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Searches and Seizures: The-Times-They-Are-A-Changin' or Technology Issue Avoidance, City of Ontario, Cal. v. Quon, 130 S. Ct. 2619 (2010)

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CASE COMMENT

SEARCHES AND SEIZURES: THE-TIMES-THEY-ARE-A-CHANGIN' OR TECHNOLOGY ISSUE AVOIDANCE

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

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I. FACTS

Petitioner, the Ontario Police Department, provided text message capable pagers restricted to a monthly character limit to its officers.[1] Officers who went over the character limit paid any overage charges.[2] After several months of overage charges, Petitioner audited records of the text messages to determine whether the character limit was sufficient for normal work use, or if the overage charges resulted from non-work messages.[3] Petitioner allegedly disciplined Respondent, Officer Jeff Quon, after viewing text messages from his pager.[4]

Respondent brought action against Petitioner for a Fourth Amendment violation in the U.S. District Court,[5] and the District Court entered judgment in favor of Petitioner.[6] Respondent appealed,[7] and the

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1. City of Ontario v. Quon, 130 S. Ct. 2619, 2625 (2010). Petitioner contracted with Arch Wireless to provide service for the pagers. *Id.* Pagers were primarily given out to the Police Department's SWAT team, of which Respondent was a member. *Id.*

2. *Id.* "Duke suggested that Quon could reimburse the City for the overage fee rather than have Duke audit the messages." *Id.*

3. *Id.* at 2626.

4. *Id.* On average, Respondent sent or received 28 messages per day. *Id.* Only 3 of these were work related messages. *Id.* In addition, many of the text messages sent by Respondent were sexually explicit. *Id.* The majority of the text messages sent or received by Respondent were from his wife, from whom he was separated, another Police Department employee, with whom he was romantically involved, and another member of the Police Department SWAT Team. *Id.*

5. *Id.* Respondent also brought action against Arch Wireless, the company the Police Department had contracted with to provide service for the pagers. *Id.* Respondent raised these claims under the Stored Communications Act (SCA), alleging that Arch Wireless violated the SCA when it turned over the transcripts of Respondent's messages to Petitioner. *Id.* However, Respondent lost this claim on summary judgment. *Id.*

6. *Id.* at 2627. The district court entered this judgment after a jury concluded that

Ninth Circuit Court of Appeals reversed in part, holding that while Respondent had a reasonable expectation of privacy, Petitioner's search was not reasonable.[8] The Supreme Court of the United States granted certiorari.[9]

HELD, Petitioner's search was reasonable and did not violate the Fourth Amendment.[10]

II. HISTORY

In *Burdeau v. McDowell*, the Supreme Court declared the Fourth Amendment to apply not only to police activity, but to any government activity.[11] Respondent brought action against Petitioner, a Special Assistant to the Attorney General of the United States, for the return of documents in Petitioner's possession.[12] The Court stated emphatically that the Fourth Amendment restrained any actions of sovereign authority.[13] The Court continued that even though Petitioner was not a police officer, if Petitioner had taken Respondent's belongings from his office, Petitioner's actions would fall under the Fourth Amendment.[14]

In *O'Connor v. Ortega*, the Supreme Court tackled searches by government employers.[15] The Court held that a Fourth Amendment search would be upheld when it is reasonable at its inception, as well as later in its scope of intrusion.[16] Respondent, an employee of a state hospital, filed suit against Petitioner, his employer, after Petitioner searched Respondent's office and seized personal items that were later used in Respondent's discharge.[17] Petitioner allegedly entered

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Id.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 2633.

11. Burdeau v. McDowell, 256 U.S. 465, 476 (1921).

12. *Id.* at 470. Respondent's documents were taken by his former employer after an agent of his employer seized his office and broke into a safe contained therein. *Id.* at 470-71. The documents were then given to Petitioner in order to help further the case against Respondent. *Id.*

13. *Id.* at 475.

