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## Text Me, Maybe?: State v. Hinton and the Possibility of Fourth Amendment Protections Over Sent Text Messages Stored in Another's Cell Phone

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**TEXT ME, MAYBE?: STATE v. HINTON AND THE POSSIBILITY OF  
FOURTH AMENDMENT PROTECTIONS OVER SENT TEXT  
MESSAGES STORED IN ANOTHER'S CELL PHONE**

*The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual . . . .*<sup>1</sup>

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1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1891).

## INTRODUCTION

For over eighty years, the United States Supreme Court has analyzed the Fourth Amendment's application to telephones.<sup>2</sup> Advancing technologies continue to complicate this analysis, as the Court has recently addressed cell phone privacy rights in the contexts of workplace privacy<sup>3</sup> and Global-Positioning-System (GPS) tracking.<sup>4</sup> The Court has given wide deference, however, to lower courts in deciding matters pertaining to cell phone privacy.<sup>5</sup> Particularly, lower courts have reached conflicting holdings on the issue of whether police officers can search a person's cell phone without a warrant.<sup>6</sup> *The New York Times* highlighted the courts' disagreement over this issue on the front cover of a November 2012 issue, with one interviewee noting that courts "can't even agree if there's a reasonable expectation of privacy in text messages that would trigger Fourth Amendment protection."<sup>7</sup>

A unique case from the Washington Court of Appeals stands out amidst the courts wrestling over the Fourth Amendment's application to cell phones and text messages. In *State v. Hinton*, the court analyzed the issue of whether an individual has a reasonable expectation of privacy in sent text messages that

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2. Katharine M. O'Connor, *o OMG They Searched My Txts: Unraveling the Search and Seizure of Text Messages*, 2010 U. ILL. L. REV. 685, 686 (2010).

3. *See City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2624 (2010). While the Court analyzed the privacy expectations of a pager in *Quon*, lower courts have interpreted the *Quon* holding to encompass all cell phone and text message communications in employment contexts. *See State v. Clappitt*, 364 S.W.3d 605, 609–10 (Mo. Ct. App. 2012).

4. *See United States v. Jones*, 132 S. Ct. 945, 948 (2012). While the Court analyzed the monitoring of a GPS tracking device in *Jones*, lower courts have applied the analysis to the monitoring of cell phones with GPS capabilities. *See United States v. Skinner*, 690 F.3d 772, 780 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 2851 (2013).

5. *See Quon*, 130 S. Ct. at 2629.

6. *See* Byron Kish, *Cell-Phone Searches: Works Like A Computer, Protected Like A Pager?*, 60 CATH. U. L. REV. 445, 464–65 (2011) (discussing three approaches courts have developed to deal with cell phone searches); Jana L. Knott, *Is There an App for That? Reexamining the Doctrine of Search Incident to Lawful Arrest in the Context of Cell Phones*, 35 OKLA. CITY U. L. REV. 445, 451 (2010) ("Although most courts have generally allowed searches of cell phones incident to lawful arrest, some courts have expressed concern about these warrantless searches and have invalidated them on several different theories."); Adam M. Gershowitz, *Password Protected? Can a Password Save Your Cell Phone from a Search Incident to Arrest?*, 96 IOWA L. REV. 1125, 1129 (2011) (stating that over forty courts have addressed the issue of searches and cell phones in the past few years).

7. Somini Sengupta, *Courts Divided Over Searches of Cellphones*, N.Y. TIMES, Nov. 26, 2012, at A1. The interviewee's comments, however, appear inaccurate according to legal research. *See infra* note 97 and accompanying text.

are stored in another's device.<sup>8</sup> The majority held that those who send text messages voluntarily run a risk that their text messages may be received by other parties, while the dissent asserted that text messaging constitutes a new mode of communication that challenges old doctrines and deserves Fourth Amendment protections.<sup>9</sup>

While the United States Supreme Court does not have jurisdiction over *Hinton*, the particular federal issue presented in the appellate court case remains open; therefore, this Note examines how the Court would analyze such a case.<sup>10</sup> While the Court has been reluctant to apply the Fourth Amendment to emerging technology, lower courts have acknowledged that "the Fourth Amendment must keep pace with the inexorable march of technological progress, or its guarantees will wither and perish."<sup>11</sup> Cell phones and text messages continue to advance, and their roles in society continue to evolve, but the analysis presented in this Note makes clear that society has formed a relationship with mobile devices that are too significant to be left unaddressed by the Court.

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8. *State v. Hinton*, 280 P.3d 476, 478 (Wash. Ct. App. 2012), *rev'd en banc on other grounds*, No. 87663-1, 2014 WL 766680 (Wash. Feb. 27, 2014). Although the Washington State Supreme Court reversed the appellate court's decision, neither the majority nor the dissent analyzed the facts of the case under the Fourth Amendment. *Hinton*, 2014 WL 766680, at \*2, \*10. Additionally, the state supreme court recognized that the state constitution is "qualitatively different from the Fourth Amendment and provides greater protections." *Id.* at \*2. If the state constitution was either identical to the Fourth Amendment or provided *less* protections, then an analysis of the state supreme court's decision would be necessary. Because that is not the case, however, the holding does not apply to the present analysis. Notably, another case accompanies *Hinton* with significantly similar facts. *State v. Roden*, 279 P.3d 461, 463–64 (Wash. Ct. App. 2012), *rev'd en banc*, No. 87669–0, 2014 WL 766681 (Wash. Feb. 27, 2014). Similarly, however, the Washington Supreme Court in *Roden* applied only state law and not federal law. *Id.* Additionally, *Roden* concerned the privacy rights of a text message receiver as opposed to those of a sender. *Id.* Therefore, this Note will focus exclusively on the appellate court's holding in *Hinton*.

9. *Hinton*, 280 P.3d at 482, 490–91 (Van Deren, J., dissenting). Research indicates that in no other case has a court examined a claimant's privacy interest in another's cell phone rather than in her own.

10. The Washington State Supreme Court expressly decided *Hinton* on state constitutional grounds only. *Hinton*, 2014 WL 766680, at \*2. As there is no federal question in the state supreme court's decision, the United States Supreme Court does not have jurisdiction. See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). The United States Supreme Court has recently granted certiorari of two cases that, like *Hinton*, involve the constitutionality of cell phone searches by the police. See *United States v. Wurie*, 728 F.3d 1, 1 (1st Cir. 2013), *cert. granted*, 82 USLW 3104 (U.S. Jan. 17, 2014) (No. 13–212); *People v. Riley*, No. D059840, 2013 WL 475242, \*1 (Cal. Ct. App. Feb. 8, 2013), *cert. granted in part*, 82 USLW 3082 (U.S. Jan. 17, 2014) (No. 13–132). Neither these cases nor any available case law, however, examine the privacy expectations of text message *senders* as does *Hinton*.

11. *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2629 (2010); *United States v. Warshak*, 631 F.3d 266, 285 (6th Cir. 2010).

Part I provides a general overview of text messages and courts' analyses of them, and Part II presents a summary of the facts and opinions in *Hinton*. Part III.A addresses the legality of the text message conversation in *Hinton*, while Part III.B focuses on the constitutionality of the first text message sent in that exchange. Through an exploration of *Hinton* under various Fourth Amendment doctrines, the analysis in Parts III.A and III.B indicates the Court's likely determination that, while one sending a text message has a legitimate expectation of privacy under *Katz*, the third-party doctrine is the likeliest option of exceptions that would defeat such an expectation. Finally, Part III.C highlights the technological advancements of text messages since *Hinton* and how these changes would likely alter the legal analysis. Specifically, the increasing popularity of alternative text message providers appears to weaken the third-party doctrine's application while invoking the exigent circumstances doctrine.

## I. BACKGROUND

### A. Cell Phones and Text Messages

#### 1. Cell Phones

Cell phones constitute “one of the most rapidly growing new technologies in the world.”<sup>12</sup> While fewer than a billion people worldwide owned a cell phone in 2001, more than five billion people owned one by 2010.<sup>13</sup> Cell phones have become “by far the most popular device among American adults,”<sup>14</sup> as 95% of adults between the ages of eighteen and thirty-four own a cell phone, and well over half of older adults aged fifty-seven to sixty-five own a cell phone.<sup>15</sup>

The more advanced smartphone—“a cell phone with PC-like functionality”<sup>16</sup>—has become a worldwide commodity. With origins dating

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12. Mikiyasu Hakoama & Shotaro Hakoyama, *The Impact of Cell Phone Use on Social Networking and Development Among College Students*, 15 AM. ASS'N OF BEHAV. & SOC. SCI. J., Spring 2011, at 1, 2 (citing Jagdish Rebello, *Global Wireless Subscriptions Reach 5 Billion*, IHS ISUPPLI MARKET RESEARCH (Sept. 17, 2010), <http://www.isuppli.com/Mobile-and-Wireless-Communications/News/Pages/Global-Wireless-Subscriptions-Reach-5-Billion.aspx>). For a brief history of the development of cell phones, see Bryan Andrew Stillwagon, *Bringing an End to Warrantless Cell Phone Searches*, 42 GA. L. REV. 1165, 1170–71 (2008).

13. See Hakoama & Hakoyama, *supra* note 12, at 2.

14. Kathryn Zickuhr, *Generations and their Gadgets*, PEW RESEARCH CTR.'S INTERNET & AM. LIFE PROJECT 2 (Feb. 3, 2011), [http://pewinternet.org/~media/Files/Reports/2011/PIP\\_Generations\\_and\\_Gadgets.pdf](http://pewinternet.org/~media/Files/Reports/2011/PIP_Generations_and_Gadgets.pdf).

15. *Id.* at 3.

16. Christian Levis, *Smartphone, Dumb Regulations: Mixed Signals in Mobile Privacy*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 191, 193 (2011). Christian notes that smartphones include iPhones, Blackberries, and Android devices. *Id.* at 193 n.11.

back to 1996,<sup>17</sup> the smartphone has significantly grown in popularity since the 2007 release of the original iPhone—“the likes of which had not been seen before in the electronics industry.”<sup>18</sup> In May 2011, 35% of American adults owned a smartphone; by March 2012, smartphone ownership had increased to 46%.<sup>19</sup> There are now over one billion smartphones used around the world, which amounts to one in seven people worldwide owning a smartphone.<sup>20</sup> Analysts expect this number to double by 2015.<sup>21</sup>

As cell phones have become the most popular device in modern society, people now have a more intimate relationship with their cell phones than with any other technological device. “No one ever leaves the house these days without three things: their keys, wallet, and mobile . . . . It is, in short, an essential lifestyle accessory . . . .”<sup>22</sup> People’s preoccupations with cell phones have distracted them from the road,<sup>23</sup> the classroom,<sup>24</sup> and the workplace.<sup>25</sup>

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17. Jun Yang, *Smartphones in Use Surpass 1 Billion, Will Double by 2015*, BLOOMBERG (Oct. 17, 2012, 4:00 AM), <http://www.bloomberg.com/news/2012-10-17/smartphones-in-use-surpass-1-billion-will-double-by-2015.html> (stating that the Nokia Oyj “introduced the first ‘modern’ smartphone in 1996”).

18. Nick Wingfield, *Apple Unveils an iPhone That Is Lighter and More Powerful*, N.Y. TIMES, Sept. 13, 2012, at B1.

19. Aaron Smith, *46% of American Adults are Smartphone Owners*, PEW RESEARCH CTR.’S INTERNET & AM. LIFE PROJECT 2 (Mar. 1, 2012), <http://pewinternet.org/~media/Files/Reports/2012/Smartphone%20ownership%202012.pdf>. As of May 2013, a majority of American adults now own a smartphone. Aaron Smith, *Smartphone Ownership – 2013 Update*, PEW RESEARCH CTR.’S INTERNET & AM. LIFE PROJECT 2 (June 5, 2013), [http://www.pewinternet.org/~media/Files/Reports/2013/PIP\\_Smartphone\\_adoption\\_2013\\_PDF.pdf](http://www.pewinternet.org/~media/Files/Reports/2013/PIP_Smartphone_adoption_2013_PDF.pdf).

20. Yang, *supra* note 17.

21. *Id.*

22. Anthony Patterson, *Digital Youth, Mobile Phones, and Text Messaging: Assessing the Profound Impact of a Technological Afterthought*, in THE ROUTLEDGE COMPANION TO DIGITAL CONSUMPTION (Russell W. Belk & Rosa Llamas eds., 2012), available at <http://ssrn.com/abstract=2047442>. “Put simply, cell phones have transformed all aspects of our culture. They impact society everywhere, from work to pleasure and everything in between.” Stillwagon, *supra* note 12, at 1172.

