LEGAL LIMBO:
THE SUPREME COURT'S DISCOMFORT WITH TECHNOLOGY IN *CITY OF ONTARIO V. QUON* CAUSED IT TO CONFUSE THE DEFINITION OF A FOURTH AMENDMENT SEARCH

*George M. Dery III**

INTRODUCTION

The Supreme Court recently refused to rule on whether the Fourth Amendment applies to government intrusions on pagers.[1] In *City of Ontario v. Quon* (*Quon III*), the Court found it "unreasonable" for a SWAT Team officer to believe that text messages he sent from a pager given to him by the police department to improve responses to emergencies would be immune from review in all circumstances.[2] The Court further concluded that such a professional, who was told his messages would be subject to auditing, should have known that as a member of law enforcement his actions would be subject to legal scrutiny and that such scrutiny might require reading the communications he made while on the job.[3] Finally, the *Quon III* Court noted that the SWAT Team officer "could have anticipated that it might be necessary for the [City of Ontario] to audit pager messages to assess the SWAT Team's performance in particular emergency situations."[4] Despite such conclusions, the Court in *Quon III* refused to rule on whether the officer had a reasonable privacy expectation under the Fourth Amendment in his text messages sent on the pager.[5]

---

* Professor, California State University Fullerton, Division of Politics, Administration, & Justice; former Deputy District Attorney, Los Angeles, California; J.D. 1987, Loyola Law School, Los Angeles, California; B.A. 1983, University of California Los Angeles. The author would like to thank his research assistant, Ken Grundy, B.A. 2011, Criminal Justice, California State University Fullerton.

1 City of Ontario v. Quon (*Quon III*), 130 S. Ct. 2619, 2631 (2010).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.* at 2628-29. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

The Court declined to evaluate whether the Fourth Amendment applies to pager messages because it feared crafting a "broad holding."[6] Compared to previous rulings, *Quon III's* stance was curiously passive for a usually vigorous Court.[7]

The *Quon III* Court offered as an excuse for its inaction that the "[r]apid changes in the dynamics of communication and information transmission" left the Court on less than sure ground.[8] The Court explained that "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear,"[9] because "[a] broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted."[10] Thus, the time was not yet ripe for handing down a legal ruling on pagers.[11]

The consequences of such hesitancy will be a confusion of mixed signals for police, judges, and citizens. The Court gave inklings instead of rulings. Future actors that must confront Fourth Amendment issues regarding communication devices will not have guidance on the most fundamental of Fourth Amendment issues: whether the Fourth Amendment even applies to audits of such communication in the first place.

This article begins, in Part I, with a historical overview of the Court's definition of a search under the Fourth Amendment. Part II reviews the Court's creation and development of a Fourth Amendment "search" definition in the context of technological advances.

U.S. Const. amend. IV.

[6] *Quon III*, 130 S. Ct. at 2630.

[7] *See generally* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010) (holding that a federal ban on independent corporate expenditures advocating either in support of or opposition to a candidate is a violation of the First Amendment); McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (holding that the Second Amendment applies to the states through the Fourteenth Amendment); Herring v. United States, 555 U.S. 135, 147-48 (2009) (holding that the exclusionary rule does not apply to evidence obtained from an unlawful search, provided the unlawful search was based on police mistake and is not a part of a pattern of negligent behavior); District of Columbia v. Heller, 554 U.S. 570, 635-36 (2008) (holding that a District of Columbia statute that banned residents from keeping firearms in their homes violated the Second Amendment); Bush v. Gore, 531 U.S. 98, 111 (2000) (holding that a manual statewide recount of votes violated the Fourteenth Amendment's Equal Protection clause).

[8] *Quon III*, 130 S. Ct. at 2629.

[9] *Id.* (citing Olmstead v. United States, 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967)).

[10] *Id.* at 2630.

[11] *Id.*

Part III critically examines *Quon III*, including the case's facts and the Court's analysis. Part IV explores the concerns created by *Quon III*'s atypical hesitancy by examining the Court's partial discussion of the reasonableness of privacy expectations in pagers after its explicit refusal to perform any such analysis. This article will also consider the inevitability of reviewing the reasonableness of privacy expectations in the special needs context. Finally, this Article, in an effort to provide guidance to citizens, police, and courts, reviews Court precedent and *Quon III*'s dicta to attempt to predict how the Court might rule on pager privacy in the future.

I. HISTORICAL OVERVIEW OF THE COURT'S DEFINITION OF A FOURTH AMENDMENT "SEARCH"

The Court's hesitation to assess the Fourth Amendment implications of a particular technology represented a break with its usual practice.[12] As early as 1928, the Court considered its first wiretap case in *Olmstead v. United States*.[13] The Court then decided its first bugging case, *Goldman v. United States*, in 1942.[14] In *Berger v. New York*, the Court traced the practice of eavesdropping to the time when "the eavesdropper listened by naked ear under the eaves of houses or their windows . . . ."[15] Yet, in the early cases of *Olmstead* and *Goldman*, the Court crafted a concrete rule, applying the Fourth Amendment only to "an actual physical invasion of [a] house 'or curtilage,'"[16] or illegal "trespass or unlawful entry."[17]

In *Katz v. United States*, a case where FBI agents electronically recorded a caller's conversation from a phone booth, the Court rejected its own "physical penetration of a constitutionally protected area" standard of Fourth Amendment application as little more than

---

[12] *See generally* Goldman v. United States, 316 U.S. 129, 135 (1942) (holding that information obtained by placing a detectaphone against a defendant's wall to amplify the conversation was not a violation of the Fourth Amendment); *Olmstead*, 277 U.S. at 465-66 (holding that the interception of conversations communicated over telephone lines outside of defendant's house was not an illegal search or seizure in violation of the Fourth Amendment).

[13] 277 U.S. 438, 465-66 (1928) (finding no Fourth Amendment violation in the government's interception of conversations communicated over telephone lines outside of the defendant's house).

[14] 316 U.S. 129, 135 (1942) (finding no Fourth Amendment violation in the use of a detectaphone by the police).

[15] Berger v. New York, 388 U.S. 41, 45 (1967).

[16] *Olmstead*, 277 U.S. at 466.

