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TEACHER CELL PHONE SEARCHES IN LIGHT OF *ONTARIO V. QUON*

By Joseph O. Oluwole\*

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I. INTRODUCTION

[1] Technological innovations permeate almost every inch of society. From the government and corporate workforce to family and social settings, technology seemingly knows no boundaries. Technology's limitless reach has even crossed into the realm of public schools, where, according to teacher Lyn Newton, "[s]chool principals are witnessing more and more cell phone use by their teachers."<sup>1</sup> Teachers, like other cell phone users, use cell phones not only for making phone calls, but also for taking pictures and texting,<sup>2</sup> which has landed some teachers in trouble

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<sup>1</sup> Lyn Newton, *Teacher Cell Phone Use at School*, FAMILIES.COM, <http://education.families.com/blog/teacher-cell-phone-use-at-school> (last visited Jan. 6, 2010).

<sup>2</sup> See, e.g., Andra Varin, *Sex Crime, Not Seduction: More Female Teachers Prosecuted for Having Sex With Students*, AOLNEWS (Aug. 21, 2009), <http://www.aolnews.com/story/female-teachers-charged-with-sex-abuse/634372>.

for inappropriate communications.<sup>3</sup> Indeed, the sexting wave has not eluded teachers.<sup>4</sup>

[2] The problems with cell phone technology become more pronounced when school-issued phones are used, particularly because school administrators may claim the right to seize and search said phones.<sup>5</sup> Yet, a vacuum in the adjudication of the search and seizure of teacher cell phones has left uncertainty concerning the legal parameters of the regulation of school-owned cell phones. Furthermore, there is a clear lack of literature examining the constitutionality of searching public school teachers' cell phones. This Article attempts to fill the literary void through examination of the U.S. Supreme Court's 2010 *City of Ontario v. Quon*<sup>6</sup> decision regarding the search and seizure of employer-provided devices.

[3] Part II of this Article presents the facts of *Quon*. Part III then discusses the Supreme Court's decision with Parts IV and V examining Justice Stevens' concurring opinion and Justice Scalia's concurring opinion, respectively. With the *Quon* decision firmly outlined, Part VI undertakes an examination of the status of teacher cell phones in public school districts. Finally, Parts VII and VIII conclude with the implications of the *Quon* decision for the search and seizure of employer-provided teacher cell phones.

## II. THE FACTS IN *ONTARIO V. QUON*

[4] *Quon* began after the Ontario Police Department (OPD), California, audited the text messages of police sergeant, and SWAT team

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<sup>3</sup> See e.g., Varin, *supra* note 2.

<sup>4</sup> See *id.*

<sup>5</sup> See e.g., B.C. Manion, *School Trying Cell Phones as Teacher's Aid*, TAMPA TRIB., Oct. 22, 1996, at University/New Tampa 1. For this article's purposes, cell phones and pagers are synonymous, as was the case in the United States Supreme Court decision *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010).

<sup>6</sup> 130 S. Ct. 2619 (2010).

member, Jeff Quon.<sup>7</sup> The text messages were retrieved from one of the twenty OPD provided pagers given to OPD officers to help further the SWAT team's work and facilitate responses to emergencies.<sup>8</sup> OPD's contract with Arch Wireless Operating Company, the wireless-service provider, limited the number of characters the pagers could send or receive monthly before incurring overage charges.<sup>9</sup> Quon eclipsed the monthly character limit.<sup>10</sup>

[5] While the OPD did not have a written policy specifically regulating employee use of cell phones or pagers, it had a general "Computer Usage, Internet and E-Mail Policy" (Computer Policy).<sup>11</sup> This Computer Policy stated *inter alia*: "[the employer] reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources."<sup>12</sup> Additionally, the OPD informed employees verbally and in a memorandum that text messages and e-mails would be treated similarly and subject to audit.<sup>13</sup> In fact, the officers were told that text messages "are considered e-mail messages."<sup>14</sup>

[6] Quon signed the Computer Policy, confirming that he had read and understood it.<sup>15</sup> Quon was further reminded of this policy after he went over the character limit for his pager.<sup>16</sup> But, at the same time he was told

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<sup>7</sup> See *id.* at 2624.

<sup>8</sup> See *id.* at 2625.

<sup>9</sup> See *id.*

<sup>10</sup> See *id.*

<sup>11</sup> See *Quon*, 130 S. Ct. at 2625.

<sup>12</sup> *Id.*

<sup>13</sup> See *id.*

<sup>14</sup> *Id.* (citation omitted).

<sup>15</sup> See *id.*

<sup>16</sup> See *Quon*, 130 S. Ct. at 2625.

that there was no ““intent to audit [an] employee’s text messages to see if the overage [was] due to work related transmissions.””<sup>17</sup> Ultimately, Quon was offered and accepted the opportunity to pay for his overages in lieu of an audit of his text messages.<sup>18</sup>

[7] Because Quon and at least one other officer repeatedly went over their allotted character limit, the OPD chief launched an investigation to determine if the character allotment for text messages was insufficient.<sup>19</sup> Integral to its investigation, the OPD sought to determine if the overages were work-related or personal; such a determination was to ensure that employees were not paying out of pocket for work-related overages.<sup>20</sup> As part of the inspection, the OPD examined the transcript of Quon’s text messages.<sup>21</sup> The transcript revealed that not only were many of the text messages personal, but some were actually sexually explicit.<sup>22</sup> This discovery prompted further internal investigations, which concluded that Quon violated OPD rules because he attended to personal affairs while on duty.<sup>23</sup>

[8] Quon, along with several individuals who had sent him text messages, filed suit against the OPD and its officials claiming a violation of the Fourth Amendment’s Search and Seizure Clause.<sup>24</sup> On a summary

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<sup>17</sup> *Id.* (alterations in original) (citation omitted).

<sup>18</sup> *See id.* (noting that other employees who incurred overages were offered the same opportunity).

<sup>19</sup> *See id.* at 2625-26.

<sup>20</sup> *See id.* at 2626.

<sup>21</sup> *See id.* Arch Wireless provided the transcript, which were redacted to protect Quon’s off-duty text messages from review. *Id.*

<sup>22</sup> *See Quon*, 130 S. Ct. at 2626.

<sup>23</sup> *See id.*

<sup>24</sup> *See id.*; *see also* U.S. CONST. amend. IV (“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

judgment motion, the federal district court for the Central District of California ruled for the OPD.<sup>25</sup> Specifically, the district court held that even though Quon had a reasonable expectation of privacy in his text messages, the search itself was reasonable.<sup>26</sup> The court ruled that the reasonableness of the search was contingent on the intent of the search, and consequently, referred the case to a jury to determine the OPD's intent.<sup>27</sup> The jury, ultimately, determined that the audit was intended to determine the sufficiency of the character allotment to the OPD's employees.<sup>28</sup> The court then reasoned that the search was constitutional in this case because the intent of the search was to evaluate the adequacy of the text character allotment, rather than to determine if Quon was abusing his pager.<sup>29</sup>

[9] Like the district court, the Ninth Circuit Court of Appeals ruled that Quon had a reasonable privacy expectation in his text messages.<sup>30</sup>

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

<sup>25</sup> See *Quon v. Arch Wireless Operating Co.*, 445 F. Supp. 2d 1116, 1138, 1151 (C.D. Cal. 2006) [hereinafter *Arch Wireless I*].

<sup>26</sup> See *id.* at 1143-46.

<sup>27</sup> See *id.* at 1146; see also *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 899 (9th Cir. 2008) [hereinafter *Arch Wireless II*].

<sup>28</sup> See *Arch Wireless II*, 529 F.3d at 899; see also *Arch Wireless I*, 445 F. Supp. 2d at 1146.

<sup>29</sup> See *Arch Wireless I*, 445 F. Supp. 2d at 1146 (“[T]he Court finds that if the purpose for the audit was to determine if Quon was using his pager to ‘play games’ and ‘waste time,’ then the audit was not constitutionally reasonable, and performing the same violated the Fourth Amendment rights of Quon and those to whom he communicated. On the other hand, if the purpose for the audit was to determine the efficacy of the existing character limits to ensure that officers were not paying hidden work-related costs, then the Court finds that no constitutional violation occurred.”); see also *id.* at 1144 (“Insofar as the audit was meant to ferret out misconduct by determining whether the officers in question were ‘playing games’ with their pagers or otherwise ‘wasting a lot of City time conversing with someone about non-related work issues,’ the Court finds the audit was *not* justified at its inception.”).