14. *Id.* Ultimately, the Court ruled that because Petitioner obtained the documents by the release of a third party, there were no grounds for an illegal search. *Id.*

15. O'Connor v. Ortega, 480 U.S. 709, 712 (1987).

16. *Id.*

17. *Id.* at 713. The items obtained by the search were a Valentine's Day card, a photograph, and a book of poetry sent to Respondent. *Id.* Hospital officials later used this evidence to impeach the credibility of the sender in Respondent's disciplinary proceedings. *Id.* Among the other items seized by the search were billing documents of one of Respondent's private patients. *Id.*

Respondent's office with the intent to inventory and secure state property.[18] This action is usually taken after an employee has been dismissed, yet at the time, Respondent was on administrative leave.[19] At trial, both parties gave evidence which showed that Petitioner's intentions may have been to conduct a search to investigate violations of workplace rules.[20]

The Court concluded that an employee's legitimate expectation of privacy must be balanced with the government's need to oversee efficient operation of the workplace.[21] Because of the need for this balance, the Court ruled that a warrant should not be required for a government employer to carry out everyday activities.[22] Instead, the Court allowed an employer's intrusions to be judged by a standard of reasonableness.[23] For an investigatory intrusion, the Court required reasonable grounds that the search would turn up evidence of work-related misconduct.[24] For a non-investigatory intrusion, there must be reasonable grounds for a work-related purpose.[25] Any intrusion, the Court clarified, must not stray too far from its purpose or it will be excessively intrusive.[26] Due to the controversy over Petitioner's search, the Court remanded the case for resolution on that issue.[27]

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18. *Id.* Although hospital officials alleged that this was the primary focus of the intrusion, the investigators did not separate state property from Respondent's personal property. *Id.*

19. *Id.*

20. *Id.* Investigators never made a formal inventory of the property in the office. *Id.* at 714. Instead, all of the documents contained in the office were simply put into boxes and placed in storage for later retrieval. *Id.*

21. *Id.* at 725.

22. *Id.* at 722. "In our view, requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business. . . ." *Id.* The Court also later stressed the difference in goals involving potential searches by employers and police. *Id.* at 724. Police investigators require probable cause for their searches, but that standard would require too much of employers who simply want to increase workplace efficiency. *Id.* "The delay in correcting the employee misconduct caused by the need for probable cause rather than reasonable suspicion will be translated into tangible and often irreparable damage to the agency's work, and ultimately to the public interest." *Id.*

23. *Id.* at 725.

24. *Id.* at 724-25. The Court pointed out that even though the nature of the intrusion may be investigatory in nature, it is a far cry from the interest involved in an investigation carried out by law enforcement. *Id.* at 724. Employers are not necessarily looking to enforce criminal law. *Id.* Instead, they are simply focused on improving the efficiency of the workplace by rooting out any misfeasance or mismanagement of their employees. *Id.*

25. *Id.* at 725.

26. *Id.* at 726.

27. *Id.* at 729.

Next, the Court in *Olmstead v. United States* considered the claim that wiretapping violated the Fourth Amendment.[28] In considering this, the Court held that because wiretapping did not seize any physical object, wiretapping did not constitute an illegal search.[29] The Court defined an illegal search as the misuse of governmental force to search or seize a person's belongings.[30] A wiretap, the Court concluded, did not resemble that misuse of power.[31] The Court emphasized that an illegal search must be a search of material things.[32] Because wiretapping did not search or seize any material thing, the Court held that it was not an illegal search.[33]

Later, however, the Court overruled this decision in *Katz v. United States*.[34] In this case, the Court in *Katz* focused on the idea that the Fourth Amendment protected people and not simply properties from the government.[35] Thus, the Court held that an illegal search is possible even without physical intrusion.[36]

With facts very similar to those of *Olmstead*, the Court in *Katz* relied upon whether the petitioner could have expected privacy in his actions.[37] Because one can easily expect that someone who places a phone call assumes that call to be private, the Court held the search was illegal.[38]

III. INSTANT CASE

In the instant case, the Court applied the rule from *O'Connor*.[39] However, the Court declined to address whether Quon had a reasonable

28. Olmstead v. United States, 277 U.S. 438, 455 (1928).

29. *Id.* at 464-66.

30. *Id.* at 463.