[17] *Goldman*, 316 U.S. at 134.

an "incantation."[18] While *Katz* spoke of government violations of the "privacy upon which [the individual] justifiably relied,"[19] the case's authoritative definition of a Fourth Amendment search came from Justice Harlan's concurrence: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, 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.'"[20] Justice Harlan characterized *Goldman's* standard as "bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion."[21]

The Court considered the application of the Fourth Amendment to yet another kind of technology in *Smith v. Maryland*.[22] In *Smith*, law enforcement directed a phone company to install a pen register that documented the numbers dialed from a particular phone.[23] Noting that this device, unlike the technology in *Katz*, did "not acquire the *contents* of communications," *Smith* deemed the device to have merely "limited capabilities."[24] The *Smith* Court thus narrowed the issue to whether the defendant had a "'legitimate expectation of privacy' regarding the numbers he dialed on his phone."[25] Since "[a]ll telephone users realize that they must 'convey' phone numbers to the telephone company" to have a call routed through the telephone lines, the Court concluded that "it is too much to believe that telephone subscribers . . . harbor any general expectation that the numbers they dial will remain secret."[26] The Court in *Smith* noted that the caller voluntarily turned over the number information to third parties, and therefore "'assumed the risk' of disclosure."[27]

---

18 Katz v. United States, 389 U.S. 347, 350 (1967).

19 *Id.* at 353.

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

21 *Id.* at 362.

22 442 U.S. 735, 736 (1979).

23 *Id.* at 737.

24 *Id.* at 741-42 (emphasis in original).

25 *Id.* at 742.

26 *Id.* at 742-43.

27 *Id.* at 744. The Court specifically ruled, "When he used his phone, [the defendant] voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business. In so doing, [the defendant] assumed the risk that the company would reveal to police the numbers he dialed." *Id.*

The Court again determined that voluntary conveyance of information to a third party undermined the reasonableness of privacy expectations in its next technology case, *United States v. Knotts*.[28] In *Knotts*, law enforcement agents traced a can of chloroform by attaching a radio transmitting "beeper" to the car into which it was loaded.[29] The Court deemed that this beeper use was not a Fourth Amendment search, because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."[30] The driver in *Knotts*, when travelling over public streets, "voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination . . . ."[31]

Similarly, in *California v. Ciraolo,* the Court returned to *Katz*'s conclusion that the reasonableness of privacy expectations could be undermined by "'[w]hat a person knowingly exposes to the public, even in his home or office."[32] In *Ciraolo*, police officers flew over a homeowner's backyard, and while in "navigable airspace," identified and photographed "marijuana plants 8 feet to 10 feet in height growing in a 15- by 25-foot plot."[33] The homeowner contended that since the area observed was "in the curtilage of his home," it therefore shared the right to privacy associated with the house itself.[34] The Court disagreed, reasoning that Ciroalo's curtilage was not free from police observation because the Fourth Amendment did not require police "to shield their eyes when passing by a home on public thoroughfares."[35] The officers viewed the homeowner's backyard from such a "public vantage point," and saw only what "[a]ny member of the public flying in this airspace who glanced down could have seen."[36]

---

[28] 460 U.S. 276, 281-82 (1983).

[29] *Id.* at 277.

[30] *Id.* at 281.

[31] *Id.* at 281-82. The Court later found Fourth Amendment application in the beeper case, *United States v. Karo*. 468 U.S. 705 (1984). In this case, unlike the officers in *Knotts*, law enforcement officers monitored a beeper device while it was inside an individual's private residence, and the Court found this monitoring without a warrant to be unconstitutional because an individual has an expectation of privacy in their private residence. *Id.* at 714-15.

[32] California v. Ciraolo, 476 U.S. 207, 213 (1986) (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

[33] *Id.* at 209.

[34] *Id.* at 212-13.

[35] *Id.* at 213.

[36] *Id.* (citing *Knotts*, 460 U.S. at 282).

The Court in *Ciraolo* thus concluded that "[i]n an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet."[37] Three years later, in *Florida v. Riley*, the Court extended *Ciraolo's* logic to include naked eye observations from a helicopter flying in the navigable airspace of 400 feet.[38]

Another flyover case, *Dow Chemical Co. v. United States*, involved a whole different level of advanced observation technology.[39] In *Dow Chemical*, the Environmental Protection Agency (EPA) used a "standard floor-mounted, precision aerial mapping camera" to photograph Dow's 2,000 acre "facility from altitudes of 12,000, 3,000, and 1,200 feet."[40] The Court recognized that "surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant."[41] The Court noted, however, that "[h]ere, EPA was not employing some unique sensory device that, for example, could penetrate the walls of buildings and record conversations in Dow's plants, offices, or laboratories, but rather a conventional, albeit precise, commercial camera commonly used in mapmaking."[42] Although the technology enhanced human vision "somewhat," it did not "give rise to constitutional problems" as would the hypothetical wall-penetrating technology.[43] The Court therefore concluded that "the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment."[44]

The kind of wall-penetrating technology that concerned the *Dow Chemical* Court was the subject of *Kyllo v. United States*, a case in which a government agent seated in a car pointed a thermal-imaging camera at a private home "to detect relative amounts of heat within

---

37 *Id.* at 215.

38 488 U.S. 445, 451 (1989) (holding "[a]ny member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse").

39 Dow Chem. Co. v. United States, 476 U.S. 227, 229-30 (1986).

40 *Id.* at 229.

41 *Id.* at 238.

42 *Id.*

43 *Id.* at 238-39.

44 *Id.* at 239.

the home."[45] The thermal imaging camera's scan revealed that the homeowner's garage was "relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex."[46] Agents, concluding that the homeowner was using special lights to grow marijuana in his home, obtained a warrant and ultimately recovered more than 100 plants.[47]

The *Kyllo* Court assessed infrared technology by returning to the most traditional of Fourth Amendment protections, noting, "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'"[48] Recognizing that advancing technology affects Fourth Amendment privacy, the Court declared, "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search."[49] The Court also considered as relevant "whether or not the technology is in general public use," and deemed thermal imaging as beyond "routine."[50] Still, *Kyllo's* focus was on the sanctity of the home, as it noted, "In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes."[51] The Court's holding thus straddled the two concepts of the uniqueness of the technology at issue and the special privacy of the home by declaring, "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' . . . ."[52]

This review of the Court's precedent clearly demonstrates that for over eighty years the Court, in contrast to its timidity in *Quon III*, confidently and frequently decided the Fourth Amendment implications of technological developments.

---

45 Kyllo v. United States, 533 U.S. 27, 29 (2001).

46 *Id.* at 30.

47 *Id.*

48 *Id.* at 31.

49 *Id.* at 34 (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)). The Court in *Kyllo* characterized this as a "ready criterion." *Id.*

50 *Id.* at 39 n.6 (internal quotation marks omitted).

51 Kyllo v. United States, 533 U.S. 27, 37 (2001) (emphasis in original).

52 *Id.* at 40.