<sup>30</sup> See *Arch Wireless II*, 529 F.3d at 906.

However, the Ninth Circuit found the search unconstitutional because it was unreasonable in scope and there were other less intrusive ways to determine the efficacy of the character allotment, including having Quon himself redact the transcript.<sup>31</sup> The Ninth Circuit ultimately denied a petition for an en banc review,<sup>32</sup> and the U. S. Supreme Court granted certiorari.<sup>33</sup>

### III. THE SUPREME COURT OPINION

[10] At issue before the Supreme Court was whether the Fourth Amendment prohibits a public employer from searching the text messages employees send on employer-provided devices.<sup>34</sup> The Court began its evaluation by emphasizing that the Fourth Amendment governs government action in its role as employer.<sup>35</sup> The Court also observed that the Amendment's reach is not limited to criminal investigations.<sup>36</sup> In fact, at its core, the Amendment is designed to protect “the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government.”<sup>37</sup> To accentuate the fact that government

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<sup>31</sup> *See id.* at 909 (“There were a host of simple ways to verify the efficacy of the 25,000 character limit (if that, indeed, was the intended purpose) without intruding on [Quon’s] Fourth Amendment rights. For example, the Department could have warned Quon that for the month of September he was forbidden from using his pager for personal communications, and that the contents of all of his messages would be reviewed to ensure the pager was used only for work-related purposes during that time frame. Alternatively, if the Department wanted to review past usage, it could have asked Quon to count the characters himself, or asked him to redact personal messages and grant permission to the Department to review the redacted transcript.”).

<sup>32</sup> *Quon v. Arch Wireless Operating Co.*, 554 F.3d 769, 769 (2009).

<sup>33</sup> *City of Ontario v. Quon*, 130 S. Ct. 2619, 2627 (2010).

<sup>34</sup> *See id.* at 2628-29.

<sup>35</sup> *See id.* at 2627-28 (citing *Treasury Emps. v. Von Raab*, 489 U.S. 656, 665 (1989)).

<sup>36</sup> *See id.* at 2627 (citing *Camara v. Mun. Court*, 387 U.S. 523, 530 (1967)).

<sup>37</sup> *Id.* (quoting *Skinner v. Ry. Labor Execs.’ Ass’n.*, 489 U.S. 602, 613-14 (1989)).

employers must comply with the Fourth Amendment, the Court relied on its decision in *O'Connor v. Ortega*.<sup>38</sup>

[11] In *O'Connor*, officials at a state hospital searched the office of a physician employed at the hospital as part of an investigation into alleged work-related improprieties.<sup>39</sup> In its review of the Fourth Amendment challenge to the search, the Court rejected the notion that “public employees can never have a reasonable expectation of privacy in their place of work.”<sup>40</sup> Instead, the Court ruled that “[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer.”<sup>41</sup>

[12] According to a plurality in *O'Connor*, “[t]he 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.”<sup>42</sup> In other words, contrary to Justice Scalia’s assertion in his *O'Connor* concurrence,<sup>43</sup> there is no blanket Fourth

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<sup>38</sup> *Id.* at 2628.

<sup>39</sup> *See O'Connor v. Ortega*, 480 U.S. 709, 712-13 (1987).

<sup>40</sup> *Id.* at 717.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*; *see also id.* (“Public employees’ expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation.”).

<sup>43</sup> *See id.* at 731 (Scalia, J., concurring) (“I cannot agree, moreover, with the plurality’s view that the reasonableness of the expectation of privacy (and thus the existence of Fourth Amendment protection) changes ‘when an intrusion is by a supervisor rather than a law enforcement official.’ The identity of the searcher (police v. employer) is relevant not to whether Fourth Amendment protections apply, but only to whether the search of a protected area is reasonable. Pursuant to traditional analysis the former question must be answered on a more ‘global’ basis. . . . I would hold, therefore, that the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by Fourth Amendment protections as a general matter.”) (citation omitted). Justice Scalia would also apply a uniform standard to private and public employer searches. *See id.* at 732 (Scalia, J., concurring) (“I would hold that government searches to retrieve work-related materials or to investigate violations of workplace rules –



Amendment protection for government employees' offices.<sup>44</sup> Instead, the *O'Connor* plurality ruled that inquiry into the "operational realities of the workplace" is a condition precedent to determining the existence of Fourth Amendment rights in the workplace.<sup>45</sup> Additionally, the Court declared that the "operational realities of the workplace" create "special needs, beyond the normal need for law enforcement," which exempt employer-conducted searches from the Amendment's probable cause and warrant requirements.<sup>46</sup>

[13] Approximately two years after *O'Connor*, the Supreme Court nominally clarified the role of "operational realities" in the Fourth Amendment analysis of workplace searches.<sup>47</sup> Specifically, the Court ruled that, rather than exclusively serving as a condition precedent to existence of Fourth Amendment rights, "operational realities" could "diminish privacy expectations" of public employees.<sup>48</sup>

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searches of the sort that are regarded as reasonable and normal in the private-employer context – do not violate the Fourth Amendment.”).

<sup>44</sup> See *id.* at 717-18; see also *City of Ontario v. Quon*, 130 S. Ct. 2619, 2628 (2010) (interpreting *O'Connor*'s plurality opinion as requiring a case-by-case decision as opposed to Justice Scalia's blanket view).

<sup>45</sup> See *O'Connor*, 480 U.S. at 717; see also *Quon*, 130 S. Ct. at 2628 (“[A] court must consider [t]he operational realities of the workplace in order to determine whether an employee's Fourth Amendment rights are implicated . . . .”) (internal quotation marks omitted).

<sup>46</sup> See *O'Connor*, 480 U.S. at 725 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)); see also *Quon*, 130 S. Ct. at 2630.

<sup>47</sup> See *Treasury Emps. v. Von Raab*, 489 U.S. 656, 671 (1989).

<sup>48</sup> *Id.* at 671; see also *id.* (“Employees of the United States Mint, for example, should expect to be subject to certain routine personal searches when they leave the workplace every day. Similarly, those who join our military or intelligence services may not only be required to give what in other contexts might be viewed as extraordinary assurances of trustworthiness and probity, but also may expect intrusive inquiries into their physical fitness for those special positions.”).

[14] A majority of the *O'Connor* Court ruled that a standard of reasonableness must govern workplaces searches.<sup>49</sup> The Justices reasoned that “[a] standard of reasonableness will neither unduly burden the efforts of government employers to ensure the efficient and proper operation of the workplace, nor authorize arbitrary intrusions upon the privacy of public employees.”<sup>50</sup> This reasonableness standard for “public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct”<sup>51</sup> demands that searches must be reasonable at inception and in scope.<sup>52</sup> Namely, under this two-step reasonableness standard, courts must first determine if the search was justified at its inception, and then determine if “the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.”<sup>53</sup>

[15] The *Quon* Court chose not to establish or endorse a “threshold test for determining the scope of an employee’s Fourth Amendment rights.”<sup>54</sup> More specifically, the Court decided not to choose between the *O'Connor* plurality’s position, which argued there should be no blanket Fourth Amendment protection for workplace searches,<sup>55</sup> and that of Justice Scalia, who argued there should be a uniform standard for searches by public and private employers.<sup>56</sup> The Court’s rationale was that *Quon* was

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<sup>49</sup> See *O'Connor*, 480 U.S. at 725.

<sup>50</sup> *Id.*; see also *id.* at 726 (“Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable . . .”).

<sup>51</sup> *Id.* at 725.

<sup>52</sup> See *id.* at 726.

<sup>53</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (internal quotation marks omitted) (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)); see also *O'Connor*, 480 U.S. at 726.

<sup>54</sup> *City of Ontario v. Quon*, 130 S. Ct. 2619, 2628 (2010).

<sup>55</sup> See *O'Connor v. Ortega*, 480 U.S. 709, 717-18 (1987).

<sup>56</sup> See *Quon*, 130 S. Ct. at 2634 (Scalia, J., concurring in part and concurring in the judgment).

not the case for such a choice since both approaches lead to the same conclusion: the search was reasonable.<sup>57</sup>

[16] The Court was also hesitant to use *Quon* as a test case for further development of *O'Connor* due to the dynamic nature of technology, the highly undeveloped state of the laws governing the interaction of technology and privacy, and the unpredictability of societal norms about proper technological etiquette.<sup>58</sup> The Court instead chose to foundationally assume that the review of Quon's text messages constituted a Fourth Amendment search; and that Quon had a reasonable expectation of privacy in the text messages.<sup>59</sup> The Court acknowledged, however, the parties' disagreement over whether Quon even had a reasonable expectation of privacy.<sup>60</sup> The petitioners contended that Quon had no reasonable privacy expectation because the OPD informed its employees that text messages were governed by the computer policy and that text messages were not deemed private.<sup>61</sup> The respondents countered, arguing that an OPD official's verbal statement to Quon—that his text messages would not be audited if he paid his overages—countermanded the official

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<sup>57</sup> *See id.* at 2628-29.