31. *Id.* at 464. "The amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only." *Id.*

32. *Id.*

33. *Id.* at 464-66.

34. Katz v. United States, 389 U.S. 347, 353 (1967).

35. *Id.*

36. *Id.*

37. *Id.* at 351. In both cases, investigators had amassed evidence after placing wiretaps on phones used by the defendants. *See id.* at 348; Olmstead, 277 U.S. at 455.

38. *Katz*, 389 U.S. at 352-53. "One who occupies [a phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Id.*

39. City of Ontario v. Quon, 130 S. Ct. 2619, 2628 (2010).

expectation of privacy as to his text messages.[40] Instead, working with the assumption that Quon did have a reasonable expectation of privacy in his text messages, the Court assumed that a search of text messages is no different from a search of an office.[41]

It appeared that the Court hesitated to make a firm rule regarding text messages because it was not clear as to the text message's place in society.[42] Different opinions were given by the Court as to whether personal use of a company owned pager was appropriate.[43] The Court regarded the pager's popularity as the major issue in whether a legitimate expectation of privacy in one could exist.[44]

Given this popularity, the Court saw that society might see a pager as a means of self-expression or self-identification.[45] However, the Court also recognized that the pager's popularity meant that employees should probably have access to their own pagers, making company owned pagers not necessary for personal needs.[46] The *Katz* and *Olmstead* cases were also brought up by the Court as examples of how time can change society's perception of privacy.[47]

Due to its unwillingness to delve into the pager's place in society, the Court simply applied the *O'Connor* rule.[48] The Court determined that Petitioner's intention, to determine whether the overage charges were the result of an insufficient character limit, satisfied *O'Connor's*

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40. *Id.* at 2629-30.

41. *Id.* at 2630. It is interesting that while much is made of Respondent's expectation of privacy in his text messages, little is made about whether the *O'Connor* rule is appropriate here. This is because both Petitioner and Respondent accepted that the principle of law from *O'Connor* controlled the issue. *Id.* Perhaps if Respondent or Petitioner had argued differently, the Court would have been forced to deal with the technology issues involved in the case more directly.

42. *Id.* at 2630 "[T]he Court [has] difficulty predicting how employees' privacy expectations will be shaped by . . . changes or the degree to which society will be prepared to recognize those expectations as reasonable." *Id.*

43. *Id.* at 2629

44. *Id.* at 2630.

45. *Id.*

46. *Id.* The Court, however, also cites an *amici* brief which argues that employers often expect or tolerate personal use of equipment by employees because it can increase worker efficiency. *Id.* at 2629-30. This seems logical, in that if a worker uses the same device to conduct both personal and work-related activities, the worker may be able to respond more efficiently to those work-related activities. However, the facts of the instant case provide a good example of where an employee used an employer-given device so much, that it was essentially a personal device.

47. *Id.* at 2629.

48. *Id.*

requirement that the employer's intrusion be for a non-investigatory, work related purpose.[49] By finding this, the Court then had to ask whether Petitioner's search was reasonable at its inception and in its scope.[50]

The Court viewed Petitioner's desire to prevent unnecessary spending by its employees as a legitimate work-related need.[51] In addition to being a reasonable way for Petitioner to determine whether the character limit was sufficient, the Court also accepted Petitioner's search as being reasonable in scope.[52] The Court highlighted that Petitioner limited its review of the text messages to only those messages which were sent or received during work hours, and only from two months, instead of every overage.[53]

The Court rejected the Ninth Circuit's argument that Petitioner's search was too intrusive because Petitioner had access to other ways of determining whether the character limit was sufficient.[54] The Court refused to acknowledge the Ninth Circuit's assertion that only the least intrusive search is allowed by the Fourth Amendment.[55] This approach, the Court warned, would open too many searches to hindsight-aided evaluations by the judicial system.[56]

IV. ANALYSIS

The instant case opinion expresses a strong desire to avoid ruling on issues that involve new or growing technologies.[57] Technology is

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49. *Id.* at 2630.

50. *Id.* at 2631.