II. *QUON III*

A. *Facts*

In October 2001 the City of Ontario, California (City) obtained "20 alphanumeric pagers capable of sending and receiving text messages."[53] Ontario entered into a service contract with Arch Wireless Operating Company in which "each pager was allotted a limited number of characters sent or received each month" with any excess usage resulting in additional cost.[54] The City issued a pager to Jeff Quon, an Ontario Police Department police sergeant and Special Weapons and Tactics (SWAT) Team member, as well as other SWAT Team members, "in order to help the SWAT Team mobilize and respond to emergency situations."[55] Ontario also had a "Computer Usage, Internet and E-Mail Policy"[56] that warned all employees that the City "'reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice.'"[57] The policy also made clear that "'[u]sers should have no expectation of privacy or confidentiality when using these resources.'"[58] Furthermore, Quon signed an "Employee Acknowledgement" verifying that he read and understood the policy.[59]

The policy did not, however, specifically mention text messages from pagers.[60] The City sought to remedy this omission by making it "clear to employees, including Quon, that the City would treat text messages the same as it treated e-mails."[61] At an April 28, 2002 meeting that Quon attended, and also in writing, "Lieutenant Steven Duke, the [Ontario Police Department (OPD)] officer responsible for the City's contract with Arch Wireless, told officers that messages sent on the pagers 'are considered e-mail messages. This means that [text]

---

53 *Quon III*, 130 S. Ct. 2619, 2625 (2010).

54 *Id.*

55 *Id.*

56 *Id.* (internal quotation marks omitted).

57 *Id.* (quoting Appendix to Petition for Writ of Certiorari at 152a, *Quon III*, 130 S. Ct. 2619 (2010) (No. 08-1332)).

58 *Id.*

59 Quon v. Arch Wireless Operating Co. (*Quon II*), 529 F.3d 892, 896 (9th Cir. 2008).

60 *Quon III*, 130 S. Ct. 2619, 2625 (2010).

61 *Id.*

messages would fall under the City's policy as public information and [would be] eligible for auditing.'"[62]

After establishing and explicitly communicating this policy, Lieutenant Duke undermined it by telling Quon "it was not his intent to audit [an] employee's text messages to see if the coverage [was] due to work related transmissions."[63] Lieutenant Duke proposed that the practice be "if there was overage, that the employee would pay for the overage that the City had . . . . [W]e would usually call the employee and say, 'Hey, look, you're over X amount of characters. It comes out to X amount of dollars. Can you write me a check for your overage[?]'"[64] Quon accepted the offer, writing checks to the City for overages.[65] Apparently, not completely comfortable with the arrangement, Lieutenant Duke further muddled his message, as described by the trial court:

> Lieutenant Duke, during this conversation, told Quon that the text messages sent over the City-owned pager were considered e-mail and could be audited. Lieutenant Duke, however, went on to say that it was not his intent to audit employees' text messages to see if the overage is due to work related transmission. Instead, Quon could reimburse the City for the overage so he would not have to audit the transmission and see how many messages were non-work related. Such an approach was Lieutenant Duke's generous way of streamlining administration and oversight over the use of pagers because, as he reminded Quon, he could, if anybody wished to challenge their coverage, . . . audit the text transmission to verify how many were non-work related.[66]

After Quon and other officers repeatedly exceeded their character limits—Quon did so three or four times in a few months—Lieuten-

---

[62] *Id.* (quoting Appendix to Petition for Writ of Certiorari at 30, *Quon III*, 130 S. Ct. 2619 (2010) (No. 08-1332)).

[63] *Id.*

[64] *Quon II*, 529 F.3d at 897.

[65] *Quon III*, 130 S. Ct. at 2625.

[66] Quon v. Arch Wireless Operating Co. (*Quon I*), 445 F. Supp. 2d 1116, 1124-25 (C.D. Cal. 2006) (internal quotation marks omitted). Compounding matters, "Lieutenant Duke's representation that the department could audit the pagers," as described by the trial court, "was not entirely accurate." *Id.* at 1124. The police department's staff itself lacked the ability to directly review the contents of the texts sent or received on employee pagers because they had no access to Arch Wireless' network. *Id.* Instead, the department had to request such information from Arch Wireless, which would then "generate a copy of the transcripts of the messages." *Id.*

ant Duke changed his mind.[67] In a meeting with the Chief of Police, Lloyd Scharf, the lieutenant said "he had grown 'tired of being a bill collector with guys going over the allotted amount of characters on their text pagers.'"[68] Lieutenant Duke had previously complained that "'some members . . . were killing trees in the overages. There were a lot of overages.'"[69]

Police Chief Scharf responded by auditing the texts to "determine whether the existing character limit was too low . . . or if the overages were for personal messages."[70] When Lieutenant Duke read transcripts of the texts, he learned that not only were many texts not work-related, but "some were sexually explicit."[71] He alerted the Chief of Police, who launched an internal affairs investigation to determine "whether Quon was violating OPD rules by pursuing personal matters while on duty."[72]

Sergeant Patrick McMahon, in charge of the internal affairs review, "used Quon's work schedule to redact the transcripts in order to eliminate any messages Quon sent while off duty."[73] Reviewing the content of the work-hour messages, McMahon determined that of the 456 messages Quon sent or received during work hours in August 2002, no more than 57 were work related.[74] On "an average workday, Quon sent or received 28 messages, of which only 3 were related to police business."[75] Upon concluding that Quon had violated OPD rules, he was "allegedly disciplined."[76]

---

67 *Quon III*, 130 S. Ct. at 2625-26.

68 *Quon I*, 445 F. Supp. 2d at 1125.

69 *Id.*

70 *Quon III*, 130 S. Ct. at 2626.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 *Quon III*, 130 S. Ct. 2619, 2626 (2010). Quon's extracurricular texts were not the only improper communications occurring at the Ontario Police Department. *See Quon I*, 445 F. Supp. 2d 1116, 1121-22 (C.D. Cal. 2006). Authorities were investigating a police dispatcher, Sally Bors, for tipping off her boyfriend, Mark Timbrell, who was a member of the Hell's Angels motorcycle gang, about police investigations involving him and his gang. *Quon I*, 445 F. Supp. 2d at 1121. In a sting operation "performed to ferret out this corruption," a narcotics officer "called in the license plate of a known Hell's Angels member to Bors, who then "used her pager to text message another dispatcher, Angela Santos." *Id.* Santos then alerted the Hell's Angels member that he was being followed and then contacted "yet another dispatcher, April Florio, and informed her of what she had done for Bors." *Id.* at 1122. Internal Affairs then investigated

Quon filed suit in federal court.[77] Jerilyn Quon, his separated wife; April Florio, an OPD dispatcher with whom Jeff Quon was "romantically involved;" and Steve Trujillo, another SWAT Team member, joined Quon's suit as plaintiffs.[78] Together, Plaintiffs asserted, among other contentions, that the obtaining and reviewing of the text transcripts violated their Fourth Amendment rights.[79]

B. *The Supreme Court's Decision in* Quon III

1. The *Quon III* Court Chose Not To Decide Whether the Fourth Amendment Applies to a Government Employer Reading an Employee's Text Messages from a Pager

The Court, in an opinion written by Justice Kennedy, began its analysis by discussing whether the Fourth Amendment even applied to a government employer reading the "text messages sent and received on a pager the employer owned and issued to an employee."[80] The *Quon III* Court was quick to recognize that the Fourth Amendment extended beyond criminal investigations, providing protection "without regard to whether the government actor is investigating crime or performing another function."[81] Justice Kennedy further noted that the Fourth Amendment applied to the government when it "acts in its capacity as an employer."[82]

The *Quon III* Court then acknowledged earlier disagreement with the Court in *O'Connor v. Ortega*[83] about what precisely was the proper Fourth Amendment analysis for assessing the reasonableness of intrusions by government employers.[84] Justice Kennedy lamented,

---

April Florio, which led to her ultimate termination. *Id.* April Florio shared a connection with the *Quon* matter, for she was having an extra-marital affair with Jeff Quon. *Id.*

77 *Quon III*, 130 S. Ct. at 2626.