<sup>58</sup> *See id.* at 2629-30. For instance, the Court pointed out that “[r]apid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. . . . *At present*, it is uncertain how workplace norms, and the law's treatment of them, will evolve.” *Id.* at 2630 (emphasis added).

<sup>59</sup> *See id.* at 2630. The Court also assumed that the same Fourth Amendment limitations that apply to the search of physical space also apply to the search of electronics. Here are the three main assumptions of the Court overarching its review, in the Court's own words: “For present purposes we assume several propositions *arguendo*: First, Quon had a reasonable expectation of privacy in the text messages sent on the pager provided to him by the City; second, petitioners' review of the transcript constituted a search within the meaning of the Fourth Amendment; and third, the principles applicable to a government employer's search of an employee's physical office apply with at least the same force when the employer intrudes on the employee's privacy in the electronic sphere.” *Id.*

<sup>60</sup> *See id.* at 2629.

<sup>61</sup> *See id.*

policy; consequently, respondents reasoned, Quon had a reasonable expectation of privacy.<sup>62</sup>

[17] In detailed dicta, the Court revealed that if it were to determine the *legitimacy* of Quon’s expectation of privacy pursuant to *O’Connor*, it would need to conduct an “operational realities” inquiry.<sup>63</sup> This inquiry would have to include the following determinations: (1) whether the verbal statements of the OPD official constituted a change in official policy; (2) if the first question is answered in the affirmative, then it must be determined whether the OPD official had actual authority or the color of authority to: (i) institute the change; and (ii) “guarantee the privacy of text messaging[;]”<sup>64</sup> and (3) other reasons that would justify or excuse auditing text messages sent on employer-provided pagers or cell phones during work hours.<sup>65</sup> Such justifications/excuses would include audits for performance evaluations, audits pursuant to litigation about the legality of government actions as well as audits necessary to comply with state open records laws.<sup>66</sup>

[18] The Court appeared a little apprehensive in its review of the Fourth Amendment implications of text messages on employer-provided communication devices. This is evident in the Court’s use of such cautionary phrases as “proceed with care”, “judiciary risks error” and “[p]rudence counsels caution” in its opinion.<sup>67</sup> For instance, the Court

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<sup>62</sup> See *City of Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See *id.*

<sup>66</sup> See *id.*

<sup>67</sup> *Id.* The Court acknowledged that, while it was able to rely on “its own knowledge and experience” to find a reasonable privacy expectation in phone booths in *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled by Katz v. United States*, 389 U.S. 347, 353 (1967), the same could not be said for pagers or cell phones. See *Quon*, 130 S. Ct. at 2629 (“In *Katz*, the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth. *It is not so clear that courts at present are on so sure a ground.*”) (emphasis added) (citation omitted).

noted that “[t]he judiciary *risks error* by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.”<sup>68</sup> Likewise, the Court observed that

[e]ven if the Court were certain that the *O’Connor* plurality’s approach were the right one, the Court would have difficulty predicting how employees’ privacy expectations will be shaped by those changes [i.e. workplace norms, technological changes and the law’s evolution in response to increased technology use at work] or the degree to which society will be prepared to recognize those expectations as reasonable.<sup>69</sup>

Ironically, in the Court’s eagerness to avoid uncertainty, it might have created more uncertainty in the law due to its failure to settle the law; indeed, the Court itself acknowledged the current pendent state of the law.<sup>70</sup>

[19] In light of the Court’s decision not to choose between the *O’Connor* plurality’s approach and Justice Scalia’s approach, the Court applied both approaches to show that they lead to the same conclusion.<sup>71</sup> However, most of the Court’s reasonableness analysis was conducted under the *O’Connor* plurality’s two-step reasonableness standard.<sup>72</sup>

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<sup>68</sup> *Quon*, 130 S. Ct. at 2629 (emphasis added); *see also id.* at 2630 (“A broad holding concerning employees’ privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted.”).

<sup>69</sup> *Id.* at 2630.

<sup>70</sup> *See id.* at 2629-30. Justice Scalia agrees, as he aptly characterized this refusal to clarify the law as “self-defeating.” *Id.* at 2635 (Scalia, J., concurring in part and concurring in judgment).

<sup>71</sup> *See id.* at 2630-33.

<sup>72</sup> *See id.* at 2630. The two-part standard requires that: (i) the search was “justified at its inception”; and (ii) “the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.” *O’Connor v. Ortega*, 480 U.S. 709, 725-26 (1987) (internal quotation marks omitted) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)).

[20] Under the *O'Connor* analysis, the Court found that the OPD's procurement and review of the text messages were "justified at [their] inception because there were reasonable grounds for suspecting that the search [was] necessary for a noninvestigatory work-related purpose."<sup>73</sup> The Court reasoned that the intent of the audit of Quon's messages – evaluation of the adequacy of employees' text character allotment<sup>74</sup> – constituted a "noninvestigatory work-related purpose."<sup>75</sup> In accordance with this reasoning, the Court concluded that the petitioners "had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or on the other hand that the City [of Ontario] was not paying for extensive personal communications."<sup>76</sup>

[21] Under the second step of the *O'Connor* reasonableness standard, the Court found the scope of the search reasonable.<sup>77</sup> As justification, the Court cited the efficiency and expediency of text message reviews to the petitioners' audit intent.<sup>78</sup> Further, the Court found the scope of the search reasonable because it was "not 'excessively intrusively.'"<sup>79</sup> This conclusion was supported by the OPD's deliberate efforts to redact text messages that Quon sent while he was off-duty, as well as the OPD's decision to review texts for only two of the months that Quon incurred overages.<sup>80</sup> Additionally, the Court declared that there are varying degrees

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<sup>73</sup> *Quon*, 130 S. Ct. at 2631 (quoting *O'Connor*, 480 U.S. at 726) (internal quotation marks omitted).

<sup>74</sup> *See id.*; *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 899 (9th Cir. 2008) (discussing the jury determination of the audit's intent).

<sup>75</sup> *City of Ontario v. Quon*, 130 S. Ct. 2619, 2631 (2010).

<sup>76</sup> *Id.*

<sup>77</sup> *See id.*

<sup>78</sup> *See id.*

<sup>79</sup> *Id.* (quoting *O'Connor v. Ortega*, 480 U.S. 709, 726 (1987)).

<sup>80</sup> *See id.* The Supreme Court acknowledged that the OPD might have reasonable grounds to review text messages for all the months that Quon incurred overages. *See id.*

of reasonable expectations of privacy, and the degree of expectation is relevant to the intrusiveness and, consequently, scope of analysis.<sup>81</sup> For instance, the Court pointed out that Quon had a relatively low expectation of privacy because he was informed in the official policy that his messages could be audited.<sup>82</sup> Therefore, the Court reasoned that Quon could not have had such a high expectation of privacy as to justify a belief that he had *carte blanche* immunity from an audit of his messages.<sup>83</sup>

[22] The Court also revealed that Quon’s role as a law enforcement officer played a key role in diminishing his expectation of privacy: “As a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications.”<sup>84</sup> In fact, the Court intimated that, law enforcement officer or not, the expectation of privacy would diminish for any employee if the employer provided the pager or cell phone, and if the employee was informed that text messages are subject to audit or the employee “received no assurances of privacy.”<sup>85</sup> The Court reasoned that, given these circumstances, “a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used.”<sup>86</sup> Accordingly, the Court concluded that Quon’s expectation of privacy was “only a limited privacy expectation,”<sup>87</sup> though the Court declined to

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<sup>81</sup> See *Quon*, 130 S. Ct. at 2631 (citing *Treasury Emps. v. Von Raab*, 489 U.S. 656, 671 (1989); cf. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654-57 (1995)) (“Furthermore, and again on the assumption that Quon had a reasonable expectation of privacy in the contents of his messages, the extent of an expectation is relevant to assessing whether the search was too intrusive.”).