23. See David L. Strayer & Frank A. Drews, *Cell-Phone-Induced Driver Distraction*, 16 CURRENT DIRECTIONS IN PSYCHOL. SCI. 128, 128 (2007), available at <http://www.psych.utah.edu/AppliedCognitionLab/cdir489.pdf> (“It is now well established that cell-phone use significantly impairs driving performance.”); Thomas B. Falkner III, *Michigan’s Texting Ban: One Step Forward, Too Many Steps Back*, 28 T.M. COOLEY L. REV. 121, 128 (2011); Adam M. Gershowitz, *Texting While Driving Meets the Fourth Amendment: Deterring Both Texting and Warrantless Cell Phone Searches*, 54 ARIZ. L. REV. 577, 582–83 (2012).

24. Greg Graham, *Cell Phones in Classrooms? No! Students Need to Pay Attention*, PBS (Sept. 21, 2011), <http://www.pbs.org/mediashift/2011/09/cell-phones-in-classrooms-no-students-need-to-pay-attention264.html>.

25. *Selectmen Banned from Texting During Meeting*, NPR (Feb. 25, 2009, 7:09 AM), <http://www.npr.org/templates/story/story.php?storyId=101135099> (stating that it is illegal to text during board meetings in Billerica, Massachusetts).

Moreover, almost half of cell phone users have relied on their cell phones for entertainment purposes.<sup>26</sup>

Given this intimate relationship users have with their cell phones, it is not surprising to find studies indicating that people consider the information stored on their cell phones to be private.<sup>27</sup> Seventy-eight percent of Americans consider the information on their cell phones to be “at least as private as that on their home computers.”<sup>28</sup> Furthermore, nearly 20% of Americans think their cell phones hold more private information than do their computers.<sup>29</sup> Seventy-six percent of Americans think that law enforcement officers should need permission from a court before searching the cell phone of “a person arrested on suspicion of committing a crime, if the person does not consent to having the phone searched.”<sup>30</sup> That percentage increased by two points when the suspect’s phone was password protected.<sup>31</sup> Additionally, a study by the Pew Research Center found that the following has been done to privatize and secure information on cell phones: 41% of cell phone owners have backed up information on their cell phones, 32% have cleared browsing and searching history, and 19% have turned off location tracking features.<sup>32</sup> Smartphone users are even more likely to take these precautions.<sup>33</sup> These studies show that

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26. Somini Sengupta, *One in Three Texters Would Rather Text than Talk*, N.Y. TIMES (Sept. 20, 2011, 8:25 PM), <http://bits.blogs.nytimes.com/2011/09/20/one-in-three-would-rather-text-than-talk> (citing a study finding that 42% of cell phone owners use their cell phones “to stave off boredom”). Cell phones have impacted behavior in less noticeable ways as well. For instance, 75% of U.S. adults have used their cell phones while in a bathroom, while communication and digital interplay from the bathroom used to be a rarity. Quentin Hardy, *The Rise of the Toilet Texter*, N.Y. TIMES (Jan. 30, 2012, 10:45 AM), <http://bits.blogs.nytimes.com/2012/01/30/the-rise-of-the-toilet-texter>.

27. Jennifer M. Urban, Chris Jay Hoofnagle & Su Li, *Mobile Phones and Privacy 2* (UC-Berkeley Sch. of Law BCLT Research Paper, 2012), available at <http://ssrn.com/abstract=2103405>.

28. *Id.* at 9. Only nineteen percent thought the information on their cell phones was less private than was the information stored on their computers. *Id.*

29. *Id.*

30. *Id.* at 9–10.

31. *Id.* at 10–11.

32. Jan Lauren Boyles, Aaron Smith & Mary Madden, *Privacy and Data Management on Mobile Devices*, PEW RESEARCH CTR.’S INTERNET & AM. LIFE PROJECT, 2 (Sept. 5, 2012), [http://pewinternet.org/~media/Files/Reports/2012/PIP\\_MobilePrivacyManagement.pdf](http://pewinternet.org/~media/Files/Reports/2012/PIP_MobilePrivacyManagement.pdf).

Moreover, over half of the teenagers who download apps to their cell phones have avoided apps due to privacy concerns. Mary Madden, Amanda Lenhardt, Sandra Cortesi & Urs Gasser, *Teens and Mobile Apps Privacy*, PEW RESEARCH CTR.’S INTERNET & AM. LIFE PROJECT 6 (Aug. 22, 2013), [http://pewinternet.org/~media/Files/Reports/2013/PIP\\_Teens%20and%20Mobile%20Apps%20Privacy.pdf](http://pewinternet.org/~media/Files/Reports/2013/PIP_Teens%20and%20Mobile%20Apps%20Privacy.pdf).

33. Boyles, *supra* note 32, at 8. According to the study, 59% of smartphone owners back up their information “at least every once in a while,” 50% clear their search or browsing history, and 30% turn off location tracking features. *Id.* at 8, 13.

a significant number of cell phone users take steps to protect access to personal information stored on their cell phones. As smartphone ownership continues to increase, this trend of mobile protective measures will likely increase as well.

## 2. Text Messages

The first text message was sent in 1992.<sup>34</sup> In 2000, text messaging was first offered commercially.<sup>35</sup> Commercial text messages were originally sent through a communication method called Short Message Service (SMS), which limits messages to 160 characters.<sup>36</sup> By 2011, 7.8 trillion SMS messages were sent worldwide.<sup>37</sup> SMS messages are sent through an SMS Center, a cell tower, and finally the receiving phone.<sup>38</sup> The SMS technology causes “the information in each text message [to be] exposed to the following four places: (1) the [SMS Center], (2) the service provider’s network, (3) the sender’s phone or wireless device, and (4) the recipient’s phone or wireless device.”<sup>39</sup> The “labeling” information—that is, the “to and from” contact information—is recorded permanently on the carrier networks, while the content of the text messages are stored for about two weeks before being removed.<sup>40</sup>

Texting is an incredibly popular means of communication. Overall, 73% of American adults that own phones and 95% of young adults (18–29 years) that

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34. PATRICIA MOLONEY FIGLIOLA & GINA STEVENS, TEXT AND MULTIMEDIA MESSAGING: ISSUES FOR CONGRESS, CONG. RES. SERVICE 1 (Jan. 12, 2012), <http://www.fas.org/sgp/crs/misc/RL34632.pdf>.

35. *Id.*

36. *Id.*

37. *Global Mobile Statistics 2012 Part C: Mobile Marketing, Advertising and Messaging*, MOBITHINKING (June 2012), <http://mobithinking.com/mobile-marketing-tools/latest-mobile-stats/c#mobilemessaging>. Advancing technologies have further evolved text messaging. A later development of messaging, Multimedia Messaging Service (MMS) allows cell phone users to send animations, audio, and video in addition to text via text message. FIGLIOLA & STEVENS, *supra* note 34. That advancement has led to the confusing reality that text messages may now contain audio, images, and videos as well as text. To further complicate matters, the transferal of text messages is no longer confined to cellular networks. Messages sent from online applications with instant message capabilities like AIM, MSN, or Google chat can also be received on smartphones. Steve Kovach, *10 Apps That Will Help You Ditch Your Expensive Texting Plan Forever*, BUS. INSIDER (Aug. 29, 2011, 12:41 PM), <http://www.businessinsider.com/free-texting-apps-2011-8?op=1>. These technologies allow for text messages to no longer be “only sent as ‘point-to-point’ communications between two mobile device users” but rather across various devices, as these applications can be accessed by computers as well. FIGLIOLA & STEVENS, *supra* note 34.

38. FIGLIOLA & STEVENS, *supra* note 34.

39. O’Connor, *supra* note 2, at 689.

40. Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 SANTA CLARA L. REV. 183, 187–88, 199 (2010).



own phones send and receive text messages.<sup>41</sup> In 2008, *The New York Times* reported that text message use in the United States had increased more than tenfold in three years.<sup>42</sup> Currently, nearly one third of cell phone owners in the United States prefer to be contacted by text message rather than by voice call.<sup>43</sup> A 2012 Pew Center study showed that teenagers continue to be the leading texting demographic, with the percentage of teenagers who text daily increasing from 38% in February 2008 to 54% in September 2009.<sup>44</sup> A different study noted:

[Sixty-three percent] of all teens[, as of 2012,] say they exchange text messages every day with people in their lives. This far surpasses the frequency with which they pick other forms of daily communication, including phone calling by cell phone (39% do that with others every day), face-to-face socializing outside of school (35%), social network site messaging (29%), instant messaging (22%), talking on landlines (19%) and emailing (6%).<sup>45</sup>

Texting, however, is not just a teenage phenomenon. In May 2011, over forty messages were exchanged daily by adults older than twenty-four, while over 100 messages are exchanged daily by young adults between the ages of eighteen and twenty-four.<sup>46</sup> Along with taking photos, texting is the most

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41. Aaron Smith, *Americans and Text Messaging*, PEW RESEARCH CTR.'S INTERNET & AM. LIFE PROJECT 2-3 (Sept. 19, 2011), <http://www.pewinternet.org/~media/Files/Reports/2011/Americans%20and%20Text%20Messaging.pdf>. See also Katherine Rosman, *Y U Luv Texts, H8 Calls: We Want to Reach Others But Not to Be Interrupted*, WALL ST. J. (Oct. 14, 2010, 12:01 AM), <http://online.wsj.com/article/SB10001424052748703673604575550201949192336.html>.

42. Jennifer Steinhauer & Laura M. Holson, *Cellular Alert: As Texts Fly, Danger Lurks*, N.Y. TIMES, Sept. 20, 2008, at A1.

43. Smith, *supra* note 41, at 8. While a majority of cell phone owners prefer to be contacted via phone call, the study found that active "texters" preferred text messages as their mode of contact. *Id.*

44. Amanda Lenhart, Rich Ling, Scott Campbell & Kristen Purcell, *Teens and Mobile Phones*, PEW RESEARCH CTR.'S INTERNET & AM. LIFE PROJECT 2 (Apr. 20, 2010), <http://pewinternet.org/~media/Files/Reports/2010/PIP-Teens-and-Mobile-2010-with-topline.pdf> (stating that one third of teenagers send more than one hundred text messages a day).

45. Amanda Lenhart, *Teens, Smartphones & Texting*, PEW RESEARCH CTR.'S INTERNET & AM. LIFE PROJECT 2 (Mar. 19, 2012), [http://pewinternet.org/~media/Files/Reports/2012/PIP\\_Teens\\_Smartphones\\_and\\_Texting.pdf](http://pewinternet.org/~media/Files/Reports/2012/PIP_Teens_Smartphones_and_Texting.pdf).

46. Smith, *supra* note 41, at 2. Additionally, a study cited by *The New York Times* found that 59% of teenagers reported that their parents text and drive. KJ Dell'Antonia, *Teenagers Say Parents Text and Drive*, N.Y. TIMES (Sept. 27, 2012, 8:27 AM), <http://parenting.blogs.nytimes.com/2012/09/27/teenagers-say-parents-text-and-drive> (citing *Teens Mirror Parents' Distracted Driving Habits in New Liberty Mutual Insurance/SADD Survey*, PR NEWSWIRE (Sept. 18, 2012), <http://www.prnewswire.com/news-releases/teens-mirror-parents-distracted-driving-habits-in-new-liberty-mutual-insurancesadd-survey-169851596.html>).

common application used among cell phone owners.<sup>47</sup> Research also supports the assertion that, with the exception of contact information, text messages are the most commonly stored information on devices.<sup>48</sup> Despite the computer-like capabilities of smartphones, most smartphone users text more than they email, play music, or even access the internet.<sup>49</sup> The popularity of texting has inspired various sectors to take advantage of the mode of communication. Stores such as Bed Bath & Beyond have sent coupons via text message.<sup>50</sup> Natural disaster relief organizations have offered donations via text message.<sup>51</sup> Political campaigns have utilized text messages as a donation-raising tool.<sup>52</sup>

The rate of SMS texting, however, has begun to decelerate and even decline in certain parts of the world.<sup>53</sup> With the growing popularity of smartphones with internet capabilities, more users are sending text messages through alternative online messaging services instead of sending text messages through cell phone networks.<sup>54</sup> Apple's recent introduction of iMessage—which runs on iPhones, iPods, iPads, and Macs—allows users to send text

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47. Aaron Smith, *Americans and their Cell Phones*, PEW RESEARCH CTR.'S INTERNET & AM. LIFE PROJECT 3 (Aug. 15, 2011), <http://pewinternet.org/~media/Files/Reports/2011/Cell%20Phones%202011.pdf>.