78 *Id.*

79 *Id.*

80 *Id.* at 2624.

81 *Id.* at 2627 ("The [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government[.]" (quoting Skinner v. Ry. Labor Execs. Assn., 489 U.S. 602, 613-14 (1989))).

82 *Id.* at 2627-28 (citing Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665 (1989)).

83 480 U.S. 709 (1987).

84 *Quon III*, 130 S. Ct. at 2628; *id.* at 2628 (citing *O'Connor*, 480 U.S. at 717, 725-26, 732). The *Quon* Court concluded that "'some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable,' a court must consider 'the operational

"In the two decades since *O'Connor* . . . the threshold test for determining the scope of an employee's Fourth Amendment rights has not been clarified further."[85] *Quon III* itself would make no headway on the employee privacy issue, for it chose to avoid the issue by *assuming* the employee had a reasonable expectation of privacy and jumping to the Fourth Amendment's reasonableness inquiry.[86] When confronted with confusion about the Fourth Amendment's reach in government employer-employee settings, *Quon III* simply chose to dodge the issue entirely.

The Court in *Quon III* also avoided assessing privacy expectations about pagers, reasoning that the "case can be decided by determining that the search was reasonable even assuming Quon had a reasonable expectation of privacy."[87] The Court steered clear of privacy issues about technology because "[r]apid changes in the dynamics of communication . . . are evident not just in the technology itself but in what society accepts as proper behavior."[88] After explicitly refusing to analyze privacy expectations, Justice Kennedy still found it "instructive to note the parties' disagreement over whether Quon [has] a reasonable expectation of privacy."[89] The Court first noted that Ontario's computer policy limiting privacy expectations "extended to text messaging."[90] Yet *Quon III* also mentioned Lieutenant Duke's assurances against the performance of audits.[91] The Court then performed a curious "what if?" analysis, pondering, "At this point, were we to assume that inquiry into 'operational realities' were called for, it would be necessary" to determine whether the lieu-

---

realities of the workplace' in order to determine whether an employee's Fourth Amendment rights are implicated." *Quon III*, 130 S. Ct. at 2628 (quoting *O'Connor*, 480 U.S. at 717-18). The Court also noted that when it is determined that an employee does indeed have a legitimate expectation of privacy, "an employer's intrusion on that expectation 'for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances.'" *Quon III*, 130 S. Ct. at 2628 (quoting *O'Connor*, 480 U.S. at 725-26). In *O'Connor*, one justice stated, "that government searches to retrieve work-related materials or to investigate violations of workplace rules" do not violate the Fourth Amendment since these searches are "the sort that are regarded as reasonable and normal in the private-employer context." 480 U.S. at 732-33 (Scalia, J., concurring).

85 *Quon III*, 130 S. Ct. at 2628.

86 *Id.* at 2628-30.

87 *Id.* at 2628-29.

88 *Id.* at 2629.

89 *Id.*

90 *Id.*

91 *Quon III*, 130 S. Ct. 2619, 2629 (2010).

tenant had changed the policy with his statements, and whether he had the authority in fact or appearance to make the alteration.[92] *Quon III* thus mapped out the specific questions it would ask about the employer-employee relationship without offering any answers.

The Court rationalized its failure to decide pager privacy issues by noting it had to "proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment" because "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."[93] The Court recognized competing arguments: While cell phones and text messaging "are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression," thus strengthening the argument for privacy expectation, "the ubiquity of those devices has made them generally affordable, so one could counter that employees . . . can purchase and pay for their own," therefore undermining the assertion that employee's use of employer devices should enjoy privacy.[94] In light of these concerns, the Court chose to narrow its holding by assuming a privacy expectation and addressing the reasonableness of the government actions in auditing the pager.[95] Thus, after much discussion, *Quon III* offered no holding on whether the Fourth Amendment applied to pager messages.

2. The *Quon III* Court Ruled that a Government Employer's Reading of an Employee's Text Messages from a Pager Was Reasonable under the Fourth Amendment

In considering the reasonableness of auditing pager texts, *Quon III* properly noted that generally, a warrantless search is "*per se* unreasonable" unless it falls within "'[one of the] few specifically established and well-delineated exceptions'" to the warrant requirement.[96] The Court placed the case within such an exception: "'special

---

92 *Id.* (citation omitted).
93 *Id.*
94 *Id.* at 2630.
95 *Id.* at 2628.
96 *Id.* at 2630 (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

needs' of the workplace."[97] *Quon III* then applied the *O'Connor* plurality's ruling:

> [W]hen conducted for a "noninvestigatory, work-related purpos[e]" or for the "investigatio[n] of work-related misconduct," a government employer's warrantless search is reasonable if it is "'justified at its inception'" and if "'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of'" the circumstances giving rise to the search.[98]

Ontario satisfied the first criterion because Chief Scharf ordered the search simply "to determine whether the character limit on the City's contract with Arch Wireless was sufficient to meet the City's needs" and thus was based on a "'legitimate work-related rationale.'"[99] Ontario also fulfilled the second criterion regarding the scope of the search given that "reviewing the transcripts was reasonable because it was an efficient and expedient way to determine whether Quon's overages were the result of work-related messaging or personal use."[100] Further, the OPD reduced its intrusion by limiting itself to reviewing only two months of messaging activity and redacting all off-duty messages.[101]

Quon III's reasonableness analysis encountered trouble because determining the intrusiveness of the search depended in part on "the extent" of the employees' privacy expectation.[102] Therefore, the issue of Quon's privacy expectation in texts from his pager again confronted the Court, despite the Court's efforts to avoid it. This time, the Court readily concluded:

> Even if he could assume some level of privacy would inhere in his messages, it would not have been reasonable for Quon to conclude that his messages were in all circumstances immune from scrutiny. Quon was told that his messages were subject to auditing. As a law enforcement officer, he would or should have known that his actions

---

97 *Quon III*, 130 S. Ct. 2619, 2628 (2010) (citing O'Connor v. Ortega, 480 U.S. 709, 725 (1987) (plurality opinion); *id.* at 732 (Scalia, J., concurring in judgment); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 666-67 (1989)).