<sup>82</sup> See *id.*

<sup>83</sup> See *id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Quon*, 130 S. Ct. at 2631.

further delineate or clarify the boundaries of the limitations.<sup>88</sup> Nonetheless, the Court ruled that the limited nature of Quon’s privacy expectation reduced the intrusiveness of the search.<sup>89</sup>

[23] Finally, in its reasonable in scope analysis, the Court rejected the Ninth Circuit’s conclusion that, since there were less intrusive ways to conduct the search, the search was unreasonable.<sup>90</sup> Specifically, the Court pointed out that “[t]his approach was inconsistent with controlling precedents.”<sup>91</sup> The Court observed that it had “repeatedly refused to declare that only the ‘least intrusive’ search practicable can be reasonable under the Fourth Amendment.”<sup>92</sup> The Court reasoned that the “least intrusive” approach would insurmountably impede “virtually all search-and-seizure powers.”<sup>93</sup> Indeed, as the Court noted, under the “least intrusive” approach, judicial imagination of alternatives to any employer searches or seizures would be limitless.<sup>94</sup> Applying these principles, the

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<sup>88</sup> *See id.*

<sup>89</sup> *See id.* at 2631-32 (“From 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. OPD’s audit of messages on Quon’s employer-provided pager was not nearly as intrusive as a search of his personal e-mail account or pager, or a wiretap on his home phone line, would have been. That the search did reveal intimate details of Quon’s life does not make it unreasonable, for under the circumstances a reasonable employer would not expect that such a review would intrude on such matters. The search was permissible in its scope.”).

<sup>90</sup> *See id.* at 2632.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995)) (internal quotation marks omitted).

<sup>93</sup> *Quon*, 130 S. Ct. at 2632 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 n.12 (1976)) (internal quotation marks omitted).

<sup>94</sup> *Id.* (quoting *Vernonia*, 515 U.S. at 663) (internal quotation marks omitted). “[J]udges engaged in *post hoc* evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might have been accomplished.” *Id.* (quoting *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 629 n.9 (1989)) (internal quotation marks omitted).



Court ruled that the OPD did not have to use less intrusive means, including having Quon redact his personal messages or asking him to conduct the audit himself.<sup>95</sup>

[24] The Court also rejected respondent's argument that statutory prohibition of a search makes a search "*per se* unreasonable under the Fourth Amendment."<sup>96</sup> The Court concluded its reasonableness analysis by pointing out that the search of Quon's text messages would pass muster under Justice Scalia's *O'Connor* approach.<sup>97</sup>

[25] Under Justice Scalia's approach, the Fourth Amendment would apply generally to Quon's text messages, and uniform standards would apply to employer searches of private and public employees.<sup>98</sup> The Court stated that the search of the text messages would be reasonable in the private sector since it was designed for legitimate work-related investigations and not overly intrusive.<sup>99</sup> Accordingly, the search of

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<sup>95</sup> *See id.* The Court also indicated, in rejecting the Ninth Circuit's decision, that the OPD did not have to forewarn "Quon that for the month of September he was forbidden from using his pager for personal communications, and that the contents of all his messages would be reviewed to ensure the pager was used only for work-related purposes during that time frame." *Id.* (quoting *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 909 (9th Cir. 2008)). The Court concluded that "[e]ven assuming there were ways that OPD could have performed the search that would have been less intrusive, it does *not* follow that the search *as conducted* was unreasonable." *Id.* (emphasis added). In other words, the presence of less intrusive means is not a determinative factor in analyzing the reasonableness of a search. *See id.*

<sup>96</sup> *Id.* (citing *Virginia v. Moore*, 553 U.S. 164, 168 (2008); *California v. Greenwood*, 486 U.S. 35, 43 (1988)).

<sup>97</sup> *See id.* 2633. Recall, under Justice Scalia's approach in *O'Connor*, "the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by Fourth Amendment protections as a general matter. . . . I would hold that government searches to retrieve work-related materials or to investigate violations of workplace rules – searches of the sort that are regarded as reasonable and normal in the private-employer context – do not violate the Fourth Amendment." *O'Connor v. Ortega*, 480 U.S. 709, 731-32 (1987) (Scalia, J., concurring).

<sup>98</sup> *See Quon*, 130 S. Ct. at 2628 (citing *O'Connor*, 480 U.S. at 731-32 (Scalia, J., concurring)).

<sup>99</sup> *See id.* at 2632-33.

Quon's text messages – designed for a legitimate work-related investigation and not excessively intrusive – was reasonable under Justice Scalia's approach.<sup>100</sup>

[26] The respondents argued that the Search and Seizure Clause also protected those who sent Quon text messages.<sup>101</sup> A *sine qua non* of such protection, however, is a determination that persons who knowingly send text messages to employer-provided devices have a reasonable expectation of privacy in the messages.<sup>102</sup> The Court refused to rule on the respondents' argument because it was possible to dispose of the case without examining this question.<sup>103</sup> Besides, the respondents contended that if the search of Quon was unreasonable, the search must necessarily be "unreasonable as to his correspondents."<sup>104</sup> But, they failed to argue the corollary position that if the search of Quon's messages was reasonable, the search of his correspondents' messages must also necessarily be reasonable.<sup>105</sup> Consequently, the Court reasoned that this wanting "litigating position," as well as the Court's finding that the search of Quon's messages was reasonable, "necessarily" precluded Quon's correspondents from prevailing.<sup>106</sup> The Court reversed the Ninth Circuit Court's decision and remanded the case for further review.<sup>107</sup>

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<sup>100</sup> See *id.* at 2633.

<sup>101</sup> See *id.*

<sup>102</sup> See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> *Quon*, 130 S. Ct. at 2633.

<sup>105</sup> See *id.*

<sup>106</sup> *Id.* ("In light of this litigating position and the Court's conclusion that the search was reasonable as to Jeff Quon, it necessarily follows that these other respondents cannot prevail.") (emphasis added).

<sup>107</sup> *Id.*

## IV. JUSTICE STEVENS' CONCURRING OPINION

[27] While Justice Stevens completely agreed with the Court's opinion, he wrote a concurring opinion to underscore the wisdom of the Court's refusal to choose between the *O'Connor* plurality's approach and that of Justice Scalia as the test for determining the reasonable privacy expectations of employees.<sup>108</sup> According to Justice Stevens, *O'Connor* actually presents a third approach: an *ad hoc* determination of employees' reasonable expectations of privacy based on the nature of the search.<sup>109</sup> He observed that Justice Blackmun propounded this approach in his dissenting opinion for four Justices in *O'Connor*.<sup>110</sup> There, Justice Blackmun declared, "the precise extent of an employee's expectation of privacy often turns on the nature of the search."<sup>111</sup> The rationale for this *ad hoc* approach lies in the absence of "tidy distinctions" between private and workplace activities in this day and age.<sup>112</sup> Consequently, Justice Stevens reasoned that the degree of privacy expectations should be determined "in light of the specific facts of *each* particular search, rather than by announcing a *categorical* standard."<sup>113</sup>

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<sup>108</sup> *See id.* (Stevens, J., concurring).

<sup>109</sup> *See id.* (Stevens, J., concurring).

<sup>110</sup> *See Quon*, 130 S. Ct. at 2633 (Stevens, J., concurring).

<sup>111</sup> *O'Connor v. Ortega*, 480 U.S. 709, 738 (1987) (Blackmun, J., dissenting)).

<sup>112</sup> *Id.* (Stevens, J., concurring) (citing *O'Connor*, 480 U.S. at 739 (Blackmun, J., dissenting)); *see also O'Connor*, 480 U.S. at 739 (Blackmun, J., dissenting) ("[T]he reality of work in modern time, whether done by public or private employees, reveals why a public employee's expectation of privacy in the workplace should be carefully safeguarded and not lightly set aside. It is, unfortunately, all too true that the workplace has become another home for most working Americans. Many employees spend the better part of their days and much of their evenings at work. . . . Consequently, an employee's private life must intersect with the workplace, for example, when the employee takes advantage of work or lunch breaks to make personal telephone calls, to attend to personal business, or to receive personal visitors in the office. As a result, the tidy distinctions (to which the plurality alludes) between the workplace and professional affairs, on the one hand, and personal possessions and private activities, on the other, do not exist in reality.") (citations omitted).

<sup>113</sup> *Quon*, 130 S. Ct. at 2633 (Stevens, J., concurring) (emphasis added) (citing *O'Connor*, 480 U.S. at 741 (Blackmun, J., dissenting)).