48. Urban et al., *supra* note 27, at 8.

49. Smith, *supra* note 47.

50. Lauren Johnson, *Bed Bath & Beyond Increases SMS Opt-ins with In-Store Call-to-Action*, MOBILE COM. DAILY (July 11, 2012, 4:30 AM), <http://www.mobilecommercedaily.com/bed-bath-beyond-ramps-up-sms-opt-ins-via-in-store-call-to-action>.

51. See Anita Hamilton, *Donating by Text: Haiti Fundraising Goes Viral*, TIME (Jan. 13, 2010), [http://www.time.com/time/specials/packages/article/0,28804,1953379\\_1953494\\_1953528,00](http://www.time.com/time/specials/packages/article/0,28804,1953379_1953494_1953528,00).

52. In August of 2012, President Barack Obama became the first presidential candidate to accept donations via text message. Dan Eggen, *Text "GIVE" to Obama: President's Campaign Launches Cellphone Donation Drive*, WASH. POST (Aug. 23, 2012), [http://www.washingtonpost.com/politics/text-give-to-obama-presidents-campaign-launches-cellphone-donation-drive/2012/08/23/5459649a-ecc4-11e1-9ddc-340d5efb1e9c\\_story.html](http://www.washingtonpost.com/politics/text-give-to-obama-presidents-campaign-launches-cellphone-donation-drive/2012/08/23/5459649a-ecc4-11e1-9ddc-340d5efb1e9c_story.html). Later that month, rival candidate Mitt Romney's campaign also began accepting donations by text message. Dave Levinthal, *Mitt Romney Now Taking Donations via Text*, POLITICO (Aug. 31, 2012, 12:53 PM), <http://www.politico.com/news/stories/0812/80527.html>.

53. See Brian X. Chen, *The State of Mobile: Less Talking, Fewer Texts, More Data*, N.Y. TIMES (May 2, 2012, 6:16 PM), <http://bits.blogs.nytimes.com/2012/05/02/state-of-mobile>. Other popular SMS-alternative services include WhatsApp and Snapchat. See Parmy Olson, *RIM Prepares to Launch New BlackBerry for "The Hyper-Connected"*, FORBES (Jan. 29, 2013, 4:49 PM), <http://www.forbes.com/sites/parmyolson/2013/01/29/rim-prepares-to-launch-new-blackberry-for-the-hyper-connected/>.

54. See Chen, *supra* note 53; Olson, *supra* note 53. See also Brian X. Chen, *Text Messaging Is in Decline in Some Countries*, N.Y. TIMES (Jan. 1, 2012, 3:27 PM), <http://bits.blogs.nytimes.com/2012/01/01/text-messaging-is-in-decline-in-some-countries>.

messages to other devices through an internet connection.<sup>55</sup> Similarly, Facebook Messenger allows smartphone users with Facebook accounts to send and receive messages while avoiding carrier charges.<sup>56</sup> In November 2012, texting traffic via cellular carriers declined for the first time due to these texting alternatives.<sup>57</sup> This trend is expected to continue as smartphone ownership increases.<sup>58</sup> As the decline of SMS text messages is a very recent development, courts have yet to determine whether to distinguish these alternative text messages from the more traditional SMS text messages.<sup>59</sup>

### B. *The Fourth Amendment Applied to Cell Phones and Text Messages*

This section first provides a brief overview of the law on searches and seizures. After summarizing the ways in which courts analogize cell phones to the search and seizure framework, this section explores more narrowly the positions that the courts have taken on the privacy of text messages.

#### 1. Search and Seizure Overview

The investigatory power of government officials to search and seize an object or document is governed by the Fourth Amendment.<sup>60</sup> Searches must be reasonable under the Fourth Amendment, and such reasonableness typically requires obtaining a warrant.<sup>61</sup> A warrantless search may nevertheless be reasonable if consent is obtained or various exceptions are met.<sup>62</sup> If a government official violates a person's Fourth Amendment rights, then such

55. See Jenna Wortham, *Is iMessage Starting to Take a Bite Out of Standard Texting?*, N.Y. TIMES (Jan. 25, 2012, 4:24 PM), <http://bits.blogs.nytimes.com/2012/01/25/is-imessage-starting-to-take-a-bite-out-of-sms/>.

56. *Facebook App Allows Users To Avoid Texting Charges*, NPR (Aug. 15, 2011, 3:00 PM), <http://www.npr.org/2011/08/15/139652111/facebook-app-allows-users-to-avoid-texting-charges>.

57. Brian X. Chen, *Text Messaging Declines in U.S. for First Time, Report Says*, N.Y. TIMES (Nov. 12, 2012, 2:36 PM), <http://bits.blogs.nytimes.com/2012/11/12/text-messaging-declines-united-states/> (last updated Nov. 12, 2012, 3:21 PM). It is important to recognize the headline's misleading title. While texting via cellular carriers has declined, texting in the general sense of the word has not. *Id.*

58. *Id.*

59. See Chris Soghoian, *US Surveillance Law May Poorly Protect New Text Message Services*, AM. CIV. LIBERTIES UNION (Jan. 8, 2013, 9:44 AM), <https://www.aclu.org/blog/national-security-technology-and-liberty/us-surveillance-law-may-poorly-protect-new-text>.

60. DANIEL J. SOLOVE & PAUL M. SCHWARTZ, PRIVACY, INFORMATION, AND TECHNOLOGY 82 (3d ed. 2011). The Fourth Amendment states, in its entirety:

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 Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

61. SOLOVE & SCHWARTZ, *supra* note 60, at 83.

62. *Id.*

person can have that evidence suppressed.<sup>63</sup> This option is commonly known as the exclusionary rule.<sup>64</sup> Moreover, all other evidence obtained by way of the illegal search or seizure is also suppressed due to the “fruit of the poisonous tree” doctrine.<sup>65</sup>

In his concurring opinion in *Katz*, Justice Harlan laid out the now-recognized test for whether a person has a reasonable expectation of privacy.<sup>66</sup> He set up a two-step analysis, whereby a reasonable expectation of privacy exists if the following elements are met: “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.’”<sup>67</sup> The Court has provided a significant guideline for interpreting the *Katz* test: that the “legitimation of expectations of privacy” be supported by “reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.”<sup>68</sup> Furthermore, the Court has since eliminated the subjective component from its analysis.<sup>69</sup> Regarding the objective component, it bears emphasizing that the test does not address whether a reasonable person would have that expectation, but rather whether

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63. *Id.* at 86.

64. *Id.* (stating that the exclusionary rule was established by the Court in *Weeks v. United States*, 232 U.S. 383 (1914)).

65. *Id.* The fruit of the poisonous tree doctrine indicates that since illegally obtained evidence (the poisonous tree) must be suppressed, so too must evidence that was “come at by [the] exploitation of that illegality” (the fruit from the poisonous tree). *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

66. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); SOLOVE & SCHWARTZ, *supra* note 60, at 101.

67. *Katz*, 389 U.S. at 361. It is worth noting that some legal commentators assert that the *Katz* test serves to determine standing as well as whether a legitimate expectation of privacy exists. *New York Pretrial Criminal Procedure*, 7 N.Y. PRAC. § 10:5 (2d ed. 2013). “[I]n *Rakas v. Illinois*, the Supreme Court suggested that the concept of standing was superfluous, and that standing inquiries could be subsumed in substantive Fourth Amendment analysis.” *Id.* (citing *Rakas v. Illinois*, 439 U.S. 128 (1978), *reh’g denied*, 439 U.S. 1122 (1979)). While an appropriate reading of *Rakas*, this quotation is misleading. As a passenger of a car in which he had no possessory interest, the defendant in *Rakas* had no expectation of privacy in the car’s glove compartment that was searched. *Rakas*, 439 U.S. at 148–49. While the *Rakas* Court worded the question of standing as whether the defendant’s rights were violated, *see id.* at 137–38, this Note will use the term “standing” to distinguish it from the *Katz* test language.

68. SOLOVE & SCHWARTZ, *supra* note 60, at 101 (quoting 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, 731–32 (1993)). *See also* José Felipé Anderson, *Reflections on Standing: Challenges to Searches and Seizures in a High Technology World*, 75 MISS. L.J. 1099, 1116–19 (2006).

69. Christopher R. Jones, “EyePhones”: *A Fourth Amendment Inquiry into Mobile Iris Scanning*, 63 S.C. L. REV. 925, 935 (2012) (citing *United States v. Jacobsen*, 466 U.S. 109 (1984)).

the expectation was one recognized by society as reasonable.<sup>70</sup> The objective component must therefore “have a source outside the Fourth Amendment,” and it can be proven by understandings that are recognized in and permitted by society.<sup>71</sup>

Even if the search is found to be unlawful and the *Katz* test is met, there are still several exceptions under which a party has no expectation of privacy. Under the misplaced trust doctrine, for example, “people place their trust in others at their own peril and must assume the risk of [that] betrayal.”<sup>72</sup> Under *White*, the Court found that one has no reasonable expectation of privacy when communicating with an undercover officer.<sup>73</sup>

Another exception to the *Katz* test is the third-party doctrine. “What a person knowingly exposes to the public,” asserted the *Katz* Court, “is not a subject of Fourth Amendment protection.”<sup>74</sup> As a result, “one assumes the risk of exposure . . . in information knowingly revealed to a third party. There is an implied assumption of the risk in conveying information to a third party so that it is no longer private.”<sup>75</sup>

Moreover, a party forfeits any expectation of privacy in the analysis for communications made by written letters. When analyzing the reasonable expectation of privacy in a letter, “courts make two distinctions: (1) between ‘envelope’ information and ‘content’ information, and (2) between a letter in transit and a letter received.”<sup>76</sup> While in transit, the Fourth Amendment protects the content of the letter but not the labeling information available on the envelope; once received, however, the content of the message is no longer protected.<sup>77</sup> Upon receipt, any expectation of privacy in the content is relinquished because the recipient can reveal the content to others.<sup>78</sup>

Finally, exigent circumstances also allow for warrantless searches and seizures to be lawful.<sup>79</sup> Under this exception, the Court recognizes “exceptional circumstances in which, on balancing the need for effective law

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70. Orin Kerr, *What Makes an Expectation of Privacy “Reasonable”? A Response to Chief Justice Roberts*, VOLOKH CONSPIRACY (Dec. 13, 2011, 3:10 PM), <http://www.volokh.com/2011/12/13/what-makes-an-expectation-of-privacy-reasonable-a-response-to-chief-justice-roberts/> (stating that Chief Justice Roberts’s questions during oral arguments illustrate a potential misunderstanding of this component).

71. *Rakas*, 439 U.S. at 143 n.12.

72. SOLOVE & SCHWARTZ, *supra* note 60, at 107.

73. *United States v. White*, 401 U.S. 745, 749 (1971).

74. *Katz v. United States*, 389 U.S. 347, 351 (1967).

75. O’Connor, *supra* note 2, at 693–94 (citing *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (“This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”)).

76. *Id.* at 695 (citing *Ex Parte Jackson*, 96 U.S. 727, 733, 735 (1878)).

77. *Id.*

78. *Id.*

79. *Johnson v. United States*, 333 U.S. 10, 14–15 (1948).

enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with."<sup>80</sup> Situations in which courts typically recognize the exigent circumstances doctrine fall into three categories: "life-threatening exigencies, hot pursuit, and preservation of evidence from destruction."<sup>81</sup> "Where there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime," the Court has found that "it is reasonable to permit action without prior judicial evaluation."<sup>82</sup>

## 2. Cell Phone Searches in General

Fourth Amendment applications to cell phones constitute a recent and contentious issue for courts.<sup>83</sup> While not the focus of this Note, the vast majority of cases discussing cell phone searches do so under the search-incident-to-arrest doctrine.<sup>84</sup> Under this doctrine, "police are authorized to search the person and his immediate 'grabbing space' to protect against physical danger and to prevent the destruction of evidence."<sup>85</sup> Most of the courts extending the doctrine to cell phone searches have upheld such searches.<sup>86</sup> The Fifth Circuit is the most prominent court to uphold such searches,<sup>87</sup> while the Ohio Supreme Court is the most prominent of the few courts to reject such searches.<sup>88</sup>

In addition to upholding that cell phones are searchable incident to arrest, a number of courts have also justified warrantless searches of cell phones by way of the exigent circumstances doctrine.<sup>89</sup> Courts have applied this doctrine

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80. *Id.*

81. Clifford S. Fishman, *Interception of Communications in Exigent Circumstances: The Fourth Amendment, Federal Legislation, and The United States Department of Justice*, 22 GA. L. REV. 1, 13 (1987).

82. *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973).

83. *See Orso*, *supra* note 40, at 183–84. *See also supra* note 6 and accompanying text.

84. *Gershowitz*, *supra* note 6, at 1137.