98 *Id.* at 2630 (quoting O'Connor v. Ortega, 480 U.S. 709, 725-26 (1987)).

99 *Id.* at 2631 (citing *Quon II*, 529 F.3d 892, 908 (9th Cir. 2008)).

100 *Id.*

101 *Id.*

102 *Id.*

> were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications.[103]

The Court thus reasoned, "Under the circumstances, a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used."[104] The Court surmised, "Given that the City issued the pagers to Quon and other SWAT Team members in order to help them more quickly respond to crises—and given that Quon had received no assurances of privacy—Quon could have anticipated that it might be necessary for the City to audit pager messages to assess the SWAT Team's performance in particular emergency situations."[105] The Court therefore concluded that "the search was permissible in its scope."[106] Further, the Court decided that the search would also satisfy reasonableness under Justice Scalia's *O'Connor* concurrence.[107] Since the search was reasonable, the *Quon III* Court disposed of the case by deciding that there was no violation of Quon's Fourth Amendment rights.[108]

III. ISSUES RAISED BY THE COURT'S CURIOUS HESITANCY IN *QUON III*

A. Quon III*'s Refusal to Rule on Whether the Government Audit of a Pager's Text Messages Constituted a Fourth Amendment "Search"*

Quon III's failure to squarely address the privacy expectations involving a pager seemed curiously passive. This peculiar hesitancy did not go unnoticed by Justice Scalia, who criticized the Court's inaction as a "disregard of duty."[109] Conceding that "[a]pplying the Fourth Amendment to new technologies may sometimes be difficult," Justice Scalia realized that "when it is necessary to decide a case we have no choice."[110] He further found indefensible the Court's implica-

---

103 *Quon III*, 130 S. Ct. 2619, 2631 (2010).
104 *Id.*
105 *Id.*
106 *Id.* at 2632.
107 *Id.* at 2633.
108 *Id.*
109 *Quon III*, 130 S. Ct. 2619, 2635 (2010) (Scalia, J., concurring).
110 *Id.*

tion that "where electronic privacy is concerned we should decide less than we otherwise would . . . or that we should hedge our bets by concocting case-specific standards or issuing opaque opinions."[111] Justice Scalia flatly characterized the Court's motivation for dithering as based on "fears that applying [the *O'Connor*] test to new technologies will be too hard."[112]

Moreover, *Quon III's* explanation that it must decide the case on narrow grounds is not quite consistent with the Court's own Fourth Amendment precedent. The most obvious counterexample might be *United States v. Leon*, the Court's famous case establishing the good faith exception to the exclusionary rule.[113] In *Leon*, the Court ruled that "our evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate leads to the conclusion that such evidence should be admissible in the prosecution's case in chief."[114] The *Leon* Court created this significant new constitutional rule; although, it could have decided the case based on previously established law.[115] As Justice Stevens noted in his concurring and dissenting opinion, the Supreme Judicial Court of Massachusetts determined that the search warrant for the defendant's home "had been issued in violation of the Warrant Clause."[116] Justice Stevens noted that *Leon's* facts created a "substantial question" of whether probable cause supported the warrant and thus complied with the Fourth Amendment in the first place.[117]

The warrant's validity was even more likely in light of the Court's recent ruling in *Illinois v. Gates*,[118] which eased the standard for assessing probable cause.[119] Justice Stevens considered it "probable" that the lower court, in light of the new *Gates* standard, "would now

---

111 *Id.*

112 *Id.*

113 468 U.S. 897, 913, 922 (1984).

114 *Id.* at 913. The Court in *Leon* further declared, "We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Id.* at 922.

115 *Id.* at 913 n.11.

116 *Id.* at 961 (Stevens, J., concurring and dissenting).

117 *Id.*

118 Illinois v. Gates, 462 U.S. 213 (1983).

119 *Leon*, 468 U.S. at 961 (Stevens, J., concurring and dissenting); *see also Gates*, 462 U.S. at 244.

conclude that the warrant in *Leon* satisfied the Fourth Amendment," thus obviating "the need for the promulgation of the broad new rule that Court announces today."[120] The Court similarly strained to create new law in *Minnesota v. Dickerson*.[121] In *Dickerson*, the Court casually expanded the plain view doctrine to include the sense of touch by reasoning that plain view "has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search."[122] After creating the plain touch doctrine, however, the Court found that the officer in its case failed to fulfill its requirements because in performing the frisk of Mr. Dickerson, the officer exceeded the traditional limits of a lawful frisk established in *Terry v. Ohio*.[123] Specifically, the officer failed to "immediately recognize" the object as contraband (crack cocaine), only coming to that conclusion after "'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket.'"[124] Such conduct was outside the bounds of a lawful *Terry* frisk.[125] Thus, the Court unnecessarily broke new ground in establishing the search right of plain touch when it could have disposed of the case with the established law of *Terry*.

The one apparent thread of consistency in the Court's differing approaches in *Leon*, *Dickerson*, and *Quon III*, is that the Court's reasoning, whether in creating new constitutional rules or from refraining from doing so, results in a diminution of Fourth Amendment rights in each case.

---

120 *Leon*, 468 U.S. at 961-62 (Stevens, J., concurring and dissenting) (emphasis omitted). Justice Stevens even noted that the Solicitor General had sought that the petition "be disposed of as appropriate in light of the Court's decision in *Illinois v. Gates*" rather than any "plenary review." *Id.* at 962 n.3. Justice Stevens was disturbed by the Court's activism here; he noted, "The court seems determined to decide these cases on the broadest possible grounds; such determination is utterly at odds with the Court's traditional practice as well as any principled notion of judicial restraint. Decisions made in this manner are unlikely to withstand the test of time." *Id.* at 962.

121 508 U.S. 366, 368, 371 (1993) (holding that "The Fourth Amendment permits the seizure of contraband detected through a police officer's sense of touch during a protective patdown search.").

122 *Id.* at 375.

123 *Id.* at 378 (citing Terry v. Ohio, 392 U.S. 1, 26 (1968)).

124 *Id.* (quoting State v. Dickerson, 481 N.W.2d 840, 844 (Minn. 1992)).

125 *Id.* (citing Terry v. Ohio, 392 U.S. 1, 26 (1968)).

