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ROOM DEBATE

A Running Commentary on the News

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Your Boss and Your BlackBerry

By *THE EDITORS*

Karen Bleier/Agence France-Presse — Getty Images

The Supreme Court agreed last week [to decide](#) whether a police department in Ontario, Calif., violated the privacy rights of an employee when it inspected personal text messages of a police sergeant on a work-issued pager. While [that case](#) concerns public employees, a federal judge involved in the proceedings asked, “What are the legal boundaries of an employee’s privacy in this interconnected, electronic-communication age?”

Employers were unlikely to tap your office phone for personal calls, but what about monitoring electronic messages? With e-mail and texting necessary on the job, it becomes hard to avoid all personal communications on office computers. Various [measures](#) to protect workers’ privacy have been proposed in Congress, but have never been approved. Will privacy law in the workplace be reshaped by the proliferation of devices from computers to work-issued BlackBerries?

- [Timothy B. Lee](#), Princeton’s Center for Information Technology Policy
- [Jennifer Stisa Granick and Kurt Opsahl](#), Electronic Frontier Foundation
- [Orin Kerr](#), George Washington Law School
- [Kashmir Hill](#), blogger
- [Jonathan Zittrain](#), Harvard Law School

Snooping Isn’t the Answer

Timothy B. Lee is an adjunct scholar at the Cato Institute and a member of the Center for Information Technology Policy at Princeton University. He blogs at the [Bottom-Up](#).

There’s never been a better time to be an American worker. The American economy is steadily replacing back-breaking farm labor and tedious factory work with comfortable white-collar jobs. Among the many benefits of working in a modern office is that white-collar employers frequently turn a blind eye to employees engaging in personal activities “on the clock.” Many office workers make personal calls on their office phones and send personal e-mails from their office computers.

Permissive workplace policies are an important way to attract and retrain the best workers. They are also one side of a *quid*

Employers should recognize that micromanaging their

pro quo: the same employee who spends an afternoon ordering Christmas presents on Amazon.com may be expected to take time away from his family to deal with a weekend emergency at work. employees is counterproductive.

As the line between company and personal communications blurs, employees are understandably worried about their privacy. But trying to regulate employer policies on the use of company-owned equipment is the wrong approach.

Close

As we see in the [City of Ontario v. Quon](#) case, there's a real danger of the courts getting bogged down in arguments about the minutia of internal corporate policies — both official and tacit. The courts have more important things to do than parse the fine print of employee handbooks.

Fortunately, well over 80 percent of Americans have personal cellphones. And employees who make calls or send text messages using these devices enjoy the full protection of federal electronic privacy laws. So employees who are worried about employer snooping can protect themselves by using their personal cellphones for sensitive personal communications.

For their part, employers should recognize that snooping on and micromanaging their employees is counterproductive. The best workers will leave, and the rest will be less willing to put in extra hours when the company needs them most. Treating your workers with respect isn't just the right thing to do; it's also good for the bottom line.

Taking Reality Into Account

Jennifer Stisa Granick and Kurt Opsahl are lawyers at the Electronic Frontier Foundation, which focuses on individual rights in the digital age.

Today, employers expect employees to be available and working well beyond the hours of nine to five. In fact, the increasingly porous boundaries between work and personal time may be one of the defining characteristics of the last decade.

Parents now [check their BlackBerries](#) first thing upon waking and last thing before going to bed. And employers issue mobile phones and laptops precisely so employees will take these gadgets home and incorporate them into their life. (After all, we are far [more productive](#) if we don't have to step away from our work environment to make doctor's appointments or get our holiday shopping done.)

Separate phones and computers for work and personal matters isn't the solution when boundaries between work and personal life are so porous.

Separate phones and computers for work and personal matters are no solution because it's simpler and more efficient to have just one device.

Privacy law should take this reality into account.

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Watch the Technology

Orin Kerr, a professor of law at George Washington University, contributes regularly to [The Volokh Conspiracy](#). He is an expert in computer search and seizure and electronic privacy law.

Employee privacy rights always depend on the technology widely in use in the workplace, and that technology can change very quickly. As a result, figuring out how new technologies affect employee privacy rights requires hitting a moving target. And it means the future may be very different from the present.

Think back to 15 years ago, around 1995. Few people had cellphones or Internet access at home. Most employees who had Internet access at work relied heavily on their work account. If employers wanted to monitor employees, they could tap the office phone and monitor the employees' work account and monitor most of their communications.

As smart phones get better, employees will just take their communications off their work networks entirely.

Now fast forward a decade, to around 2005. By 2005, most people have cellphones, and if they have Internet access at work they probably have it at home, too. They have lots of personal accounts beyond their work, and they probably access them from work.

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Employers' Rights

Kashmir Hill is an associate editor of [Above the Law](#), a legal blog. She writes about privacy issues at ["The Not-So Private Parts"](#) on [True/Slant](#).

Where does work end and your personal life begin? Now that the office extends into the pants pocket where your BlackBerry resides, it's more and more difficult to draw that line. At the same time, our personal life has crept into our work hours and onto our work devices. Most of us check Facebook accounts from office computers and exchange personal text messages with our work-issued phones.

Employers have the right to monitor what their employees do on work equipment and work accounts. And they should have that right. They need to make sure that employees aren't using company resources to run an eBay business or spending the majority of the work day looking at porn.

Employers should have the right to watch what their workers do on company equipment.

But the law is evolving with regard to the extent to that right. In several recent cases,

courts have found that employers don't have the right to capture e-mails that are sent on work computers but sent from personal accounts, like Yahoo and Gmail. Both practically and legally, that seems like the clearest and easiest line to draw when it comes to employee privacy.

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Total Monitoring on the Web

Jonathan Zittrain, a professor of law at Harvard Law School and co-founder of the Berkman Center for Internet and Society, is the author of "The Future of the Internet — And How to Stop It."

Cases like this feel dated already. First, many more employees bring their own network infrastructure to the office. An iPhone or BlackBerry can work without local Internet access, and the era of expensive text messaging (including via pagers) is winding down. It's still priced way above carriers' costs, of course, but it's affordable to the public at large without requiring employer help.

Second, employers can redraft their handbooks to give themselves as much latitude as possible in snooping on employees. In the private sector there's not much workplace privacy left unless you use your own equipment and network.

Third, so often the sources of disclosure of private information are the people with whom we communicate. (I suppose Tiger Woods's texts would be a recent and well-known example — they came from the recipients themselves.)

More privacy issues will arise when data and applications move to Internet-hosted computing.

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