[28] Withal, Justice Stevens concluded that even under the third approach, the search of Quon’s text messages was reasonable for the very same reasons the Court relied on in reaching the same conclusion: Quon had only a *limited* privacy expectation because the facts showed that he should have known that his employer-provided device was subject to audit.<sup>114</sup>

#### V. JUSTICE SCALIA’S CONCURRING OPINION

[29] Justice Scalia, a critical voice in the *O’Connor* decision, filed an opinion concurring in part with the *Quon* Court’s opinion and concurring wholly with the judgment.<sup>115</sup> Justice Scalia’s rationale for his separate opinion was his continued support for a uniform standard for searches conducted by private employers and public employers.<sup>116</sup> Specifically, Justice Scalia stated, “the proper threshold inquiry should be not whether the *Fourth Amendment* applies to messages on *public* employees’ employer-issued pagers, but whether it applies *in general* to such messages on employer-issued pagers.”<sup>117</sup>

[30] While Justice Scalia reaffirmed his rejection of the *O’Connor* plurality’s “operational realities” framework for analyzing public

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<sup>114</sup> See *id.* at 2633-34 (Stevens, J., concurring) (“For the reasons stated at page 13 of the Court’s opinion, it is clear that respondent Jeff Quon, as a law enforcement officer who served on a SWAT Team, should have understood that all of his work-related actions – including all of his communications on his official pager – were likely to be subject to public and legal scrutiny. He therefore had only a limited expectation of privacy in relation to this particular audit of his pager messages. Whether one applies the reasoning from Justice O’Connor’s opinion, [Justice Scalia’s] concurrence, or Justice Blackmun’s dissent in *O’Connor*, the result is the same: The judgment of the Court of Appeals in this case must be reversed.”).

<sup>115</sup> See *id.* at 2634 (Scalia, J., concurring in part and concurring in the judgment); see also *O’Connor*, 480 U.S. at 729-32 (Scalia, J., concurring).

<sup>116</sup> See *Quon*, 130 S. Ct. at 2634 (Scalia, J., concurring in part and concurring in the judgment) (finding that the *O’Connor* plurality’s standard for determining the Fourth Amendment’s application to public employees is “standardless and unsupported”).

<sup>117</sup> *Id.* (Scalia, J., concurring in part and concurring in the judgment) (alterations in original).

employer searches,<sup>118</sup> he agreed with the *Quon* Court's refusal to use this as the test case for choosing between his *O'Connor* approach and that of the plurality.<sup>119</sup> Like the Court, he reasoned that even if it were assumed that Quon had a reasonable expectation of privacy, the search was reasonable and "[t]hat should end the matter."<sup>120</sup> But he chided the Court for "inexplicably interrupt[ing] its analysis with . . . an excursus on the complexity and consequences of answering, [an] admittedly irrelevant threshold question," in light of the Court's acknowledgment that the case could be disposed of without further clarifying *O'Connor*.<sup>121</sup> He warned the Court that its excessive discussion of the *O'Connor* plurality's approach would inspire a "heavy-handed" posture in the lower courts and excite litigants to flood the courts with cases.<sup>122</sup>

[31] Justice Scalia also admonished the Court for foregoing the opportunity to further illuminate the constitutional parameters of workplace electronic communication.<sup>123</sup> He criticized the Court for

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<sup>118</sup> *Id.* (Scalia, J., concurring in part and concurring in the judgment).

<sup>119</sup> *See id.* (Scalia, J., concurring in part and concurring in the judgment).

<sup>120</sup> *Id.* (Scalia, J., concurring in part and concurring in the judgment).

<sup>121</sup> *See id.* at 2634-35 (Scalia, J., concurring in part and concurring in the judgment) Questioning the Court's decision, Justice Scalia asked wittingly, "To whom do we owe an *additional* explanation for declining to decide an issue, once we have explained that it makes no difference?" *Id.* (Scalia, J., concurring in part and concurring in the judgment).

<sup>122</sup> *See Quon*, 130 S. Ct. at 2635 (Scalia, J., concurring in part and concurring in the judgment) ("Litigants will do likewise, using the threshold question whether the *Fourth Amendment* is even implicated as a basis for bombarding lower courts with arguments about employer policies, how they were communicated, and whether they were authorized, as well as the latest trends in employees' use of electronic media.").

<sup>123</sup> *See id.* (Scalia, J., concurring in part and concurring in the judgment) ("The Court's inadvertent boosting of the *O'Connor* plurality's standard is all the more ironic because, in fleshing out its fears that applying the test to new technologies will be too hard, the Court underscores the unworkability of that standard. Any rule that requires evaluating whether a given gadget is a 'necessary instrumen[t] for self-expression, even self-identification,' on top of assessing the degree to which 'the law's treatment of [workplace norms has] evolve[d],' is (to put it mildly) unlikely to yield objective answers.") (citation omitted).

justifying its refusal with the rationale of the unpredictable nature of technology:

Applying the *Fourth Amendment* to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice. The Court's implication . . . that where electronic privacy is concerned we should decide less than we otherwise would (that is, less than the principle of law necessary to resolve the case and guide private action) – or that we should hedge our bets by concocting case-specific standards or issuing opaque opinions – is in my view indefensible. The-times-they-are-a-changin' is a feeble excuse for disregard of duty.<sup>124</sup>

Justice Scalia concluded his opinion by castigating the Court for its eschewal, arguing that it would fuel further uncertainty in the lower courts.<sup>125</sup> He might be right, but certainly only time will tell.

## VI. TEACHERS AND THE INCIDENCE OF CELL PHONES AT SCHOOL

### A. Overview of the Posture of Teacher Cell Phones in Public Schools

[32] Recently, public schools have begun providing their teachers with cell phones.<sup>126</sup> For example, in partnership with GTE Mobilnet, Broward Elementary School in Florida provided cell phones to its teachers as part of a program designed to enhance the communication between students' families and the school.<sup>127</sup> With the increased availability of cell phones in public schools, a growing debate has developed between teachers and

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<sup>124</sup> *Quon*, 130 S.Ct. at 2635 (Scalia, J., concurring in part and concurring in the judgment). *See supra* Part II (arguing that the Court might actually create more instability and uncertainty in the law by failing to clarify the law).

<sup>125</sup> *See id.* (Scalia, J., concurring in part and concurring in the judgment) (finding that the Court “underscores the unworkability of that standard” to yield objective answers).

<sup>126</sup> *See, e.g.*, Manion, *supra* note 5.

<sup>127</sup> *See id.*

administrators over the permissible scope of teachers' cell phone use and the power of schools to regulate their use.<sup>128</sup> According to a Florida principal, the expanded availability of cell phones to teachers is "one of the last taboos in education."<sup>129</sup>

[33] Some educators contend that public schools should permit teachers to use cell phones during school hours as a matter of convenience.<sup>130</sup> For example, cell phones afford teachers the opportunity to return parent calls, or follow up with ill students or those with disciplinary issues.<sup>131</sup> Deirdre Fernandes of the *Virginian-Pilot* aptly observed that "[w]hen it comes to student discipline, the cell phone is emerging as the teacher's most feared - and effective - tool of choice. And it doesn't even have to be turned on."<sup>132</sup>

[34] This practice, known as "dialing for discipline," has received great reviews from teachers who use it as a "stick."<sup>133</sup> Eighth grade teacher Carolyn Smith has noticed "she need only hold the phone up, fingers poised on the keypad, to subdue an unruly student."<sup>134</sup> The cell phone, coupled with the horrifying words "Your mother wants to talk to you," helped instill discipline in her class.<sup>135</sup> Smith described this discipline approach as a "watershed."<sup>136</sup> Laurian Bascay, a 13-year old student at

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<sup>128</sup> See, e.g., Newton, *supra* note 1.

<sup>129</sup> Manion, *supra* note 5 (quoting Beverly DeMott, Principal, Broward Elementary School).

<sup>130</sup> See, e.g., Newton, *supra* note 1.

<sup>131</sup> See *id.*

<sup>132</sup> Deirdre Fernandes, *Local Teachers Use Cell Phones as Type of Discipline; They May Call Parents When Problems Arise*, VIRGINIAN-PILOT, Aug. 28, 2003, at A1.