B. *The* Quon III *Court Failed to Resist Discussing the Fourth Amendment "Search" Issue Anyway, Thus Confusing Police and Courts as to the True Meaning of Its Ruling*

Even if the *Quon III* Court had the best of intentions in avoiding a broad holding, it failed to carry out its intent. Although it had explicitly refused to rule on whether Quon had a reasonable expectation of privacy in the pager's text messages,[126] the Court could not resist indirectly weighing in on this issue.[127] Justice Kennedy, writing for the majority, deemed it "instructive to note the parties' disagreement over whether Quon had a reasonable expectation of privacy."[128] In response, Justice Scalia wondered why the Court "inexplicably interrupt[ed] its analysis with a recitation . . . and an excursus on the complexity and consequences of answering, that admittedly irrelevant threshold question."[129] The Court's digression prompted Justice Scalia to ask a question: "To whom do we owe an *additional* explanation for declining to decide an issue, once we have explained that it makes no difference?"[130]

Nevertheless, *Quon III* offered an assessment of the facts, noting, "The record does establish that OPD, at the outset, made it clear that pager messages were not considered private."[131] Although this is dictum, future courts cannot fail to notice that it is Supreme Court dictum. They might thus be tempted to read the Court's mention of these particular facts as indicative of later rulings. Or, of course, since this is dictum, perhaps these statements of the Court do not carry this meaning. *Quon III* also notes that, "The City's Computer Policy stated that '[u]sers should have no expectation of privacy or confidentiality when using' City computers."[132] Future courts might wonder if computer policies can thus be extended to cover other technologies and if so, what kinds of technology. Moreover, *Quon III's* quotation of the policy could raise questions about whether such employer poli-

126 *Quon III*, 130 S. Ct. 2619, 2628-29 (2010).

127 *See id.* at 2629.

128 *Id.*

129 *Id.* at 2634-35 (Scalia, J., concurring).

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

131 *Id.* at 2629.

132 *Quon III*, 130 S. Ct. 2619, 2629 (2010).

cies should make explicit reference to the Fourth Amendment's language of "expectation of privacy."[133]

The *Quon III* Court then launched into a hypothetical situation where it speculated about how it might apply the *O'Connor* plurality rule.[134] The Court discussed how it might apply a rule, but it refused to commit to whether this would be the proper rule to apply.[135] Undaunted, the Court in *Quon III* stated, "It would also be necessary to consider whether a review of messages sent on police pagers, particularly those sent while officers are on duty, might be justified for other reasons, including performance evaluations, litigation concerning the lawfulness of police actions, and perhaps compliance with state open records laws."[136] The Court concluded with a clear and definitive statement: "These matters would all bear on the legitimacy of an employee's privacy expectation."[137] This statement could be interpreted as a telling sign of how the Court would actually analyze such cases in the future or simply a meaningless spilling of ink because such assertions are nothing more than dicta.

Thus, the *Quon III* Court first refused to answer whether the reading of text messages on pagers was an intrusion on a reasonable privacy expectation, then offered hints about how it would have ruled if it had chosen to do so, and finally commended itself on avoiding a "broad holding."[138] The Court failed to provide the clear guidance expected of it while at the same time dribbling out statements likely to sow confusion among employers, police, and courts alike.

C. *The Special Needs Test Required the Court to Assess the Reasonableness of* Quon III's *Privacy Expectations in Any Event, Thus Forcing the Court to Indirectly and Partially Address the One Issue it Meant to Avoid*

As part of its analysis of whether the city of Ontario violated Quon's Fourth Amendment rights, the Court had to consider, "on the assumption that Quon had a reasonable expectation of privacy in the contents of his messages, the extent of an expectation is relevant to

---

133 *Id.*
134 *Id.* (citing O'Connor v. Ortega, 480 U.S. 709, 717 (1987)).
135 *Id.*
136 *Id.*
137 *Id.*
138 *See Quon III*, 130 S. Ct. 2619, 2630 (2010).

assessing whether the search was too intrusive."[139] This approach placed the Court in the awkward position of having to measure an aspect of something it had yet to acknowledge even existed.

The Court found itself in this unfortunate position due to the structure of the special needs test itself. In *New Jersey v. T.L.O.*, an early "special needs"[140] case where a school official searched a student's purse for evidence of a school rule violation,[141] the Court determined that its special needs inquiry involved a "balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place[.]"[142] The Court concluded, "schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds."[143]

The Court continued to "balance the governmental and privacy interests" in *Skinner v. Railway Labor Executives Association,* a special needs case involving employees' rights to privacy.[144] In *Skinner*, the Court found the privacy implications of blood testing railway employees to be "not significant" because such tests are "'commonplace in these days of periodic physical examinations'"[145] and thus did not "'constitute an unduly extensive imposition on an individual's privacy and bodily integrity.'"[146] The urine testing of employees gave the Court pause because collecting urine "require[s] employees to perform an excretory function traditionally shielded by great privacy."[147] Yet, since the urine test was similar to those of a regular physical exam, it took place in a medical setting, and it was performed "by personnel unrelated to the railroad employer,"[148] the Court in *Skinner*

---

139 *Id.* at 2631 (citing Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 671 (1989); Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654-57 (1995)).

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

141 *Id.* at 328.

142 *Id.* at 340.

143 *Id.* at 339. The Court continued to assess the reasonableness of student privacy expectations in the special needs context as recently as 2009. *See* Safford Unified Sch. Dist. v. Redding, 129 S. Ct. 2633, 2641-42 (2009).

144 Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 619 (1988).

145 *Id.* at 625 (quoting Schmerber v. California, 384 U.S. 757, 771 (1966)).

146 *Id.* at 625 (quoting Winston v. Lee, 470 U.S. 753, 762 (1985)).

147 *Id.* at 626.

148 *Id.* at 626-27.

concluded that the testing posed "only limited threats to the justifiable expectations of privacy of covered employees."[149] This was particularly so because the employees had diminished privacy expectations by choosing to participate in an "industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees."[150]

A special needs examination of individual privacy expectations also occurred in *National Treasury Employees Union v. Von Raab*, a case in which the government drug tested persons working for the U.S. Customs Service.[151] In *Von Raab*, the Court declared, "We have recognized, however, that the 'operational realities of the workplace' may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts."[152] The Court further found it "plain that certain forms of public employment may diminish privacy expectations" even with respect to searches of an employee's person or personal effects.[153] The Court in *Von Raab* also determined that Customs employees directly involved in drug interdiction or who carried firearms in the line of duty "have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test."[154] This was especially true of employees "required to carry firearms," because, unlike private citizens or most public employees, agents responsible for firearm use "should expect effective inquiry into their fitness and probity."[155]

If the Court, in prior cases involving persons as diverse as schoolchildren and Customs agents, felt the need to probe particulars ranging from diaries to firearms, the *Quon III* Court had to examine privacy expectations in order to adequately perform its special needs analysis. The Court in *Quon III* therefore, after declaring it would not assess privacy expectations in order to maintain the narrowness of its holding,[156] assessed privacy expectations.[157] The Court determined

---

149 *Id.* at 628.

150 Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 627 (1988).

151 489 U.S. 656, 665-66 (1988).

152 *Id.* at 671 (citing O'Connor v. Ortega, 480 U.S. 709, 717 (Scalia, J., concurring)).