85. *Id.* at 1131.

86. For a list of cases upholding searches of cell phones incident to arrest, see *id.* at 1137 n.66. Courts typically include at least one of the following rationales to support this decision: (1) the search is necessary due to the risk of the destruction of evidence; (2) cell phones are containers, which may be searched incident to arrest; (3) cell phones are like pagers, which most courts hold may be searched incident to arrest; and (4) the information stored on cell phones is like that in wallets or address book, which may be searched incident to arrest. Ashley B. Snyder, *The Fourth Amendment and Warrantless Cell Phone Searches: When is Your Cell Phone Protected?*, 46 WAKE FOREST L. REV. 155, 166–67 (2011) (internal citations omitted).

87. *Gershowitz*, *supra* note 6, at 1139 (citing *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007)).

88. *Id.* at 1140 (citing *State v. Smith*, 920 N.E.2d 949 (Ohio 2009)). For a list of cases rejecting searches of cell phones incident to arrest, see *id.* at 1139 n.76.

89. *Snyder*, *supra* note 86, at 173 (citing *United States v. Santillan*, 571 F. Supp. 2d 1093, 1101 (D. Ariz. 2008); *United States v. Parada*, 289 F. Supp. 2d 1291, 1303–04 (D. Kan. 2003)).

by classifying cell phone searches under the category of preservation of evidence from destruction.<sup>90</sup> The Ohio Supreme Court, however, has rejected this rationale, noting that such information stored in a cell phone could be recoverable from cell phone service providers, “which might possibly maintain such records as part of its normal operating procedures.”<sup>91</sup>

In courts’ analyses of cell phone privacy, they have also analogized them to wallets, address books, and diaries; such courts have held that cell phones contain information similar to these storage devices.<sup>92</sup> Since most of today’s cell phones have applications (or “apps”) containing contact information and “[since] police are entitled to open a pocket diary to copy the owner’s address, [police] should [also] be entitled to turn on a cell phone to learn its number.”<sup>93</sup> The Seventh Circuit, however, has recognized a distinction between such “labeling” information and other “content” information that can be highly private and therefore unsearchable without a warrant.<sup>94</sup> Importantly, the Seventh Circuit recognized the enormous amount of “content” information that can be stored on a cell phone, emphasizing that “a modern cell phone is a computer.”<sup>95</sup>

### 3. Reasonable Expectations of Privacy in Text Messages

A recent note by Katherine O’Connor, a former editor of the *University of Illinois Law Review* who graduated from law school in 2010, presented various courts’ analyses of Fourth Amendment protections over text messages.<sup>96</sup> She stated that a number of courts have reached a consensus that an individual has a reasonable expectation of privacy over text messages in one’s own device.<sup>97</sup>

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Furthermore, Snyder asserts that even when courts follow Ohio’s precedent and reject an extension of the search-incident-to-arrest doctrine, law enforcement will likely rely on the exigent circumstances doctrine to search cell phones without a warrant. *Id.* at 174.

90. See Fishman, *supra* note 81 and accompanying text.

91. *Smith*, 920 N.E.2d at 956.

92. See e.g., *United States v. Cote*, No. 03CR271, 2005 WL 1323343 (N.D. Ill. May 26, 2005), *aff’d*, 504 F.3d 682 (7th Cir. 2007). “Searches of items such as wallets and address books, which I consider analogous to Cote’s cellular phone since they would contain similar information, have long been held valid when made incident to an arrest.” *Id.* at \*6 (citing *United States v. Rodriguez*, 995 F.2d 776 (7th Cir. 1993)).

93. *United States v. Flores-Lopez*, 670 F.3d 803, 807 (7th Cir. 2012).

94. See *id.*

95. *Id.* at 804.

96. See O’Connor, *supra* note 2, at 691.

97. *Id.* at 703 (citing *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892, 905 (9th Cir. 2008), *rev’d sub nom.*, *City of Ontario, Cal. v. Quon*, 560 U.S. 746 (2010); *United States v. Finley*, 477 F.3d 250, 259 (5th Cir. 2007)). O’Connor notes that these courts distinguish between the phone itself and the actual transmission of information. *Id.* See also Robin Miller, Annotation, *Expectation of Privacy in Text Transmissions to or from Pager, Cellular Telephone, or Other Wireless Personal Communications Device*, 25 A.L.R.6th 201 (2007). “Where the government

At the same time, Ms. O'Connor wrote, courts also appear to be in general agreement that a person sending a text message has no such reasonable expectation of privacy in content stored in the other's device.<sup>98</sup> The rationale for this agreement is twofold: (1) the third-party doctrine defeats any claim the sender has of a reasonable expectation of privacy, and (2) text messages are analogized to letters, whereby a reasonable expectation of privacy is relinquished upon delivery.<sup>99</sup>

Ms. O'Connor asserted that a user would not have a reasonable expectation of privacy under the third-party doctrine because the sent message "can exist in various places besides a sender's phone; for example, in a SMC, in the recipient's phone, or as part of the service provider's temporary or permanent records."<sup>100</sup> Courts applying the third-party doctrine have held that the sender knowingly reveals information to these parties.<sup>101</sup> Most people, however, do not fully understand the extent to which, nor the process by which, text messages are exposed to third parties.<sup>102</sup> Ms. O'Connor emphasized that the Smith dissent recognized this potential lack of knowledge regarding phone monitoring,<sup>103</sup> although the Smith majority held that such subjective expectations are not legitimate.<sup>104</sup> Ms. O'Connor suggested that the rationale in the Smith dissent is more applicable than the rationale in the majority because of "[t]he vast amounts of information stored in modern cell phones [that] entail greater privacy concerns."<sup>105</sup>

Additionally, a number of courts have analogized text messages to letters.<sup>106</sup> Under the extension of this analogy, senders lose any reasonable expectation of privacy upon delivery.<sup>107</sup> The advancement of technology, however, makes this analogy "insufficient and logically inconsistent" for at least three reasons.<sup>108</sup> First, text messages are transmitted in a matter of seconds, while letters are delivered in a matter of days.<sup>109</sup> Consequently, "any

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acts in a law enforcement capacity, the courts are in agreement that a person using a . . . cellular telephone . . . with text messaging capabilities has a reasonable expectation of privacy, against a search by law enforcement personnel, in text messages received by and stored on the device[.]" *Id.* at § 2.

98. See O'Connor, *supra* note 2, at 703–04.

99. *Id.* at 703–05.

100. *Id.* at 704 (internal citation omitted).

101. *Id.*

102. *Id.* at 708.

103. O'Connor, *supra* note 2, at 704 n.148 (citing *Smith v. Maryland*, 422 U.S. 735, 749 (1979) (Marshall, J., dissenting)).

104. *Id.*

105. *Id.* at 708–09.

106. *Id.* at 706.

107. *Id.* at 707.

108. O'Connor, *supra* note 2, at 707.

109. *Id.* at 708.



reasonable expectation of privacy that existed is obliterated just as quickly as the message is delivered.”<sup>110</sup> Second, text messages are more analogous to phone calls than letters in significant ways. As telephone booth users seek to preserve the privacy of their communication by excluding those outside the booth from “the uninvited ear,” senders of text messages arguably take extra precaution to preserve such privacy “by avoiding speaking into the mouthpiece altogether.”<sup>111</sup> The visual formatting of text message apps on popular smartphones furthers this analogy to phone calls because the display of text messages within speech bubbles reinforces a conversational quality.<sup>112</sup> Finally, as technology evolves, courts should consider not only the sophistication of the technology but also the way in which people relate to and interact with the technology. “A user bases her expectation of privacy on how she uses the technology . . . rather than on the specific technical means used. This functional view by users lends credence to the idea that society should—and likely will—recognize a reasonable expectation of privacy for [text messaging].”<sup>113</sup>

Despite this analogy, senders of letters have certain privacy protections that are not extended to senders of text messages.<sup>114</sup> For instance, opening a

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110. *Id.*

111. *Id.* at 713 (citing *Katz v. United States*, 389 U.S. 347, 351–53 (1967)).

112. See *Galaxy S III*, SAMSUNG.COM, <http://www.samsung.com/us/galaxy-s-3-smartphone/> (last visited Feb. 10, 2013) (depicting an image corresponding with the text “Powerful Performance”); *Texting and Messaging*, WINDOWSPHONE.COM, <http://www.windowsphone.com/en-us/how-to/wp8/people/messaging> (last visited Dec. 26, 2013); *Messages*, APPLE.COM, <https://www.apple.com/ios/messages/> (last visited Dec. 26, 2013). A similar conversational element can be found in emails, which courts have analogized to letters for Fourth Amendment purposes. See Wiltse Carpenter, *Turn Off Gmail’s Conversation View*, OFFICIAL GMAIL BLOG (Sept. 29, 2010), <http://gmailblog.blogspot.com/2010/09/turn-off-gmails-conversation-view.html>; *infra* note 156 and accompanying text. This grouping of emails, however, does not have the “skeuomorphism,” or the visual imitation, of conversation like the speech bubble layout of modern text messages. Moreover, texting is becoming a primary mode of communication, even in the business context, since cell phones are typically just an arm’s length away and do not require an internet connection. See Lydia Dishman, *Texting is the New Email—Does Your Company Do It Right?*, FAST COMPANY (May 30, 2013, 7:35 AM), <http://www.fastcompany.com/3010237/bottom-line/texting-is-the-new-email-does-your-company-do-it-right>. The more conversational quality of texting aligns more closely with telephone communication than email, and texting’s prominence among teenagers and adults alike furthers its distinction from email, which is a “practically nonexistent” form of communication for teenagers. Dara Kerr, *Teens Prefer Texting over Phone Calls, E-mail*, CNET (Mar. 19, 2012, 8:10 PM), [http://news.cnet.com/8301-1023\\_3-57400439-93/teens-prefer-texting-over-phone-calls-e-mail/](http://news.cnet.com/8301-1023_3-57400439-93/teens-prefer-texting-over-phone-calls-e-mail/).

113. John Soma et al., *Bit-Wise but Privacy Foolish: Smarter E-Messaging Technologies Call for a Return to Core Privacy Principles*, 20 ALB. L.J. SCI. & TECH. 487, 504 (2010) (categorizing telephone systems, email, text messages, instant messages, and social networking under the umbrella term of electronic messaging, or “e-messaging”).

114. O’Connor, *supra* note 2, at 709.

letter addressed to someone else constitutes a federal offense, and officers typically require a warrant before opening sealed letters.<sup>115</sup> “Using the letter analogy to question a sender’s reasonable expectation of privacy, while simultaneously denying these additional protections, highly diminishes privacy expectations in sending a text message compared with sending a letter.”<sup>116</sup> Courts are therefore reluctant to extend to text messages the full privacy protections that are afforded by the doctrine they have analogized.

While highly informative and well-researched, Ms. O’Connor’s note contained a significant inaccuracy worth emphasizing. When asserting that courts generally agree that text message senders have no privacy expectation, she only cited case law analyzing text messages sent via devices other than cell phones.<sup>117</sup> Ms. O’Connor’s rationale, while valid, is misleading due to her failure to distinguish text messages sent via cell phones—the focus of her note—from text messages sent via pagers or emails.<sup>118</sup>

Although pertaining to pager messages, *Quon* is nonetheless significant for the purposes of this Note in that the Court did not actually make a decision regarding whether a text message sender had Fourth Amendment protections in a context outside of the workplace.<sup>119</sup> Given that all of the case law before *Quon* held that there was no reasonable expectation of privacy in sent text messages via pager, the Court’s reluctance to do so in this case suggests that technological advancement has caused the Court to consider reexamining the letter analogy’s extension to mobile communication in the twenty-first century.

Unlike the third-party doctrine and the letter analogy, the exigent circumstances doctrine would likely not play a role in the analysis of privacy expectations of text message senders. While cellular service providers keep permanent records of calls, they typically store the contents of text messages for only two weeks before deleting them.<sup>120</sup> “[I]f text messages are, in fact,

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115. *Id.*

116. *Id.*

117. *Id.* at 703 n.143 (citing *United States v. Heckenkamp*, 482 F.3d 1142, 1147 (9th Cir. 2007) (regarding sent emails); *United States v. Jones*, 149 F. App’x 954, 959 (11th Cir. 2005) (regarding sent text messages between pagers); *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) (regarding sent emails); *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001) (regarding sent emails)). Ms. O’Connor is not alone in grouping text messages from cell phones together with those of pagers. *See also* Miller, *supra* note 97, at § 5.

118. O’Connor, *supra* note 2, at 703 n.143.

119. *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2633 (2010) (“Petitioners and respondents disagree whether a sender of a text message can have a reasonable expectation of privacy in a message he knowingly sends to someone’s employer-provided pager. It is not necessary to resolve this question in order to dispose of the case, however.”).