<sup>133</sup> See *id.* Some teachers, however, prefer the old-fashioned form of discipline, which involves a note from the teacher and a call from the principal to the parent. *Cf. id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

Western Branch Middle School in Chesapeake, Virginia, revealed the “power of the cell phone” when she indicated that the immediate threat of a call to her parents instantly inspired her to stop disrupting her class.<sup>137</sup>

[35] First grade teacher Linda Lynch pointed out another benefit of providing teachers with cell phones by saying, “[i]f a child gets hurt on the playground, help can be summoned instantly. You don’t have to worry about running for help. You can call 911 right away.”<sup>138</sup> Kindergarten teacher LuAnn Apple used her cell phone to create an innovative program called Senior Telephone Pals (STP), which incorporates cell phones into her pedagogy.<sup>139</sup> Under STP, students connect with senior citizens for weekly five-minute phone conversations and picture sharing sessions to learn language skills and life experiences from their elders.<sup>140</sup> Further, access to cell phones ensures that teachers can make important calls from the classroom without leaving the students unattended.<sup>141</sup>

[36] But, some teachers use phones for personal calls such as hair and doctor appointments.<sup>142</sup> Consequently, various schools have opted to police teacher cell phone use, restricting use to lunch or other breaks during the school day.<sup>143</sup> For example, South Jackson Elementary School in Georgia restricts teacher use of cell phones to planning time or breaks.<sup>144</sup> Additionally, the school prohibits teachers from using cell

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<sup>137</sup> *Id.* “‘I stopped,’ the rising eighth-grader said. ‘Nobody likes to get their parents called.’” *Id.* (quoting Laurian Bascay, Student, Western Branch Middle School).

<sup>138</sup> Manion, *supra* note 5 (quoting Linda Lynch, First Grade Teacher, Broward Elementary School) (internal quotation marks omitted).

<sup>139</sup> *Id.*

<sup>140</sup> *See id.*

<sup>141</sup> *See, e.g.,* Newton, *supra* note 1.

<sup>142</sup> *See, e.g.,* Manion, *supra* note 5; *accord* Newton, *supra* note 1.

<sup>143</sup> *See* JACKSON CNTY. SCH. SYS., SOUTH JACKSON ELEMENTARY SCHOOL TEACHER HANDBOOK 15 (2004), *available at* [http://www.jackson.k12.ga.us/sjes/sjes\\_teacher\\_handbook\\_fall\\_2004.pdf](http://www.jackson.k12.ga.us/sjes/sjes_teacher_handbook_fall_2004.pdf).

<sup>144</sup> *See id.*



phones when supervising or teaching students.<sup>145</sup> Even in emergencies, cell phone use is limited to office staff and administrative personnel.<sup>146</sup> Largo High School in Florida admonishes teachers to keep personal calls to a minimum.<sup>147</sup> The faculty handbook for Wisconsin Dells (WD) High School states in pertinent part: “Modeling the WD WAY is an essential factor in creating an effective classroom environment. Therefore, teaching staff should not use cell phones during instructional time.”<sup>148</sup> But, not everyone is thrilled about the regulation of teacher cell phones. During his tenure as president of the Virginia Beach Education Association, Jeff Cobb was apathetic about teacher cell phone regulation and expressed the union’s opposition.<sup>149</sup>

[37] Despite the regulations, some teachers disregard school cell phone policies and essentially model improper behavior for their students.<sup>150</sup> Evaluating these improper role models, Carol Bengle Gilbert, an award leading Associated Content education writer and legal commentator, declared:

What distresses me about cell phone use in the classroom is not what the children might do – the teachers are there to supervise them and enforce the rules after all. No, it’s the *teachers* who concern me. . . . It seems that teachers who expect children to respect them by paying attention and not

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<sup>145</sup> *Id.*

<sup>146</sup> *See id. But cf.* BOWIE INDEP. SCH. DIST., BOWIE ELEMENTARY SCHOOL FACULTY HANDBOOK 2008-2009, at 15 (2008), *available at* [http://es.bowieisd.net/pdf/Faculty\\_handbook\\_08-09.pdf](http://es.bowieisd.net/pdf/Faculty_handbook_08-09.pdf) (allowing cell phone use in emergency situations).

<sup>147</sup> *See* LARGO HIGH SCH., LARGO HIGH SCHOOL TEACHER HANDBOOK 1914-2011, at 19 (2010), *available at* <http://www.largo-hs.pinellas.k12.fl.us/Staff/TeacherHandbook.pdf>.

<sup>148</sup> WIS. DELLS HIGH SCH., WIS. DELLS HIGH SCHOOL FACULTY HANDBOOK 2010-2011 (2010), *available at* [http://www.sdwd.k12.wi.us/highschool/2010-11\\_Faculty\\_Handbook.pdf](http://www.sdwd.k12.wi.us/highschool/2010-11_Faculty_Handbook.pdf).

<sup>149</sup> *See* Fernandes, *supra* note 132.

<sup>150</sup> *See, e.g.*, Newton, *supra* note 1.

using cell phones in class do not feel the same compulsion to model respectful behavior by spending their teaching hours focused on the children rather than their cells.<sup>151</sup>

She reported that her children often came home with complaints about teachers chatting during class time on cell phones.<sup>152</sup> Indeed, students often see a double standard when their cell phones are regulated, while the teachers' are not.<sup>153</sup> For instance, a frustrated fifteen-year old Amy Gomes declared: "If their cell phone rings, it interrupts the class. If the rule isn't the same for them, it's not fair."<sup>154</sup> In retort, some schools contend that because teachers are adults, their cell phones do not need to be regulated.<sup>155</sup>

[38] There is likewise a taxpayer concern with unregulated teacher cell phone use: "[a]re the taxpayers paying public school teachers to chat on the phone or attend to personal business during class time?"<sup>156</sup> Particularly in this period of economic distress, and with teachers' widespread complaints about the inadequacy of time to effectively educate students, calls for audits of work time cell phone use are not infrequent.<sup>157</sup>

[39] Teachers also have faced disciplinary action and even criminal charges for texting students, providing a possible rationale for searches of teachers' cell phones. In Texas, a thirty-four-year old elementary school

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<sup>151</sup> Carol Benge Gilbert, *Cell Phones in Classrooms? It's the Teachers Talking*, ASSOCIATED CONTENT (Aug. 4, 2009), [http://www.associatedcontent.com/article/2023232/cell\\_phones\\_in\\_classrooms\\_its\\_the\\_teachers.html?cat=4](http://www.associatedcontent.com/article/2023232/cell_phones_in_classrooms_its_the_teachers.html?cat=4) (emphasis added).

<sup>152</sup> *See id.*

<sup>153</sup> *See, e.g.*, Kimberly Atkins, *Students Say Cell Phone Ban Doesn't Ring True for Teachers*, BOS. HERALD, Oct. 28, 2005, at News 6.

<sup>154</sup> *Id.* (quoting Amy Gomes, Student, Charlestown High School).

<sup>155</sup> *See id.*

<sup>156</sup> Gilbert, *supra* note 151.

<sup>157</sup> *See id.*

teacher sent a text message stating “U suck” to her ten-year old student, who responded: “So do you.”<sup>158</sup> The student’s stepparent discovered the array of text messages on his son’s cell phone, mistakenly assuming that they were merely chatter among fifth-graders.<sup>159</sup> This event represents a prime example of a teacher violating the bounds of appropriate teacher-student conduct.<sup>160</sup> According to Stop Educator Sexual Abuse, Misconduct and Exploitation (SESAME), the explosion of teacher cell phones and texting in schools presents challenges since it gives teachers “24-hour access” to students.<sup>161</sup> While, as SESAME points out, the evidence trail preserved by cell phones in cases of misconduct is remarkable, it is not surprising that this teacher claimed that someone used her cell phone to text the student without her knowledge.<sup>162</sup>

### B. Teachers and the Growing Incidence of Sexting

[40] With increasing use of cellular phones, sexting is a growing concern across the country.<sup>163</sup> This practice, involving the transmission of graphic messages via cell phones, is particularly appalling when it entails teacher-student communications.<sup>164</sup> For example, a math teacher in New

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<sup>158</sup> Lindsay Kastner, *What Happens When Teachers Text Students?*, SAN ANTONIO EXPRESS-NEWS, Nov. 19, 2009, at 1A.

<sup>159</sup> *See id.* Following a period of administrative leave, the Texas teacher mentioned above ultimately resigned. *See id.*

<sup>160</sup> *See id.*

<sup>161</sup> *Id.* (quoting Terri Miller, President, Stop Educator Sexual Abuse, Misconduct and Exploitation).

<sup>162</sup> *See id.*

<sup>163</sup> *See e.g.*, Amanda Lenhart, *Teens and Sexting, How and Why Minor Teens Are Sending Sexually Suggestive Nude or Nearly Nude Images Via Text Messaging*, PEW RESEARCH CENTER, 2-3 (2009), available at [http://www.pewinternet.org/~media/Files/Reports/2009/PIP\\_Teens\\_and\\_Sexting.pdf](http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Teens_and_Sexting.pdf).