153 *Id.* (analogizing Quon to a United States Mint employee who should expect routine personal searches or military personnel who should expect intrusive inquiries into their personal fitness).

154 *Id.* at 672.

155 *Id.*

156 *Quon III*, 130 S. Ct. 2619, 2630 (2010).

157 *See id.* at 2631.

that, "it would not have been reasonable for Quon to conclude that his messages were in all circumstances immune from scrutiny" because he was specifically told that his messages were subject to auditing, he worked in a profession likely to attract legal scrutiny, he had received no assurances of privacy, and was given the pager for the work-related purpose of enabling SWAT Team members to respond more quickly to crises.[158] The *Quon III* Court contrasted the audit with the more intrusive searches of personal e-mail or pagers, or wiretaps of home phones.[159] Finally, considering the circumstances, a "reasonable employer" would simply not expect that the audit would intrude on such personal matters as sexual messages.[160] The audit was "not excessive in scope" and therefore reasonable under the *O'Connor* plurality's[161] (and the *Von Raab* majority's) analysis.[162]

The resulting conclusion about Quon's privacy expectations seemed easily reached. The apparent straightforwardness of the privacy expectation analysis makes the Court's refusal to provide a full answer all the more curious, especially in light of its earlier volunteering to diagram "the parties' disagreement over whether Quon had a reasonable expectation of privacy."[163] The Court has somehow leaked out all sorts of hints, without giving its analysis the clarity and authority of a holding. As a result, the Court did not leave any guidance for future police, courts, or citizens when faced with the issue of pager privacy expectations.

D. *Divining the Future in Light of the Court's Precedent and* Quon III's *Dicta*

Earlier cases assessing the scope of Fourth Amendment privacy provide some sense as to how the Court might ultimately rule on the government's reading of pager text messages. The first cases involving the reasonable expectation of privacy standard, *Katz* and *Smith* provide, at best, mixed signals. The *Katz* Court's rejection of "the presence or absence of a physical intrusion into any given enclosure"[164] as

---

158 *Id.* at 2631-32.
159 *Id.* at 2631.
160 *Id.* at 2631-32.
161 *Id.* at 2632 (citing O'Connor v. Ortega, 480 U.S. 709, 726 (1987) (plurality opinion)).
162 *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665 (1989).
163 *See Quon III*, 130 S. Ct. at 2630.
164 Katz v. United States, 389 U.S. 347, 353 (1967).

a criterion for Fourth Amendment application lends credence to the notion that Quon's employers could have intruded on his privacy even though much of his texting occurred outside his home. Further, in *Smith*, the Court's emphasis that the privacy that phone callers expect is in the "contents of communications" rather than the numbers dialed supports the contention that reading an employee's pager messages intrudes on a reasonable privacy expectation.[165]

Yet, the Court in *Katz* also recognized that what a person "knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[166] The *Smith* Court expanded *Katz* by creating an assumption of the risk exception to Fourth Amendment application.[167] Similarly, the Court in *Knotts* relied heavily on the argument that an individual cannot have a reasonable expectation of privacy in information that he voluntary conveys.[168] For example, a driver on a public road broadcasts to anyone paying attention the direction the car is traveling, the stops it makes, and the driver's ultimate destination.[169] In *Quon III*, since the entire purpose of the pagers was to enable city employees—SWAT Team members—to share information "in order to help the SWAT Team mobilize and respond to emergency situations,"[170] it could be assumed that each pager user expected the information given on pagers to be shared with other team members so that the team could effectively coordinate their actions in an emergency. Under the logic developed in *Katz*, *Smith*, and *Knotts*, each SWAT Team member sending text messages thus assumed the risk that the information could be revealed to the government.[171]

The Court's search precedent added another factor in assessing the reasonableness of privacy expectations: whether the observer was lawfully positioned during the observation. In *Oliver v. United States*, the Court noted that the "public and police lawfully may survey lands from the air."[172] Similarly, *Ciraolo* and *Riley* both made a point of noting that the observations in those cases came from "navigable air-

---

165 *See* Smith v. Maryland, 442 U.S. 735, 741 (1979).

166 *Katz*, 389 U.S. at 351 (citing Lewis v. United States, 385 U.S. 206, 210 (1966); United States v. Lee, 274 U.S. 559, 563 (1927)).

167 *See Smith*, 442 U.S. at 745-46.

168 United States v. Knotts, 460 U.S. 276, 281-282 (1983).

169 *Id.*

170 *Quon III*, 130 S. Ct. 2619, 2625 (2010).

171 *See Knotts*, 460 U.S. at 281-82; *Smith*, 442 U.S. at 743-44; *Katz*, 389 U.S. at 350-52.

172 Oliver v. United States, 466 U.S. 170, 179 (1984).

space."[173] Thus, the reasonableness of privacy expectations turns in part on the lawfulness of the behavior of the observer in making the observation. In *Quon III*, independent of the Fourth Amendment issue, the plaintiffs contended that Ontario and others violated the Stored Communications Act (SCA).[174] The district court in *Quon I* granted Arch Wireless' motion for summary judgment on Quon's SCA claim,[175] while the United States Court of Appeals for the Ninth Circuit in *Quon II* concluded that Arch Wireless, in turning over the transcript to Ontario, did violate the SCA.[176] Thus, if the Court adheres to the lawfulness of the observer factor in the future, it may have to assess the reading of text messages in light of relevant statutory laws and resolve the lower courts' differing interpretations about them.

Another factor used in assessing privacy expectations is the type of technology used to make observations.[177] The Court in *Dow Chemical* specifically declared that the use of "highly sophisticated surveillance equipment not generally available to the public . . . might be constitutionally proscribed absent a warrant."[178] *Kyllo*, envisioning the homeowner "at the mercy of advancing technology," mandated that its rule "take account of more sophisticated systems that are already in use or in development."[179] The *Quon III* Court found that the consideration of the technology at issue in the case actually cut both ways on the privacy issue.[180] Thus, it seems that the technology factor in the case may be non-determinative.

---

173 Florida v. Riley, 488 U.S. 445, 450-51 (1989); California v. Ciraolo, 476 U.S. 207, 209, 213 (1986).

174 18 U.S.C. § 2702(a) (2011) (prohibiting those providing an electronic communication service or remote computing service to the public from knowingly divulging records or information); *Quon I*, 445 F. Supp. 2d 1116, 1128 (2006) (internal quotation marks omitted).

175 *Quon I*, 445 F. Supp. 2d at 1138.

176 *Quon II*, 529 F.3d 892, 903 (9th Cir. 2008).

177 *See Quon III*, 130 S. Ct. 2619, 2630 (2010); Kyllo v. United States, 533 U.S. 27, 35-36 (2001); Dow Chem. Co. v. United States, 476 U.S. 227, 238 (1986).

178 *Dow Chem. Co.*, 476 U.S. at 238.

