because the information conveyed to the ISP is not information meant to be further put to use by the ISP. *Id.* at 274. *But see* Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 SANTA CLARA L. REV. 183, 186 (2010) (arguing that courts should apply a rule distinguishing between coding and content information for data stored on cellular phones, but recognizing that data stored with third-party servers would pose a different question).

ing government employers' searches of their employees' electronic communications.¹⁹⁴ Any other standard applied would result in inconsistencies in lower court decisions and confusion for government employers attempting to search their employees' communications.

E. Using the Bright-Line Rule, *Quon* Would Have Come Out the Same

If the Supreme Court had chosen to address the issue of Quon's reasonable expectation of privacy in the text messages he sent over the pager, the Court would have had to include the coding vs. content distinction in their analysis. For Quon, the text messages he was claiming a reasonable expectation of privacy in were content information. The City had obtained a printout of the content of the text messages Quon had sent using the pager.¹⁹⁵ If the Court applied the coding vs. content distinction that courts have used in the past, Quon would be more likely to have a reasonable expectation of privacy in the content of those text messages than the numbers to which he had sent messages using the government-provided pager.

This distinction can also help aid government employers when they make their privacy policies or plan to search employees' devices. Privacy policies should make explicit that the content of an employees' communications are subject to review by employers. If the employer does not have a privacy policy, or is worried that the privacy policy will not override a reasonable expectation of privacy, the employer can stick to searches of the "addressing" information—the numbers dialed or from which the employer received calls or text messages, or e-mail addresses—to avoid a Fourth Amendment search and seizure issue.

IV. CONCLUSION

The preceding discussion examined the Supreme Court's decision in *Quon* and its potential effect on future determinations of reasonable expectation of privacy issues. The Supreme Court was able to avoid determining whether a public sector employee has a reasonable expectation of privacy in an employer-provided communication device because the search itself was reasonable. The Court should have adopted a bright-line rule recognizing that individuals have a different expectation of privacy in the content of their communications than they do in the coding, or addressing, information. Such a bright-line

194. See Daniel Zamani, *There's an Amendment for That: A Comprehensive Application of Fourth Amendment Jurisprudence to Smart Phones*, 38 HASTINGS CONST. L.Q. 169, 181 (2010) (arguing the coding and content distinction should be applied to government searches of SmartPhones because it is the easiest standard to apply to a variety of situations).

195. *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010).

rule would hold the Fourth Amendment applies to government employers' searches of the content of government employees' electronic communications.

The increasing prevalence of electronic communication devices in general, and employer-provided devices in particular, will necessitate the determination of the reasonableness of employees' privacy expectations. Employers will need guidance as to what searches they can and cannot perform, employees will need guidance as to what their employers can do, and lower courts will need guidance in adjudicating these issues when they arise. A bright-line rule holding the Fourth Amendment applies to the content of government employees' electronic communications would aid government employers, government employees, and the lower courts.