<sup>164</sup> *See, e.g.*, David F. Capeless, *Sexting*, BERKSHIRE DISTRICT ATTORNEY, <http://www.mass.gov/?pageID=berhomepage&L=1&L0=Home&sid=Dber> (follow “Crime Awareness & Prevention” hyperlink; then follow “Parents & Youth” hyperlink; then follow “Sexting” hyperlink) (last visited Nov. 9, 2010).

Jersey lost his job in 2009 after two female students complained about his unbecoming graphic text messages.<sup>165</sup> In Mississippi that same year, an assistant football coach was terminated and arrested for texting a sexual image of himself to a female student.<sup>166</sup> Additionally, a forty-one year old teacher in New Hampshire, dubbed the “Sexting Teacher,” was charged with a felony for transmitting nude pictures of herself via cell phone to a fifteen-year old student.<sup>167</sup> The teacher’s sexting was disclosed only after the student showed the graphic texts to his friend out of utter excitement.<sup>168</sup> Similarly, a teacher in Florida was charged with transmitting pornography with an electronic device and transmitting harmful material to a minor, when she sent sexually explicit images of herself to an eighth grader.<sup>169</sup> This incident was reported as “just the latest in a number of recent arrests involving sexting, the dissemination of pornographic messages a la naked pictures via cellphones.”<sup>170</sup>

[41] In 2010, a thirty-six year old teacher in Indiana resigned after he was exposed for sending several sexual text messages to various cheerleaders.<sup>171</sup> In one of his texts to a fourteen-year old cheerleader, the

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<sup>165</sup> See Kastner, *supra* note 158.

<sup>166</sup> See *id.*

<sup>167</sup> Roz Zurko, *Sexting Teacher - Melinda Dennehy - From Londonderry New Hampshire- Sexting Pictures, The Sexting Teacher - Melinda Dennehy - Out on Bail - Order to Stay Away From Children Under 16*, ASSOCIATED CONTENT (Mar. 7, 2010), [www.associatedcontent.com/article/2768590%20sexting\\_teacher\\_melinda\\_dennehy\\_from.html?cat=7](http://www.associatedcontent.com/article/2768590%20sexting_teacher_melinda_dennehy_from.html?cat=7).

<sup>168</sup> See *id.*

<sup>169</sup> See Saul Relative, *Teacher Christy Lynn Martin Arrested, Caught Sexting 8th Grade Student, Sexting Naked Pictures Arrests on the Rise*, ASSOCIATED CONTENT (Mar. 9, 2009), [http://www.associatedcontent.com/article/1547907/teacher\\_christy\\_lynn\\_martin\\_arrested.html?cat=17](http://www.associatedcontent.com/article/1547907/teacher_christy_lynn_martin_arrested.html?cat=17).

<sup>170</sup> *Id.*

<sup>171</sup> See Andrew Greiner, *Indiana Teacher Accused of Sexting 8th Grade Cheerleaders, “How About U Tell Me the ‘Bad’ Stuff U Do?”*, NBC CHI. (Mar. 5, 2010, 8:45 AM), <http://www.nbcchicago.com/news/local-beat/Indiana-Teacher-Accused-of-Sexting-8th-Grade-Cheerleaders-86587952.html>.

teacher wrote, “Something tells me ur not the goody good yur mom thinks ur. I can be tempted to play Ru tempting?”<sup>172</sup> Consequently, the student was granted a protective order against the teacher and the police were called in to investigate.<sup>173</sup> Furthermore, a teacher had to register as a sex offender with the state of Tennessee, after pleading guilty to four sexual offense counts stemming from sexting female students.<sup>174</sup> One of the students indicated that the teacher sought to “see more skin” after she texted him her photograph.<sup>175</sup> The school district suspended the thirty-seven year old teacher and as a result, he is no longer permitted to teach kindergarten through high school.<sup>176</sup>

[42] Recently, a twenty-nine year old teacher in New York was indicted for sending inappropriate texts to a student, including a text reading, “Naked photos please.”<sup>177</sup> Similarly, a teacher in Washington resigned after she was accused of texting her student inappropriately.<sup>178</sup> Moreover, another teacher was arrested and charged in Washington that same year for “communicating with a minor for immoral purposes.”<sup>179</sup> During a 2010 judicial proceeding in North Carolina, a thirty-eight year old teacher

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<sup>172</sup> *Id.* While the texting began innocently, the texts became inappropriate once the teacher asked the girl, “Why don’t u think ur hot?” . . . . ‘Well ur way sexy for a lil girl’ . . . . ‘How about u tell me the ‘bad’ stuff u do?’” *Id.*

<sup>173</sup> *See id.*

<sup>174</sup> *See* Assoc. Press, *Tennessee Teacher Admits ‘Sexting’ Two Teenage Students*, FOXNEWS.COM (Feb. 26, 2009), [http://www.foxnews.com/printer\\_friendly\\_story/0,3566,501029,00.html](http://www.foxnews.com/printer_friendly_story/0,3566,501029,00.html).

<sup>175</sup> *Id.*

<sup>176</sup> *See id.*

<sup>177</sup> *See* Assoc. Press, *New York Teacher Accused of Soliciting Text Sex From Female Student*, FOX NEWS.COM (Jan. 30, 2009), <http://www.foxnews.com/story/0,2933,486024,00.html>.

<sup>178</sup> *See* Kastner, *supra* note 158.

<sup>179</sup> *Teacher Accused of Sexting Student, Police Arrest Substitute Castle Rock Teacher*, KPTV.COM (May 16, 2009, 1:41 PM), <http://www.kptv.com/news/19481429/detail.html>.

admitted to texting an image of his intimate body parts to a thirteen-year old student.<sup>180</sup> This teacher was sentenced to probation and received a suspended sentence, where he was required to undergo a mental health evaluation.<sup>181</sup>

[43] Furthermore, in 2009 a fifty-year teacher in New Jersey was “charged with endangering the welfare of a child after allegedly sending sexually explicit texts, emails and images to a 15-year-old student.”<sup>182</sup> During that same year, a teacher in Pennsylvania was charged with transmitting “sexual messages and a picture of a woman exposing her breasts to the 16-year old boy’s cell phone.”<sup>183</sup>

[44] As these sexting incidents continue to increase, school districts will likely move toward permitting searches of teachers’ cell phones, particularly in light of the *Quon* decision.<sup>184</sup>

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<sup>180</sup> See Ann Doss Helms, *Former Teacher Admits Sexting Middle Schooler, Mother of 13-Year-Old Found Explicit Photo on Girl’s Phone. Man Gets Suspended Sentence.*, CHARLOTTE OBSERVER, Apr. 8, 2010, available at <http://www.charlotteobserver.com/2010/04/08/1363303/former-teacher-admits-sexting.html>.

<sup>181</sup> See *id.*

<sup>182</sup> Loren Fisher, *Bridgewater-Raritan High School Teacher Charged with ‘Sexting’ Teen Student*, FLEMINGTON INJERSEY (Oct. 25, 2009, 3:32 PM), <http://flemington.injersey.com/2009/10/25/bridgewater-raritan-high-school-teacher-charged-with-sexting-teen-student/>.

<sup>183</sup> Justin Vellucci, *Butler Senior High School Teacher Accused of ‘Sexting’ Student*, PITT. TRIB. REV., May 19, 2009, available at [http://www.pittsburghlive.com/x/pittsburghtrib/news/regional/s\\_625734.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/regional/s_625734.html).

<sup>184</sup> For more accounts, see *School Employees Arrested for Sexual Crimes*, TEACHERCRIME.COM, <http://www.teachercrime.com/> (last visited Nov. 21, 2010). While it is unclear whether all of the examples above involved employer-provided cell phones, all of them could play out with employer-provided cell phones. See, e.g., *id.* Consequently, it is important to know what the implications of the Supreme Court’s decision are for searching employer-provided devices, since an increasing number of schools provide such devices to their employees.