179 *Kyllo*, 533 U.S. at 35-36.

180 *Quon III*, 130 S. Ct. at 2630. *Quon III* found that "[c]ell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy." *Id.* Yet, *Quon III* conceded, "[o]n the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own." *Id.*

Perhaps one way to break the deadlock is to consider the context of the observations. The Court was not offended by the use of technology when it made observations arguably open to the public, whether in *Knotts* (a tracking device of a car on public highways),[181] *Ciraolo* (an airplane observing a yard),[182] *Riley* (a helicopter making an observation through a hole in a roof open to the public),[183] or *Dow Chemical*, (an aerial camera observing outer structures).[184] Yet, a problem occurs when the technology creeps inside a home, whether in *Karo* (leaving a tracking device on inside a home),[185] or *Kyllo* (measuring heat radiation from inside a home).[186] *Kyllo* made a particular point of the sanctity of the home, noting, "In the home, our cases show, *all* details are intimate details."[187] *Kyllo's* reasoning pointed to the crossing of an actual physical line, curiously reminiscent of the "constitutionally protected area" standard *Katz* rejected.[188] Drawing such a line in *Quon III* would benefit Ontario, because Quon made his calls even outside of his home while he was on duty.[189]

In sum, precedent offers readers of *Quon III* little reasonable expectation of privacy. The greater weight of the case law just reviewed would seem to point in the direction of Quon lacking a reasonable privacy expectation in his pager messages, and thus a lack of a Fourth Amendment search in the case.

A review of the special needs precedent strengthens this perspective, offering a dramatically limited view of privacy for certain government employees. The Court has severely curtailed the privacy rights of those employees who, "by reason of their participation in an industry that is regulated pervasively to ensure safety," have chosen to accept a diminished expectation of privacy.[190] Police officers, behaving in a variety of contexts such as driving vehicles in hot pursuit, managing crowds, and using lethal force, are minutely monitored by the government, press, and public, and are continually called upon to perform safety-sensitive tasks. This should be particularly so with

---

181 United States v. Knotts, 460 U.S. 276, 281 (1983).
182 Florida v. Ciraolo, 476 U.S. 207, 213-14 (1986).
183 Florida v. Riley, 488 U.S. 445, 449-50 (1989).
184 Dow Chem. Co. v. United States, 476 U.S. 227, 238-39 (1986).
185 United States v. Karo, 468 U.S. 705, 714 (1984).
186 Kyllo v. United States, 533 U.S. 27, 38 (2001).
187 *Id.* at 37 (emphasis in original).
188 Katz v. United States, 389 U.S. 347, 349, 358 (1967).
189 *Quon III*, 130 S. Ct. 2619, 2626 (2010).
190 Skinner v. Ry. Labor Execs. Assn., 489 U.S. 602, 627 (1989).

Quon who, as a member of a SWAT Team, is privileged to use even greater force in terms of weapons and tactics.[191] Indeed, the Court has recognized that armed employees have duties that depend "uniquely on their judgment and dexterity . . . ."[192] With greater access to more powerful weaponry given to SWAT Team members could arguably come a lower privacy expectation. Because the Court has already dramatically diminished the privacy expectations railroad employees and Customs agents have in their own bodily fluids,[193] any privacy expectation a SWAT officer has in his arguably less personal pager messages would thus be vanishingly small.

The Court's confused meanderings hint to a lack of reasonable privacy expectations in *Quon III*. The *Quon III* Court, unable to resist being "instructive," volunteered that the record in the case "does establish that OPD, at the outset, made it clear that pager messages were not considered private."[194] Further, when compelled by its special needs analysis to directly confront privacy expectations, *Quon III* noted, "Even if he could assume some level of privacy would inhere in his messages, it would not have been reasonable for Quon to conclude that his messages were in all circumstances immune from scrutiny."[195] The Court noted that not only was Quon alerted that his messages were subject to auditing, "as a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications."[196] Thus, the Court's own dicta seems to point, however unofficially, to a lack of expectation of privacy in pager messages. The balance of privacy expectation precedent, special needs litigation, and the Court's own non-rulings would likely cause future actors in criminal justice to guess that when the Court ultimately rules on pager messages, it will probably find no Fourth Amendment application. What we lack here is a clear and definitive holding saying as much.

---

191 "SWAT," after all, is an abbreviation for "*Special* Weapons and Tactics." *Quon III*, 130 S. Ct. at 2624 (emphasis added).

192 Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 672 (1989).

193 *See Skinner*, 489 U.S. at 627; *Von Raab*, 489 U.S. at 672.

194 *Quon III*, 130 S. Ct. at 2629.

195 *Id.* at 2631.

196 *Id.*

CONCLUSION

A blog for medical students declared, "Face it, these days only doctors and drug dealers use pagers."[197] While an exaggeration, this statement made a point the *Quon III* Court should heed: perhaps the justices have learned the wrong lesson from the quick pace of technological change. Instead of worrying that it might make a premature ruling regarding technology, the Court might find its slow reaction to technological advances has undermined its relevance, leaving it to offer legal opinions on obsolete technology. While the Court scratches its head about pagers, the public has moved on to newer technologies, such as cell phones. The United States, a country with a population over 308 million,[198] has some 260 million cell phones in use.[199] In fact, in 2009, 25 percent of households did not use landlines, relying solely on cell phones.[200]

The Court explained its refusal to determine whether auditing pagers was a Fourth Amendment search by the laudable aim of avoiding an unnecessarily broad holding.[201] The Court's failure to act, however, might have had more to do with timidity than with judicial restraint. In the very opinion in which it eschewed holding on the Fourth Amendment "search" issue, the Court could not resist the temptation to discuss the particulars of privacy expectation.[202] Further, the special needs analysis it chose to apply forced the Court to at least partially address the privacy expectations anyway.[203] The result is an inelegant opinion that, while refusing to offer guidance, provides uncertainty and confusion.

---

197 *The Future of Medical Education: 2011*, Scrub Notes Medical Blog: Tips for Med Students – Advice on how to succeed in medical school, apply for residency programs, and become a doctor! http://www.scrubnotes.com/2011/01/future-of-medical-education-2011.html (last visited Aug. 28, 2011).

198 The 2010 Census lists the population as 308,745,538. *2010 Census*, UNITED STATES CENSUS 2010, http://2010.census.gov/2010census/data/ (last visited Aug. 28, 2011).

199 *Cell Phones and Cancer Risk*, NATIONAL CANCER INSTITUTE, http://www.cancer.gov/cancertopics/factsheet/Risk/cellphones (last visited Aug. 16, 2011).

200 Christine Kenneally, *How To Fix 911*, TIME MAGAZINE (Sunday, April 17, 2011).

201 *Quon III*, 130 S. Ct. at 2630.

202 *Id.* at 2629.

203 *Id.* at 2631.