120. Orso, *supra* note 40, at 199 (citing Mike Wendland, *Mayor’s Texts Weren’t Private, but Yours Probably Are*, USA TODAY (Jan. 24, 2008), [http://www.usatoday.com/news/nation/2008-01-24-detroit-texts\\_N.htm](http://www.usatoday.com/news/nation/2008-01-24-detroit-texts_N.htm) (in which a Sprint spokesman stated that text messages are stored for about two weeks according to standard practice in the industry)).

saved for roughly two weeks, then it leaves officers more than adequate time to obtain a warrant and serve it upon the cellular company.”<sup>121</sup> Therefore, it appears that text messages sent through cellular providers do not create a “now or never” situation in which exigent circumstances would apply.<sup>122</sup>

Finally, it is worth noting that privacy expectations of text messages could potentially be analyzed under the Stored Communications Act (SCA).<sup>123</sup> While Congress enacted the law in 1986 in light of the Fourth Amendment’s inadequacies, the SCA’s categorization of electronic information has since become outdated and has caused lower courts to wrestle with the issue.<sup>124</sup> Moreover, the SCA “offers no suppression for criminal defendants,”<sup>125</sup> making it inapplicable in *Hinton*. Congress may soon revise the Electronic Communications Privacy Act, however, which includes the SCA.<sup>126</sup> Courts considering privacy expectations of text-message senders ought to be mindful of the SCA, should it be updated.

## II. *STATE V. HINTON*

Equipped with a general comprehension of the status of cell phones, text messages, and Fourth Amendment privacy analysis, one can better understand the issues in *Hinton*. This section first establishes the significant facts of the case and then summarizes the differing opinions of the majority and the dissent. The majority, authored by Judge Joel Penoyer, applied both the third-party doctrine and the letter analogy, and it held that Hinton had no reasonable expectation of privacy in the text messages he sent. The dissent, written by Judge Marywave Van Deren asserted that Hinton’s communication carried Fourth Amendment protections.

### A. *Summary of Facts*

In 2009, officers who worked with Detective Kevin Sawyer gave him an iPhone they had acquired from Daniel Lee, a suspected drug dealer who had been arrested earlier that day.<sup>127</sup> While Lee’s phone was in Detective Sawyer’s

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121. *Id.*

122. *Id.* at 200 (citing *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973)). However, text messages sent through other means could very well create such a “now or never” situation. *See infra* Part II.C.

123. *See* O’Connor, *supra* note 2, at 690 (citing *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892, 903 (9th Cir. 2008), *rev’d sub nom.*, *City of Ontario, Cal. v. Quon*, 560 U.S. 746 (2010)).

124. *Id.*

125. *Id.*

126. *Electronic Communications Privacy Act (ECPA)*, ELECTRONIC INFO. PRIVACY CTR., <http://epic.org/privacy/ecpa/> (last visited Mar. 16, 2014).

127. *State v. Hinton*, 280 P.3d 476, 477–78 (Wash. Ct. App. 2012), *rev’d en banc on other grounds*, No. 87663-1, 2014 WL 766680 (Wash. Feb. 27, 2014).

possession, Lee received a text message from Shawn Hinton, whom Detective Sawyer knew from past arrests.<sup>128</sup> The text message, appearing on the smartphone's home screen, read: "Hey whats [sic] up dogg [sic] can you call me i [sic] need to talk to you."<sup>129</sup> Detective Sawyer, impersonating Lee, replied to Hinton's text message.<sup>130</sup> Detective Sawyer and Hinton then exchanged several text messages, during which a drug transaction was arranged in a parking lot.<sup>131</sup> Based on this text message conversation and the arranged drug transaction, Detective Sawyer arrested Hinton in the parking lot.<sup>132</sup> After the arrest, Detective Sawyer called Hinton's purported number, and Hinton's cell phone rang, which proved that the text messages had indeed come from Hinton's phone.<sup>133</sup>

Hinton was later tried for attempted possession of heroin.<sup>134</sup> Hinton filed a motion to suppress "any and all evidence obtained as a result of the search of a cell phone taken from Daniel Lee," arguing that Detective Sawyer had violated Hinton's Fourth Amendment rights.<sup>135</sup> The State asserted that Hinton "did not have a legitimate expectation of privacy in the text messages."<sup>136</sup> Denying Hinton's motion to dismiss, the trial court stated:

[T]here is no expectation of privacy in a communication transmitted to a device such as an iPhone . . . . Whoever is sending a text message does not know who is observing the message. The sender of a text message makes an assumption that the message will be received by the person intended. The communication is not rendered private based on that assumption.<sup>137</sup>

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128. *Id.* at 478.

129. *Id.*

130. *Id.*

131. *Id.* "The following text message exchange occurred:"

[Sawyer]: Can't now. What's up?

....

[Hinton]: I need to talk to you about business. Please call when you get a chance.

....

[Sawyer]: I'm about to drop off my last.

....

[Hinton]: Please save me a ball. Please? I need it. I'm sick.

*Id.*

132. *Hinton*, 280 P.3d at 478.

133. *Id.* The court noted that "[t]o discover the phone number associated with Z-Shawn Hinton, Sawyer had to navigate to the contacts folder on Lee's iPhone. It is unclear from the record when Sawyer accessed the contacts folder to retrieve Hinton's phone number." *Id.* at 478 n.4.

134. *Id.* at 478.

135. *Id.* Hinton also argued that the detective had violated the Washington Constitution through his actions. *Id.*

136. *Id.*

137. *Hinton*, 280 P.3d at 478 (internal citation omitted).

The trial court convicted Hinton for attempted possession of heroin, and Hinton appealed.<sup>138</sup>

*B. Majority Opinion*

The majority briefly addressed the conversation between Detective Sawyer and Hinton.<sup>139</sup> The majority analogized the case to *Washington State v. Goucher*, wherein a police detective answered a suspect's telephone while executing a search warrant at the suspect's house.<sup>140</sup> By intercepting the phone call and saying he "was handling business," the detective told the caller to come over and subsequently arrested him for drug possession.<sup>141</sup> The *Goucher* court held that a caller "has no reasonable expectation of privacy when he 'voluntarily expose[s] his desire to buy drugs to someone he did not know.'"<sup>142</sup> The majority also cited *United States v. Passarella*, in which "callers made incriminating statements about the sale of drugs" under a belief that an agent with a warrant on the other end of the conversation was the defendant.<sup>143</sup> In *Passarella*, the Sixth Circuit held that the phone conversation was properly admitted into evidence.<sup>144</sup> The *Hinton* majority implied that the exchange between Hinton and Detective Sawyer via text message is equivalent to the phone conversations in *Goucher* and *Passarella* and that Hinton, therefore, had no reasonable expectation of privacy in the conversation under the Fourth Amendment.<sup>145</sup> Moreover, the majority asserted in a footnote that whether or not Lee's phone was properly seized was not at issue.<sup>146</sup>

The majority also applied the third-party doctrine to the facts in *Hinton*, noting that "the Court 'consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.'"<sup>147</sup> The majority asserted that the Fourth Amendment therefore "does not protect Hinton's 'misplaced trust that the message actually would reach the intended recipient.'"<sup>148</sup>

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138. *Id.*

139. *Id.* at 480–81. In addition to analyzing the issue under the Fourth Amendment, both the majority and dissenting opinions included analysis of the issue under Washington's state constitution as well. *Id.* at 479; *id.* at 484–85 (Van Deren, J., dissenting).

140. *Id.* at 480–81 (majority opinion) (citing *State v. Goucher*, 881 P.2d 210 (Wash. 1994)).

141. *Id.* at 481 (quoting *Goucher*, 881 P.2d at 211).

142. *Hinton*, 280 P.3d at 481 (quoting *Goucher*, 881 P.2d at 213).

143. *Id.* (citing *United States v. Passarella*, 788 F.2d 377, 378 (6th Cir. 1986)).

144. *Id.* at 481–82.

145. *See id.*

146. *Id.* at 478 n.2.

147. *Hinton*, 280 P.3d at 481 (quoting *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979)).

148. *Id.* at 482 (quoting *Washington v. Wojtyna*, 855 P.2d 315, 318 (1993) (quoting *United States v. Meriwether*, 917 F.2d 955, 959 (6th Cir. 1990))).

While analyzing Hinton's claims under the third-party doctrine, the majority analogized cell phones to pagers.<sup>149</sup> Adopting the Sixth Circuit's rationale, the majority held that when an agent seizes a pager pursuant to an arrest and calls the incoming number to arrange a drug transaction, the individual who sent the incoming number has no reasonable expectation of privacy in that message.<sup>150</sup> The majority repeatedly emphasized that, like a pager, Lee's iPhone could have been in anyone's possession.<sup>151</sup> Moreover, the sender risks that the recipient, whether the intended person or not, can disclose the contents of the message by forwarding it to others.<sup>152</sup> Maintaining the analogy to pagers, the majority rejected Hinton's argument that a cell phone is more technologically advanced than a pager and therefore ought to be analyzed differently.<sup>153</sup> Hinton asserted that, because cell phones are now capable of computer-like functionality, sending a message to such a device carries with it a greater expectation of privacy than sending a message to a "less sophisticated device like a pager."<sup>154</sup> The majority, however, held that "it is the individual's decision to transmit a message to an electronic device *that could be in anybody's possession*—and not the receiving device's level of technological complexity—that defeats the individual's expectation of privacy in that communication."<sup>155</sup>

Additionally, the majority also analogized cell phones to letters, noting that "[c]ase law has consistently applied the standard for letters to new technology."<sup>156</sup> Such precedent dictates that any privacy expectation one has in a sent letter terminates upon delivery, even if the sender orders the recipient to keep it private.<sup>157</sup> The majority "decline[d] to offer communication made using a technological device more privacy protections than have been provided for letters, one of the most traditional form [sic] of communication."<sup>158</sup>

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149. *See id.* at 481.

150. *Id.* (citing *Meriwether*, 917 F.2d at 957–58).

151. *See id.* at 482.

152. *Hinton*, 280 P.3d at 482. "By [transmitting messages to a device over which he had no control, Hinton] voluntarily ran the risk that his messages, once delivered, would be received by whomever possessed the iPhone, and he had no control over what that person might do with that message." *Id.* at 480.

153. *Id.* at 482.

154. *Id.*

155. *Id.* (citing *Meriwether*, 917 F.2d at 959) (emphasis added).

156. *Id.* at 484 (citing *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) (extending the letter doctrine to email); *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001) (extending the letter doctrine to email); *United States v. Dupree*, 781 F. Supp. 2d 115, 159 (E.D.N.Y. 2011) (extending the letter doctrine to email)).

157. *Hinton*, 280 P.3d at 483–84 (citing *United States v. Jacobsen*, 466 U.S. 109, 114 (1984); *United States v. King*, 55 F.3d 1193, 1195–96 (6th Cir. 1995)).

158. *Id.* at 484.

Reinforcing its analogies to letters and pagers, the majority distinguished text messages from phone calls by focusing on the inability to discern with whom one is communicating via text message.<sup>159</sup> “Unlike the phone conversation where a caller can hear a voice and decide whether to converse, one who sends a message to a pager has no external indicia that the message actually is received by the intended recipient.”<sup>160</sup> Given this lack of identification indicators, “[a] party sending a message to a pager has expressed his subjective desire to preserve his privacy even less than in the telephone situation.”<sup>161</sup> The majority implied that this assertion also extends to cell phones due to the court’s refusal to distinguish pagers from cell phones in its analysis.<sup>162</sup>

To summarize, the majority held that Hinton had no reasonable expectation of privacy in the text message *conversation* he engaged in with Detective Sawyer when he believed he was communicating with Lee. Moreover, the majority found that Hinton had no reasonable expectation of privacy in his *first message* under both the third-party doctrine and the letter analogy.

### C. *Dissenting Opinion*

Unlike the majority, the dissent asserted that Hinton’s *conversation* with Detective Sawyer was protected under the Fourth Amendment. More so than the majority, the dissent emphasized that Detective Sawyer not only read Hinton’s text message but also conversed with him via text message.<sup>163</sup> “Sawyer engaged in a continuing search when he . . . used Lee’s iPhone to send and receive messages from Hinton.”<sup>164</sup> The dissent contended that a “[p]hysically invasive inspection is simply more intrusive than [a] purely visual inspection.”<sup>165</sup> Since the back-and-forth conversation required more than a visual inspection, the dissent asserted, Hinton reasonably expected that he was texting Lee and not a government official representing himself as Lee.<sup>166</sup> The dissent also challenged the majority’s analogy to Goucher by recognizing

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159. *Id.* at 482.