## VII. IMPLICATIONS

[45] The *Quon* case highlights several important principles related to employer-conducted workplace searches. One of these is the continuing, foundational principle that employers do not need probable cause or a warrant before searching employer-provided cell phones.<sup>185</sup> Beyond this foundational principle, employers will be well advised to comply with both the principles the Court highlighted in the *O'Connor* plurality, and in Justice Scalia's concurrence.<sup>186</sup>

[46] Following the Court's reasoning in *Quon*, it is safe to assume that teachers have a reasonable expectation of privacy at work.<sup>187</sup> As a consequence of this assumption, and under the *O'Connor* plurality approach, school districts seeking to conduct work-related investigatory searches or searches for non-investigatory ends, must satisfy the two-step standard: (i) the search must be justified at its inception; and (ii) the conducted search must be reasonable in scope to the objectives of the justified search without being excessively intrusive.<sup>188</sup>

[47] School districts must be aware of the fact that courts will examine the intent of the cell phone audit in order to determine if the first step is satisfied.<sup>189</sup> If the intent of the search is a legitimate work-related intent, the school district is likely to pass muster under the first step.<sup>190</sup> In *Quon* for example, the Court found the search of the text messages justified at inception because it was intended to ensure that employees were not paying for work-related text messages or that the employer was not paying

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<sup>185</sup> See *City of Ontario v. Quon*, 130 S. Ct. 2619, 2628, 2630 (2010).

<sup>186</sup> See *supra* Part III. This is critical because, as emphasized above, the Court chose not to determine whether the plurality opinion or Justice Scalia's approach should control in this matter. See *supra* Part III.

<sup>187</sup> See *Quon*, 130 S. Ct. at 2630.

<sup>188</sup> See *id.*

<sup>189</sup> See *id.* at 2631.

<sup>190</sup> See *id.*

for personal text messages – “a legitimate work-related rationale.”<sup>191</sup> If schools similarly have such work-related rationale or if the search is “necessary for a noninvestigatory work-related purpose,” the search would likely satisfy the first step.<sup>192</sup> Other rationales include audits pursuant to performance evaluations, audits necessary for litigation about the legality of government actions and possibly even audits designed to comply with state open records laws.<sup>193</sup>

[48] For school districts to satisfy the second step, they need to show that the cell phone audit is reasonably related to the intent of the search.<sup>194</sup> In *Quon*, the court found the cell phone audit to be an “expedient” and “efficient” means toward the intent of the search.<sup>195</sup> There is nothing in the Court’s opinion to suggest that school district cell phone audits would not be upheld if districts choose to examine transcripts and records of text messages for a similar end as in *Quon*.<sup>196</sup> To strengthen its litigation position in Fourth Amendment challenges to cell phone audits, it would be prudent for districts to prepare and preserve clear documentation showing that each cell phone audit conducted is an “expedient” and “efficient” means to the ends of the search.<sup>197</sup>

[49] Additionally, under the second step, in order to pass muster, searches must not be “excessively intrusive.”<sup>198</sup> According to the Court, the search in *Quon* was not “excessively intrusive” because the OPD only reviewed two months of text messages as opposed to all months in

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<sup>191</sup> *Id.* (quoting *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 908 (9th Cir. 2008)).

<sup>192</sup> *Id.*

<sup>193</sup> *Quon*, 130 S. Ct. at 2629.

<sup>194</sup> *See id.* at 2630.

<sup>195</sup> *See id.* at 2631.

<sup>196</sup> *See id.*

<sup>197</sup> *See id.*

<sup>198</sup> *See id.* (quoting *O’Connor v. Ortega*, 480 U.S. 709, 726 (1987)).



which Quon incurred overages.<sup>199</sup> The search was also not excessively intrusive because the OPD redacted text messages Quon sent while he was off duty.<sup>200</sup> Similarly, in reviewing transcripts of text messages, school districts would be wise to redact messages sent by teachers while off duty or to build in other controls to protect such messages from the audit.

[50] An employer can diminish the intrusiveness of a search by clearly forewarning employees that employer-provided cell phones are subject to audit.<sup>201</sup> Such warnings would serve to reduce employees' expectations of privacy for, as the Court stated, "the extent of an expectation is relevant to assessing whether the search was too intrusive."<sup>202</sup>

[51] School districts also should implement a clear policy on teacher cell phone searches and have employees sign a statement acknowledging receipt and understanding of the policy; this would further ensure a diminution of teachers' privacy expectations.<sup>203</sup> To maintain the validity of such a policy, the school district should train school administrators on how to implement the district policy and clearly inform them not to circumvent the official policy. Additionally, the school district should tell administrators not to grant *ad hoc* exceptions to the audit requirements in

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<sup>199</sup> *Quon*, 130 S. Ct. at 2631 (quoting *O'Connor*, 480 U.S. at 726). However, the Court noted that the OPD might have had reasonable grounds to search text messages for all months in which Quon incurred overages. *Id.* In other words, the court will not likely deem a school district cell phone audit of all months pertinent to the audit to be excessively intrusive as long as the district has reasonable grounds. *See id.* In all, school districts are welcome to limit their review to "a large enough sample" of the months pertinent to the audit. *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *See id.*

<sup>202</sup> *Id.* (citing *National Treasury Emps. Unions v. Von Raab*, 489 U.S. 656, 671 (1989); *cf. Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654-57 (1995) (explaining that student athletes have a lower privacy expectation because of the required changing in public locker rooms and preseason physical examinations)).

<sup>203</sup> *See id.* at 2631-32.

the policy, similar to the one that ostensibly occurred with the OPD supervisor's statement to Quon.<sup>204</sup>

[52] Further, the very fact that the cell phone is an employer-provided device also diminishes the privacy expectation of teachers.<sup>205</sup> The Court declared that searches of "employer-provided" cell phones are "not nearly as intrusive as a search" of personal cell phones or e-mail accounts, or wiretapping of home phones.<sup>206</sup> School districts should recognize that a court does not render a search excessively intrusive simply because it reveals "intimate details" of the teacher's personal life, particularly where the district has made reasonable efforts to avoid intrusion on such details.<sup>207</sup> School districts could also take solace in the fact that they are not required to resort to the least-restrictive means when seeking to audit teacher cell phones.<sup>208</sup> Indeed, as noted earlier, the Court rejected the Ninth Circuit's requirement of a "least-restrictive means" approach.<sup>209</sup>

[53] Under Justice Scalia's *O'Connor* approach, which was reiterated in *Quon*, the Fourth Amendment would apply as a general matter to searches of public school teachers.<sup>210</sup> Moreover, the same standard of reasonableness would apply to private employer and public employer

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<sup>204</sup> See *id.* at 2625 ("Duke [the OPD supervisor] said, however, that it was not his intent to audit [an] employee's text messages to see if the overage [was] due to work related transmissions. Duke suggested that Quon could reimburse the City for the overage fee rather than have Duke audit the messages. Quon wrote a check to the City for the overage. Duke offered the same arrangement to other employees who incurred overage fees.") (internal citations omitted) (internal quotations omitted) (second and third alteration in original).

<sup>205</sup> *Quon*, 130 S. Ct. at 2631-32.

<sup>206</sup> *Id.* at 2631.

<sup>207</sup> See *id.* at 2631-32.

<sup>208</sup> See *id.* at 2632.

<sup>209</sup> See *id.*

<sup>210</sup> See *id.* at 2632-33; see also *id.* at 2634 (Scalia, J., concurring in part and concurring in the judgment).

searches.<sup>211</sup> If school districts can show, as the OPD did in *Quon*, that the search has a legitimate work-related intent and is not excessively intrusive, it would pass muster under Justice Scalia's approach.<sup>212</sup>

### VIII. CONCLUSION

[54] As highlighted earlier, even after *Quon*, uncertainty remains in the workplace-cell phone-search jurisprudence as the Court itself readily acknowledged.<sup>213</sup> Consequently, going forward, schools must proceed cautiously pursuant to *both* the Scalia and *O'Connor* plurality approaches discussed above to minimize their legal exposure. As teacher sexting, as well as public employee sexting, continues to increase on employer-provided devices, it is uncertain how the lower courts will interpret and apply the *Quon* decision and the Supreme Court might be forced to revisit the issue in the future and to make a choice between the plurality and Justice Scalia's *O'Connor* approaches. As Justice Scalia aptly observed:

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 (if it applied), as a heavy-handed hint about how *they* should proceed. Litigants will do likewise, using the threshold question whether the Fourth Amendment is even implicated as a basis for bombarding lower courts with arguments about employer policies, how they were communicated, and whether they were authorized, as well as the latest trends in employees' use of electronic media. In short, in saying why it is not saying more, the Court says much more than it should.<sup>214</sup>

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<sup>211</sup> See *Quon*, 130 S. Ct. at 2634 (Scalia, J., concurring in part and concurring in the judgment).

<sup>212</sup> See *id.*

<sup>213</sup> See *id.* at 2630; *supra* part III.

<sup>214</sup> *Quon*, 130 S. Ct. at 2635 (Scalia, J., concurring in part and concurring in the judgment) (emphasis in original) (internal citations omitted).