51. *Id.*

52. *Id.* 2631-32. Even though Respondent's expectation of privacy was assumed by the Court, the extent of that expectation was still examined in order to determine the search's intrusiveness. *Id.* at 2631. Respondent had been told prior to the audit that his messages could be audited at anytime. *Id.* The Court also puts extra emphasis on Respondent's role as a police officer. *Id.* "As a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny . . . ." *Id.* These factors helped to lower Respondent's assumed expectation of privacy, giving Petitioner even more leeway in its audit of Respondent's messages. *Id.*

53. *Id.*

54. *Id.* at 2632. The lower court suggested that Petitioner could have simply warned Respondent that his messages would be audited the following month and then audited those messages to see if the character limit was sufficient. *Id.* Other suggestions by the lower court were to ask Respondent to count the messages himself, or to redact personal messages from the audit and supply Petitioner with the remaining messages. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 2629.

becoming more and more entrenched in the lives of Americans, and it is likely that the judiciary will see more cases concerning new technology. It must be questioned whether it is wise for the Court to avoid tackling these kinds of issues.

The Court hesitated because of the speed at which technology moves.[58] Technology can easily outpace the judicial system, and rulings on an issue involving technology can become quickly outdated. However, in expressing these doubts, the Court does not decide how much firm ground it does need to make a decision.[59]

Technologies can be born and die out in a relatively short amount of time. Likewise, societal expectations about technology can fluctuate just as quickly. If the judicial system refuses to rule on a fast moving technology at present, then it may never feel secure enough to do so in the future.

These results can be acceptable as long as the judicial system is provided with cases like the instant case, which can be decided on other grounds.[60] Yet, when presented with cases where it is necessary to decide an issue where technology is deeply involved, the courts cannot simply avoid the issue. The Court *in Quon* offered a solution to this problem by advising courts to make case-specific rulings in these situations.[61]

Justice Scalia's concurrence points out two potential problems with this plan.[62] First, Justice Scalia questions whether it is appropriate for the Court to avoid ruling on an issue.[63] Justice Scalia phrases this as a "disregard of duty."[64] Justice Scalia also sees this duty as forming principles of law that serve to guide private action.[65] If the Court avoids an issue or rules in a way specific only to the facts of a case, private action cannot be guided.[66]

Secondly, Justice Scalia believes that in avoiding a tough issue involving technology or making a case-specific ruling, the Court will still lead lower courts toward following the precedent set in the case.[67]

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58. *Id.*

59. *See id.* "A broad holding concerning employees' privacy expectations . . . might have implications for future cases that cannot be predicted. It is preferable to dispose of this case on narrower grounds." *Id.* at 2630.

60. *See id.*

61. *See id.* at 2629.

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

63. *Id.* "The-times-they-are-a-changin' is a feeble excuse for a disregard of duty." *Id.*

64. *Id.*

65. *Id.*

66. *See id.*

67. *Id.* "[L]ower courts will likely read the Court's self-described 'instructive' expatiation on how the *O'Connor* plurality's approach would apply here (if it applied) as a heavy-handed

In refusing to tackle the issue of whether Quon had a legitimate expectation of privacy, the Court handed down a ruling that assumes the *O'Connor* rule applied to the instant case facts.[68] Justice Scalia argues that in applying this rule, the Court is setting precedent that may not be a correct principle of law, but will nevertheless shape future litigation.[69]

The Court also put a strong emphasis on the societal expectations of electronic devices.[70] The Court wanted to avoid making a ruling where expectations may change.[71] In *Olmstead*, the Court refused to uphold an expectation of privacy concerning use of a phone.[72] *Katz*, however, saw the Court protect what it believed to be a legitimate expectation of privacy in communications from a phone.[73] In the instant case, the Court pointed out these contrary opinions as situations where it would avoid having decided a technological issue.[74] The Court even suggested that if the phone privacy issue were heard today, it might even have a different outcome.[75]

V. CONCLUSION

The *Quon* Court created a dangerous precedent in its decision to avoid ruling on whether Quon had a legitimate expectation of privacy. While the facts easily allowed the Court to decide the case through another avenue, the idea that the judicial system should avoid ruling on issues deeply rooted in growing technologies should be questioned.