160. *Id.*

161. *Id.*

162. *See Hinton*, 280 P.3d at 482.

163. *Id.* at 484 (Van Deren, J., dissenting). The dissent explained that Detective Sawyer “did more than ‘simply read the text messages [from Shawn Hinton] after they were delivered to the intended recipient.’” *Id.* (citing *id.* at 483 (majority opinion)).

164. *Id.* (Van Deren, J., dissenting).

165. *Id.* at 488 (quoting *Bond v. United States*, 529 U.S. 334, 337 (2000)).

166. *Id.* at 489.

that the defendant in that case conversed “with an acknowledged stranger,”<sup>167</sup> while Hinton “communicated with an officer pretending to be Lee.”<sup>168</sup>

Turning its attention to Detective Sawyer’s *initial search* of Hinton’s text message, the dissent contended that the third-party doctrine should not apply to text messages due to the authority of Smith, Quon, and Jones.<sup>169</sup> Quoting Justice Marshall’s dissenting opinion in Smith, the Hinton dissent asserted that “[t]hose who disclose certain facts to a . . . phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes.”<sup>170</sup> Additionally, the Quon Court noted the pervasiveness of text-message communications, suggesting that a reasonable expectation of privacy in text messages exists outside the workplace.<sup>171</sup> The dissent also emphasized Justice Sotomayor’s concurring opinion in Jones, in which she stated that “it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties . . . [, as t]his approach is ill suited to the digital age.”<sup>172</sup> The dissent shared Justice Sotomayor’s assertion that even if a text message is knowingly communicated to a third party, such as a cellular network, the ubiquitous nature of today’s technological society requires that it still retain Fourth Amendment protection.<sup>173</sup> Thus, the dissent strongly indicated that recent Supreme Court opinions conflict with the majority’s reasoning.

The dissent further challenged the third-party doctrine’s application to text messages by noting how often individuals are in possession of their own phones and how often they engage in text messaging.<sup>174</sup> “[M]any, if not most, mobile phone owners are in immediate possession of their phones at all times.”<sup>175</sup> By exceeding phone calls, the dissent stated, texting “has become the predominant form of communication.”<sup>176</sup> These findings substantially

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167. *Hinton*, 280 P.3d at 486–87 (Van Deren, J., dissenting) (quoting *State v. Goucher*, 881 P.2d 210, 213 (Wash. 1994)).

168. *Id.* at 487.

169. *See id.* at 487–89.

170. *Id.* at 487 (quoting *Smith v. Maryland*, 442 U.S. 735, 749 (1979) (Marshall J., dissenting)).

171. *Id.* (quoting *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2630 (2010)). “Cell 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.” *Id.*

172. *Hinton*, 280 P.3d at 489 (Van Deren, J., dissenting) (quoting *United States v. Jones*, 132 S.Ct. 945, 957 (2012) (Sotomayor, J., concurring) (internal citations omitted)).

173. *See id.*

174. *Id.* at 489–90.

175. *Id.* at 489.

176. *Id.* at 490 (emphasis added). Moreover, “[t]ext-message use is expected to continue to surge. ‘One study estimated that there were 5 trillion SMS texts sent worldwide in 2009 and that there will be more than 10 trillion SMS texts sent worldwide in 2013.’” *Id.* at 490 n.17 (internal



support a person's expectation "that the phone's owner will be the immediate recipient of the message and, thus, the sender can expect that the message will remain private absent voluntary action by the phone's, [sic] owner to disclose the contents of the text message."<sup>177</sup> Given the popularity of text messaging and the immediate accessibility of cell phones, the dissent argued that "[c]ourts must analyze new forms of communication within the context of our society's evolving and existing expectations of privacy."<sup>178</sup> Taken together, these points demonstrated the dissent's determination that society has reached a point in which it recognizes that all text messages, both sent and received, have an expectation of remaining private.

The dissent directly, albeit briefly, distinguished text messages from letters. In a footnote, the dissent declared the letter analogy "unworkable in the electronic communication context because electronic messages are delivered nearly instantaneously and thus, would leave the sender of electronic communications with no expectation of privacy."<sup>179</sup>

The dissent completed its rejection of the majority's device analogies and distinctions by asserting that text messages are more private than phone calls rather than less so.<sup>180</sup> In response to the majority's argument that a person cannot confirm another's identity through text messages, the dissent emphasized that "oral conversations can be overheard... [while] text messages are insulated from the accidental or deliberate eavesdropper unless the eavesdropper possesses the receiving phone."<sup>181</sup> Due to the significant unlikelihood of eavesdropping, text message senders therefore expect a greater degree of privacy.<sup>182</sup> By rejecting the third-party doctrine application, distinguishing text messages from letters, and highlighting the improbability of eavesdropping, the dissent concluded that sent text messages deserve privacy expectations.

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citation omitted). Many Americans not only text "information that formerly would have been the subject of an oral telephone conversation," but they utilize text messaging more than phone calls. *Id.* at 490 (citing Marguerite Reardon, *Americans Text More Than They Talk*, CNET (Sept. 22, 2008), <http://tiny.cc/CNET>).

177. *Hinton*, 280 P.3d at 489 (Van Deren, J., dissenting).

178. *Id.* at 490-91 (noting the *Quon* Court's acknowledgement 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") (quoting *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2629 (2010)).

179. *Id.* at 490 n.20.

180. *Id.* at 489-90.

181. *Id.* (citing O'Connor, *supra* note 2, at 713).

182. *Hinton*, 280 P.3d at 489-90 (Van Deren, J., dissenting).

## III. ANALYSIS

This section begins with an analysis as to whether the conversation between Detective Sawyer and Hinton violated Hinton's Fourth Amendment rights. This section then turns to the primary issue in the majority and dissent: whether Hinton possessed constitutional protections over Hinton's *initial text message* sent to Lee. Finally, after applying the law to the unique facts provided in *Hinton*, this section concludes with an examination of recent advancements in text message communications and ways in which these changes would alter a Fourth Amendment analysis.

A. *The Legality of the Conversation Between Detective Sawyer and Hinton*

Detective Sawyer's back-and-forth conversation via text message provides a unique set of significant facts that the Court may consider when it hears a similar case. As the dissent highlights, Detective Sawyer not only searched through Lee's phone but also conversed with Hinton through text messaging while posing as Lee.<sup>183</sup> To this point, the dissent's application of *Jones* appears valid. In *Jones*, the Court held that attaching a device to the exterior of a car constitutes a search in part because "the officers 'did *more* than conduct a visual inspection of respondent's vehicle.'"<sup>184</sup> Likewise, the conversation Detective Sawyer instigated plainly constituted a "[p]hysically invasive inspection . . . more intrusive than purely visual inspection."<sup>185</sup> Therefore, applying language from *Jones*, the Court could determine that actions similar to those of Detective Sawyer are unlawful. On the other hand, Justice Scalia would likely distinguish Hinton's situation from that in *Jones*; in *Hinton*, the property being trespassed, Lee's iPhone, did not belong to Hinton.<sup>186</sup> Justice Scalia would consider the extent of a search like Detective Sawyer's insignificant because under his prioritization of the trespass doctrine, which provides that physical intrusion into a person's property is required for an action to constitute a Fourth Amendment search, none of Hinton's rights would have been violated by the search.<sup>187</sup>

Whether it applies *Jones* or not, it is more probable that the Court would recognize the misplaced trust doctrine as the more applicable doctrine.<sup>188</sup> While it is accurate that Hinton displayed misplaced trust when texting Detective Sawyer, however, the *White* Court's determination that "one contemplating illegal activities must realize and risk that his companions may

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183. *Id.* at 484.

184. *Id.* at 488 (citing *United States v. Jones*, 132 S. Ct. 945, 952 (2012) (internal citation omitted)).

185. *Id.* at 488 (quoting *Bond v. United States*, 529 U.S. 334, 337 (2000)).

186. *Jones*, 132 S. Ct. at 952 (citing *United States v. Knotts*, 460 U.S. 276, 278–79 (1983)).

187. *See id.*

188. *See supra* notes 72–73 and accompanying text.

be reporting to the police”<sup>189</sup> does not neatly fit into Hinton’s situation. It was not the case that Hinton’s trust in Lee was betrayed or that Lee was an undercover officer.<sup>190</sup> Moreover, lower court holdings under *White*’s precedent do not fully extend to Hinton’s situation either. In *Goucher*, the defendant conversed with “an acknowledged stranger.”<sup>191</sup> Unlike in *Goucher*, here, Hinton conversed with Detective Sawyer posing as Lee.<sup>192</sup> Furthermore, Lee did not consent to Detective Sawyer’s interjection into the conversation.<sup>193</sup> In other words, Hinton’s misplaced trust was not in his accomplice Lee but rather in his means of communication. By choosing to communicate with Lee via text message instead of by phone, Hinton prevented himself from observing any external indicia that Lee was indeed the individual on the other end of the conversation.<sup>194</sup> Therefore, if the Court were to determine that the misplaced doctrine applies, it would extend the doctrine beyond the already-extended boundaries adopted by lower courts. By choosing not to apply the doctrine, however, the Court would effectively construct a new limit to its application that had not yet been considered by lower courts. Consequently, since any determination as to the application of the misplaced trust doctrine would alter the doctrine in ways not yet reviewed by lower courts, it is most likely that the Court would explore alternative doctrines to determine whether the ensuing text message conversation violated Hinton’s constitutional rights.

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

190. *See Hinton*, 280 P.3d at 477 (acknowledging that Detective Sawyer acquired Lee’s phone and posed as Lee while texting Hinton).

191. *State v. Goucher*, 881 P.2d 210, 213 (Wash. 1994). *See also* *United States v. Seinfeld*, 632 F. Supp 622, 626 (E.D.N.Y. 1986) (holding that a reasonable expectation of privacy did not exist when an agent told the caller-defendant that he was speaking to an employee of the phone’s owner rather than posing as the owner himself); *United States v. Congote*, 656 F.2d 971, 976 (5th Cir. 1981) (holding that a reasonable expectation of privacy did not exist when “[n]one of the agents pretended to be . . . the party [whom] appellant wished to reach”). *But see* *United States v. Little*, 753 F.2d 1420, 1437 (9th Cir. 1984) (holding that requiring all undercover agents to identify themselves would effectively end undercover operations). *Hinton* is also distinguishable from *Passarella*, which the majority cited, because in that case it was the phone’s owner rather than the caller who raised Fourth Amendment claims. *United States v. Passarella*, 788 F.2d 377, 378 (6th Cir. 1986).

192. *Compare Hinton*, 280 P.3d at 477 (noting that Detective Sawyer posed as Lee), *with Goucher*, 881 P.2d at 213 (noting that detective’s “conversation was with an acknowledged stranger”).

193. *Hinton*, 280 P.3d at 478; *see also* *United States v. Meek*, 366 F.3d 705, 710, 713 (9th Cir. 2004) (holding that an individual had no Fourth Amendment privacy protections over online chatroom communications made to an agent posing as a minor because the minor and his father consented to the agent’s interjection into the conversation). It is worth noting that if Lee consented to the search of the phone, Detective Sawyer’s interjection into the conversation may nonetheless have exceeded the scope of Lee’s consent. *See* *U.S. v. Lopez-Cruz*, 730 F.3d 803, 809 (9th Cir. 2013).

194. *Hinton*, 280 P.3d at 482.

Should the Court analyze such a case under *Jones* and disregard any applicability of the misplaced trust doctrine, the Court could hold that a conversation like the one between Detective Sawyer and Hinton would violate the defendant's constitutional rights. Justice Scalia's emphasis on the trespass doctrine, however, could undermine the defendant's privacy expectations in another device. By way of the exclusionary rule and the poisonous tree doctrine,<sup>195</sup> the defendant could then move to suppress the information obtained by the unlawful search. However, such an application of *Jones* would effectively swallow the misplaced trust doctrine, as any interjection by legal enforcement officials into a conversation is more invasive than a merely visual inspection. Therefore, in order to avoid making such sweeping decisions, it is likely that the Court would reach its holding by solely analyzing the search of the defendant's initial text message.<sup>196</sup>

*B. The Legality of Detective Sawyer's Initial Search of Hinton's Sent Text Message*

Recognizing that an analysis of the ensuing conversation like the one between Detective Sawyer and Hinton would result in far-reaching determinations, the Court's holding would likely pertain to the initial search.<sup>197</sup> Additionally, an analysis of the initial search would be more relevant to the typical instance in which an officer searches a person's cell phone in order to access a third party's sent text message.<sup>198</sup> Below is an exploration of Hinton's claims under the *Katz* test, followed by the Court's probable analysis of such facts under the third-party doctrine and letter analogy.<sup>199</sup>

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195. See *supra* notes 63–65 and accompanying text.

196. It appears that Hinton's allegations focused primarily on this initial search. See *Hinton*, 280 P.3d at 478–79 (“[Hinton] argues that when Sawyer read Hinton's text message . . . Sawyer conducted a search that violated . . . the Fourth Amendment. He asserts, therefore, that the trial court should have suppressed . . . ‘the officer's communications with [Hinton], as well as the presence of [Hinton] at the fake drug sale the officer arranged.’”) (quoting Brief of Appellant at \*16, *Hinton*, 280 P.3d 476 (No. 41014-1-II)).

197. See *supra* Part III.A.

198. See *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2633 (2010).

199. Before delving into the analysis, it is worth noting the apparent applicability and conclusiveness of the plain view doctrine, which allows an officer to seize an item not described in a warrant if the item is in “plain view” from the officer's position. See *Horton v. California*, 496 U.S. 128, 134 (1990). After all, Detective Sawyer was already in possession of Lee's phone when Hinton's text message appeared in its entirety on Lee's iPhone. *Hinton*, 280 P.3d at 478. However, technicalities and policy rationale complicate this doctrine's application. The doctrine “deals only with those circumstances where an officer has already justifiably intruded into a constitutionally-protected area, spots and then removes incriminating evidence. It refers only to seizures but not to searches.” Howard E. Wallin, *Plain View Revisited*, 22 PACE L. REV. 307, 325 (2002); *United States v. Miller*, 769 F.2d 554, 557 (9th Cir. 1985). The plain view doctrine does not apply in Hinton's case because Detective Sawyer's observation of the text message appearing

### 1. *Katz* Requirements

While neither opinion in *Hinton* made any reference to *Katz*, the Court would likely do so in order to establish a prima facie case under the Fourth Amendment. In order to meet the *Katz* test, a defendant in *Hinton*'s position must meet the following requirements: (1) he must have had a subjective expectation of privacy in his sent text messages, and (2) this expectation must be shared by society.<sup>200</sup> The first, subjective prong of the test would likely be assumed, as the Court "appears to have eliminated the subjective component of the *Katz* test."<sup>201</sup>

on the screen did not constitute a seizure. *See Hinton*, 280 P.3d at 477–78. While the Court could appropriately find that Detective Sawyer's search was lawful because a search in plain view does not constitute an invasion of privacy, no court has addressed the plain view doctrine as it pertains to the privacy rights of the individual on the opposite end of a conversation. *See, e.g., United States v. Gomez*, 807 F. Supp. 2d 1134, 1142 (S.D. Fla. 2011) (holding that an agent's observation of a caller's name on an individual's cell phone did not violate the cell phone owner's privacy rights). Furthermore, Detective Sawyer's seizure of Lee's phone presents problems as well. Because the legal justification for Detective Sawyer's warrantless seizure was never established, *Hinton*, 280 P.3d at 277–78 & n.2, and the Supreme Court has not yet decided on the constitutionality of searching an arrestee's cell phone as incidental to an arrest, *see supra* notes 84–88 and accompanying text, the Court would have to decide a contentious issue merely to find that an officer like Detective Sawyer "already justifiably intruded into a constitutionally-protected area." *See Wallin, supra*. Therefore, like with the misplaced trust doctrine, the Court would likely avoid the plain view doctrine to prevent a far-reaching determination.

200. *See supra* note 66 and accompanying text. An intertwined but separate analysis that the Court could consider is whether or not a defendant like *Hinton* had standing to allege his claims. *See supra* note 67 and accompanying text. The Court could compare the defendant's privacy expectations to those in *Rakas*, finding that a text message sender's privacy expectations in another's cellular device are as unfounded as an automobile passenger's privacy expectations in that vehicle's glove compartment. *See Rakas v. Illinois*, 439 U.S. 128, 148–49 (1978). After all, protecting such privacy expectations of sent text messages could allow the potentially thousands of contacts engaging in text message conversations with the cell phone's owner to claim that the searching officer violated their Fourth Amendment rights. "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Id.* at 134 (citing *Alderman v. United States*, 394 U.S. 165, 174 (1969)). However, the *Rakas* Court recognized that conversations, in addition to possessory interests, constitute a privacy expectation sufficient for standing. *Id.* at 136 (stating that parties to unlawfully overheard conversations have standing under the Fourth Amendment). Therefore, the Court could appropriately find that, like in *Katz*, the defendant communicated in a way that "entitled [him] to assume that the words he [communicated would] not be broadcast to the world." *See id.* at 149 (quoting *Katz v. United States*, 389 U.S. 347, 352 (1967)). *See also infra* notes 239–40 and accompanying text. Finally, it is worth noting that while standing was not discussed by the Washington Court of Appeals or analyzed in the parties' briefs, it appears that the trial court determined that *Hinton* had standing. *See* Brief of Appellant, *supra* note 196, at \*7–8 (stating the trial court held that *Hinton* had neither automatic standing nor general standing).

201. *Jones, supra* note 69, at 935 (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). *See also supra* note 68–69 and accompanying text.

The next question to consider is whether or not this expectation of privacy over sent text messages is “shared by society.” As studies have indicated, people consider their cell phones to be at least as private of a device as a computer, if not more so.<sup>202</sup> Other than contact information, text messages are the most commonly stored items on a phone.<sup>203</sup> Additionally, text messages are becoming the most popular mode of communication.<sup>204</sup> As Smith indicates, such findings are sufficient to show that society shares an expectation of privacy in text messages.<sup>205</sup>

Hinton’s expectation of privacy, however, was narrower than simply his text messages in general. He expected that the text messages he sent to Lee, which were saved on Lee’s phone, would be private.<sup>206</sup> Research indicates that the specific question of whether or not society possesses a shared expectation of privacy in sent text messages stored in another’s device has not yet been analyzed by case law, nor has it been researched in any studies. Still, it is possible to develop an answer to this question by considering a variety of different, but related, studies. Because cell phones are practically always attached to one’s person,<sup>207</sup> it is reasonable to think that the recipient is carrying the phone when the message is sent. Moreover, people are reluctant to give others access to their cell phones.<sup>208</sup> If the average person is in near-constant possession of her cell phone and does not let others use it, there is a low probability that another person will view her text messages. Considering these findings, it is likely that these sent text messages are not exposed to third parties when they are sent.

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202. See *supra* notes 28–29 and accompanying text.

203. See *supra* note 48 and accompanying text.

204. See *supra* note 175 and accompanying text.

205. See *Smith v. Maryland*, 442 U.S. 735, 743 (1979). “Although subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret.” *Id.* The fact that the Court thought to consider if scientific studies could measure expectations strongly indicates that it would be a sufficient indicator in the *Katz* analysis.

206. See *State v. Hinton*, 280 P.3d 476, 483 (Wash. Ct. App. 2012), *rev’d en banc on other grounds*, No. 87663-1, 2014 WL 766680 (Wash. Feb. 27, 2014) (“That an individual may have a reasonable expectation of privacy in certain contents of his or her own cell phone, including the sent and received text messages that are stored on the phone, is simply not at issue here.”).

207. See *id.* at 489 (Van Deren, J., dissenting) (“[M]any, if not most, mobile phone owners are in immediate possession of their phones at all times.”).

208. Urban et al., *supra* note 27, at 11–13. Ninety percent of cell phone owners in the survey stated they would “definitely not allow” strangers to borrow their phones. *Id.* at 12. Only half of cell phone owners stated they would “definitely allow” a spouse or close family member to borrow the phone. *Id.* Importantly, the phrasing of the survey question highlighted that the cell phone would be borrowed with the person’s knowledge and permission. *Id.* Moreover, when asked why they would not allow others to borrow their phones, most responses contained concerns about privacy. *Id.* at 12–13. Four percent even specified their concern that the borrower would look through emails, texts, pictures, or contacts. *Id.* at 13.

Furthermore, the Court would merely consider whether the shared expectation exists, not whether such expectation is reasonable.<sup>209</sup> The Court need look no further than the judicial system to identify such an expectation, as the sharing of intimate text messages is common in divorce litigation.<sup>210</sup> “More than 90% of America’s top divorce attorneys said they have seen a spike in the number of cases using evidence from smartphones in the past three years.”<sup>211</sup> These numbers strongly suggest an expectation among society that text messages are a safe mode of communication for highly private affairs, even though such messages are often used as evidence in litigation. Such evidence would indicate to the Court that, whether reasonable or not, society shares an expectation that sent text messages will be kept private.

Based on the aforementioned studies and cases, the Court should find that privacy expectations over sent text messages, even if stored in another’s device, are constitutionally protected under *Katz*. The Court would assume that a defendant like Hinton had a subjective expectation of privacy—if it even considered that factor—and it would hold that the defendant’s expectation of privacy is one shared by society because studies suggest the intended recipient will read the sent text message. As the following paragraphs examine, however, the exceptions under *Katz* as applied to the facts set forth in Hinton require further analysis.

## 2. The Third-Party Doctrine

While Hinton’s claims would presumably meet the *Katz* test, an application of the third-party doctrine would be problematic for the defendant in a number of ways. As the underlying facts occurred in 2009, and iMessage was not released until 2011,<sup>212</sup> Hinton’s text message must have been sent through a cellular carrier in order to reach Lee’s iPhone. Consequently, the content of the message would be disclosed to the third-party cellular carriers and, under *Smith*, such disclosure would undermine any Fourth Amendment

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209. See *supra* note 70 and accompanying text.

210. Patricia Reaney, *Be Careful What You Text If You’re Heading for Divorce*, REUTERS (Feb 20, 2012, 10:02 AM) [hereinafter Reaney 1], <http://www.reuters.com/article/2012/02/20/us-divorce-texting-idUSTRE81J0V020120220>. Additionally, the prevalence of “sexting” suggests that “texters” think they are communicating with the intended people. Roughly 30% of U.S. teenagers reportedly “sext,” or send text messages containing nude photos. Patricia Reaney, *Sexing Common Behavior Among U.S. Teens—Study*, REUTERS (Jul. 2, 2012, 4:23 PM), <http://www.reuters.com/article/2012/07/02/sexting-teens-study-idUSL2E8I26PF20120702>.

211. Reaney 1, *supra* note 210.

212. See Don Reisinger, *Apple Unveils iCloud, Shows Off Features of Lion, iOS 5*, CNET (June 6, 2011, 12:02 PM), [http://news.cnet.com/8301-13506\\_3-20069336-17/apple-unveils-icloud-shows-off-features-of-lion-ios-5/](http://news.cnet.com/8301-13506_3-20069336-17/apple-unveils-icloud-shows-off-features-of-lion-ios-5/) (“Apple showed off a new feature, called iMessage, allowing iPhone, iPad, and iPod Touch users to send text messages, videos, photos, and more to each other.”).

protections.<sup>213</sup> Therefore, if it applies the third party doctrine, the Court would likely hold that the defendant did not have an expectation of privacy in the sent text message.

The Court could, however, use cases like *Hinton* as an opportunity to adopt Justice Sotomayor's assertion that the third-party doctrine is not workable in today's technology-dependent society. As the *Hinton* dissent highlighted, Sotomayor declared the doctrine "ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."<sup>214</sup> While no other justice joined in Sotomayor's concurrence, it is possible that a majority of the Court agrees with her contention that the third-party doctrine ought to be rethought in light of advancing technology. Moreover, as Ms. O'Connor and the *Hinton* dissent both indicate, the Court may turn to the rationale found in the *Smith* dissent to determine that technological complexity and the vast amounts of information stored in cell phones have rendered the doctrine ineffective.<sup>215</sup>

In addition to the third-party disclosure that occurs when text messages are sent, the possibility of intentional disclosure might also factor into the Court's application of the third-party doctrine. Although studies suggest that the intended recipient accesses the device at the time a text message is sent, no studies have examined the likelihood that the intended recipient will refrain from disclosing the contents of that message to a third party. One can disclose the contents of received text messages in numerous ways,<sup>216</sup> but there are currently no studies pertaining to the prominence of such actions.

Nevertheless, as the majority recognizes, the mere possibility of intentional disclosure may be sufficient for the Court to find that there is no expectation of privacy for sent text messages.<sup>217</sup> The majority's refusal to distinguish text messages from pager messages<sup>218</sup> is concerning on this point, however, because text messages can include images, audio, and even video.<sup>219</sup> The ability to converse through a variety of formats allows "texters" to "record

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213. See *supra* notes 100–101 and accompanying text.