At first glance, such advice seems useful. It allows courts to let society develop concrete expectations in a technology's use.[76] However, these concrete expectations may not form, due to the pace technology

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hint about how *they* should proceed." *Id.* (internal citation omitted).

68. *Id.* at 2630 (majority opinion).

69. *Id.* at 2635 (Scalia, J., concurring). "Litigants will . . . [use] the threshold question [of] whether the Fourth Amendment is even implicated as a basis for bombarding lower courts with arguments about employer policies, how they were communicated, and whether they were authorized, as well as the latest trends in employees' use of electronic media." *Id.* It is interesting that Justice Scalia sees this as problematic when he argues that instead of questioning whether the Fourth Amendment applies to messages on public employee-issued pagers but to any employee-issued pagers. It is likely that in opening the door to all employee-issued devices similar arguments would be brought into court.

70. *Id.* at 2630 (majority opinion).

71. *Id.*

72. Olmstead v. United States, 277 U.S. 438, 465 (1928).

73. Katz v. United States, 389 U.S. 347, 351-52 (1967).

74. *Quon*, 130 S. Ct. at 2629.

75. *Id.*

76. *See id.*

sets.[77] Issues can also arise that cannot be put off or ruled on a case-specific basis.

It is unlikely that the Supreme Court will ever be capable of understanding all the complexities of cutting edge technology.[78] However, the Justices of the Supreme Court are placed on the bench to serve the people of the United States.[79] We expect the Justices to rule in ways that are logical and based on the lifestyle of the average citizen.

It is not hard to imagine ideas concerning technology changing over time.[80] The decisions in *Olmstead* and *Katz* do not hinge on the technical intricacies of the phone, but on society's expectation of privacy.[81] The Court in *Olmstead* found it implausible that a man using a phone to speak to another outside the building might claim his calls to be private.[82] The Court in *Katz* recognized that even in public, the phone is not used for a public purpose.[83] Each Court reflected the opinion that it believed the average citizen at that time would agree with.

It may be argued that the instant case differs from *Olmstead* and *Katz*, in that the telephone had existed for much longer in both cases. Yet, telephones had gained widespread popularity some twenty years before the decision in *Olmstead*, and similarly text messages have been available to the public for nearly fifteen years before the decision in *Quon*.[84]

The Supreme Court has regularly held principles of law that were later overturned.[85] If at each time the court is simply reflecting society's

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77. For instance, there have been many media format technologies (HD-DVD, Laser Discs, Beta-Max) that were created and discontinued in relatively short order. As product cycles shorten due to the speed of innovation, it is likely that this may occur with even greater frequency.

78. This seems especially true with life-expectancies ever increasing. As Supreme Court Justices are given life terms and the position seems to be increasingly more politically oriented, many Justices can be expected to serve far into their old age. It is unfortunate that while we may place Justices on the bench with good intentions, they may inevitably grow disconnected from American society as a whole.

79. *See* U.S. CONST. art. III, § 1.

80. This is even more striking when we consider the effect the cell phone has had on the telephone. As the cell phone grows more popular, more people are forgoing the traditional telephone installation.

81. *See* Katz v. United States, 389 U.S. 347, 351-52 (1967); Olmstead v. United States, 277 U.S. 438, 465 (1928).

82. *Olmstead*, 277 U.S. at 465.

83. *Katz*, 389 U.S. at 351-53.

84. ANTON A. HUURDEMAN, THE WORLDWIDE HISTORY OF TELECOMMUNICATIONS 181 (2003). "At the end of the nineteenth century, access to a telephone was available in most urban centers . . . ."

85. *See* Lochner v. New York, 198 U.S. 45 (1905), *overruled by* Ferguson v. Skrupa, 32

wishes, it seems unlikely that it can be criticized. Likewise, while the Supreme Court may feel that expectations regarding text messages may change in the future, it must still make principles of law that apply today.

U.S. 726 (1963); Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ. 347 U.S. 483 (1954); Pennoyer v. Neff, 95 U.S. 714 (1877), *overruled by* Collins v. Youngblood, 497 U.S. 37 (1990).