214. See *supra* note 172 and accompanying text.

215. See *supra* notes 103–105 and accompanying text; *State v. Hinton*, 280 P.3d 476, 487 (Wash. Ct. App. 2012), *rev'd en banc on other grounds*, No. 87663-1, 2014 WL 766680 (Wash. Feb. 27, 2014) (Van Deren, J., dissenting) (quoting *Smith v. Maryland*, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting)).

216. On an iPhone, one can: directly forward a text message; copy and paste the text message's contents into another text conversation; share its contents with people nearby by reading it aloud or allowing others to read it; or take a screenshot of the conversation and send that image to a third party or post it on the internet.

217. See *supra* notes 151–155 and accompanying text.

218. See *id.*

219. See *supra* note 37.



their most private thoughts and conversations.”<sup>220</sup> Moreover, text messages allow more characters per message than do pager messages, allowing for deeper conversations.<sup>221</sup> Considering that cell phone text messages lend themselves to more private conversations, it is less likely that one would intentionally disclose their contents. Therefore, if the Court were to determine that the third-party doctrine does not apply due to advancing technology, distinguishing text messages sent via cell phones from ones via pager could further the rationale for such a holding.<sup>222</sup>

### 3. The Letter Analogy

The majority relied extensively on the letter analogy in defeating Hinton’s claims.<sup>223</sup> In order to evade this exception, the Court would need to decide that text messages should not be analyzed under the doctrine. The dissent accurately determined the majority’s analysis to be problematic. First, the majority repeatedly contended that the device to which Hinton was sending text messages could have been in anyone’s possession.<sup>224</sup> As previously stated, however, studies show that cell phone owners are resistant to let others use their phones.<sup>225</sup> Such resistance indicates a high probability that when someone sends a text message, the intended recipient will be in possession of the device and will read it.

The second problem with applying the letter doctrine to text messages is that the “termination upon delivery” rationale is practically moot.<sup>226</sup> Considering, as does Ms. O’Connor, the speed of today’s cell phone networks, the transmission of a text message is nearly instantaneous.<sup>227</sup> This technological advancement in communication leaves no opportunity to intercept the message and to prevent it from reaching its destination. This problem, however, would likely not be significant, as the doctrine’s extension

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220. *United States v. Park*, No. CR 05–375 SI, 2007 WL 1521573, at \*8 (N.D. Cal. May 23, 2007).

221. *See supra* note 36 and accompanying text; Sam Grobart & Ian Austen, *The BlackBerry, Trying to Avoid the Hall of Fallen Giants*, N.Y. TIMES, Jan. 29, 2012, at BU5 (noting that “a pager message is so tiny that it makes a tweet look like ‘The Iliad’”).

222. It is worth briefly noting that, regardless of the Court’s stance on the third-party doctrine for text messages, the exigent circumstances doctrine simply does not apply in *Hinton*. As the phone network would have saved the content of Hinton’s text message for two weeks, Detective Sawyer would have had ample opportunity to obtain a warrant to search Hinton’s text message. Consequently, the Court would not consider this exception. *See supra* notes 120–121 and accompanying text.

223. *See supra* notes 156–162 and accompanying text.

224. *See supra* notes 151, 155 and accompanying text.

225. *See supra* note 208 and accompanying text.

226. *See supra* note 157 and accompanying text.

227. *See supra* notes 109–110 and accompanying text.

to emails and messages via pager have been successful despite the inability to intercept messages in these instances.<sup>228</sup>

Finally, and most importantly, the utilization of cell phone text messages differs greatly from that of the communication methods that currently fall under the letter doctrine. Today's smartphones, such as the iPhone owned by Lee, are not merely advanced pagers but rather computers in the full sense of the word.<sup>229</sup> Unlike emailing or paging, texting "has become the predominant form of communication."<sup>230</sup> Moreover, the conversational nature and design of modern text messaging challenges the application of the letter analogy doctrine.<sup>231</sup> The majority failed to recognize that it is not the mere complexity of the device but rather the way it is used in society that affects its legal analysis.<sup>232</sup> The dissent's comparison of texting to phone calling reinforces this conversational aspect by referring to a third party viewing a text message as an "eavesdropper."<sup>233</sup> This terminology signifies that the third party observes a glimpse of a conversation rather than merely one message in a series of exchanged letters. To search a text message is, therefore, more like eavesdropping on a conversation than inspecting a letter in the mail.

Should the Court address the letter doctrine, it would likely hold that it does not extend to the uniquely advanced, popular, and conversational communication of text messaging. "Inevitably, such a dramatic shift will result in new situations that may implicate a person's Fourth Amendment right to protection from unlawful search or seizure. It happened before: with the advent of the 'vital role that the public telephone [had] come to play in private communication . . .'"<sup>234</sup> Considering the vital role text messages now play in private communications, the Fourth Amendment protections they afford should be independent of the letter doctrine as well. The Court may therefore refuse to extend the letter doctrine by finding Hinton's decision to text Lee analogous to the decision made in *Katz* to communicate in an enclosed phone booth. By sending Lee a text message rather than calling him, Hinton reasonably thought that his conversation would be excluded from uninvited eavesdroppers.<sup>235</sup>

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228. See *supra* note 156 and accompanying text.

229. See *supra* note 95 and accompanying text.

230. See *supra* note 176 and accompanying text.

231. See *supra* note 112 and accompanying text.

232. See *supra* notes 113, 153–155 and accompanying text.

233. See *State v. Hinton*, 280 P.3d 476, 489–90 (Wash. Ct. App. 2012), *rev'd en banc on other grounds*, No. 87663-1, 2014 WL 766680 (Wash. Feb. 27, 2014) (Van Deren, J., dissenting).

234. Monica Mark, *GPS Tracking, Smartphones, and the Inadequacy of Jones and Katz*, 27 WTR CRIM. JUST. 36, 36 (2013) (quoting *Katz v. United States*, 389 U.S. 347, 351–52 (1967)).

235. See *supra* notes 111–112, 179–181 and accompanying text.

### C. Future Considerations

As the analysis above illustrates, the Court would likely find that the original text message of a defendant falls under Fourth Amendment protections under *Katz* and that the third-party doctrine is more likely than the letter doctrine to defeat such protections. However, the Court ought to recognize that setting such boundaries could set an unworkable precedent. Smartphones have advanced since *Hinton*, and that would alter the analysis if such a scenario were to happen today. First, smartphones can be configured in such a way that, when a text message is received, the content of the message is not displayed until the phone is unlocked and the texting application is open.<sup>236</sup> Furthermore, unlocking a smartphone's home screen can require typing in a password.<sup>237</sup> Therefore, even if the phone is in another's possession when a message is sent, it is possible that they will not be able to read the content of the message due to these security features. In such a situation, which was not present in *Hinton*, the Court would need to decide whether or not the officer violated the "texter's" constitutional rights by unlocking the user's cell phone without a warrant in order to read the incoming message. While not as invasive as engaging in a text message conversation, unlocking a phone in order to read a text message's content is significantly more invasive than merely observing such content as it appears on the phone's home screen. The Court could appropriately find, however, that this higher degree of invasion relates only to the user's privacy, not the sender's. So far, courts have only analyzed the cell phone owner's rights in such a situation, not the rights of the individual sending the text message.<sup>238</sup>

The Court must also consider that advancing technology allows text messages to be sent over the internet instead of through cellular networks.<sup>239</sup> If a message is sent through Apple's iMessage service, the content of that message is not stored on Apple's servers, and an officer would be unable to otherwise obtain the message's content from Apple.<sup>240</sup> While iMessage only works if the text message is sent between Apple devices, the growing popularity of the iPhone market, as well as the recent decrease of text messages sent through cellular networks, strongly indicates an increasing

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236. See Sharon Vaknin, *Five iPhone Tricks to Beef up Your Texting Skills*, CNET (May 11, 2012, 3:24 PM), <http://bit.ly/J6652n>.

237. See Heather Kelly, *How to Protect Your Digital Data from a Vengeful Ex*, CNN (Feb. 4, 2013, 5:14 PM), <http://bit.ly/14CfMCy> (noting that 40% of individuals password-protect their phones in the United States).

238. See Gershowitz, *supra* note 6, at 1149–50.

239. See *supra* notes 53–58 and accompanying text.

240. Telephone Interview with Senior Technical Advisor, Apple, Inc. (Jan. 26, 2013); see also Declan McCullagh & Jennifer Van Grove, *Apple's iMessage Encryption Trips up Feds' Surveillance*, CNET (Apr. 4, 2013, 4:00 AM), [http://news.cnet.com/8301-13578\\_3-57577887-38/apples-imessage-encryption-trips-up-feds-surveillance/](http://news.cnet.com/8301-13578_3-57577887-38/apples-imessage-encryption-trips-up-feds-surveillance/).

likelihood that a third-party server no longer has access to the contents of a text message.<sup>241</sup> Officers would have an easier time retrieving information from Facebook, however, as judges have authorized warrants to search individuals' entire Facebook accounts, including chats.<sup>242</sup> Going forward, courts must recognize that this changing technology may render the third-party doctrine inapplicable to text message situations because many text messages are not in fact disclosed to third party servers.

The phenomenon that weakens the application of the third-party doctrine, however, strengthens the application of the exigent circumstances doctrine. As more text messages are sent through routes other than cellular networks, there is no longer an assurance of temporary storage with respect to message content.<sup>243</sup> This changing reality presents a "now or never" situation for officers in which failure to immediately search or seize could result in a destruction of the evidence.<sup>244</sup> Consequently, advancing technology strengthens the applicability of the exigent circumstances doctrine while it weakens that of the third-party doctrine.

#### CONCLUSION

Considering the popularity of text messaging as a means of communicating private information, this author concludes that the U.S. Supreme Court would hold that a defendant like Hinton had a legitimate expectation of privacy under *Katz* in the text messages sent to another's phone and read by an officer. Moreover, the Court would reject the *Hinton* majority's extension of the letter doctrine to text messages sent via cell phones due to the popularity and conversational nature of modern text messaging. The Court is more likely, however, to consider the third-party doctrine as an exception to *Katz* that would undermine the defendant's privacy expectations. If a majority of the

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241. See *supra* notes 53–58 and accompanying text; see also Mikey Campbell, *Apple Sees 2 Billion iMessages Sent Daily from Half a Billion iOS Devices*, APPLE INSIDER (Jan. 23, 2013, 3:37 PM), <http://bit.ly/W19yKd>.

242. Jeff John Roberts, *A New U.S. Law-Enforcement Tool: Facebook Searches*, REUTERS (Jul 12, 2011, 11:58 AM), <http://www.reuters.com/article/2011/07/12/us-facebook-idUSTRE76B49420110712>.

243. See *supra* notes 89–91 and accompanying text.

244. See *supra* notes 81–82, 120–122 and accompanying text. A new smartphone app called Snapchat allows text messages to be sent and then "self-destruct" a few seconds after the message has been viewed. Jenna Worthham, *A Growing App Lets You See It, Then You Don't*, N.Y. TIMES, Feb. 9, 2013, at A1. The growing popularity of Snapchat has been noted by Facebook, which has created its own impermanent messaging app called Poke. *Id.* In November 2013, Snapchat rejected a \$3 billion acquisition offer from Facebook. Evelyn M. Rusli & Douglas MacMillan, *Snapchat Spurned \$3 Billion Acquisition Offer from Facebook*, WALL ST. J. (Nov. 13, 2013, 1:43 PM), [http://blogs.wsj.com/digits/2013/11/13/snapchat-spurned-3-billion-acquisition-offer-from-facebook/?mod=WSJ\\_LatestHeadlines](http://blogs.wsj.com/digits/2013/11/13/snapchat-spurned-3-billion-acquisition-offer-from-facebook/?mod=WSJ_LatestHeadlines). Impermanent messaging would even further increase an officer's sense of urgency to secure the information contained in these messages.

Court shares Justice Sotomayor's views as expressed in her *Jones* concurrence, the Court could use a case like *Hinton* to determine that the third-party doctrine is no longer useful in today's technological world. If, however, a majority of the Court disagrees with Justice Sotomayor's suggestion and focuses instead on the possibility of intentional disclosure, it would probably find that the defendant had no Fourth Amendment protections under the third-party doctrine. Moreover, should the Court recognize recent developments in text message communications, it would likely disregard the third-party doctrine altogether but nonetheless find the exigent circumstances determinative because officers could not access a text message's content through alternative means.

Despite the continuing evolution of electronic communication, the Court cannot ignore that text messaging has come to play a vital role in American society as a prevalent way to convey private information. The future undoubtedly promises new and unforeseeable forms of electronic communication. The ability to turn to a uniform body of law surrounding text messages would likely save future courts the headache of applying increasingly obsolete analogies.

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